A COMPENDIUM OF SPEECHES AND PRESENTATIONS

DELIVERED AT THE SADC LAWYERS' ASSOCIATION AND KONRAD ADENAUER STIFTUNG SADC REGIONAL WORKSHOP ON ELECTIONS, DEMOCRACY AND GOOD GOVERNANCE

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JOHANNESBURG, SOUTH AFRICA

Compiled and Edited by Makanatsa Makonese

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FOREWORD

The SADC Lawyers' Association (SADCLA), Democracy and Governance Programme and the Konrad Adenauer Stiftung, Rule of Law Programme for Sub-Saharan Africa hosted a joint Southern African Development Community (SADC) regional workshop to discuss the issue of elections, democracy and good governance in the SADC region. Participants from the legal profession, civil society, regional election management bodies, the African Union, the SADC Parliamentary Forum and the donor community attended the workshop, which was held from 27-28 May 2015 in Johannesburg, South Africa. This publication is a product of that workshop following a realisation that there was need to widely share the papers that were presented at the workshop by various stakeholders in election management, democracy, human rights, rule of law and electoral law.

The papers are published in this compendium as they were received from the presenters and as such there are variations in length, writing style and referencing format. The SADCLA and KAS however hope that readers will find the papers useful and of relevance as the SADC region strives to promote good governance, democracy and the holding of free, fair and credible elections that respect the rule of law and the rights of citizens.

The papers focus on a number of issues but with a special emphasis on electoral legal frameworks and the role of the law in promoting the tenets of democracy and good governance, the rule of law and the holding of free, fair and credible elections in specific SADC countries and at the regional level.

The views expressed are however those of individual presenters/authors and not necessarily those of SADCLA and KAS.

Mrs. Makanatsa Makonese
Executive Secretary- SADC Lawyers' Association

Welcome Remarks

By Mr Gilberto Caldeira Correia[1]

Introduction

Distinguished delegates and friends from the SADC region and beyond, all protocol observed.

It gives me great pleasure to welcome you to this SADC Lawyers' Association (SADCLA) and Konrad Adenauer Stiftung (KAS) workshop on Democracy and Governance in the SADC region. I hope that you all had pleasant trips from your different locations in the region (and of course from East Africa- seeing that three of our colleagues from KAS travelled from Nairobi, Kenya). I hope that you have had a restful night and are ready for the two days of hard work ahead. I appreciate your efforts in making the time to come and join the SADCLA and KAS in this very important event. I know that you are all very busy people and therefore I do not take your availability for this meeting for granted. I am particularly pleased to see that we have representation from a number of electoral management bodies in the region, including those from Malawi, Zambia, Zimbabwe, South Africa, Lesotho, Swaziland and Namibia as well as from the African Union and the SADC Parliamentary Forum. It gives great hope for our region when civil society and state institutions are able to work together and share ideas for the development of our region.

Objectives

As you may have noticed from the concept note that was circulated ahead of this meeting, the main aim of this initiative is to share experiences and concerns, best practices and views on areas that need improvement and to create mutual and lasting relationships amongst different institutions and actors from across the region for the development of free, fair and credible electoral processes and outcomes in the SADC region. The specific objectives of the workshop are:

- To provide a platform for sharing and recommending best practices for electoral processes in the SADC region
- To provide a platform for the development of sound legal and institutional frameworks for elections, democracy and good governance by comparing the electoral environments in SADC with a focus on legal provisions, application of the law and electoral dispute resolution mechanisms across SADC countries.
- To evaluate the electoral legal environments in SADC against international and regional electoral and human rights laws and standards with a focus on the SADC Principles and Guidelines Governing Democratic Elections and the African Charter on Democracy, Elections and Governance.

[1] President; SADC Lawyers' Association

- To give the SADCLA election observers an opportunity to share practical experiences from their election observation with electoral commissions and other stakeholders from the region and proffer recommendations
- To afford the legal profession, civil society and electoral management bodies an opportunity to build relationships that can be tapped on during and in between elections for the promotion of democracy and good governance in the region, and to;
- To initiate discussions on the need or otherwise of a SADC regional protocol on democratic elections in the region.

I would like to speak briefly on the issue of developing a regional protocol on elections in SADC. As you are all aware, SADC leaders have for a long time been working to produce a sound and foolproof instrument to guide electoral processes in the region. This culminated in the adoption of the SADC Principles and Guidelines Governing Democratic Elections in 2004. The Principles have played an important role in guiding regional governments over the years in their efforts to improve the electoral environments and processes in their countries. Many of the countries in the region have in fact reviewed their electoral legislation so as to capture the provisions and essence of the guidelines. However the fact still remains, that the principles are voluntary and not binding on any state, making their effective implementation subject to the whims and caprices of the different countries. Courts in some of the regional jurisdictions have made rulings confirming the non-binding nature of the Principles and Guidelines. Realising this shortcoming, civil society in SADC has been making calls for the Principles and Guidelines to be turned into a stronger and binding instrument in the form of a protocol. We understand the Principles are currently undergoing review to ensure that they capture current developments on the issue of elections in the region. However our view as SADCLA and I believe that of many other civil society organisations is that no amount of strengthening of the SADC Principles and Guidelines Governing Democratic elections would provide as much assurance and certainty to the citizens of SADC on the fact that the regional leaders will abide by the provisions of the instrument as would a protocol that is binding on all the states. I believe this is one of the issues that we should focus our attention on during our two days of deliberations here so that by the time we leave this meeting tomorrow, we would have gauged our willingness or otherwise to engage on the issue going forward.

SADCLA's work on elections in the region

As many of you are already aware, the SADCLA has been working on the issue of elections in the SADC region for a considerable period of time. We have actively participated in electoral processes in 6 countries over the past few years and indirectly made inputs in others. We acknowledge the work that many other organisations; be they civil society, academic institutions, governmental entities and intergovernmental organisations are doing in the area of elections in various ways. At the same time, we also believe that no one organisation can tackle the myriad challenges in this area of work, hence our contribution as the legal profession in the region, small as it might appear. We also pride ourselves in being able to bring together a diversity of institutions working on elections in collaborative efforts to

make our region a better one. This workshop is one of many such efforts. Having said that I would still want to emphasise the unique contribution that SADCLA brings to the table on election issues, which is the legal input. We believe that as an association with tens of thousands of lawyers as our members directly or indirectly (through the law societies) we do have an abundance of expertise to provide to our governments in this critical developmental area. For the elections that we have directly participated in over the past few years, we have always made sure that our reports focus on the electoral legal environment and have provided recommendations for legislative review where this was seen as necessary. Whilst we cannot entirely attribute current developments to the work of SADCLA, we are happy to notice that many of the governments in the region have embarked on electoral legal reforms in their countries in line with recommendations from the SADCLA election observer reports and those of other such missions. We have been well received by many of the electoral management bodies represented here, before, during and after elections in the various countries and we hope that this meeting will help in cementing those relationships.

Lastly, although it's not yet time for a vote of thanks, I would like to thank you (in case I am not given that opportunity at a later stage) for making it to the meeting. I would also like to thank our partner KAS for partnering with us on this initiative and it is my hope that this will be one of many such partnerships. I wish you all successful deliberations, relationship building and robust debates well after the conclusion of this workshop.

I THANK YOU

Opening Remarks

By Dr. Arne Wulff[2]

Distinguished participants, all protocol observed, ladies and gentlemen!

A warm welcome to all of you! Konrad-Adenauer Stiftung (KAS) "Rule of Law Program" is very happy to host you at this conference, which is co-hosted with the SADC Lawyers' Association (SADCLA). As far as I know it is the first time that we cooperate in this program and I would like to thank the Lawyers Association for organising this stakeholders' workshop. I am sure we will have interesting presentations and discussions about electoral processes. Even though the circumstances under which elections are held are different from country to country, there is a minimum standard on how this should be done. We will learn, how much this standard is theoretically and practically being implemented in the SADC countries.

Before I hand over to my colleagues and friends Holger Dix and Bernd Althusmann from the KAS offices in South Africa and Namibia respectively, let me present our Rule of Law Program.

The Rule of Law Program

Promoting the rule of law is one of the top priorities in the work of the Konrad-Adenauer-Stiftung and therefore, since 1990 the Foundation has been complementing its global projects for the promotion of democracy and political dialogue with the transnational, worldwide Rule of Law Program.

This program is coordinated from Berlin, Germany, and operates in five regions worldwide namely,

- The Rule of Law Program for Latin America based in Bogotá, Colombia
- The Rule of Law Program for Asia based in Singapore
- The Rule of Law Program for South-East Europe based in Bucharest, Romania
- The Rule of Law Program for Middle East/ North Africa based in Beirut, Lebanon and
- The Rule of Law Program for Sub-Saharan Africa based in Nairobi, Kenya.

This programmatic intervention was borne out of the realization that the rule of law is a precondition for sustainable development and stability in any democracy. In a nutshell, the rule of law program seeks to promote and protect,

- the rule-of-law structures and institutional framework;

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[2] Director, Rule of Law Programme for Sub Saharan Africa, Konrad Adenauer Stiftung

- the separation of powers, particularly a strong and independent judiciary and a legitimate executive;
- the guarantee of fundamental human rights and freedoms;
- the strengthening of regional networks dedicated to safeguarding both the rule of law and democracy.

Rule of Law Program for Sub-Saharan Africa

The Rule of Law Program for Sub Saharan Africa based in Nairobi and which I have been heading since March last year, was started in January 2006 to specifically promote the rule of law in Sub-Saharan Africa. The program was started based on the positive experiences of the Rule of Law Programs in Latin America, Asia and Europe as well as the Foundation's own conviction that democracy, economic and social development in Africa are only achievable and sustainable under a thriving and strong rule of law regime. The Program covers 49 African countries with the exclusion of Morocco, Tunisia, Libya, Algeria and Egypt which fall under the Middle East/ North Africa program.

The main objective of the Rule of Law Program for Sub-Saharan Africa is to contribute to the development and strengthening of effective legal and judicial systems which conform to the requirements of rule of law and which can support the same.

By complementing and linking the work of the KAS country programs in the field of rule of law, this program aims at strengthening the rule of law in the individual countries, at the regional and continental level, by promoting networking and exchanging of views, experiences and expertise among various key stakeholders. It is the program's strong conviction that the rule of law can only thrive where there is a strong, impartial and independent judiciary that guarantees and enforces citizens' rights and liberties. In this regard, the program addresses pertinent issues concerning the independence of the judiciary on the continent such as the constitutional and legislative framework that establishes and governs the functioning of the judiciaries; legal and administrative policies that regulate the appointment, promotion and removal criteria of judicial officers and the fiscal autonomy of the judiciaries among others.

Regarding constitutionalism, most countries on the continent recognise the constitution as the supreme law of the land. Nevertheless, there exist big gaps between the written text and the practice on the ground. This gap between legality and reality is attributable to many factors. This program therefore endeavors to identify and address some of the issues that contribute to the lack of respect and full implementation of the constitutions so as to ensure that African states not only get good democratic constitutions, but that these constitutions are respected, implemented and upheld by all. In the foregoing, the program engages and supports various initiatives in constitution-making and constitutional reform activities in various countries.

The program also focuses on regional integration in Africa in line with its objective of promoting the rule of law in specific regions and economic blocs. The Foundation recognises that strong regional blocs are paramount to the realization of peace, stability, social and economic development in Africa.

Out of the realisation that the subject of the rule of law is not a preserve of the legal and judicial experts and sectors, but also requires a sound political environment that is progressive or at the minimum tolerates reforms, the Rule of Law Programme for Sub Saharan Africa engages all stakeholders that includes judicial officers, prosecutors, the executive arm of government, legislatures, political parties, legal institutions, bar associations, the civil society and the media across the continent. The ultimate aim is to create and strengthen a network of progressive actors that are committed to the course of protecting and protecting the rule of law in Africa. In order to achieve its objectives, the program implements a variety of activities in collaboration with various partners on the continent. The ultimate objective of such activities is to provide a platform for the exchange of ideas, experiences, successes and challenges with a view of analysing them as a means towards finding practical and sustainable solutions to some of the challenges.

This program does not claim to have solutions to all the challenges pertaining to the rule of law in Africa but it offers a facilitative support towards overcoming some of the challenges. Therefore, the success of this program depends largely on the acceptance and support of all stakeholders in Africa.

I wish to thank you all for your attention and look forward to working with you in one or another area in the near future!

THANK YOU!

The Significance of Free and Equal Elections by Secret Ballot for the Strengthening of Democracy

Keynote Address

By Dr. Bernd Althusmann[3]

1. The democratic right to vote as a constituent element of a democracy: a few critical remarks on current developments in Germany.

2. Democratic developments in the SADC member states – a personal assessment.

3. A short analysis of elections in Namibia.

4. Summary.

1. The democratic right to vote as a constituent element of a democracy: a few critical remarks on current developments in Germany

Free and equal elections by secret ballot are regarded as the foundation of a liberal democracy. The democratic right of free citizens to vote is given special protection in all democratic constitutions. Free elections are the cornerstone of a successful democracy; they are a reflection of any government. As a rule, the democratic right to vote stands alongside the equally important fundamental rights that, among others, protect human dignity, the integrity of human life, the freedom of expression, the freedom of assembly, the freedom of the press, property and the right to political activity.

More than 66 years ago, on 23 May 1949 to be exact, the Constitution of the Federal Republic of Germany, the Grundgesetz (Basic Law), was proclaimed. In this Law general, free and equal elections by secret ballot occupy a special position. The electoral system, however, was only introduced in 1953 in the form of personalized proportional representation with first and second votes - and parallel to this the so called 5% parliamentary entry threshold for political parties. Todate, the electoral law in Germany has been amended 22 times, most recently on 21 February 2013. The electoral law of Germany has survived these amendments without substantial damage to the reputation and function of its democracy, which is by no means a matter of course.

With its ancient roots, democracy, as a form of government that is characterized by the participation of its people, only became associated with the concept of people's representation or with the concept of parliamentary democracy around the middle of the 19th century. In its beginnings, the right to vote was limited to men or was related to social status. Equal rights for women were only added much later. For

[3] KAS- Resident Representative for Namibia and Angola

example in Switzerland this only happened – as far as I remember it- in 1992 in one canton.

Since its legal constitution the high value of the right to vote had to be frequently fought for and subsequently protected against the interests of previous rulers.
Upon closer inspection, this still holds true until today.

We easily forget, especially in Europe or Germany, the inestimable value of the right to vote, although, in view of the recent crisis in the Ukraine, there are reasons enough not to take peace and freedom for granted. 1990, after the collapse of the Soviet Union, World Peace has simply not "broken out". Instead, the almost forgotten Cold War has returned. We sometimes do not want to see that elections in Africa, from 1990 until recent times, have been accompanied by violence, conflicts or civil wars or that elections have triggered these. Instead we often talk about disenchantment with politics/political apathy or rather disenchantment with politics/political apathy in Germany. According to Article 21 of the German Grundgesetz, political parties participate in democratic decision-making processes. However, the evaluations by citizens of political parties and their political leaders vary immensely. In addition people have recently started to talk about the so called disenchantment with the media. In media-managed "spectator democracies" only sensational news allegedly stir citizens' interest. This kind of sensationalism increasingly damages the reputation not only of politicians but also of media representatives. Credibility and trust, a precondition of democratic systems, have profoundly been shaken. Nevertheless, the battle for shaping opinions (opinion leadership) and breaking news possibly also has some advantages: the digitalised "mediocracy", or the rule of the media, can reach the potential voting citizen online – continuously, 24 hours a day. Whether this can indeed be seen as sound progress with respect to democracy remains to be seen and might be doubted.

But in this article, I would like to add this: Some of the problems that we complain about in Europe, other states would gladly have - if these would be their only problems. In connection with this, I do see in a serious light the declining voter turnout, especially in those states that enjoy special protection of free and fair elections by secret ballot - where elections have taken place freely and fairly for decades, where the separation of powers have worked well in general, where the judiciary in principle decides independently, where Parliament has accepted its supervisory powers of the government and where in the long run government and its opposition are struggling to find optimal political solutions. This indeed appears strange, because in other parts of the world people would fight and even die for the right to vote and to choose their best leaders in a democratic way.
(A recent example in Germany is the federal state of Bremen. Voter turnout was just below 50%, while elections for the German Bundestag still show relatively high voter participation.)

I suppose no country in the world that calls itself and probably is a democratic state and can show off a democratic constitution has ever reached the condition of a

perfect democracy. Democracy is the most valuable form of a political system that allows people regardless of sex, race, colour of skin, religion or sexual orientation to develop freely. However, democracy also means hard work and needs the efforts of every citizen. Democracy needs committed democrats. Peace, stability, freedom and justice, including social justice, have to be worked for, every day anew. Our aspirations and the reality on the ground need to be re-adjusted day after day. Political power is only awarded as a loan, power is awarded by the nation as a loan for a limited period of time. This politcal power should always be used cautiously and in the interest of the people and never for self-interest. When Ludwig Erhard (German Minister of Finance and from 1963 German Chancellor) published his book "Wohlstand für alle" (Welfare for all/Prosperity for all) in 1957, he wrote an important sentence that was of significance for the development in Germany after two world wars: Prosperity is the goal (of a social market economy), but performance is the path. Gratia suponit naturam: nothing comes from nothing.

Peace, freedom and justice are not God-given. Democracy needs willpower and the will of the majority. Only this way can democracy set itself apart from dictatorship, oligarchy and other forms of arbitrary rule. Konrad Adenauer, first Chancellor of the Federal Republic of Germany formulated it as follows:

"Democracy is more than a parliamentary form of government, it is a philosophy, a Weltanschauung, that has its roots in the concept of the dignity, the value and the inalienable rights of every human being. A true democracy has to respect these inalienable rights and the value of every single human being – in the political, economic and cultural sphere."

I have nothing to add to this. These words show the wisdom and insight of a founding father of the CDU in Germany, who was part of the resistance against the dictatorship of the National-Socialists and who, at the end of the war, set out to found a new community with shared values.

2. Democratic and economic developments in the SADC member states- a personal assessment.

The core objective of the new formation of SADC in 1992, including the admission of South Africa, was the stronger integration of the economic and political cooperation of the 14 member states with a population of more than 240 million people. (see: Soest, Christian von/Scheller, Julia: Regionale Integration im südlichen Afrika: wohin steuert die SADC, GIGA Focus 10/2006). In compliance with the topic, let me define it more broadly: In my opinion the core objective was also the democratic stabilization of the then mostly still young democracies through strengthened integration and political cooperation. Progress until today seems to be mixed. Economic and regional multiple memberships are considered a barrier, for example the trade cooperation with the EU. According to an assessment of the Stiftung Wissenschaft und Politik, (German Institute for International and Security Affairs), SWP-Aktuell of April 2015, 34 of the 48 poorest countries in the world lie in Sub-Saharan Africa. Their exports, however, increased between 2000 and 2013 from about 113 to 484 billion US-Dollars. Is this what we call the well known resource curse? Yes, around 70 percent of these exports are raw materials such as uranium, oil, diamonds, rare earth or gas. Could this wealth of resources substantially improve the situation of

local people? Not really: For example, of the around 800 million people living in Sub-Saharan Africa only 200 million have regular and constant access to electricity. Energy security is, however, a basic need and a pre-requisite for numerous processes of democratization.

The progress made todate with respect to economic integration in the SADC area has, so it seems, removed only partly the major problems of poverty, unemployment, unequal income distribution between rich and poor, insufficient education systems or insufficient health provision. The required economic power – see exports - would at least be available in principle. The democratic development processes and their stabilization are significantly dependent on the economic development in the respective countries. According to Kühne 2010, also internal stability, for example with respect to traditional ethnic or religious conflicts, internal as well as eternal security, a functional judiciary or an orderly electoral process are determining factors for the consolidation of a democracy. (see Winrich Kühne: The role of elections in emerging democracies and post-conflict Countries, 08/2010, FES)

The strengthened political integration of the SADC states would be a logical next step towards democratization. Some people already see an increasingly autonomous new Africa on the horizon. However, some developments are casting a shadow over this vision: An example are the recent resolutions on the quasi-disempowerment of the SADC Tribunals in 2014. The sharing of power through the transfer to transnational levels seems to remain a difficult process. Occasionally determination, acceptance and implementation seem to be lacking. However, in a world that is increasingly growing together internationally and digitally, re-nationalization processes are not likely to be helpful. The voice of the SADC states could lose weight internationally. These aspects may still play a subordinate role for democratic elections in the SADC states, but in 2050 at the latest, when according to the UN the total population of Africa will have risen to over 2 billion people, the problems of energy, poverty eradication, security and health can no longer be resolved at national level. This development also needs to be taken into consideration in the long term, when looking at the future of democracies and their strengthening.

Elections are often regarded as the festival of every democracy, at least in theory. It is not without reason that Election Day is often a holiday. During the past decades, elections in the SADC states were often characterized by violence and terror by the government apparatus. Elections could lead to civil war, though not inevitably. They could also lead from one election to the next to a consolidation and stabilization of initiated democratization processes. Zimbabwe is and remains however a negative example of the reversal of an initially promising democratization process. In addition, it seems to be a characteristic of many countries in southern Africa, according to Henning Melber in his book “Namibia verstehen” (2014), that those political parties which were elected during the 90s by a majority still rule their countries today, in the meantime having a two-thirds majority. This might be irritating, because in terms of democratic theory, the opposition of today might be the government of tomorrow. But obviously this situation has contributed to

stability and peace in spite of numerous deficits and problems in many countries in southern Africa.

But in my opinion there is justified reason for hope. The elections in 2014 in 5 states in southern Africa (South Africa, Malawi, Mozambique, Botswana and Namibia) have to a large extent been held peacefully and democratically legitimized, even when the observation of some processes has shown that democratic election procedures- I am thinking here of Namibia and the use of electronic voting machines, are processes of continuous learning.

3. A short analysis of elections in Namibia

Namibia's hard fought road to independence was something special from the beginning. The Constitution – as retrospectively analysed by numerous constitutional experts – was from the beginning a constitution of compromises. In the election on 28 November 2014, SWAPO, ruling the country since 1990, won the election with 80 percent and its presidential candidate Dr. Geingob won with 87 percent. This result did not come as a surprise. The opposition parties were not able to find a sound strategy during the election campaign to present themselves as a credible political alternative. Their election result with about 5 percent for the strongest opposition party, the DTA, was as disappointing as the performance of the RDP with slightly more than three percent of the votes. The elections themselves went smoothly and rather unemotionally. For the first time Namibia introduced electronic voting machines. In spite of numerous doubts no manipulation of elections could not be established. In addition, Namibia had at its disposal a rather transparently acting Election Commission (NEC) and an ombudsman system for possible complaints outside the realm of elections.

The clear election result for the ruling party SWAPO in spite of numerous unsolved problems in the country was in the end also an expression of the deep-seated longing of the population for security, peace and political stability. In his first address to the nation as newly elected president a few weeks ago, Dr. Hage Geingob set the standards. One could also say, he put some basic principles in place, he clearly formulated his vision for Namibia, but also his vision of the New Africa. Even critics or the opposition parties had difficulties to find fault with his presentation. As president of Namibia he had unambiguously declared that he and his whole government would stand firmly on the ground of the Namibian Constitution. This is basically self-evident. Law and order are guidelines for all actions. His clear commitment to the Constitution did not really come as a surprise, after all it was Geingob who was chairperson of the Constituent Assembly of Namibia 1989/90. (see also: Erika von Wietersheim, Die Verfassung der Republik Namibia- ein außergewöhnliches Dokument, 2015)

Dr. Geingob declared, despite what his critics were saying, that white citizens were Namibians as well, with all rights and duties and that the country should put an end to the occasional automatic antagonism between Black and White. Allow me to regard this as a strong signal to other leaders of states in Africa. And also to all the

Mugabes of this world, whether black or white, to stop dividing the societies in which we live. Instead we should do everything to unite them.

We cannot deny that what holds a society together is, other than the statutory law, a common understanding of values, the famous cement that holds society together. Therefore President Geingob's speech was historically significant, and we need to take advantage of the opportunities that are arising from it.

4. Summary:

A constitution, put down in writing and including guaranteed democratic elections is, when looking at the constitutional reality of numerous democracies worldwide, just the well-known one side of the coin. Constitutional aspirations and the constitutional reality often differ considerably. This holds specifically true when looking at the democratically legitimized right to vote. Voting means being able to choose. However, numerous processes of democratization, including those in SADC states, also show, decades after gaining independence, weaknesses that we are able to work on together. Not as clever know-it-alls but rather as partners. Democracy thrives on those who take on an active role. The young generation in southern Africa should particularly recognize the opportunity to take their future into their own hands. Not as beggars/supplicants, but as a self-confident generation that could change Africa into a continent of opportunities. Democratic elections are the pre-requisite and the starting point for any development in Africa. To walk ahead with courage also means to courageously walk new paths that do not lead back to the past.

In a relatively new study of the University of Frankfurt (see Tagesspiegel report of 10.03.2015) researchers have collected and evaluated the statements of 380,000 people from 104 countries (figures of 1994-2013), also from the field of the Afrobarometer, with respect to the reality and the conditions of democracy in their countries. Results: The longer people live in a democracy, the more they are willing to defend democratic values. Isn't this amazing! Or is it not? The longer we have experienced a stable and peaceful democracy, the more valuable democracy appears to us – this in short is the summary of the research findings.

Therefore the famous sentence of JFK remains valid: Ask not what your country can do for you - ask what you can do for your country.
It's worth it, because democracy needs democrats.

Hurdles Confronting SADC Countries on the Implementation of the African Charter on Democracy, Elections and Governance

By Professor Kealeboga J. Maphunye (Ph.D.)[4]

Abstract

In public administration, policy sciences and government or public spheres, implementation is a fundamental process without which agreements, policies, laws and regulations cannot be carried out to benefit citizens or the public. In the Southern African Development Community (SADC) sub-region, various agreements, protocols, treaties, Charters, and similar documents or instruments are signed regularly by political office bearers and diplomats. However; for them to achieve their objectives, systematic implementation measures and plans are required. Otherwise, such instruments will remain mere paper declarations with no domestication or enforcement. This paper examines issues related to implementation challenges facing SADC countries in terms of the African Charter on Democracy, Elections and Governance (ACDEG). First, it will introduce the topic and outline the concept of implementation. Second, the paper will outline the approach and methodology. Third, it will contextualise implementation of the African Charter in the SADC region focusing particularly on the advantages and challenges of implementation. Fourth, it will examine the levels underpinning the implementation or "domestication" of the AU Charter. Fifth, it will present observations from the extant literature on implementation challenges in SADC countries and thereafter (sixth) assess the challenges of implementation facing SADC in implementing the Charter. Next, the paper will outline the points arising from the extant literature on the implementation challenges of the African Charter in SADC countries. The limitations of the paper will be outlined followed by the conclusion and recommendations.

1. Introduction

We, the Member States of the African Union (AU)
Inspired *by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasise the significance of good governance, popular participation, the rule of law and human rights*; …
(African Charter on Democracy, Elections and Governance, ACDEG. 2007, Preamble)

The above section of the Preamble to the African Charter on Democracy, Elections and Governance (ACDEG), which was adopted by the African Union (AU) in 2007, clearly indicates that the document is a product of collegial collaboration at the level of AU member states. The Charter aimed at, among others, averting the then practice of unconstitutional changes of government, challenges of governance, misrule and undemocratic rule in many parts of the continent. A look at this Preamble suggests that implementation resides primarily with governments (i.e. African Union member states). This implies a top-down process or approach, but the

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situation is far more complex if one carefully inspects the different chapters and articles of the Charter, which refer to other role-players.

The Charter aimed to improve and promote democratic governance including the management of democratic elections in Africa (Matlosa, 2008; 2014). The significance of the Charter is that, unlike other similar regional instruments, its focus is on democracy, elections and governance — issues which had for many decades been a thorn on the side of Africa's democratisation.[5] It is stated that:

"[t]he Charter, therefore, draws together the member states' commitment and noble declarations into a single consolidated treaty with legally binding commitment…[this implies that by] adopting it in January 2007, member states have committed themselves to an established set of common standards, principles and guidelines for participatory democracy, credible elections and good governance, in the process of holding each other accountable for their actions and inactions," (Matlosa, 2008: 7).

This focus on democracy, elections and governance significantly assisted regional and international diplomatic and other initiatives to maintain vigilance over implementation of relevant instruments pertaining to democratic, electoral and governance processes in Africa. Further, the Charter was adopted at an opportune period during which the AU was undergoing long-expected structural reform (i.e. from the former Organisation of African Unity). Such structural reform raised hopes that new and democratic reforms would herald numerous more changes in African countries' political and governance systems. Prior to these reforms, very few African writers, voters and observers expected the development and adoption of a document/charter that would be the basis upon which future elections and democratic practice would hinge continentally. Observers state that:

"…the overarching concern that propelled the charter's development was the political destabilisation caused by unconstitutional changes [of government]" (Matlosa, 2008: 1).

In line with the NEPAD (New Partnership for Africa's Development) and African Peer Review Mechanism (APRM) processes, the Charter became yet another mechanism through which to evaluate Africa's willingness and ability to adopt and sustain democratisation through credible elections and good governance practices (Matlosa, 2014). Focus on elections by the Charter is in recognition of the fact that:

Elections straddle the divide between participatory and representative aspects of democracy and therefore issues of representation are equally of importance as those of participation in Africa's

[5] In the 1980s, many African and developing countries were subjected to the so-called "Economic Structural Adjustment Programmes" or ESAPS which imposed conditions upon which such countries could receive aid from the wealthier countries including the IFIs (International Finance Institutions) (see Williams, 2007). Among these IFIs, the International Monetary Fund and World Bank, in particular, insisted that countries must be "democratic", hold elections and practice "good governance". However, the kinds of democracy, governance and elections were not always clearly specified. Hence, many countries especially in Africa pretended to comply with these conditions merely to qualify for desperately needed aid.

democratisation. In terms of participation, they help to highlight the voices of the usually undermined or overlooked electorates who only use their balloting power during regular elections. (Maphunye, 2014: 2284)

But any continental or transnational blueprint or charter cannot be effectively implemented without clearly outlined indicators for public participation, regular reviews, implementation procedures and parameters, and monitoring and evaluation. Moreover, implementation (whether of laws or policies) perennially poses serious challenges for many African countries. This is partly because it entails many actors, processes and legal or constitutional reform, and partly because it also largely depends on political will and readiness by several stakeholders to ensure such implementation. Undoubtedly, such political will does not seem to be a serious concern because, as Matlosa (2008: 3) notes, generally,

"[v]arious other AU documents have reinforced [the AU's] commitment to building a democratic, stable, peaceful and prosperous Africa."

Among these documents are the 1981 African Charter on Human and People's Rights, the 1990 African Charter for Popular Participation in Development, the 1990 Declaration on the Political and Socio-economic Situation in Africa, and the Fundamental Changes Taking Place in the World and The 2002 Declaration on Democracy, Political, Economic and Social Corporate Governance of the New Partnership for Africa's Development (NEPAD) (Ibid.).
Further, it is argued that:

Civil society participation in continental wide initiatives is complex and sometimes difficult to facilitate. One approach is to suggest that participation of civil society is through nationally established processes at the level of Member States; another orientation is to limit participation to the ECOSOCC [AU Economic, Social and Cultural Council] channel; a third option is to allow direct contributions by expert civil society groups to continental meetings. (Latib, 2010: 6)

1.1 The Concept of Implementation

Implementation as a concept is quite broad as recent scholarship and the extant literature suggest (Lane, 2015, Matland, 1995, Pressman & Wildavsky, 1973). Jan-Erik Lane argues that:

"[i]n the dynamic interpretation of the concept of implementation the events constituting a process of implementation are approached as pieces forming a whole", (Lane, 2015).

In the case of the African Charter on Democracy, Elections and Governance and in relation to SADC, the process of implementation is likewise far-reaching and spans different timelines and time zones. However, the question to ask is: is eight years adequate for sufficient review to be completed on such a comprehensive instrument? Part of the answer lies in continual reviews, say every five years, ten, fifteen years or annually focusing particularly on the extent or levels of implementation. Such reviews require trained and knowledgeable people with relevant quality assessment, monitoring and evaluation skills who can assist in

interpreting data, research evidence, trends and technical issues pertaining to implementation.
According to Winter (2003: 205),

"…implementation research became one of the fads of political science and policy analysis and reached its peak …in the 1980s."

Further, such research

"…focused on the consequences of those public policies that have been enacted as laws or other authoritative statutes" (p. 206).

Others argue that:
The terminology of implementation conjures up a picture of clear, consistent, and stable policy directives waiting to be executed. It encourages us to think that a reasonable and responsible person can easily measure the discrepancy between policy and bureaucratic action, that the discrepancy can be attributed to some properties of the organization (e.g., its competence and realibility [sic]) or to some properties of the policy (e.g., its clarity and consistency), and that the properties of the organization and the properties of the policy can be chosen arbitrarily and independently in order to reduce the discrepancy. [But] … studies of policy making cast doubt on such a characterization. (Baier, et al., 1986: 208)

The above suggests that implementation, while often treated as a simple process or matter, is actually difficult and sometimes entails confusion and ambiguity (p. Baier, et al., p. 208). Such confusion and ambiguity sometimes emanate from the multiplicity of role-players that are involved (or are potentially involved) in the success of a continental instrument's implementation. In addition, if one factors into this equation the possibility that some African countries might be reluctant or unwilling to implement the provisions of the ACDEG (for reasons that remain unknown to their citizens), then this might clearly illustrate the difficulties of implementation of such instruments in the continent.
Observers argue that implementation might be seen as a top-down or bottom-up process. However, they caution that both approaches

"…contain kernels of truth relevant in any implementation situation." (Matland, 1995: 171).

2. Approach and Research Methodology

The compilation of this paper relied on several research, information and data gathering techniques. First, the paper relied on secondary research and data including a review of the extant literature on SADC matters and similar structures globally. This included a review of the implementation statuses of the relevant SADC and African Union (AU) instruments, policies and documents. Second, we then undertook theoretical reflection on pertinent issues especially the nature and extent of democratisation in Africa, diplomacy and international relations dynamics and their implications for the SADC region. Generally, the assumption is that issues of elections, democracy and governance are sub-sets of broader debates on Africa's

democratisation trajectory, state formation and state role in development, hence it was also imperative to revisit theories of democracy, the state and post-independence realities of Africa. Third, a review of SADC and continental implementation practices of the African Charter on Democracy, Elections and Governance including relevant research on the matter was undertaken (see Alemu, 2007; Kane, 2015; Mulikita, 2010; Saungweme, 2007; Pambazuka).

Finally, the author also contacted a few African election experts from the regional body including some officials of SADC EMBs as an attempt to understand the underlying issues pertaining to the implementation of regional treaties and instruments such as the ACDEG; and to augment the material gleaned from the extant literature. The names and details of these experts are however omitted to fulfil their requests for anonymity. Furthermore, the following assumptions also guided the development of this paper and the argument contained herein.

2.1 Preliminary Assumptions about Implementation Issues in SADC Countries

The following assumptions are based on anecdotal evidence and therefore have not been tested systematically or subjected to rigorous empirical falsification but were gleaned from informal discussions with individuals in the elections management fraternity (EMBs, political parties, diplomats and academics). While they may or may not be entirely correct in depicting the implementation challenges of the Charter in the SADC region, they were nevertheless useful in helping the author to map out some of the usual (unstated) reasons behind the poor domestication of the Charter in SADC and continentally:

- Not all African countries take the Charter seriously[6]
- Among those that have signed and ratified it, some 'fear' implementation of the charter as it might "undermine their 'sovereignty'; perhaps 'open the floodgates of criticisms' and forces of reaction
- Some countries ignore the presence of the African Charter (ACDEG) (e.g. Eritrea)
- Many do not have capacity to implement it while they may have acceded to it
- It is possibly viewed as one of those 'must haves' but without member states feeling obligated to take it seriously (some countries might have buckled under diplomatic and other pressures to sign and ratify the ACDEG and therefore chose to follow other countries so as to be accepted as 'democracies').

[6] Undoubtedly, there is need for further research on the reasons facing many African countries in implementing the ACDEG, but informal discussions of the author with some African diplomats and policy-makers suggested that they are overwhelmed by the many such instruments that they have to implement, which entails numerous meetings, consultations with many stakeholders — probably reducing the whole implementation process to a "tick-a-box" exercise.

3. Contextualising Implementation of the African Charter on Democracy, Elections and Governance

Systematic, sustainable and consistent implementation of the African Charter on Democracy, Elections and Governance remains the ideal to which all African countries aspire. Signing and ratifying the Charter by a number of countries is a positive step that will hopefully result in democratisation for those that recently emerged from despotic or undemocratic rule. For those that have experienced continual but uneven bouts of democratic rule through credible and internationally accepted elections, signing and ratifying the Charter will enable them to join the increasing number of countries that are governed largely on the mandates of their electorates globally.

The context of implementing the African Charter is however complicated in a sense that it involved, first and foremost, governments or inter-governmental relations. Such relations are conducted largely based on countries' bilateral and multilateral links which rely on diplomacy to succeed. One of the advantages pertaining to SADC countries is that they share many socio-economic, political cultural and diplomatic links which have been nurtured through the numerous experiences they shared during colonialism and minority rule especially in Zambia, Botswana, Angola, Namibia, Zimbabwe, Malawi, Mozambique, Lesotho, and Swaziland. Perhaps, this led to the sub-region's overall common approach to issues of governance, elections and democracy. Likewise, many SADC "…member states have concluded various instruments such as Charters, Protocols, and Codes" (Nyenti and Mpedi, 2012:3).

The challenge, of course, is that many of these countries and others in the entire SADC sub-region also have specific challenges or problems pertaining to their individual national or domestic governance systems. With different legal, constitutional, political and other characteristics such as electoral systems and political culture, one would not expect to find uniformity on some issues e.g. capital punishment, electronic voting, term limits of sitting Heads of State and Government, gay and other human rights. In fact, it would appear that the SADC countries prefer to belong to a loosely structured regional body that serves a utilitarian purpose of undertaking a common though not a uniform approach to regional issues; without compromising the individual sovereignty of each SADC country. Yet, the region does not operate in a geo-political vacuum and therefore must be sensitive to the interests, influence and occasional demands from powerful states and regional power blocs in Africa and globally. Thus, the context within which the implementation of the Charter is premised also encompasses role-players such as the European Union, Regional Economic Communities (RECs), Commonwealth, United Nations and other influential global players. The point being made here is that all these are powerful role-players and inevitably wield influence on the implementation of African instruments such as the ACDEG since they also have bilateral, multi-lateral and other agreements with a potential to affect the implementation capacities of the SADC countries. Furthermore, the African Charter has to be implemented amid numerous dynamics such as wealth and resource inequalities, unequal access to economic facilities such as loans, poor infrastructure, poor or low educational skills bases, and lack of finance or capital to run

development projects that can ensure effective implementation of the Charter. In terms of people, the actual participation of the different publics and citizens in the SADC countries pose pertinent challenges for implementation. For instance, serious urban-rural dynamics have to be navigated including accommodating the diverse demographic profiles of these countries such as women's organisations, youth formations, religious, linguistic and cultural groups, especially traditional leaders, faith-based organisations and various civil society bodies in SADC. Part of the mammoth task facing SADC in domesticating the Charter is on how to contact and consult the relevant individuals and bodies within often very tight timelines and meagre resources.

The different levels of implementation of a continental instrument such as the ACDEG, as discussed below, also add further hurdles which often impede progress.

4. Levels of Implementation and Domestication of the Charter

The levels and extent of implementation of the African Charter on Elections and Governance affect the different levels as follows:

Table 1

Implementation Levels
Micro • Individual/ Cognitive • Legal (constitutional/ domestic law) • Political (national) • Economic • Socio-cultural • Local/community • Process
Macro • Diplomatic • Bilateral • Multilateral • Legal (International Law • Transnational • Regional • Continental

Source: Own analysis

In line with *Table 1* above, the concept of implementation is clearly comprehensive or at least has broad implications. At the Micro levels, the following factors need to be taken into account whenever a document of this nature is considered for implementation:

- At the individual or cognitive level, an individual citizen or resident of the SADC sub-region has to internalise the values of the Charter and be able to contextualise areas in his or her life wherein the Charter would make a difference or improve his or her life. To do this, she/he needs information

and clarity on local implementation plans on the Charter and how they will ensure the Charter's implementation.

- At the national or central level, there are clear policy, legal and jurisdiction issues to consider and factor into the implementation process, without which the application of the Charter will be hamstrung or undermined. An example here could be the provisions of Article 8 (3.) of the Charter which states that:

  "States parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation."

  Yet, not all the SADC countries especially those that have signed and ratified the Charter, are free from practices that discriminate against ethnic, religious and cultural minorities, such as Jehovah's Witnesses who are sometimes victimised for refusing to participate in elections and politics.
- Other processes will also need to be undertaken at the district, province or sub-regional level of each SADC member state to ensure that authorities at this level are also consulted about the Charter's ratification.
- At the municipality, local government or town and rural area levels, the different residents and by-laws governing cities and towns at the local government levels will be critical for implementation. This will also include villages, urban and peri-urban areas where various consultation methods such as workshops, seminars, electronic and print media, social media etc. should be utilised to ensure buy-in from a cross-section of the population at these levels.
- At the Micro-spheres, such as schools and nursery schools, youth organisations, etc. implementation plans will have to contain clear strategies for sensitising (younger) citizens and residents about the importance and implementation of the Charter. As in the case of the other levels above, there will clearly be need for legal or constitutional reform in some SADC countries to ensure that the educational curriculum complies with the implementation requirements of the Charter.

At the Macro levels, diplomatic, bilateral, multilateral and related levels are quite critical to implementation. Thus, as other observers (Isaksen and Tjønneland, 2001: 18) aptly note, the implementation of SADC instruments including the ACDEG inevitably involves multitudes of actors such as the following:

- Council of NGOs (SADC-CNGO)[7]
- Association of SADC Chamber of Commerce and Industry (ASCCI)
- Southern African Trade Union Co-ordinating Council (SATUCC)
- SADC Women in Business
- SADC Banking Association
- SADC-ECF (Electoral Commissions Forum)
- SADC Lawyers Association

Each of these sectors and organisations, including the SADC-Parliamentary Forum (SADC-PF), has to be accommodated in the implementation of the Charter.

[7] Southern African Development Community (SADC) Council of Non-Governmental Organisations;

"However, many of these organizations remain weak and vulnerable and their capacity to participate and make input is often limited", as Isaksen and Tjønneland (2001: 18) note.

Similarly, commenting on the implementation of such treaties elsewhere in the world, it is stated that:
"…divergent capacities in member states impact the likelihood that agreements will be carried out" (Gray, 2014: 56).

A look at the preliminary steps that were undertaken in the adoption of the Charter suggests that many of the above levels will become even more relevant during the implementation phases of the instrument. Matlosa (2008: 1-2) states that:

"[t]he adoption of the Charter was a culmination of various meetings of experts from government, the independent, and the legal sectors to debate and refine various drafts between 2005 and 2006."

The main meetings were (Matlosa, 2008:1-2):

- Preliminary consultative meetings between…[consultants] and the [AU] Department of Political Affairs in May 2005, Addis Ababa, Ethiopia.
- The independent meeting of the Government Experts in March 2006, Addis Ababa
- The meeting of Independent Legal Experts in Africa, 2006, in Addis Ababa
- The back-to-back Government Experts and Ministers meetings in Brazzaville, Republic of Congo in June 2006
- The Council of Ministers Meeting in July 2006 in Banjul, The Gambia, before the Charter was adopted in Addis Ababa in June 2007.

The above meetings serve to highlight the elaborate networks of public and other engagements that involve but certainly affect the implementation process of a regional instrument such as the ACDEG. Clearly, the implementation of any Charter, policy, law or instrument will unavoidably entail some kind of implementation plan or programme of action which encompasses the above institutions, regions and levels including their diverse needs. Depending on the individuals and institutions involved, this could range from mere consultation and information to demands for full participation in the entire process. Even in terms of elections alone, such plans will need to accommodate the different electoral systems, composition of election management bodies, national constitutions and domestic law ramifications of the SADC countries including their relevant processes for policy design, formulation, legal reform and implementation (ECF-FES, 2008). In addition, the different SADC countries' geopolitical and socio-cultural heritages and former colonial era traditions of Anglophone, Francophone and Lusophone government and legal systems also have implications for implementation in the relevant countries.

Fig. 1 Geopolitical Categorisation of the SADC Countries

Geopolitical Group	Countries
Anglophone	Zimbabwe; Zambia; Tanzania; Malawi; Botswana; South Africa; Zanzibar; Namibia; Swaziland; Lesotho
Francophone	Democratic Republic of Congo; Mauritius; Madagascar, Seychelles
Lusophone	Angola; Mozambique

Source: Own analysis

Recent information (2014) suggests that out of 54 African Union Member States, 45 have signed the Charter on Democracy, Elections and Governance, 23 have ratified it and still 23 more have registered deposits on the instrument (Maphunye, 2014: 2286, citing African Union, 2014). It is difficult to understand as to why so few SADC countries have acceded to the Charter by signing and ratifying it [8] but the implementation or domestication proves a challenge for the few that have done, as will be explained below. Ironically, full domestication is the ideal situation to which all governments and their people aim as this will indicate their governments' political will on the contents of the Charter and thus legitimise their rule.

5. The Extant Literature on Implementation Challenges in SADC Countries

It has to be noted that the question of the implementation of a treaty such as the African Charter on Democracy, Elections and Governance in the SADC region and continentally is subject to numerous considerations, especially diplomacy. However, there are also numerous interests to be considered including the roles of parliaments, the Pan-African Parliament (PAP), SADC Parliamentary Forum (SADC-PF), civil society organisations, election management bodies, SADC Heads of State and Governments, local communities and various other stakeholders (Musavengana, 2009: 3). In addition, the importance and adherence to constitutionalism and the rule of law in the SADC region and continentally is another critical issue that has to be considered in the debate on the domestication of the Charter (ACDEG). This was highlighted during a 2003 conference organised on the theme "Elections, Democracy and Governance" which underscored the importance of national constitutions. It also emphasised that:

"…constitutions and legal frameworks should determine the tenure and number of terms that a head of state and government can stand for elections" (Matlosa, 2008: 4).

But many African countries which have committed to the holding of democratic elections seem to be struggling in this regard as witnessed in the recent (May 2015)

[8] During discussions, the SADCLA Workshop (Johannesburg, 28/05/2015) heard that in SADC only South Africa, Malawi, Zambia and Lesotho had signed and ratified the Charter. One may therefore ask as to whether SADC countries are serious about acceding to this Charter given that more than half of the (15) member states are seemingly not complying.

case of Burundi whereby incumbent President Pierre Nkurunziza approached the courts to extend his term of office, exploiting legal technicality or loophole that "allowed" him to do so. Commenting in terms of another regional instrument (African Union Public Service Charter) which SADC Member States also have to domesticate, an observer indicates that:

The option of having an inspirational Charter with no real legal basis was always available to [AU] Member States. However, it was during the Algeria seminar that Member States present expressed the view that the Charter needed to become a legal instrument with a follow-up mechanism. (Latib, 2007: 2).

Remarking on the general challenges of implementation pertaining to other SADC agreements or instruments, an earlier study found that many of the difficulties facing the sub-regional body stem from donor dependence, capacity constraints, incapacity to deal with big political issues, and inability to enforce regional agreements (Isaksen and Tjønneland, 2001: 18-45). The phrase "big political issues" here alludes to SADC's inability to confront the major political controversies in the sub-region without rallying to the defence of member states and their leaders.
Perhaps all this points to the pertinent challenges facing the implementation of the ACDEG.

6. Implementation Challenges facing the African Charter (ACDEG)
The implementation of many regional and continental instruments or charters is subject to inter-organisational dynamics since there are often many organisations and individuals involved in many countries in terms of domestic policies and international agreements. Thus, an observer argues that:
The implementation of public policy occurs in highly varied settings, but it is not clear that, quite often, inter-organizational cooperation is called for to achieve successful results. The organizations involved include governmental departments and ministries, subnational agencies, non-profit and for-profit units, and organizations of target groups – who may even be involved in coproducing the implementation action. Whether and how inter-organizational cooperation emerges depends on a number of factors. Substantial impediments may be present, so cooperation must be developed; it cannot be assumed. (O'Toole Jr, 2003:242-243)

This means that the implementation of an instrument, policy, law or treaty faces particular impediments long before the relevant document or implementation plan can be submitted to an organisation, government, multilateral agency or local community for deliberations and approval. In terms of the SADC countries, the implementation of the African Charter presents similar challenges. An observer states that:

"[o]nce adopted, the Charter can only be effectively enforced 30 days after its ratification by 15 AU member states…Before signature and ratification, the Charter cannot be domesticated and applied; thus the task facing member states is to sign and ratify it in preparation for its application at the national level" (Matlosa, 2008: 6).

Similarly, some have noted that "…the first major challenge" facing the SADC region is the fact that it has a "multiplicity" of "sub-regional instruments", possibly alluding to the African Charter on Democracy, Elections and Governance, SADC Principles and Guidelines Governing Democratic Elections, SADC Principles on Elections Management, Monitoring and Observation, among others (Musavengana, 2009:5). He added that:

"…the fact that the SADC sub-region has more than one such instrument, provides potential for confusion." (Ibid.)

Such confusion will most likely affect those who are closer to the implementation processes although it could equally encompass the wider publics in the different countries.[9] Furthermore, it would appear that the problems of implementation in the case of regional instruments such as the Charter remains what is often termed "domestication" or translation of the regional or international treaties and agreements into simple, implementable and manageable local action plans. At the country level, problems of implementation in terms of domestication of regional instruments revolve around the following questions:

- Who are the focal points (persons or institutions) regarding the specific instrument?
- What mandate/s do they have?
- How do they contact the different stakeholders in the different regions and organisations?
- What are the action plans, timelines and reporting mechanisms and who will ultimately drive the process and coordinate with regional partners?
- What peace-building or dispute resolution mechanisms are there to address any disagreements that may arise during domestication and in the event that various actors fail to agree on implementation?

The above questions, while not comprehensive, highlight some of the stumbling blocks that SADC member states confront whenever a Charter, treaty, agreement or similar instrument is to be signed, ratified and implemented. It is further noted that problems of enforcement of regional instruments also pose specific problems:

The domestication of regional instruments in general and electoral norms, standards and principles in particular, remains a key challenge in the SADC region's road towards rapid electoral systems and processes. One way of addressing this challenge could be through the rationalisation of the existing regional instruments into an enforceable SADC Protocol for Democratic Elections read with the African Charter on Democracy, Elections and Governance. This should give greater impetus to governments to seriously consider institution measures for the domestication of

[9] This may be seen as "implementation fatigue" given the fact that diplomats and government officials who are tasked with scrutinising the letter and spirit of such treaties, agreements and charters often attend too many meetings, sometimes meeting counterparts from the same countries but discussing different agreements (e.g. SADC, AU, European Union) such that they acknowledge (privately) that they are "overwhelmed" by such meetings.

such a protocol in domestic legislation (Musavengana, 2009:8). This option might assist implementation but it requires political will[10] by SADC governments to vigorously push for such rationalisation. However, it is doubtful whether this is possible given the competing demands and diverse political interests facing SADC and other regions. An off-the-record discussion with some experts on SADC and AU matters[11] also revealed that the implementation of the African Charter is beset by the following hurdles:

- Countries in the SADC region and elsewhere in the continent tend to be protective and overly sensitive about their positions and roles in the signing, ratification and domestication of regional and continental instruments such as the African Charter on Democracy, Elections and Governance;
- In the SADC region, especially, there is no provision for compliance and what measures to take should Member States flout the provisions of this instrument;
- It is also not clear whether the document is accompanied by treaty-based standards to ensure effective implementation and application of pertinent sanctions in the event that compliance is flouted;
- Member States also have to be invited to observe another Member State's elections and no provision is made as to what happens in the event that a Member State who is having elections chooses not to extend such invitations to others;
- Another major challenge to the implementation of the Charter is Member States' penchant to observe one another's elections while excluding election experts and other groups and individuals from the region who could enhance SADC Member States' election observation reports. Subsequently, Member States alone selectively observe and comment on their colleague's elections and other processes; excluding other players. This practice impedes implementation of the Charter because this "trade union" like approach of SADC overlooks or ignores areas that need serious effort and outside collaboration where SADC mechanisms, resources or procedures might be found wanting (such as pertinent research);
- The apparent lethargy of SADC countries to implement the Charter also stems from the fact that the document is comprehensive and touches on virtually all aspects of their lives; the scale of issues to address is massive. Some of these issues, for which there might be divergent views and meanings which are not always acknowledged, are listed below (ACDEG, Ch.4, Articles 4-10):
    - Promote democracy, the principle of the rule of law and human rights;

[10] Political will, as used here, refers to the visible and energetic commitment of the political leadership in a country (presidents, prime ministers, ministers etc.) to the ideals or requirements of a programme. Thus, former leaders like Thabo Mbeki of South Africa, Meles Zenawi (Ethiopia), Olusegun Obsanjo (Nigeria) and Jerry Rawlings (Ghana) might have displayed political will in the implementation of NEPAD and the APRM programmes (NEPAD, 2015).

[11] Interview, 06 May 2015.

- Recognise popular participation; universal suffrage as the inalienable right of the people;
- Ensure constitutional rule, particularly constitutional transfer of power
- Ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility;
- Strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity;
- Eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance;
- Entrench the principle of the supremacy of the constitution in the political organization of the State;

Moreover, another stumbling block to implementation is the usual bureaucratic and administrative approach, lethargy and bungling which normally undermine faster implementation in many developing countries as noted even in the implementation of another regional Charter (Khan, 2007). Such approach and practices frequently entail nit-picking by the administrative authorities in terms of the entire document. Thus, they usually feel that they have to painstakingly scrutinise all the clauses, provisions, implications and other issues including the wording, sentences, clauses and sub-clauses of the Charter before actual implementation can begin. Even then, implementation would normally be preceded by several administrative and Cabinet memoranda, workshops, "strategic sessions" and more correspondence across the different spheres of a government such that the pace of implementation becomes adversely affected. The question of ethics and ethical governance which entails anti-corruption and reliance on above-board methods of campaigning and canvassing votes, recruiting supporters and voters, ensuring free and fair access of all political parties to the country's media before, during and after elections is vital to the promotion of democratic governance processes in the SADC region. However, some criticise and caution against a "menu of manipulation" which can engulf elections in a country whenever practices such as "Unfair media coverage and breach of law", "Illegal amendment of the Electoral Act", "Breach of Constitution and unfair registration of voters", "Partisan application of law on damage to campaign material", "Manipulation of the special vote", "Failure to provide electronic copy of voters' [roll to relevant stakeholders including opposition parties"], "Election-related intimidation" and "Election-related bribery" (Masunungure, 2014: 107-108). Here, the onus is upon SADC not to turn a blind eye to such issues but to take concerted action even though such action might be "career limiting"[12] or not be welcomed diplomatically.

[12] In countries such as South Africa, some public servants often fear to confront unethical, maladministration or corruption related issues in their work for fear that they may be fired or not be promoted if they address such issues.

Of all the challenges facing the implementation of the African Charter in the SADC region, perhaps questions of finance and resources remain stubborn reminders that nothing can ever be implemented without financial contributions and commitments by the regional role players such as EMBs, governments and multilateral partners of the sub-region. In terms of elections, observers note that:

"[i]n countries like Botswana, South Africa and Mauritius, Electoral Commissions have the necessary financial, logistic and human resources and enjoy relative independence in the administration of elections" (Kabemba and Da Silva, 2003: 1).

However, they add that:

"…budgetary constraints that Commissions face do not help them to put in place a credible election operation. In most cases, the Electoral Commissions' budget is decided upon by its respective government. Since there is just a fine line that distinguishes government from ruling party in this part of the world, budget control by the executive gives the ruling party room to influence the work of the Commission" (p.2).

Furthermore, in a recent report, the question of "late payment or non-payment of subscriptions by members" was mentioned in terms of the ECF (ECF- SADC. 2013). Another regional workshop identified "lack of adequate resources", and "lack of adequate and sustainable contributions from Member States" as pertinent challenges in terms of domesticating the African Charter by EMBs (Mothusi & Dibeela, 2012: 35). For SADC election management bodies (EMBs) in particular, this situation clearly threatens efficiency and effectiveness and might undermine the democratic trajectory that the SADC region was beginning to enjoy.

"For instance, a cash-strapped EMB may not be able to function efficiently thus disenfranchising sections of the electorate", (Musavengana, T. 2009:5).[13]

Finally, the nascent tendency of incumbent leaders to stay in power beyond the expiry of their constitutionally enshrined terms also creates anxieties for the implementation of the Charter in some SADC and AU Member States.[14]

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[13] Elsewhere in Africa, programmes such as the APRM seemingly face financial challenges since "[t]oo few countries are meeting their annual obligations, which contributes to an overall shortfall"; apparently, "[c]ountries such as South Africa, Nigeria and Egypt pay more than their dues, and others, such as Liberia and Mauritania have contributed no money" (City Press, 31/05/2015).

[14] The DRC in SADC in 2015 faced such a challenge when incumbent President Laurent Kabila announced his intention to extend his term of office, which created a political crisis in that country (Mail & Guardian, 21/01/2015); in east Africa, Burundi's highly-publicised case can be seen as a clear violation of the provisions of Article 3 (10) of the AU Charter on Democracy, Elections and Governance whose "Condemnation and total rejection of unconstitutional changes of government" is unwavering.

7. Are Implementation Problems Unique to SADC and Africa?

It should not be assumed that implementation challenges to continental and regional treaties are a uniquely African or SADC phenomenon. Globally, numerous studies and evidence suggest that implementation remains one of the most intractable stumbling blocks to effective and efficient public administration and governance (see Baier, et al., 1986; O'Toole, 2003; Winter, 2003). As scholars note, the "implementation problem" commonly affects many countries and includes attempts to understand the usual gaps between policy and practice (Baier, et al., 1986: 197). Nevertheless, Africa's myriad problems such as lack of resources, unemployment and poverty, poor infrastructure and relatively fewer technical and other special skills compared to the rest of the world might add their own dynamics which will adversely affect the implementation of regional instruments such as the ACDEG. Moreover, some difficulties to implementation have been attributed to "bureaucratic incompetence" and "conflict of interest between policy makers and bureaucratic agents, and thus to deficiencies in organizational control", (Baier, et al., 1986: 197-198). Perhaps "bureaucratic incompetence" might not be extensively researched as an aspect that impedes the implementation of the African Charter in the SADC countries partly because of the sensitivity of the issue and the difficulty of researchers gaining access and information on relevant institutions in the SADC region. However, it remains a potential threat even in countries that are often categorised as being fairly efficient (e.g. South Africa, Botswana, Namibia). Increasingly, countries in the SADC region are adopting anti-corruption and ethical standards in line with international practices and to improve implementation in domestic policies and laws. This might be able to help address conflict of interest as addressed above although much more concerted efforts are needed to enhance practices in this regard. Thus, as observers note, SADC needs to raise the bar to an extent that it must not accept mediocrity in its elections and governance processes simply on the basis that "there is no violence" (Masunungure, 2014: 118) or serious political instability in one or other Member States.

7.1 How to Ensure Effective and Sustainable Implementation

Successful and effective implementation of the African Charter on Democracy, Elections and Government in the SADC region clearly requires mechanisms that will ensure sustainability as part of the domestication of the Charter. Observers argue that this entails:

"domesticating good practices which have proved successful in other areas of the continent. The concept of domestication …does not entail blind copying of ideas from other countries or regions but rather applying those ideas to specificities of local conditions, that is, taking cognizance of complexities and difficulties in each country, and applying the practices to address those conditions" (Ajulu and Lamin, 2007: 11).

The specificities and local conditions referred to here include being sensitive to the following:

- Government Policy and national legislation reform
- CSO (civil society organisations) role
- Political parties (esp. opposition) role

- Continental and regional bodies roles
- UN, Commonwealth, European Union etc.
- EMBs and EMB fora (such as the African Association of Electoral Authorities, and AU-Democracy & Elections unit)
- Donor or multilateral agencies

Admittedly,
"…it is important to understand that the successful process of domestication does not necessarily guarantee that things will automatically begin to work smoothly" (Ajulu and Lamin, 2007: 11).

However, for the effective implementation of the African Charter, it could be argued that it needs to accommodate "customer" or "clients" concerns and satisfy the need of the intended beneficiaries. Thus, it is argued that (Balogun, 2007: 6-7):
A charter oriented towards the "customer" would of necessity have to acknowledge the diversity in the "products" supplied and/or demanded, and in "consumer preferences." Still, it can be safely assumed that regardless of the product supplied by a public agency, the average "consumer" would assess its overall worth against the following broad standards:
• Clarity in the definition of eligibility;
• Access to the product or service;
• Timeliness/promptness of delivery;
• Simplicity of service delivery procedure (and accommodation of "one-stop" arrangements);
• Convenience of hosting facilities and of service delivery perimeters;
• Courtesy and politeness of service delivery agents;
• Accountability for actions or omissions;
• Provision for fault-reporting and rectification;
• Adequacy, reliability and clarity of information;
• Assurance of security, dependability and confidentiality (e.g., of cheques, money orders, regular mail);
• Cost-effectiveness/economy of operation / value for money; and
• Transparency of actions.
All the above points by Balogun apply in one way or another in the implementation process of a Charter or regional instrument. Thus, the different publics (or "clients"/"customers" as used by Balogun above) all deserve to be included in all the processes of implementing regional instruments, to ensure buy-in or support from individuals, communities and organisations.
To be fair to the framers of the ACDEG, there are clearly outlined mechanisms for application in Chapter 10, Article 44 (ACDEG, 2007, which refer to different levels of implementation such as:

- Individual state party level
- [African Union] Commission level
- Continental level
- Regional level

Yet, it is more at the micro levels which directly affect ordinary people's lives that implementation of the Charter is found wanting despite the noble intentions outlined in the above chapter. For instance, the concluding section, Article 53 states

that the Charter is "…drawn up in four (4) original texts in Arabic, English, French and Portuguese languages" (ACDEG, 2007). At the local level in remote locations of SADC and AU member states, innovative and proactive measures will need to be taken to translate any of these languages into local dialects and languages spoken in the different countries.

8. Limitations

This paper's scope on the African Charter is limited in that its focus is on SADC countries, which constitute a fraction of Africa's 54 countries. Therefore, the views expressed here may not be adequate to indicate whether the continent's implementation of this instrument is succeeding or failing to achieve any expected results.

Similarly, the paper's focus on those countries that have signed and ratified the ACDEG in SADC may not provide adequate explanation of the reasons for not ratifying or signing the charter for those countries that have not done so.

Further, a review of SADC and continental implementation practices on the African Charter is quite likely to be very comprehensive, taking into consideration a very full range of obstacles from financial issues to infrastructure, political will, citizen support and a country's political culture; which has not been attempted here.

Finally, owing to the fact that implementation matters inevitably touch the hallowed spaces of "private and confidential" matters that individuals, offices or leaders might not want to share with researchers and the public, it should be noted that access to some material was not possible and such material is obviously not reflected in this paper.

9. Conclusion

Since the transition from the Organisation of African Unity (OAU) to the African Union (AU), numerous steps were undertaken by the continental body which suggest that Africans are serious about addressing their socio-economic, political and development challenges. The adoption of the AU Charter on Democracy, Elections and Governance should thus be viewed in this light. It is as a continental agreement that focuses on elections, democracy and governance, issues that have for decades been annoying to African leaders whenever they engaged their global counterparts. According to the African Union,

"even though the [African] Charter effected on 15 February 2012, it is expected that it would take time to make the necessary impact in terms of its actual implementation and the outcome or impact thereof" (Tapoko, in Mothusi and Dibeela, 2012: 59-60).

Given SADC's recent efforts at structural reform to "develop and harmonise policies in a number of sectors" (Isaksen & Tjønneland, 2001: ix), there seems to be hope that the sub-region will address its myriad of implementation challenges. This is particularly given the fact that countries in the region face numerous regional, continental and international instruments, which are not always synchronised or systematically implemented. For instance,

"…two charters of significance here are the African Charter on Democracy, Elections and Governance (ACDEG) and the African Union Convention on Preventing and Combating Corruption (AUCPCC)" (Khan, 2007: 26).

In the case of SADC, the implementation of these two instruments might prove to be a challenge in a sense that both seem to be addressing similar issues that ultimately impact upon governance and democratisation, yet they entail different ratification, enforcement and domestication procedures which may confuse implementers at the different levels of implementation. It is also noted that some countries such as South Africa are crucial for the development of regional initiatives and that:

"South Africa must take a leading role in this process, contribute resources required to make it work, and do so in a manner that does not increase tensions and divisions in the region". (Ibid, p.x).

The region and possibly the whole African continent could benefit from some form of hegemonic leader or country that will help SADC and the AU to speedily and effectively implement their agreements. However, for a country like South Africa, which has been accused of "sub-imperialism" (Bond, 2004), this poses difficulties and dilemmas for the country irrespective of whether it chooses to be pro-active or dormant in SADC and continentally. Nevertheless, in a recent report, observers urge "for cautious optimism" adding that:

"SADC should not be expected to make rapid progress in implementation and delivery in the short term" (Isaksen & Tjønneland, 2001: x).

Yet, the region now needs to move rapidly from policy declarations to practice especially since:

"…the AU has signed numerous progressive declarations to date, many of which have not been translated into policy practice by way of law reform, reform of government institutions, transformation of political culture, and socio-economic policy reviews and adaptation" (Matlosa, 2008: 9).

Consequently, we may agree with Matlosa (2014: 5) who urges caution on the African Charter and its potential contribution to sustainable democratisation in Africa, arguing that "…it is still fairly new and in its embryonic stage" given that it was only in "early 2012, when the requisite 15 ratifications were secured for the ACDEG." Still, it would appear that SADC has experienced mixed results in terms of the implementation of the African Charter on Democracy, Elections and Governance although the sub-region seems to be united in attempts to ensure continental and international election management best practices and the promotion of democratic governance in many spheres of their countries.

In conclusion, the SADC region clearly faces many hurdles in implementing the African Charter on Democracy, Elections and Governance. These hurdles manifest themselves into political, economic, socio-cultural, diplomatic and international dynamics at the micro and macro levels. Undoubtedly, the region has made some strides and "…commendable progress towards political liberalisation and

democratisation since the past decade" (Matlosa, 2004: 2). But the above obstacles and challenges lead one to conclude that much more needs to be done to commit countries and their leaders (at least all those that have signed and ratified) to the implementation of the Charter. Domestication of the Charter, in my view, needs to be undertaken systematically and will demand much more efforts, political will and tangible resources by African leaders, policy-makers, diplomats, non-governmental and non-state organisations, communities and individuals at the lowest levels in all the SADC countries. Thus, we conclude with the following recommendations that are aimed at suggesting ways and means through which the domestication of the Charter can be enhanced.

9.1 Recommendations

The following recommendations are therefore presented for consideration in view of the issues raised in this paper on the implementation of the Charter:

- Additional measures that will entail systematic monitoring and evaluation of the implementation of the African Charter on Democracy, Elections and Governance should be considered at the level of the Heads of State and Government; which will hopefully be cascaded to the different levels as discussed in this paper;
- All SADC countries should endeavour to contribute financial and material resources towards implementation of the Charter;
- All EMBs, political parties, youth bodies, women's organisations and various sectors in SADC should be pro-actively engaged by governments and SADC and AU diplomats so that they may popularise the Charter in their elaborate networks;
- However, it will be advisable for member states to wholeheartedly commit to the Charter and its contents and to respect the rule of law, national constitutions and ensure that the EMBs in their territories enjoy relative autonomy to manage all electoral events efficiently and effectively without unwarranted interference from the executive, legislative and judicial branches of their respective governments;
- For member states that do not domesticate the Charter or comply, strict measures that will apply to all member states (irrespective of status, influence or other considerations) should be undertaken; Those that have not acceded to the Charter should be urged to do so in periods preceding to their elections;
- SADC as a regional body needs to adopt inclusive approaches in its election observation processes by ensuring that the relevant role-players and experts in election management in the region are part of SADC's regular deployment; and to engage them pro-actively whenever governance challenges arise in the region;
- Such measures must be part of clearly outlined implementation plans that will ensure effective and efficient domestication;
- Given the numerous SADC election observer missions (SEOMs) that regularly observe but give different reports on the same electoral event, SADC should consider combining all these missions so as to produce a single report that

will contain the inputs of all the different sectors such as Parliamentary Forum (SADC-PF), ECF, etc.;

- All SADC member states should be urged to introduce the Charter and other continental instruments in all their schools and educational institutions to be part of the curriculum about African affairs; and finally
- SADC should commission independent and scientific studies and research on all matters pertaining to the implementation of the Charter including other instruments to ensure the availability of reliable data upon which implementation will rest. Such research will require SADC to collaborate with the different higher education and research institutions in the region so as to tap into the knowledge and expertise that exists on elections, democracy and governance matters.

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By Prof Michelo Hansungule[15]

Introduction

Swaziland does not fit the democratic template in the SADC region. None of the countries in the region, the kingdom of Lesotho included, has an unelected executive like Swaziland. As head of the Executive, King Mswati III of course is unelected. Parliament is partially elected. A good number of legislators in both Parliament and Senate are appointed by His Majesty. Elected members must contest on the basis of their individual merit without any political party affiliation because political parties do not exist in the kingdom since 1973 when they were banned by King Sobhuza 11. Some of the Senators are elected by Parliament while the rest are appointed by the king.

Formally though, the 2005 Constitution generously provides for the same liberties and institutions every democracy would have.[16] Section 25 (1) provides that:

"A person has the right to freedom of peaceful assembly and association".

Ideally, this clause should be adequate to guarantee individual and collective liberties, especially the much cherished freedom to establish political parties including the right to join and not to join those parties. Interestingly, Section 25(1) very closely mirrors article 20 of the Universal Declaration of Human Rights, which in its paragraph one, provides that:

"Everyone has the right to freedom of peaceful assembly and association"

This global standard regardless, Swaziland isn't open to free political competition but rather to competition of individuals who subscribe to the Monarchy system of government.

Tinkhundla government system

As indicated above, free political competition is not allowed in Swaziland. A number of people that nevertheless tried to exercise their God given right to free political association and to free speech as guaranteed in Section 24 of the Constitution have easily collided with government and are either serving their prison services or worse. To achieve this, Section 79 of the Constitution dovetails Section 25 and other liberties by limiting democratic participation to the Tinkhundla system of governance. It provides:

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[15] University of Pretoria, Centre for Human Rights

[16] . The Constitution of the Kingdom of Swaziland Act, 2005 (Act No: 001 of 2005)

"The system of government for Swaziland is a democratic, participatory, tinkhundla based system which emphasises devolution of state power from central government to tinkhundla areas and individual merit as a basis for election or appointment to public office"

Tinkhundla system isn't in the template of the SADC,[17] African Union,[18] or indeed the United Nations. In fact, most SADC citizens don't understand what Tinkhundla means because beside it being a Swazi term amenable only to Swazis, the rest of the region has adopted Western-style systems based on global dictionary of democracy. But what it means though is that individual merit is the basis of election or appointment to public office. Incredibly, however, this has not been a preoccupation of the SADC organs who are driving democracy in the region.[19] Despite it being different from the familiar processes and systems in the SADC, leaders of the SADC are visibly quiet about the fact that Swaziland isn't moving along with the rest of the region.

The result of the Tinkhundla system and its restriction on individual freedom to contest public office, is that many Swazis see no point in participating in that country's politics and do not register to vote. The last election recorded one of the lowest voter registrations, in part because real politics is banned and most of those opposed to the current system escaped the country to live in neighbouring South Africa. At least one party - PUDEMO[20] - is proscribed after being listed as a terrorist organization.

Right to Vote

Notwithstanding this, the constitution fairly adequately guarantees the right to vote. The right to representation is encoded in Section 84 (1) which, inter alia provides:

"Subject to the provisions of this Constitution, the people of Swaziland have a right to be heard through and represented by their own freely chosen representatives in the government of the country" (sic).

Given the political restrictions around representative office in Swaziland, there is no doubt this is a mockery. The entire electorate is being mocked into believing they have a right to 'freely chosen representatives', as the Constitution cries yet that is not it.

Also, the Constitution quite eloquently affirms women's representation. Recognising the historical and cultural imbalances that for centuries in the kingdom disenfranchised women, Section 84 (2) provides:

"Without derogating from the generality of the foregoing subsection, the women of Swaziland and other marginalized groups have a right to equitable representation in Parliament and other public structures"

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17 . See the SADC Principles on: www.ohchr.org

18 . *www.achpr.org/instruments/guide-**elections***

19 . www.sadc.int SADC has had mediation programmes in DRC, Lesotho, Madagascar, even Malawi and Zimbabwe but not in Swaziland

20 . Peoples United Democratic Movement, *www.**pudemo**.org*

Again, this is not to be taken seriously in practice. During the August 2013 elections, it was reported that at least two women were prevented from contesting elections as Members of Parliament; one of them because she was wearing trousers at the Chief's Kraal on the day of nomination. The other, a widow and immediate past holder of the seat she wanted to re-contest, was told by her Chief that as a widow, tradition dictated that she does not contest public office. Due to the systemic cultural practices and traditions, the 2013 election drew the smallest number of women candidates to contest parliament or local government, which in effect meant that men would represent women.

A notable best practice, however, is that unlike most SADC systems, the right to vote in local government systems is available to citizens and to permanent residents. In most SADC and other jurisdictions, the right to vote whether at local government or other sphere is limited to citizens. But Section 85 (1) provides:

"Subject to the provisions of this Constitution, every Swazi or person ordinarily resident in Swaziland has a right to vote at any election of members of the House or members of the Bucopho".

Affording persons that are ordinarily resident in the country of their residence an opportunity to vote is a very good best practice worth emulating in the rest of the SADC. Permanent residents pay all types of taxes to local authorities but are not allowed to influence policies and decisions of their local authorities in the countries of their residences in most of the jurisdictions in the region.

However, there is no postal or diaspora vote in Swaziland. Section 85 (2) states that:

"A person is not entitled to vote in terms of subsection (1) if that person is for any reason unable to attend in person at the place and time prescribed for polling except as it may otherwise be prescribed"

As a result, even though a significant number of Swaziland's electoral population lives in nearby South Africa, they could not vote unless they attended to the particular voting centre they registered in during voters' registration. Even more restrictive is Section 85 (3) according to which:

"A person shall not vote at any election in terms of this section except at an inkhundla where that person is registered as a voter unless a special polling arrangement has been prescribed"

During the 2013 elections, it was explained by the Elections and Boundaries Commission that this clause enabled soldiers and other security officials away from their usual stations to vote in their temporary polling stations on the basis of 'special polling arrangements', which is done as an exception to the rule. This does not make the rule any more liberal. The best practice is to open voting by a voter to any polling station. A freer voting environment should be possible with current technology and this would encourage most voters to vote.

Section 85 (4) deals with eligibility for candidates to contest election. It states that:

"A person is not entitled to stand as a candidate for election in terms of this section or section 86 unless that person is registered as a voter in that inkhundla or Region."

This clause prevented many potential candidates from contesting because of the requirement to register in a particular inkhundila or Region both of which are under the jurisdiction of Chiefs. Chiefs would not register known political activists let alone opponents of the regime. As a result, activists in and out of the country never dared try to seek to contest the election.

Again, the issue of women is addressed post the election. Section 86 (1) and (2) provide that:

'Where at the first meeting of the House after any general election it appears that female members of Parliament will not constitute at least thirty percentum of the total membership of Parliament, then, and only then, the provisions of this section shall apply. (2) For the purposes of this section, the House shall form itself into an electoral college and elect not more than four women on a regional basis to the House in accordance with the provisions of section 95(3).

This clause was meant to address a male dominated electoral outcome such as the 2013 election results in which as indicated, women were hugely underrepresented. But despite it being a constitutional provision, it was never implemented and Parliament remains hugely imbalanced in respect of women representatives.

Elections and Boundaries Commission (EBC)[21]

The *Election Order, 1992* established The Elections and Boundaries Commission (EBC) replacing the Delimitation Commission. The Order also reaffirmed the provisions of the *Establishment of the Parliament of Swaziland Order of 1978 (amended in 1992)* providing for voter registration and secret ballot and the direct election of representatives by plurality.

The Voters Registration Order of 1992

The Order established the National Electoral Office, its composition, its powers and functions. The registration of rural voters takes place at public meetings. In chiefdoms this is done in the presence of the Chief and his council who vouch for the prospective voter. In urban areas it is done in the presence of the Indvuna Yenkhundla (elected head of the inkhundla). Registration is with constituency registration officers who receive the information publicly and orally and writes it on registration forms. The names are then entered on voters rolls for the inkhundla.

[21] . www.gov.sz/index.php?option=com_content&id=366&Itemid., *Unsurprisingly, the EBC is located in the Ministry of Justice*

Electoral Institutions in Swaziland

The Elections Order of 1992 and The Voters Registration Order of 1992 created The National Electoral Office, which was replaced by the 2005 Swazi Constitution in 2006.

The Elections and Boundaries Commission

The elections management body in Swaziland is called the Elections and Boundaries Commission. In terms of section 90 of the Constitution, the King, on the advice of the Judicial Service Commission, appoints a chairperson, deputy chairperson and three other members after consultation with the Ministers responsible for elections and local government. The appointed persons are individuals who possess the qualifications of a Judge of the superior courts or persons of high moral character, proven integrity, relevant experience and demonstrable competence in the conduct of public affairs. The Elections and Boundaries Commission (EBC) is established by the new constitution and replaces the Electoral Office, which previously managed Swaziland's elections (Constitution 2005, Article 90 (1).

Commissioners may only be removed by the King for incompetence or misbehaviour on the recommendation of the Judicial Services Commission (Constitution 2005, 90 (10) as read with section 158). The term of office of a Commissioner is twelve years and is not renewable (Constitution 2005, 90). The Constitution tasks the EBC with the following (Constitution 2005, 90(5)):

- To supervise voter registration.
- To ensure fair and free elections.

The following were appointed members of the Commission by King Mswati III

· Chief Gija Dlamini (Chair)
· Mzwandile Fakudze (Deputy Chair)
· Nkosingumenzi Dlamini
· Gloria Mamba
· Ncumbi Maziya

The EBC is required to produce a report after each election on that election for the minister responsible for elections (Constitution 2005, 92). The EBC must also produce a report making recommendations on the boundaries of the *tinkhundla* and the King will then
proclaim the new boundaries delimited by the Commission to be effective for the next general election not less than six months before the dissolution of Parliament.

The Election/ Voting Process

With Swaziland being a non-party state (Proclamation No. 7 of 12 April 1973 on ban of political parties), political parties do not play any role in electoral processes. However, candidates standing for election are allowed to campaign and also have agents and messengers who are allowed to watch the election process from Voter Registration, Voter Education and Nomination of Candidates up to the actual Election including Voting.

Voter registration is open to any citizen of Swaziland who is of the age of 18 and older. Section 85(1) of the constitution states that every citizen of the Kingdom who has attained the age of 18 years is entitled to vote. However, a citizen could be restricted to exercise this right by reason of any of the following grounds:

a) Being certified to be insane or otherwise adjudged to be of unsound mind under any law in force in Swaziland
b) Being convicted of certain specified criminal offences.
c) Failure to prove/produce evidence as to age, citizenship or registration certificate as a voter.
d) Being not a citizen of the Kingdom.

There are certain factors as specified under the Voters Registration Order of 1992 that may disqualify a voter. A person, for instance is not entitled to vote if he/she is judged insane. The registration is undertaken in each of the constituency where a voter is entitled to register.

Chiefs

Traditional leaders play a prominent role in the country's polity. As a kingdom, traditional leaders, despite the term, play important traditional and political roles. But this is controversial. Despite the fact that political parties are banned, the Constitution in fact forbids traditional leaders from taking part in partisan politics.

Section 233 (6) of the Constitution provides that:

"A Chief, as a symbol of unity and a father of the community, does not take part in partisan politics"

By law, therefore, Chiefs are not expected to take part in politics more especially partisan politics. But the practice echoes a different tune. In fact, there are Chiefs in most political institutions in Swaziland including Parliament, Senate, Executive, etc.
More than this, however, Chiefs play instrumental roles in election administration. While the Elections and Boundaries Commission is the statutory body entrusted with administering elections including demarcation of electoral boundaries, on the ground this is done by Chiefs in whose chiefdoms or palaces election campaigns are held with their permission and under the scrutiny of their eyes. Nominations for candidates to contest all levers of power including council and legislative must be authorized by Chiefs in their areas who should also supervise the meetings.

Recommendations

Some of the recommendations that this paper makes in a bid towards improving the Swaziland electoral environment include that Swaziland should:[22]

- Lift the ban on political parties and allow free political activities for organizations in line with section 25 of the Constitution, demands by sections of Swazis expressed in Sibaya, as well as regional and global practice
- Repeal sections 79 and 80 of the Constitution on the Tinkhundla system of government as the only model authorized to constitute government in Swaziland because it hinders exercise and enjoyment of section 25 and isolates Swaziland from the rest of the world
- Without prejudice to the above, adopt a liberal interpretation of sections 79 and 80 that allows these sections to co-exist with section 25 by legalizing political parties in a Tinkhundla based system of government. His Majesty should ignore the Supreme Court ruling in Jan Sithole and others versus The Government of Swaziland and others where majority judgment misleadingly held that section 25 does not extend to political parties yet it naturally does. Not only is it an international trend but it is in section 25 of the Constitution. Parties are also reflected in section 233 on Chiefs who are banned from 'partisan politics', a clear reference to political parties.
- Release all prisoners sheltering in His Majesty's prisons for alleged breaches of industrial, political, security and related legislation. Trade unionist Musa Dube detained on the eve of the September 20 elections for calling for boycott of the election need not have been arrested for exercising his rights and must be released and charges instantly dropped along with others in similar situations.
- Rescind the recent decision to appoint Chiefs to the House of Assembly because this blatantly violates section 233 (6) of the Constitution which declares that as symbols of national unity, Chiefs shall be non-partisan hence not allowed to participate in political forums or forums where politics is the domain. While they may be appointed to 'public office' by the king, 'public office, should be construed to exclude political office as this inevitably makes them partisan. As the Constitution provides, Chiefs should be completely banned from any politics.
- Direct enactment of enabling legislation for the registration of political parties
- Appoint a Prime Minister from elected/not appointed members of the House of Assembly
- Consistent with SADC Declaration on Gender read with the African Union Declaration on equitable representation of women, direct necessary amendments to the Constitution to ensure compliance with relevant instruments Swaziland subscribes to, raise and ensure equitable number of women representation in the House of Assembly and Senate, and therefore

[22] . Extracted from the Report of the SADC Lawyers' Association Election Observer Mission to the 2013 Swaziland Elections, *www.**sadc**la.org/*

in Cabinet, through a combination of elections and appointment for the latter on the basis of affirmative action.

- Pursuant to the foregoing, and in the light of sections 85 and 86 of the Constitution as indicated below, ensure direct implementation of the equitable clauses for women representation as dictated to in the Constitution
- Subject to section 95 (2) (b) of the Constitution cited above, appoint nominated members both to the House of Assembly and Senate only from among those recommended to His Majesty by constitutionally qualifying groups.
- To boost democracy, His Majesty's nominated members of Senate should be reduced to no more than five (5) while the rest should be elected not by the House of Assembly as per present constitutional provision but by direct adult suffrage simultaneously as election of members of the House of Assembly
- His Majesty should ensure that only qualified persons are appointed Commissioners of the EBC with the qualifications stipulated in the Constitution as the only grounds for appointment
- His Majesty should direct amendment of section 95 to repeal the provision making the Attorney General an ex-officio member of the House of Assembly as the political role conflicts with his duty to act as Chief government Legal Advisor

Consolidating Democracy Through Strengthening Electoral Institutions: The Case of Mozambique

By Justice João Carlos Trindade[23]

1. Introduction

Multiparty democracy was introduced in the political system in Mozambique twenty years ago. Since October 4, 1992, when the Frente de Libertação de Moçambique (FRELIMO) Government and Resistência Nacional Moçambicana (RENAMO) signed the General Peace Agreement in Rome, ending a 16-year civil war, the country has held five legislative and presidential elections[24] and four municipal elections[25].

My presentation will focus on the electoral processes relating to Presidential and National Assembly elections.

A general overview on the behavior of the electorate in these five nationwide elections shows that, after a very good turnout in 1994 (88%) and 1999 (68%), the abstention rate became higher than 50% after 2004. Far from being a unique phenomenon of Mozambique, this is, however, a worrying sign and revealing a certain disenchantment of citizens with politics, leading some writers to draw attention to the danger of a "democracy without voters" (Brito, 2007: 5).

The challenges to regain citizens' confidence in the electoral system and increase their levels of participation in the deepening of democracy and good governance are several and from different dimensions. It will not be possible to mention all of them in this brief presentation. I chose, therefore, a set of topics that have been considered, by national and international observers as of key importance to achieve these objectives.

2. The need for revision and adjustment of the legal framework

One of the most striking features of the Mozambican electoral system is the instability that characterizes the relevant legal framework. Each of the electoral processes was conducted using its own legislation[26], which was continually adopted according to the conveniences and political agreements between the two main national parties, Frelimo and Renamo. This is one of the reasons usually cited by observers and electoral analysts in recent years for the persistent defects and errors

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[23] Retired Judge of the Supreme Court, Lawyer

[24] In 1994 (27 to 29 October), 1999 (3 to 5 December), 2004 (1 and 2 December), 2009 (28 October) and 2014 (15 October)

[25] In 1998 (30 June), 2003 (19 November), 2008 (19 November) and 2013 (20 November)

[26] Law Nº 4/93 of 28 December, for the first general elections in 1994; Law Nº 3/99, of February 2, for the elections of 1999; Law Nº 7/2004, of June 17, for the elections of 2004; Law Nº 7/2007, of 26 February, for the elections of 2009; and Law Nº 12/2014, of 23 April, to the last general elections, in October 2014.

in the management of electoral processes, leading to the contestation of electoral results by the opposition parties.

It is necessary to reverse this situation. The electoral legislation must comply with a strategic vision, in accordance with the norms and standards in use in SADC and other parts of the world. The legislation must not be held hostage to political interests, regardless of the political parties involved. It is therefore important for the country to adopt a single Electoral Law, that is consolidated and consistent, and able to regulate all aspects of the electoral process in its different phases. This legislation must be the result of a broad, inclusive and participatory national consensus, avoiding constant changes and modifications (EU, 2014: 43; EISA, 2009: II.1). The law must be simple and accessible in its language and on the requirements and procedures for elections. It must promote transparency and accountability regarding the actions and decisions of electoral management bodies, ensure the unobstructed access to electoral information by the public and promote efficiency and effectiveness in the use of public resources in all aspects of the electoral process. The law must also facilitate gender balance and parity, in line with the SADC Protocol on Gender and Development of 2008, which Mozambique has ratified.

The country will go for at least three years without elections if the electoral calendar is respected and not changed. This is an opportune moment to launch the necessary dialogue amongst the political players, citizens and civil society organisations in the country, in order to embark on a legislative reform process leading to the creation of a new legislative framework that will put an end to the current instability.

3. The delicate issue of the composition and performance of electoral management bodies

In 2013, Law n^{o} 6/2013 of 22 February was passed, establishing the composition, structure, responsibilities and roles of the National Electoral Commission (CNE). Initial steps have since been taken towards the professionalization of elections management bodies (including STAE[27]). This was in response to long-standing recommendations of several Election Observation Missions, and of some analysts and political parties.

Under the 2013 law, the CNE must be composed of 13 members: 5 appointed by FRELIMO, 2 by RENAMO and 1 by the Mozambique Democratic Movement **(**MDM), a Judge appointed by the Superior Council of the Judiciary, a public Prosecutor recommended by the Superior Council of Public Prosecution and three members appointed by civil society organizations. In turn, the STAE must be headed by a General Director and include a permanent staff compliment of personnel with special qualifications that are recognised in terms of the General Statute of Officials and Agents of the State.

[27] STAE – Technical Secretariat for Election Administration

However, the occurrence of violent clashes in the central region of the country between the Army and the military forces of RENAMO in late 2013 and first half of 2014, forced the warring parties to negotiate new political conditions for the realization of the scheduled General Elections of 2014, culminating in the revision of the 2013 Law, among others. This resulted in a new law, which was republished under Law n^{o} 9/2014, of 12 March.

The principle of professionalization of CNE and STAE was abandoned as the system reverted to the previous form of strong party control of both institutions. FRELIMO and RENAMO dominated this process. CNE is now composed of 17 members, including five nominated by FRELIMO, four by RENAMO, one by MDM, and seven by civil society organisations and elected by the Parliament. The President must be a member of the Forum of civil society organisations. There are two Vice-Presidents, nominated by the two parties with majority parliamentary representation.

As I mentioned earlier, after resetting the course that the institutions must take, we must proceed with the public debate about the composition of the electoral bodies and their roles in line with the expectations of public service, professionalism and non-partisan performance.

The *Carter Center* notes, in its preliminary statement of 17 October 2014, that:

"The politicization of the electoral administration infrastructure does not fully comply with the international standard for independent, neutral, and professional electoral bodies [so, all stakeholders, including the national assembly, must be encouraged] *to consider the opportunity to revise the articles in the electoral laws referring to the presence of political party members within the election administration bodies while finding other means of maintaining parties' confidence in the system"*

The legislation should also promote the adoption of more effective mechanisms of engagement between the central structures of CNE/STAE and their local organs, reinforcing the internal operational and logistical capacity and defining a more effective communication strategy, which takes into account the rapid and complete publication of decisions, instructions and regulations.

4. Continuous voter registration

This is a key issue for transparency of the electoral process and the exercise of the right to vote. It is crucial to ensure continuous voter registration, updating of the voters' roll and ridding it of deceased or ineligible voters. For this purpose, electoral institutions may work together with the Civil Registry services and the courts, without waiting for a new election.

As already proposed on previous occasions (Cistac & al, 2012: 45), it is necessary to perform basic voter registration and to undertake annual updates for new voters and transferred people, through the registration brigades of STAE. The process must therefore become permanent, as happens in other countries, and undertaken by

dedicated institutions in the areas of residence of voters with the possibility of mobile brigades.

Voter registration is indeed one of the most delicate moments of the electoral chain, because it can leave out a large number of voters leading to their failure to exercise their right to vote.

The period of time allowed for the public inspection of the voters' lists should be extended. The law provides for three days for this exercise, which is clearly insufficient to allow for a sound inspection of the roll by the electorate. The opposition political parties often complain of lack of transparency and seriousness in respect to voter registration, especially in areas where they have greater political influence and support.

5. Civic education and training of staff

Despite the efforts made by STAE in organizing electoral education activities with a focus on voting procedures and voter participation, there is still a lot of work that needs to be done in this area. Considering that over 70% of the electorate live in rural areas, the availability of voting information is still insufficient. Civic education should be directed towards the promotion of political tolerance, respect for opponents and of the will expressed by voters at the polls.

There is also need to ensure wide participation by community leaders, traditional authorities, Non Governmental Organisations (NGO's) and political parties in civic and electoral education campaigns. These campaigns should not only take place towards elections but should be a permanent feature of the electoral process. Special attention should be given to the young first-time voters, women, the elderly and people with disabilities.

Political parties have a special responsibility for the proper training of their members and agents. Opposition political parties must play an important role in this regard so as to reduce the gaps that currently exist between them and the ruling party.

6. Election campaign

The most recurrent problems during the election campaign phase can be summarised as relating to campaign financing, illicit use of public funds and assets and media coverage.

The Mozambican electoral legislation does not clearly stipulate provisions relating to financing of campaigns for the legislative and presidential elections. It simply gives CNE the authority to set the criteria for the distribution of public funding. This is a matter that deserves more attention from the legislature. Public funding of election campaigns and procedures for distribution of funds must be clearly stipulated in the law and not be left to the discretion of CNE. It is necessary that the funds be

released on time. One commentator has previously proposed that the funds should be made available at least 30 days before the beginning of the electoral campaigns and in not more than two tranches (Cistac & al, 2012: 47).

The ruling party has been accused, in virtually all elections, of misuse of State funds and property as well as the funds and properties of public entities, thereby giving it an unfair advantage over other competing parties. This observation has also been made by election observers, the independent media and by opposition political parties.

To avoid repeated violations of electoral rules and ethics, it is necessary to strengthen the supervision of the use of public resources and stipulate appropriate sanctions for misuse. The Constitutional Council, in a decision passed on 22 November 2011, concerning the use of State vehicles during election campaigns, stated that:

"such behaviour cannot be allowed to prevail and deserves to be discouraged by the competent authorities such as the Attorney General's Office"

One of the basic principles of any democratic contest, whether in the field of political elections, or in any other area, is the observance of equality of means and opportunities amongst the contestants. One of the most important areas to use in assessing that equality is the media. But for that to happen, the media, and in particular the state media, must not serve any partisan political interests. It must be guided by principles of objectivity, impartiality and fairness. Many analysts and public opinion makers are of the view that both the print and electronic state media are failing to observe these principles.

Media coverage of elections has been marred by restrictions on press freedom, largely due to the control of major media houses by the governing party. One of the most obvious examples in the last two years, was the creation of a group of "opinion makers", popularly known as G40, which used social media and social networks to defend the interests and image of the regime and its leader.

The strategic role of the Media Superior Council on monitoring of press organs must be recognised and strengthened. In addition and as recommended by the European Union's election observation mission, it may be necessary to change the composition of the institution, give it more independence and remove any political authority over its operations.

7. Counting and announcement of results

The announcement of election results is done through several levels. This is time consuming, resulting in apprehension and speculation before the election results are announced. The process begins at the clearance table of the polling station, goes to the district or town level, followed by the provincial level and then finally to the national central and general clearance platform.

A simplified procedure is recommended for the verification of votes so as to allow for faster announcement of results.

The process of counting votes in polling stations is important and should be done with openness and transparency in relation to all stakeholders and in particular, the Chairperson of the polling station, candidate election agents, electoral observers and journalists.

Electoral authorities and electoral administrators must develop a code of conduct for polling officers in line with the law and ensure that the code of conduct is scrupulously observed. This is important because any misconduct on the part of polling officers reflects negatively on the work of CNE and STAE at national and lower levels.

8. Conclusion

As I said on the outset, these are just some of the constraints and obstacles facing the process of construction and consolidation of multiparty democracy in Mozambique. There are many more challenges in the country.

For more than a year, the two main political parties – FRELIMO and RENAMO – have gone through a long and difficult political negotiation process that, ultimately, aims to deepen democracy in the country. They are seeking ways to have effective and independent State structures and institutions that can help in creating conditions for a democratic coexistence between all political forces, with broad participation of citizens.

I hope that the representatives of both parties are aware that their historical role will be truly recognized if they respect the legitimate aspirations of the people of Mozambique to have perennial and effective peace and to exercise their right to dignity, development and happiness.

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Electoral Democracy: 20 Years of South African Experience

By Mr Terry Tselane[28]

Let me begin by thanking the SADC Lawyers' Association for inviting me to address this workshop on Governance and Democracy in the Southern African Development Community (SADC), and to offer my views of 20 years of electoral democracy in my country, South Africa.

Last year was a singularly important one for my country, for we held our 5th national and provincial elections, as well as celebrating the 20th anniversary of our first democratic elections.

For those of you who are not that familiar with South Africa, I present you with some key facts about our beautiful country:

- Population: ± 54 million
- ± 51% (approximately 27,64 million) of the population is female
- Province of Gauteng comprises the largest share of the South African population – ± 13 million people (23,9%)
- KwaZulu-Natal is the province with the second largest population with 11 million people (19,8%)
- Northern Cape is smallest with a population of approximately 1,17 million people (2,2)
- About 30% of the population is aged younger than 15 years and approximately 8,4% (4,54 million) is 60 years or older
- 11 official languages.

About the Electoral Commission

In South Africa, the Electoral Commission is one of several institutions created by the Constitution to strengthen constitutional democracy. The history of the our organisation extends all the way back to 24 December 1993, when the Interim Independent Electoral Commission met for first time having being formed as part of multiparty negotiations.When I think that we have challenges as an electoral management body today, I always just remember that this interim commission had just four months to arrange South Africa's first ever democratic elections, eventually held on 27 to 29 April 1994. Some 19.5 million votes were cast in these historic elections, with an estimated 86% turnout, for remember that there was no voters' roll in 1994. In 1996 the new Constitution of South Africa was adopted, a Constitution which established a permanent Electoral Commission of South Africa as one of six state institutions to support democracy. The powers, duties and functions of the Electoral Commission were established by the Electoral Commission Act of 1996, while the Electoral Act was adopted in 1997 to regulate the administration of national, provincial and municipal elections. At the head of the Electoral Commission is a five-member Commission. The Commission has a mandate to support and promote constitutional democracy, and ensure the broader Electoral Commission not only complies with the law but also keeps the spirit of the Constitution alive.

[28] Vice-chairperson, Electoral Commission of South Africa

The appointment of Commissioners and the composition of the Commission are set out in the Electoral Commission Act. Commission members must be South African citizens who do not, at that stage, hold a high party political profile; one of the Commission members must be a judge. Commissioners are nominated by a committee of the National Assembly, and interviewed by a panel consisting of the Chief Justice of the Constitutional Court, representatives of the Human Rights Commission and the Commission on Gender Equality, and the Public Protector. The panel recommends a set number of candidates to the National Assembly. A majority resolution from the National Assembly is required to confirm a candidate. Appointments to the Commission are made by the President. Each Commissioner is appointed for a seven-year term, which may be extended by the President on the recommendation of the National Assembly.

In terms of our administration, the Electoral Commission typically has just over a thousand permanent staff members. During registration weekends this number swells to about 45 000 permanent and temporary staff members, and grows even further to number some 220 000 staff members, most of whom are temporary staff who man our voting stations. A large proportion of these staff members are female (about 70% of them, in fact) and unemployed (78%), while we estimate about 59% of them are under the age of 35.

Elections to Date

Under our stewardship, South Africa has held five democratic national and provincial elections to date: in 1994, 1999, 2004, 2009 and last year, as I mentioned, in 2014.

The Electoral Commission has also successfully managed three municipal elections, namely in 2000, 2006, and 2011. We are currently in election planning mode, with our next municipal election scheduled for about a year from now – that is between May and August in 2016. As part of our municipal elections, we also hold about 120 by-elections per year. One of the first tasks of the permanent Electoral Commission was that of compiling the first national common voters' roll, which was done in preparation for the 1999 national and provincial elections. The basis of a voters' roll is the division of the country into voting districts, and for the people in each voting district to register as voters. To achieve this, an electronic geographic database had to be created within a period of months and the people residing in each voting district had to be registered. This was done over a period of three weekends at the end of 1998 and the beginning of 1999 during which 18,1-million South Africans presented themselves to be registered.

Within 10 years, the voters' roll had grown to over 23,1-million people; and, after the final registration weekends for the 2014 national and provincial elections, the number of registered voters in South Africa stood at 25,3-million people, representing more than 80% of the total voting age population.

As with any maturing democracy, voter turnout has also evolved, with the highs of 89.3% in 1999, dipping to 76.73% in the following national and provincial elections in 2004. Voter turnout showed a slight recovery in 2009, growing to 77.3%, and fell slightly again to 73.48% in last year's elections, a figure which is in line with international averages for general elections. To accommodate the record numbers of

registered voters, revisions of the voting station network have also seen the number of voting districts grow to 22 263, which has reduced waiting and voting time from hours to minutes.

National Electoral System

At national level, the Legislature is Parliament, which is made up of:

- The National Assembly, the biggest part of Parliament, with 400 members, representing the whole country
- The National Council of Provinces, the second part of Parliament, with 90 members representing the nine provinces.

Provincial government in each of the nine provinces is headed by a provincial premier and provincial Cabinet. The law-making function is carried out by the Provincial Legislature. Altogether there are 430 seats in the nine provincial legislatures, each of which ranges in size according to provincial population. The largest provincial legislature, with 80 seats, is that of the province of KwaZulu-Natal, and the smallest, at 30 seats, is the Northern Cape's provincial legislature. In terms of South Africa's proportional representation system, also called the party list system, every vote counts. The total number of votes a party gets decides the number of seats it gets. Parties draw up lists of candidates, and the number of people that get in will be decided by the number of seats the party wins. This is the system used in all of South Africa's national and provincial elections since 1994. So, parties contesting national and provincial legislatures must submit three closed lists for representation at national, provincial, regional levels.

Parties… Coming to the Party

The number of political parties appearing on the national ballot has also increased dramatically, from 19 in 1994 to 29 in 2014 – with provincial ballots taking the total number of contesting parties to a record 45 parties in 2014. This has meant dramatically increasing the Electoral Commission's capacity to engage with political parties and candidates, and has influenced a number of changes to the printed ballots in order to accommodate all contesting parties on the same ballot, without compromising the legibility or readability of the ballots. What is interesting is that while the number of political parties contesting national elections has increased with almost every election, from

- 19 in 1994
- 16 in 1999
- 21 in 2004
- 26 in 2009
- 29 in 2014,

… the number of political parties represented in National Assembly has remained fairly steady at 12 or 13 since 1999. To be exact, the figures are as follows:

- 1994: 7
- 1999: 13
- 2004: 12
- 2009: 13
- 2014: 13.

The Right to Participate

As the infrastructure and operational proficiency of the Electoral Commission have matured, the focus of the Commission has shifted, again, back to its primary mandate of promoting electoral democracy – and interrogating what this means in South Africa today, through interactive processes involving citizens and all other stakeholders. The legislation governing South Africa's electoral processes is one of the areas that continues to be refined, both proactively and responsively, to expand on the rights and values enshrined in the Constitution. In many instances this process is guided by the Electoral Court. In preparation for the 2014 elections, the Commission reviewed the Electoral Act and Electoral Regulations and decided that certain amendments to the Act and the Regulations should be made to further comply with these objectives, and to broaden the participation by South African citizens in the national and provincial elections. The resulting Electoral Amendment Act and amended Electoral Regulations were promulgated in 2013, allowing for thousands of additional South Africans – particularly those citizens living abroad who were not previously registered, and prisoners serving terms outside of their regular voting districts – to participate in the electoral process.

So, today, in addition to the continued recognition of the need for special votes – required because of physical infirmity or disability, or pregnancy of the voter; or the voter being away from his or her registered voting district in order to serve as an election officer or as a member of the security forces for the election – the Act now allows people to apply for a special vote if they cannot vote in the district in which they are registered (on the designated election day).

Essentially, there are three kinds of special votes:

- home visits
- at a voting station ahead of elections
- overseas voting.

In May 2014, the Electoral Commission received 297 375 applications from voters to cast their vote in home visits, while 96 141 citizens applied to vote at their voting station ahead of elections. Overseas voting was previously reserved only for diplomats, defence force personnel deployed overseas, but was opened to all South African citizens living abroad for May 2014 election. The registration of voters took place at 123 South African high commissions, embassies and consulates in 108 countries, and the votes were combined into a single voting district. The elections saw 26 703 voters registering and applying to vote overseas, and in the end 18 446 votes were actually cast. The following five locations recorded the highest number of votes:

- London – 6 809
- Dubai – 1 300
- The Hague – 529
- Doha – 475
- Canberra – 460.

In total, special votes cast in May 2014 came to 324 909, or 1.74% of overall votes.

Municipal Electoral System

With our municipal or local government elections just around the corner, I thought that it is also worth sharing with you the intricacies of our municipal electoral system. Since South Africa has in place a combination of 'first past the post' and a proportional electoral system for local government elections, it would be correct to say it has a mixed system in this regard. This approach was used in the 2000, 2006 and 2011 Local Government Elections, where some councillors were elected by winning ward elections, and others got in by being on their party lists for the area, and will be used again in the 2016 elections. In terms of this mixed proportional representation and constituency system, ward seats are allocated per the 'first past the post' or 'winner takes all' system, while PR, or proportional representation, seats are allocated from the party lists. We also have three different municipality types per election, namely;

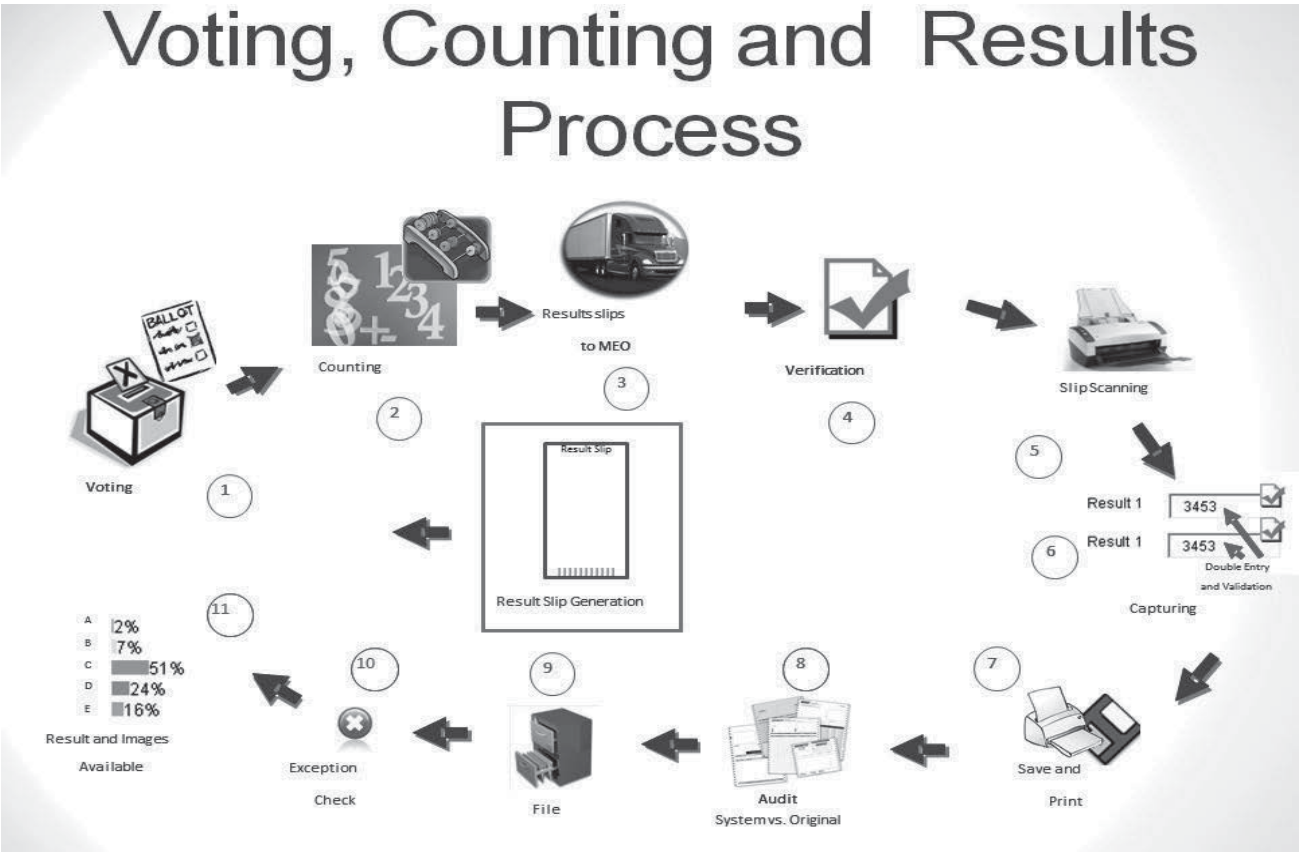
- Metropolitan councils (6 in 2000 and 2006; 8 in 2011)
- Local councils (231 in 2000 and 2006; 226 in 2011)
- District councils (47 in 2000; 46 in 2006; 44 in 2011).

Some interesting statistics from our last (2011) municipal elections are as follows:

- 121 parties
- 53 757 candidates
- 4 277 wards (compared to 3 754 in 2000, and 3 895 in 2006).

Voting, Counting and Results Process

Turning now to the Electoral Commission's results process, the process of counting and recording the votes begins as soon as all votes have been cast.



As you will see from the diagram, this process starts at each voting station where, in the presence of an observer, the numbered and sealed ballot boxes are opened. The ballots are unfolded, sorted and reconciled by election officials in the presence of party agents and an observer. Ballots are counted, checked and bundled (again, under the watch of an observer), and the recorded votes are entered onto a results slip that is submitted to the voting station's counting officer in the presence of two party agents. The ballots are then placed back into the ballot boxes, which are re-sealed – and kept in secure storage for six months after each election, in the event of any queries or challenges. Results slips are sent to municipal electoral offices, where they are verified and then scanned, captured and transmitted to a centralised database. The dual scan-capture system makes the image of the original results slip available, together with the captured result. The capture of results uses double-blind capturing and validations, and are audited by independent auditors. Where exceptions are raised by the system – for example exceptionally high or low voter turnout – a team at the National Results Operations Centre (ROC) checks the exceptions and, if necessary, initiates steps to resolve the matter. As soon as all exceptions have been resolved and the scanned image is available, the result is made known in the reports and on the display board at the ROC. The results process concludes with the announcement of the results once seat allocation and assignment has been completed. As soon as possible after the announcement, detailed results are published in the *Government Gazette*.

Objection Process

I wish to stress that throughout the voting and counting process, a party agent (or voter) can lodge an objection regarding any alleged irregularity. Such an objection is dealt with immediately by Presiding Officer at the voting station, and all objections material to the results of an election are also submitted to the Commission.

You are probably wondering how many objections the Commission received in the 2014 elections, and the answer is 22 objections, three of which were withdrawn, and 19 of which were dismissed. There were no appeals. Any person not satisfied with a decision of the Commission may appeal to the Electoral Court. In South Africa the Electoral Court is a specialised court with the status of a High Court that has jurisdiction over all electoral disputes and breach of code of conduct. The Constitutional Court is the final arbiter of all electoral disputes.

Results Operations Centres

Any discussion about South Africa's elections would not be complete without a mention of our ROCS, and no, I don't mean the kind that you throw. ROC is the abbreviation for Results Operations Centre. The National Results Operations Centre in Pretoria serves as the central hub of activity over the election period, and enhances the transparency of the election process. The National Results Operations Centre (ROC) officially opens one week before the actual elections – but planning and construction of the ROC facilities begins six months before an election. Construction of the ROC takes places over just seven weeks, during which time two levels of empty flooring, covering some 12 000 m^2, are transformed into a high-tech, world-class business centre.

Commissioners and electoral staff relocate to the ROC for approximately 10 days – from a few days before the ROC launch, until after the results have been announced – and are joined by stakeholders, representatives from all the political parties illustrated on the national ballot paper, and television, radio and print media providing national and international coverage of the election events. During this time, the ROC becomes the command centre for all voting activities throughout the country. Cellphone companies increase their capacity in the area to ensure coverage is available. Eskom (the national electricity public utility) are advised that the Electoral Commission's National and Provincial ROCs are strategic locations for this brief period, to ensure continued electrical supply. Back-up generators are also in place. Worth noting is that all election results are posted on giant screens within the ROC as they are captured and verified, and all stakeholders also have access to the results system.

New Technology

The 2014 national and provincial elections saw the Commission launch a number of new interactive online and mobile-based platforms, both to encourage voter engagement prior to and during the registration process and election day events, and to make election results information more accessible to a broad audience. To facilitate the distribution of election data, the Commission developed various Application Programming Interfaces (APIs) incorporating a variety of functions relating to voter information, election results and other related information. The APIs provided data and functionality that could be utilised by third-party websites, mobile devices, political parties and the media – which effectively created multiple new content streams based on the Commission's data. To access the Electoral Commission's API, third-party users had to apply for a username and password from the Commission's ICT department. Authorised applications received access tokens that were valid for a limited time only. These APIs formed the basis of the Electoral Commission's citizen facing mobile application designed to function with the most commonly used mobile platforms including Apple iOS, Android, Blackberry, Windows and Symbian. This downloadable application allows users to check:

- Registration status and voting station details, based on the user's ID number
- Information about special votes, special needs voting and voting out of the country or your registered voting district
- Maps on how to find your and other voting stations
- Information about candidates and ward councillors (for local government elections)
- Election results and the calculation and assignment of seats.

Announcement of Results

This then brings me to the point in the electoral process for the announcement of results, as provided for in the Electoral Act of 1997. The Act stipulates that:

"The determination and declaration of the result of an election must occur within seven days after the voting day but not-

- Sooner than 21h00 of the second day after voting day
- Before all objections made have been dealt with (other than an appeal to the Electoral Court).

It is worth noting that the Electoral Court, on good cause shown, may extend the period within which the Commission must declare the election results. However, the Electoral Commission has upheld its sterling track record of announcing general election results within three days in 1999, 2004, 2009 and 2014. I also wish to point out that independent qualified auditors are employed by the Commission to verify that the results captured on the results system at each local office correspond with the results on the original results slip as received from the voting station.

A Foundation for the Future

I am of the opinion that South Africa's maturing democracy has a great deal to be proud of in its electoral management body, but this does not mean that the Electoral Commission can rest on its laurels. Over the years of its existence the Electoral Commission has established itself as a widely recognised and trusted feature of the South African, and dare we say African, landscape. During the 2016 elections there will no doubt still be voting queues; some voting stations will still be open late; and, in some instances, a scanner will malfunction. In 1994 these issues were common. Today these glitches are not only limited, but there are robust systems in place that ensure prompt redress and the election administration continues to be professionalised. Similarly as electoral laws and regulations are applied, opportunities to review these continue to present themselves. The Electoral Commission's strength has come from its ability not only to consolidate its gains, but also to innovate and anticipate future challenges.

Over the first 20 years of South Africa's democracy the Electoral Commission has laid a solid foundation for an enduring democratic structure, and it is firmly focused on the future.

I thank you!

Challenges faced by and success stories of National Electoral Management Bodies in electoral law reform initiatives in the SADC Region

By Sibongile Ndlovu[29]

Objectives

This presentation will:

- Discuss the role of Electoral Management Bodies (EMBs) in relation to electoral law reform;
- Examine the challenges faced by EMBs in the area of electoral law reform and the successes achieved in this area.

Introduction

Electoral laws must provide the framework for the holding of free, fair, transparent and credible elections. Electoral Management Bodies are responsible for conducting elections and these bodies would obviously want to ensure that the electoral laws provide a sound foundation for holding proper elections. The aim of electoral law reform is to improve the electoral processes to ensure that all elections are conducted efficiently, freely, fairly, transparently and in accordance with sound electoral laws.

Because these bodies administer and apply the electoral laws, they are well placed to identify deficiencies and inconsistencies in the laws and ways in which these laws can be improved. Thus, whether or not they have an explicit mandate to do this in the constitution or other legislation, it is expected that the EMBs will recommend to Government any necessary reforms to the electoral laws. EMBs interact with the public generally and the participants in elections in particular. During this interaction and public consultations, views and recommendations may be made about ways of improving the electoral laws. If the EMBs consider that these views have substance, they may again make appropriate recommendations to Government. The active involvement of EMBs in promoting good electoral laws increases confidence in these bodies on the part of the electorate. It should be noted at the outset that good electoral laws will only achieve their desired results if they are properly implemented and consistently and impartially applied and enforced.

Do EMBs have a mandate to recommend reform of electoral laws?

EMBs are constitutional bodies which derive their mandate from the constitution and the electoral laws of their individual countries. According to research by the Institute for Democracy and Electoral Assistance (IDEA; 2014) most countries in the Southern African Development Community (SADC) Region have not given their EMBs a formal mandate to engage in electoral law reforms, with the exception of the Seychelles, who among other things,

[29] Commissioner- Zimbabwe Electoral Commission

"review the existing legislation governing electoral matters and make recommendations to the Government" (article 116(1)).

In Zimbabwe section 157(4) of the constitution that came into force after a popular referendum in 2013 provides that:

"no amendments may be made to the Electoral Law, or to any subsidiary legislation made under that law, unless the Electoral Commission has been consulted and any recommendations made by the Commission have been duly considered."

Some EMBs have a mandate to make subsidiary regulations that have implications for the organization of elections for example, the Electoral Commission of Zambia (ECZ) in Zambia, is mandated by a statutory instrument to make regulations providing for the registration of voters for the purposes of elections and for the procedure and manner of conducting elections. (Electoral Act 2006: section 129) (IDEA: 14) The mandate tends to strengthen the involvement of an EMB as well as ensure willingness by governments to ensure the implementation of the said reforms.

Why EMBs should be actively involved in electoral law reform?

Scholars argue that EMBs possess hands on experience with the electoral laws and they know best what problems arise and how those problems can be overcome to ensure that the electoral processes secure a free and fair election hence their involvement. (IDEA: 13). EMBs carry out comparative research which enables them to identify how other countries have overcome problems and difficulties. They also interact with other EMBs in the region for lessons in best practice.

It must, however, be appreciated that electoral law reform is not just a technical process but also is political in nature. EMBs must ensure that law reform proposals are not only carefully thought out but must also consider whether the proposals may be politically contentious. When Zimbabwe was going towards the referendum in February 2013, the issue of diaspora voting arose. The Commission though invited to make its opinion, agreed it would probably not get directly involved in the argument because the issue was by then politically contentious. Zimbabwe Electoral Commission (ZEC) felt it advisable to leave the matter to be decided by the Ministry of Constitutional Affairs and simply to channel its own research findings through to its line Ministry. On the other hand, running towards the 2014 elections in South Africa, there was a motion that voting in the diaspora be conducted at provincial level. The Independent Commission (IEC) of South Africa was instrumental by advising the Parliamentary Legal Affairs Committee of possible logistical challenge if that route was taken. Eventually, the matter was shelved for implementation in future elections. There was however limited diaspora voting for some South Africans outside the country at the time of elections. It then follows that EMBs decide when and how to be involved particularly if the issue being contested upon does affect the freeness and fairness of the conduct of elections.

When deciding upon their recommendations for electoral law reform, EMBs will take account of the views of election practitioners, scholars and Civic Society Organisations (CSOs) as regards to best practice and possible areas of improvement. At regional level, there are regionally crafted instruments which set parameters and guidelines for the conduct of free and fair elections. I have in mind instruments such as the "SADC Principles and Guidelines Governing Democratic Elections" and the "Principles for Election Management, Monitoring and Observation" (PEMMO) which provide the basics of managing and validating elections. In addition, they will consider the considerable body of research that has been carried out on various aspects and principles of election management and electoral legal reforms including, International Institute for Democracy and Electoral Assistance (IDEA), Electoral Institute of Sustainable Democracy (EISA), the International Foundation for Electoral Systems (IFES) and the Electoral Commissions Forum of SADC (ECF-SADC). However all these seem not to determine the principles of setting and recommending these electoral reforms.

Examples of EMBs recommending and implementing electoral legal reforms

The following examples are instances where some EMBs have recommended reforms although some of the recommendations may not have been adopted.
The SADC Principles and Guidelines Governing Democratic Elections recommend that elections should be run by an Independent Electoral Management Body. The establishment of EMBs therefore is a result of electoral reforms recommended by CSOs, election management bodies, election observers and politicians in line with the above.

- IDEA (2014: 14) records that following recommendations from election observer missions in Seychelles in 2007 and 2011, election legal reforms led to a shift from the office of the Commissioner to that of the Electoral Commission (EC) so as to enhance credibility of elections in that country.

Although almost all SADC countries have complied with this principle, there are arguments over the level of independence of some of these bodies and that is usually on the checklist of observer missions. They check if the legal framework is clear about the independence of an EMB, giving it guidance and allowing for flexibility in its implementation.

- ZEC has been given enhanced powers and authority since its inception in 2005. The powers of delimitation, media monitoring and most recently voter registration have been transferred to ZEC from other bodies. This leads the discussion to focus on implementation of the recent mandate of voter registration which also happens to be of interest not just to Zimbabweans or the region alone but recognized internationally because voter registration is key to democratic elections. Complaints over the process of voter registration and the voter's roll have included issues of inclusivity, accessibility, transparency and a voter's roll that is full of dead people. ZEC has taken strides towards delivering on this mandate starting with recommending electoral reforms in 2013.

These included:

- easy replacement of lost national identification cards since they are used throughout the election process,
- reducing the cost of voter's rolls,
- registration of aliens and
- relaxing the issue of proof of residence.

The SADC Electoral Observer Mission in 2013 noted that despite all these efforts which were appreciated by many Zimbabweans, there were still challenges over the delayed voter's roll and some names that could not be found on the polling day. After the 2013 Harmonised Election, ZEC took the following steps:

- worked with its stakeholders on the reforms for the enactment of the Electoral Act

according to the law

- held a consultative workshop with stakeholders to decide on the voter registration model to be used and the continuous voter registration model was identified;
- held an all stakeholder conference to interrogate the model, to enlighten stakeholders on the requirements of the new law and to present the implementation plan;
- engaged renowned experts and consultants as well as critics from CSOs;
- carried out pilot testing of voter registration and reported back progress to all stakeholders
- -sourced for donor funds to carry out parts of the plan like recruiting experts for voter registration and voter education;

What is of significance here is the involvement of stakeholders so that the product is accurate, comprehensive, and sustainable whilst also allowing for accountability. Having taken these steps ZEC still meets challenges of implementation here and there but keeps a straight view of the big cake ahead.

- When moves were made in Zimbabwe to adopt a polling station based voter's roll a majority of the Parliamentary Legal Committee felt that the provisions relating to the polling station specific system were unconstitutional. ZEC argued that the polling station specific system did not violate the Bill of Rights provisions on the right to vote, freedom of movement and freedom of expression and pointed at the major advantages of the polling station specific system for the benefit of legislators.

Challenges in the electoral reform process

Research by IDEA: 2014 reveals that:

"A crucial challenge to the work of EMBs is related to political will and political commitment to the legal reform agenda. Legal reforms eventually need to be adopted by politicians themselves—either by the government through decree procedures or through parliamentary law making structures. In the end, EMBs can go as far as to provide recommendations or draft amendment bills and engage with government and parliamentary stakeholders to advocate and sensitize them to the need for reform and the rationale behind the recommendations made by the EMB. If reform proposals are not seen as

benefiting the incumbents, and where incumbents are strong enough to block reform proposals in parliament, the work that EMBs undertake may become redundant."

Thus even well researched reforms may be blocked if the party holding a parliamentary majority considers that the reforms will benefit the opposition. The process of creating legislation to effect law reform is usually a challenge in the region. Does the EMB present its proposals to a legal committee or to government before bills are tabled as opposed to tabling them directly to parliament? There are fears that reform bills may be watered down before they reach the final decision-makers. The autonomy of the EMB makes a difference. However some argue that it may also depend on relations between the EMB and the said avenues and on how well researched and presented an argument is, among other things.

It is important that the parliamentary committees and the legislators be presented with full arguments to justify the proposed law reforms so that they properly understand the rationale for the reforms and not just block reforms because they fail to understand the compelling reasons for the proposed reforms. Poor timing is also said to be a risk in that EMBs may not have adequate time to inform their stakeholders who may need time to allow proposed ideas to sink in order to be accepted or to train election officers about the change and its implications for those involved. Another challenge for engagement in electoral reform is staff turnover. When those with expertise and experience at drafting legal reforms leave the EMB, it is usually a challenge to replace them and to keep up with the demand of making reforms. What immediately comes to mind is the resignation of two lawyer commissioners in ZEC one after the other in 2013. The Commission's legal reforms committee was affected one way or the other. Relations between EMBs and other interested bodies such as CSOs and other stakeholders also matters as the involvement of such may either enrich the proposals or cause mayhem if not handled properly.

Conducive environment

What then makes an environment conducive for EMBs to participate in the making and implementation of electoral legal reforms? What is best practice for the creation of legal electoral reforms by EMBs? The following ideas are worth considering for EMBs that honestly want to make far reaching contributions to the legal frame work of elections in their countries;

- **Maintaining good relations with government and other stakeholders**

Assessing ZEC's needs, Rushdie advises that it is important for ZEC as an EMB to foster cooperation with relevant government ministries and generally all stakeholders because experience shows that communication and advocacy are of necessity in this affair. He further says that:

EMBs need to undertake serious efforts to sensitize relevant entities within the government as to why certain reforms are needed and what sort of challenges their recommendations are responding to.

It has been observed that engagements by EMBs ought to:

…be guided by underlying principles related to inclusiveness, neutrality and transparency. Broad consultations and inclusive participation of typically marginalized groups, such as women and ethnic or religious minorities are essential for electoral reform processes. (IDEA; 7)

These principles are covered in both international and regional instruments already alluded to. Inclusiveness is closely related to democracy and requires that reforms ensure that no eligible person should be denied participation in elections. Neutrality requires a completely non-partisan approach by EMBs to electoral law reform.

- **Taking advantage of institutional strengths**

It is imperative for EMBs to continually make an honest self-assessment and be sure to use their strengths in advocating electoral legal reforms and have them accepted.

- It has been realised that holding election reviews with all relevant stakeholders soon after elections yields results for an EMB because stakeholders' memory of and interest in that election is still fresh and to the fore. The strength in this case is the undivided attention the EMB receives from stakeholders because the review is immediately after elections. It is hoped that those countries that had elections in the period of 2013-2014 have carried out such reviews because ECF-SADC requires that and assists EMBs in the region to make these reviews. EMBs can then research on issues raised by the review and recommend election legal reforms where necessary while the iron is still hot. In March 2014 ZEC held an all stakeholder review conference for the 2013 Referendum and Harmonised Elections. ZEC received honest criticism that strengthened the EMB among other things in its pursuance of and desire for the alignment of the electoral law to the provisions of the new Constitution with regards to voter registration.

- **Membership in existing electoral bodies** such as ECF-SADC and participating in election observer missions under various bodies such as SADC, African Union (AU) Common Market for Eastern and Southern Africa (COMESA), as well as networking with CSOs such as in this very important workshop where iron sharpens iron, EMBs can only take advantage of such platforms to up themselves to active and calculated contribution in the area of making electoral legal reforms,
- **Knowledge research** also enables an EMB in ensuring high quality presentations and appropriate manner of presenting these reforms thereby ensuring a greater chance of their acceptance. An ability to attract and retain relevantly qualified and experienced staff by an EMB is a strength, as such staff will be able to interpret situations and argue for electoral legal reforms effectively. EMBs in the region reportedly have legal departments and have serving Commissioners with a legal qualification or who are in legal practice. Having such staff also builds on stakeholder confidence in the EMB.
- **The constitutional standing of an EMB** can be a strength. It is an advantage if an EMB can present its recommendations of electoral legal reforms direct to Parliament or to parliamentary committees rather than having to go through

intermediaries. An EMB should make good use of its status, should be non-partisan and professional and should present well-researched recommendations after full consultations with stakeholders. Where the law requires the establishment of Multiparty Liaison Committees (MPLs) at all levels these committees can be involved in discussions on law reform. This is done in South Africa and Ghana. While most EMBs have the MPLs, not all of them use them for this purpose.

- **Assurance to access funding** appears to be vital before an EMB embarks on research and consultations regarding matters of electoral reforms. EMBs in the region are funded by government, which poses a challenge when the economy is not doing well. In some countries EMBs may receive funds for extensive research and consultative programmes yet there should be clear caution that such funds are accepted and used with eyes open or else the EMB loses the purpose for its existence to the serving of foreign agendas. In some countries, Zimbabwe included, donor funding for this purpose would not be acceptable. Donor funds are welcome only for capacity building purposes as a way of guarding a country's sovereignty (IDEA: 25)

Conclusion

From the debate and attention this matter has received in this workshop and elsewhere, it is without doubt that EMBs are best placed to push for electoral legal reforms. It should therefore be accepted that EMBs do have a legitimate role in recommending electoral law reform. However, in this regard they must be guided by the legal framework of their nations and both the international and regional guiding principles adopted by most SADC countries. It also requires the legislators to appreciate and act on the issues of concern raised by EMBs and stakeholders. Legislative reform is often a slow process and political partisanship by members of EMBs and CSOs can stand in the way of progress. There are meaningful efforts by EMBs, governments, politicians, CSOs and the general public (such as this workshop) to proffer a conducive environment for EMBs to play their role of recommending and implementing the electoral legal reforms. Let me conclude with this story. A kombi/taxi tout says to passengers, "I can't give you change. Today it's your turn to bring it.!!!!!" Surely EMBs cannot expect somebody let alone legislators and or the public to put in place all the legislation around elections without them taking an active leading role in bringing together interested bodies to lobby for desired electoral reforms and their implementation.

Thank you!

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Some Thoughts on Electoral Reform in Malawi: The Legal Framework

By Khumbo Bonzoe Soko (LLB (Hons), LLM (Warwick)[30]

Abstract

Malawi's electoral institutions can be strengthened so as to guarantee the constitutional promise of a truly democratic society under the present legal framework. This article identifies key electoral institutions and the role that they play in the conduct of elections. It contributes to the ongoing conversation about electoral reform in Malawi. The article contends that the reform process is a step in the right direction because there remains a gulf between the aspirations of competently managed free and fair elections and the reality that Malawians currently endure. By fully committing herself to electoral reform, Malawi can ensure that the ideals of 'liberal democracy' are realised.

PART I

1. Introduction

Malawi's journey as a democracy has been rather interesting. She was declared a British protectorate in 1891 and remained as such until 1964 when she was granted self-rule. As the colonial masters were ceding the spaces of political power to the new black elite, they sought to introduce a popular government, one that they themselves had long denied the people they had governed.[31] It is commonly believed that this was chiefly in a bid to protect the white minority that remained in the country after the end of the colonial rule.[32] However, on attaining a republican status in 1966, the 1964 Constitution, which had provided for pluralistic politics was scrapped and a new Constitution was adopted. The new Constitution declared the Malawi Congress Party to be the only lawful party. In 1971, Dr Banda was declared the country's life President.[33] For some three decades beginning 1964 the country slipped into an autocracy under Dr Hastings Banda.[34] A combination of factors, however, heralded a change in the political governance in the country and in 1993 Dr Banda's one party state crumbled as the country opted for multiparty politics.[35]

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[31] A Thomson, *Introduction to African Politics,* (3rd edn, Routledge 2010), 21.
[32] Ibid.
[33] Africa Watch, *Where silence rules: The suppression of dissent of Malawi* (Africa Watch 1995), 1-5.
[34] N Patel, *Political Parties: Development and Change in Malawi,* (EISA 2005).
[35] N G Emmanuel, 'Democratization in Malawi: Responding to International and Domestic Pressures' (2013) 12 African and Asian Studies 415.

With the aid of the international community, the country set about putting up institutions that would support its liberal democratic order.[36] It had to set up an independent electoral commission and pass the necessary laws to ensure that hitherto banned opposition parties could be registered and freely operate.[37] It had to free the courts to ensure that they could stand guard over the new constitutional order that the country had committed itself to.[38]

The year 2014 marked twenty years since Malawians ushered in their 'second republic'. During this period, the country has held some 5 general elections with varying degrees of credibility. The expectation that with each general election the country would improve the quality of the management of its national elections has not been met.[39] The tripartite general elections held in 2014 was arguably the most disputed since the re-introduction of multipartysm.[40] The experiences that the country has undergone for the past twenty years have led people to call for radical reforms in the manner in which elections are organised as well as in the institutions that are entrusted with the management of the elections.

2. Organisation of paper

The paper is divided into four parts. The first part is an introductory part which presents the historical background to the matters dealt with in the other parts. The second part presents an overview of the key electoral institutions in Malawi with a focus on the legal framework governing their operations. The penultimate part deals with the reform efforts for the country's electoral institutions and the obtaining legal framework. The fourth and final part is the conclusion.

PART II

3. Elections in Malawi

Malawi's Constitution aspires to create a liberal democracy[41] and of these it has been said that 'free and fair elections are the cornerstones of a democratic political

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[36] J Lewis et al (eds), *Human Rights & The Making of Constitutions: Malawi, Kenya, Uganda,* (Report of a workshop held at Trinity College, Cambridge 11th February 11, 1995, University of Cambridge 1995).

[37] See generally R E Kapindu, 'Malawi: Legal System and Research Resources' available at http://www.nyulawglobal.org/globalex/Malawi.html (accessed on May 16, 2015).

[38] A P Mutharika, 'Malawi's 1995 Constitution' (1996) 40 (2) Journal of African Law 205.

[39] S Gloppen et al, *The Institutional Context of the 2004 General Elections in Malawi* (CMI 2006).

[40] 2014 was the first time that the country was holding tripartite elections. Some of the challenges that were seen during the election have been attributed to lack of capacity of the electoral commission to handle tripartite elections. See EUEOM, *Malawi Final Report Tripartite Elections: Presidential, Parliamentary and Local Council* (EUEOM 2014).

[41] F E Kanyongolo 'Law, Power and The Limits of Liberal Democratic Constitutionalism In Malawi' (2012) 6 Malawi Law Journal 1

system. Although democracy cannot be limited to free and fair elections, neither can a democracy exist without such elections.'[42] The centrality of elections to Malawi's constitutional order is reflected in section 12 (1) (c) of her Constitution, which declares that:

"The authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice."

The Constitution provides that general elections be held once every 5 years to elect a president, members of parliament and members of local councils.[43] All of these elected officials are elected directly. The country uses the first past the post system where the winner takes it all.[44] There is no requirement that the winner have an absolute majority[45] with the effect that on two occasions the president has been elected with a majority of less than 40%.[46] While the country is not a parliamentary democracy, political parties play an important role in Malawi's democracy. It is, however, not a requirement that one be a member of a political party in order to compete in elections and there are many members of parliament and local councils who successfully participate in elections as independents.[47]

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[42] L Svåsand, 'Financing elections in Malawi: between national processes and the international community' (2011) 47 (4) Representation 417, 418.

[43] See sections 67, 80(1) and 147 (5) of the Constitution. Local elections in Malawi have had a rather chequered history. They were first held in 2000 before a 9 year break with the next elections being held in 2014 together with presidential and parliamentary ones. Attempts to hold the elections in 2004 were frustrated after the opposition shot down the bill that made provision for tripartite elections. Various reasons, including lack of funds, were cited by the administration of Bingu wa Mutharika for the failure to hold the elections. They were finally held in 2014 after the necessary amendment to section 147 (5) of the Constitution.

[44] S Gloppen et al (n 9).

[45] This paper uses the phrase 'absolute majority' to mean 50% plus 1 of the votes cast. In Chakuamba and Others v Attorney General (the Presidential Elections case) MSCA Civil Appeal No. 20 of 2000 (unreported), the Malawi Supreme Court ruled that the word majority as used in section 80 (2) simply means greater than the other (simple majority) and not absolute majority.

[46] In 2004 and 2014. See S Gloppen et al (n 9); EUEOM, *Malawi Final Report Tripartite Elections: Presidential, Parliamentary and Local Council* (EUEOM 2014). See also *Chakuamba and Others v Attorney General (the Presidential Elections case) MSCA Civil Appeal No. 20 of 2000 (unreported).*

[47] Section 32 (3) of the Presidential and Parliamentary Elections Act and section 23 (3) of the Local Government Elections Act (LGEA). In 2004 then Vice President Justin Malewezi run for president as an independent.

4. Malawi's key electoral institutions

4.1. The Electoral Commission

The Electoral Commission ('EC') is established under section 75 (1) of the Constitution. Section 76 of the Constitution provides the EC's primary responsibilities which include the demarcation of constituency boundaries and the resolution of electoral complaints. Curiously, the organisation and management of free and fair elections is a responsibility that only gets mentioned in section 8 (1) (m) of the Electoral Commission Act ('ECA').[48]

Members of the EC are appointed by the President in consultation[49] with leaders of political parties represented in the National Assembly.[50] Neither the Constitution nor the ECA fixes the number of members of the Commission although the Constitution requires that it be not less than six.[51] The Commission is led by a chairperson who is appointed in that behalf by the President after the nomination of the Judicial Service Commission.[52] The EC is also empowered under the ECA to establish committees for the better carrying out of its functions under the law.[53]

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[48] The Special Law Commission on the review of the Constitution has recommended that this be changed and that the Constitution clearly provides that the organisation and management of free and fair elections is one of the functions of the EC. See Law Commission, *Report of the Law Commission on the review of the Constitution* (Law Commission 2007).

[49] The practice during the presidency of Mr Bakili Muluzi (1994-2004) was to ask the parties represented in the National Assembly to nominate candidates from which he would appoint the commissioners. Invariably, the parties would nominate their sympathisers. This practice was rebuffed by Mr Muluzi's successor, Mr Bingu wa Mutharika who argued that the practice run counter to the constitutional requirement that the Commission be independent and nonpartisan. President Mutharika, while asking the parties represented in the National Assembly, to comment on a list of candidates that he himself had drawn up, totally ignored the candidates that were proposed by the opposition parties in appointing the commission leading to a protracted court battle. The court, however, eventually ruled in favour of Mutharika holding that the words consultation under section 4 (1) of the Electoral Commission Act did not oblige the President to follow the consultee's views and further that the convention that had developed on the appointment of the commissioners could be departed from by the President. See *The State and President of the Republic of Malawi Ex-Parte Dr Bakili Muluzi, Miscellaneous Civil Cause No. 99 of 2007 (unreported.)* President Joyce Banda upon succeeding Mutharika reverted to the old practice of appointing commissioners from the names proposed by the parties in the National Assembly.

[50] Sections 75 (1) of the Constitution and 4 (1) of the ECA.

[51] Section 75 (1) of the Constitution.

[52] Ibid.

[53] Section 7 of the ECA.

Members and employees of the EC are required to perform their functions and exercise their powers independent[54] of any functionary although the law provides that 'for the purpose only of accountability the Commission shall be answerable, and report directly, to the President on the overall fulfilment of the functions and powers of the Commission.'[55] How this is done in practice is open to speculation.[56]

The EC maintains a secretariat which comprises the Chief Elections Officer as the chief executive officer and other members of staff appointed under sections 12 (1) and 13 (1) of the ECA respectively. The ECA empowers the EC to have personnel from the public service seconded to it to beef up its ranks. For the duration of their secondment to the EC these officers are subject to the control and direction of the EC.[57]

To perform its functions, the EC principally relies on funds allocated to it by parliament.[58] These funds are disbursed by the national treasury, however. The EC also receives substantial amounts of donor aid for its operations. This lack of financial autonomy greatly affects the operations of the Commission and has sometimes led to its failure to hold some of its planned activities on time.[59]

Key electoral laws

Aside from the Constitution and the ECA, the EC's management of elections is governed by the Parliamentary and Presidential Elections Act ('PPEA') and the Local Government Elections Act ('LGEA'). These laws contain detailed provisions on the management of elections from the registration of voters, nomination of candidates, campaigning, polling to the determination and announcement of results.

4.2. The Judiciary

The Judiciary is created under section 9 of the Constitution and is charged with the responsibility of interpreting, protecting and enforcing the Constitution and all laws made under it. The High Court is given powers to hear appeals in respect of decisions made by the EC.[60] It also has original jurisdiction to review the EC's decisions.[61] The Court's powers to hear appeals and to review decisions of the EC have been enthusiastically used by the courts and have spanned all the stages of the electoral

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[54] Sections 76(4) and 6 (1) of the Constitution and ECA respectively.
[55] Section 6 (1) of the ECA.
[56] There was some controversy when former President Joyce Banda purported to delegate this 'responsibility of being accounted to' to her deputy. She quickly reversed the decision after criticism.
[57] Section 13 (4) and (5) of the ECA.
[58] See generally section 15 of the ECA.
[59] In early May 2015 the EC indefinitely suspended preparatory activities for the holding of local council by-elections in some wards after the Treasury failed to release the necessary funds. See W Mzungu 'Poll postponement worried NICE' *The Nation* (Blantyre, May 15, 2015) available at http://mwnation.com/poll-postponement-worries-nice/ accessed on May 17, 2015.
[60] Section 76 (3) of the Constitution.
[61] Section 76 (5) of the Constitution.

process. Accordingly, courts have had to rule on the eligibility of candidates[62], the conduct of the state broadcaster during the official campaign periods[63], use of public resources during the campaign period[64] and the determination[65] as well as validity of the election results.[66]

Gloppen and others have observed that the role of the courts in the management of elections has been extremely crucial in that by deciding on heavily contested disputes, they have acted as society's safety valve.[67]

4.3. The political parties

Political parties in a democracy are so important such that without them, democracy is inconceivable.[68] Chinsinga writes that 'the primary function of political parties is to capture power with the view to forming government, failing which they must serve responsibly as alternative governments in waiting.'[69] Political parties in Malawi are registered and regulated under the Political Parties Registration and Regulation Act ('PPEA'). [70] They can and often do sponsor candidates during elections although it is permissible for candidates to stand in an election as independents.[71] Political parties with representation in the National Assembly also play a key role in the appointment of commissioners of the EC as they must be consulted before the President makes the appointment.[72]

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[62] *Chakuamba and another v Electoral Commission [1999] MLR 59 (HC); Jesse Kabwila v Electoral Commission, Electoral case No. 02 of 2014.*

[63] *Dr Charles Kafumba, Luka Banda, Laurent Kamulete v The Electoral Commission and The Malawi Broadcasting Corporation Miscellaneous Civil Cause No. 35 of 1999 (unreported).*

[64] *Gondwe and another v Gotani-Nyahara [2005] MLR 121 (SCA).*

[65] *The State and the Electoral Commission Ex-parte Friday Jumbe et al (Chakwera et al, Interested parties) Judicial Review Case No. 38 of 2014.*

[66] Chakuamba and others v Attorney General (the Presidential Elections case) MSCA Civil Appeal No. 20 of 2000 (unreported).

[67] S Gloppen (n 9).

[68] Z Kadzamira, 'The management of the electoral process', in M Ott et al (eds), *Malawi's Second Democratic Elections. Kachere Book Series No. 4* (CLAIM 2000)

[69] B Chinsinga 'Malawi's Democracy Project at a Crossroads' in Konrad-Adenauer-Stiftung, *Towards the consolidation of Malawi's democracy: Essays in honour of the work of Albert Gisy German Ambassador in Malawi (February 2005–June 2008)* (Konrad-Adenauer-Stiftung 2008).

[70] Curiously, the registration of parties under this Act does not incorporate them as legal persons. See *The State and Speaker of the National Assembly Ex-Parte Democratic Progressive Party Judicial Review Case No. 34 of 2012.*

[71] From 1999, each general election has seen an increase in the number of independent candidates being elected to parliament. See S Gloppen et al (n 9).

[72] Despite the law requiring the commissioners to act independently of the influence of any political party, most of them perhaps influenced by the manner of their appointment, act as representatives of their nominating parties while sitting on the commission. See S Gloppen et al (n 9).

4.4. Parliament

Parliament is another key electoral institution in Malawi. Beyond making financial provisions for the EC[73], it is also involved in the demarcation of constituency boundaries. [74] The Constitution requires the EC to determine constituency boundaries so as to ensure that constituencies have approximately equal number of people eligible to vote. The boundaries so determined must be reviewed every 5 years. However, the determination of the boundaries are required to be confirmed by the National Assembly which may reject or alter the EC's determination.

PART III

5. The reform agenda and its rationale

Any reform effort must have a sound rationale and its need must be backed by evidence. It is vital to have electoral reform in Malawi firstly because of the centrality of credible elections to her constitutional order. As alluded to above, it is one of the principles on which the Constitution is founded that those who govern must have the trust of the governed and that trust can only be maintained through credible elections. Elections that lack credibility risk ushering into power individuals who do not enjoy the mandate of the people to govern and who will consequently lack legitimacy. They also have the potential of shaking people's confidence in electoral institutions, which can in the long run threaten the country's peace and stability.[75] Secondly, it is important to have reform because the experience of the last 20 years have regrettably shown that, as a country, Malawi is not getting any better at managing elections. In fact, there are signs that she is retrogressing.[76]

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[73] Section 15 of the ECA.

[74] Sections 76 (2), (5) and 8 (1) of the Constitution and the ECA respectively.

[75] N Patel and M Wahman, 'The Presidential, Parliamentary and Local Elections in Malawi, May 2014' (2015) 50 (1) Africa Spectrum, 79-92.

[76] S Gloppen et al (n 9) quote EC's Chief Elections Officer Willie [Kalonga] as having said that 'It is true, we do not have the capacity to conduct free and fair elections, we did indeed have better elections in 1994 than in 2004, we are not moving in the right direction. This is due to capacity and planning. The election date is set in the constitution, we have a good five years to plan, but nevertheless elections are characterised by chaos.'

It is quite clear, therefore, that the system is broken and needs fixing.[77] A caveat might be helpful at this point. The focus of the discussion on reforms in this paper is on the legal framework governing the institutions and the holding of elections in this country. Obviously, that would just be part of the solution. A lot of the challenges that Malawi's electoral institutions face will not simply go away by fixing the law. The law cannot be a replacement for competent management or thorough planning of elections. Neither does having a robust legal framework guarantee that the law will be scrupulously enforced.

5.1. Reform of the Electoral Commission

The reform of the institutions concerned with management of elections and the legal framework for the conduct of elections started a couple of years ago. Between 2004 and 2007 the Malawi Law Commission undertook a comprehensive review of the Constitution. In its report, the Commission made a number of key and helpful recommendations on how the constitutional regime on electoral institutions could be strengthened. The bulk of the recommendations concentrated on the election management body, the EC. A summary of the Commission's key recommendations[78] were as follows:-

a) Fixing the number of commissioners to 10, with 6 being the minimum number.
b) Opening up the headship of the Commission to other professionals and not just limiting it to Judges as is currently the case.
c) Reducing the role that political parties play in the appointment of commissioners by providing for a selection panel which would draw up a list of nominated candidates on the basis of their expertise and not political allegiance which list would then be presented to the President for formal appointment.
d) Replacing the presidency with the National Assembly as the authority to which the EC accounts for the exercise of its legal powers.

The merits of these recommendations should be obvious. By fixing the number of commissioners, the law would remove the not-so-remote possibility of the President, who invariably has vested interests in the EC, packing the Commission with his or her sympathisers. The number of commissioners also has obvious costs implications. Reducing the role that political parties play in the appointment of

[77] Of the bodies that monitored that 2014 tripartite elections, the Malawi Human Rights Commission (MHRC) was the most scathing in its assessment of the polls concluding that 'the May 2014 Tripartite Elections were not fair, transparent and credible.' See MHRC, *May 2014 Tripartite Elections Monitoring Report* (MHRC 2014). This was in sharp contrast to the majority of the reports by international observers such as the SADC Parliamentary Forum, the Commonwealth and the EU Observer Mission and the African Union who passed off the elections as being free, fair and credible. The reports are available on the EC website < http://www.mec.org.mw/> accessed on May 19, 2015.
[78] See generally Law Commission (n 16).

commissioners also has the benefit of ensuring that the commission is not beholden to any political party and that it meets its legal obligation of being independent.[79] The same can be said about the proposal to substitute the presidency with the National Assembly as the institution to which the EC accounts. The fact that the National Assembly has broader membership would significantly reduce the risk of interference by any single political functionary just as it would also have the benefit of increasing the appearance of independence by the EC.

However, other matters beyond those addressed by the Law Commission need redressing as well. The first is the issue of resources for the EC. Currently, the EC finances its operations through funds allocated to it by Parliament and those from donors.[80] This arrangement has, however, proved unsatisfactory in practice. This is so because Treasury more often than not, even after expenditure for the EC has been authorised by parliament, has failed to disburse the funds.[81] Furthermore, the practice with donors has been that they have channelled their funds through a joint fund managed by the UNDP. This has, however, created bottlenecks in so far as accessing those funds by the EC is concerned which has sometimes also led to delays with or cancellation of electoral activities.[82] The general volatility of aid has also meant that these funds are sometimes committed into the common kitty rather late. Furthermore, some donors choose to channel their aid through parallel streams resulting in lack of coordination.[83] In short, the EC's lack of financial independence is a serious threat to its ability to meet its obligations under law. Given the opaque motives that those who control the Treasury and the donor-kitty may have, the leverage of finances may be used to compromise the EC's independence.

In view of the foregoing, there is need for the law to guarantee the financial autonomy of the EC. One way in which this can be done is to ring-fence the expenditure that parliament authorises for the EC's use by placing it under protected expenditure fund in terms of section 183 of the Constitution. The protected expenditure fund is a fund within the accounts of the consolidated fund[84] containing expenditure which is protected. Sums provided for as protected expenditure in the annual estimates that the Minister of Finance presents to the National Assembly cannot be revised downwards by the Assembly and the Minister can only withdraw from it to meet expenditures that are expressly authorised under section 183 of the Constitution. [85] Considering the centrality of credible elections to Malawi's constitutional order, it is submitted that expenditure for the EC should rank alongside that of other protected expenditures

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[79] The Law Commission has recommended that the Special Panel specifically invites nominations from political parties. See Law Commission (n 16).
[80] L Svåsand (n 12.)
[81] See n 27 above.
[82] L Svåsand (n 12.)
[83] Ibid.
[84] Created under s 172 of the Constitution.
[85] Protected expenditure under this provision include salaries, allowances and other benefits of the President and his or vice and of Judges and funs for the operation of Parliament.

5.2. Reform of electoral laws

As for reform of electoral laws, of urgency is the need to amend the Constitution so that the President is elected by an absolute majority. Indeed, one wonders how a President can be said to have the trust of Malawians if he or she is elected by less than 40% of those who voted. This recommendation was also made by the Law Commission in 2007.[86]

The 2014 tripartite elections also showed that the legal framework for the determination of election results is inadequate and can potentially be manipulated to usher in illegitimate governors. Section 99 of the PPEA provides as follows:-

"The Commission shall publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national result of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof."

However, the 2014 tripartite was so disputed that the EC itself came to the conclusion that there was a need to conduct a recount and audit of the presidential votes.[87] This meant that the EC would have had to go beyond the 8 day limit set by the law. Some candidates, however, quickly rushed to court and obtained an injunction restraining the EC from proceeding with the recount arguing that the law did not authorise the EC to recount votes.[88] Although the court did rule that the EC was competent to conduct a recount to determine the results, it felt bound by the provision above and refused to grant an extension for the period within which results ought to be announced.[89] It seems obvious that there is a need to enlarge the period between the finalisation of polling and the publication of results. A 30 day period to replace the current 8 days in section 99 of the PPEA was proposed by the EC itself through the Parliamentary and Presidential Elections (Amendment) Bill of 2003. The bill, however, was rejected by the opposition in parliament because the 30 days for the determination and publication of the results was seen as too long. With the clarity of hindsight, it would seem that this is certainly not the case. In fact, there might be a need for the law to provide for a longer period between the publication of national results and the swearing in of the new elected officials. This will give ample time to those disputing the results to have their cases examined and resolved by the Judiciary.

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[86] Law Commission (n 16). The bulk of the recommendations of the Special Law Commission, for all their usefulness and progressiveness have been ignored by the political establishment in Malawi.
[87] MHRC (n 44).
[88] *The State and the Electoral Commission Ex-parte Friday Jumbe et al (Chakwera et al, Interested parties) Judicial Review Case No. 38 of 2014.*
[89] Ibid.

5.3. Judicial reforms

There appears to be a difference in attitude between the High Court and the Supreme Court of Appeal when it comes to handling electoral disputes. As noted by Gloppen and others, the High Court has been more willing to interfere with electoral outcomes than the Supreme Court which has tended to maintain the status quo.[90] One may speculate that one of the reasons for this is the length of time that electoral matters take to be resolved in the courts. By the time the matters would have reached the Supreme Court, the candidate the election of whom is being questioned would perhaps have served half his/her term. It is arguable that this disposes the Supreme Court more towards the maintenance of the status quo as opposed to the uncertainty that the nullification of an election mid-way into a candidate's term may bring. Obviously, this is an area that may benefit from further research.[91] Needless to say, this may speak to the need for a speedy resolution of electoral disputes and for the provision of a lull between the publication of results and the taking of office by the newly elected officials. As for challenges to the presidential election result, perhaps it might be appropriate to give the Supreme Court exclusive and original jurisdiction to hear and determine these disputes.[92] It would further be recommended that all members of the Supreme Court should empanel the court for purposes of determination of these challenges.[93]

5.4. Reforming the legal framework governing political parties.

Political parties are a key stakeholder in the management of elections. Under electoral law, political parties are allowed to monitor the electoral process in all of

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[90] S Glopper et al (n 9).

[91] For another study on how judicial behaviour is shaped by political context see P Vondoepp 'Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia' (2006) 59 (3) Political Research Quarterly, 389.

[92] This is the practice in Kenya where a challenge to results of a presidential election is filed in the Supreme Court. See Article 140 of the Kenyan Constitution. In Nigeria, the Court of Appeal (which however is not the Apex court) has got the exclusive and original jurisdiction to determine the question as to whether anyone has been validly elected to the office of the president and or vice president. See section 239 of the Constitution of Nigeria.

[93] In 2003 section 9 of the Courts Act was amended to require that on the Chief Justice's certification, proceedings in the High Court that 'expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution' be heard by a panel of not less than 3 judges. The amendment appear to have been motivated by the decision of a single High Court Judge in *The Registered Trustees of the Public Affairs Committee v Attorney-General and The Speaker of the National Assembly [2002–2003] MLR 333 (HC)* invalidating an amendment to the Constitution. The thinking was that constitutional matters are so weighty to be left to a single member of the High Court. The same can be said about challenges to a result of a presidential election. These are matters so significant that they should at least benefit from the wisdom of all members of the highest court in the land.

its stages from registration of voters to determination of results.[94] However, paucity of resources means that not all parties are able to hire monitors. Although the Constitution requires that political parties be funded, this is limited to those that have 'secured more than one-tenth of the national vote in elections to [...] Parliament […].'[95] There is a case to be made that it might perhaps be a worthwhile public expense to fund parties that contest in elections so as to enable them to recruit monitors. To avoid abuse of the funds, the monitors could be paid out of a fund controlled by the EC.

There might also be a need to have a comprehensive legal regime on political party financing to ensure transparency and to rein in the abuse of public resources. Malawi's legal regime on party financing is rather rudimentary. Oddly, there is nothing on party financing in the principal legislation which regulates political parties in the country, the PPEA. What passes for party financing law in Malawi are solitary provisions in the PPEA and the LGEA which in any event are limited to the campaign period. The provision in the PPEA provides as follows:-

"Every political party may, for the purpose of financing its campaign, appeal for and receive voluntary contributions from any individual or any non-governmental organization or other private organization in or outside Malawi."[96]

There is a similar provision in the LGEA.[97] This sketchy regime on party financing provides a permitting environment for abuse of public resources especially for those who have access to them. Naturally, this distorts electoral competition.[98] There is a need, therefore, for the law to comprehensively deal with these matters, preferably through a stand-alone statute.

Given the importance of political parties in a democracy, it is important that the law should be concerned with the manner in which parties are run and governed. Leaders who hope to govern a liberal democracy should themselves be from parties that embrace the ideals of liberal democracy. They cannot be from illiberal and undemocratic institutions. Observing these illiberal and undemocratic tendencies in Malawi's political parties, Chinsinga writes that:-

"[P]olitical parties in Malawi have failed to function as essential building blocks of the evolving democratic culture especially with regards to the intra party politics of leadership. All the major parties are, at least in some way, beset by perennial leadership problems, destructive power struggles, unorthodox voting practices, and domination by a single leader."[99]

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[94] See sections 27, 72 of the PPEA and sections 18 and 56 of the LGEA.
[95] See section 40 (2) of the Constitution.
[96] Section 66 of the PPEA.
[97] Section 50 of the LGEA.
[98] See *Gondwe and another v Gotani-Nyahara [2005] MLR 121 (SCA)*.
[99] B Chinsinga 'Lack of Alternative Leadership in Democratic Malawi: Some Reflections Ahead of the 2004 General Elections' (2003) 12 (1) Nordic Journal of African Studies.

These types of institutions cannot be credible fountains of a truly democratic government. There is, therefore, a need for the law to highlight the importance of intra-party democracy. Kenya offers a good example on this aspect. Article 91 (1) of the Kenyan Constitution provides that political parties shall:-

(a.)

a) have a democratically elected governing body;
b) abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party.

These are progressive provisions although they do raise the question of how they can be enforced. With these kind of requirements always comes the danger of mere 'paper compliance.' These concerns notwithstanding, it would be important for the law in Malawi to regulate how political parties are governed so as to inculcate a democratic culture in them.

Other matters that a review of the law governing political parties could look at include incorporating parties on registration so that they are able to sue and be sued in their own name as well the regulation of coalitions and mergers.[100]

5.5. Reform of Parliament

The suggested area of reform for Parliament mainly relates to its role in the demarcation of constituency boundaries. It is to be noted that despite the law providing for the boundaries of constituencies to be reviewed every 5 years, this has not been the case.[101] The last time constituency boundaries were reviewed was in 1999 when the number of constituencies was increased from 176 to 193. Gloppen and others note that the EC itself had proposed an addition of 70 new constituencies. It is, therefore, not clear on what basis this reduction of the proposed number of new constituencies was based on and whether in any event Parliament was guided by the guidelines in section 76 (2) (a) of the Constitution.[102] The need for review of constituency boundaries was accentuated during the last

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[100] Kenya has quite a progressive statute (The Political Parties Act No. 11 of 2011) which addresses all of these matters. Currently, the law in Malawi does not regulate mergers and coalitions although the High Court ruled in *Chakuamba and another v Electoral Commission [1999] MLR 59 (HC)* that it is permissible for a presidential candidate to have a running mate from another political party, provided they run under the same symbol. The court did not decide on the issue of legality of electoral alliances. Electoral alliances, loose or otherwise, have featured in 1999, 2004 and 2009 general elections.

[101] S Gloppen et al (n 9). The ostensible reason for the failure to comply with the Constitution on this aspect appear to be paucity of resources to carry out the exercise but also to support a Parliament with a bigger membership in the event that the exercise leads to increase in constituencies.

[102] Section 76 (2) (a) requires that in drawing up constituency boundaries the aim must be to have approximately equal number of voters in each constituency. The considerations that the EC must have regard to are population density, ease of communication and geographical features and existing administrative areas.

election where some constituencies had almost 12 times the number of voters in other constituencies.[103] However, for this to be effectively done, it might require that the powers that Parliament currently have of confirming constituency boundaries be taken from it and that the exercise be exclusively handled by the EC in a relatively less politically charged environment. This would of course necessitate an amendment to section 76 (5) of the Constitution.

PART IV

6. Conclusion

There continues to be a strong preference for competitive politics in Malawi.[104] Democracy is accordingly 'the only game in town.'[105] For the ideal of a truly representative government to be lived out, however, it is important that the institutions charged with the sacrosanct responsibility of presiding over national elections retain their credibility. This paper is a modest contribution towards the ongoing conversation in Malawi, mainly precipitated by the not-so-pleasant experience of the 2014 tripartite elections, about how our electoral system, laws and institutions should operate so that they work for the people. There obviously remains a gulf between the aspirations of competently managed free and fair elections and the reality that Malawians currently endure. This, however, is not an irredeemable situation. By fully committing herself to electoral reform Malawi can ensure that the ideal of 'a government of the people, by the people, for the people, shall not perish from [her] earth.'[106]

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[103] For instance Salima Central constituency had total registered voters of 76,765 whereas Likoma Island constituency had 6,933 voters. Results of 2014 parliamentary elections can be accessed at http://www.mec.org.mw/Portals/0/Parliament%20results.pdf on May 19, 2015.

[104] S Khaila and C Chibwana, 'Ten years of democracy in Malawi: are Malawians getting what they voted for?' (2005) Afrobarometer Working Paper No. 46, 10 http://www.afrobarometer.org/files/documents/working_papers/AfropaperNo46.pdf accessed July 8, 2014.

[105] L Svåsand (n 12.)

[106] Abraham Lincoln (Gettysburg address.)

Strategies for developing and maintaining Democratic Electoral Processes: Lessons learnt from the 2013 Elections in Madagascar

With a focus on the electoral legal environment

By Francois Butedi[107]

Introduction

Elections are at the core of democratic processes in modern states since the 17th century[108]. Some countries more advanced in relation to holding democratic and transparent elections, especially in most of Europe and North America whilst most countries in South America, Asia and Africa are lagging behind. Most African countries went through long periods of civil or military dictatorships, autocratic rule and long presidential terms after their independence. These include the following: President Yasimbe Eyadema in Togo (1960-2000), Mobutu Sese Seko in Zaire (DRC) who ruled the country from 1965-1997, Muammar Gaddafi of Libya (1969-2011), the current President of Zimbabwe, Robert Mugabe in power since 1987, Hosni Mubarak of Egypt (1981-2011), President Omar Al Bashir of Sudan, in power since 1993 and President José Eduardo dos Santos of Angola who has been in power since 1979.

The new era of democracy dawned in Africa in the 1990s after the fall of the Berlin wall in 1989. To heal their nations, some countries organized national conferences, reconciliation processes and constitutional referenda. Despite some progress made in organizing periodic elections, there is still a lot that needs to be done to improve democracy in some of the countries and for peace to prevail in others. Democracy entails respect for human rights, holding democratic elections and where necessary creating new constitutions and introducing reforms for socio-economic development and stability.

Madagascar, a former French colony situated in the Indian Ocean with 22 million inhabitants is considered a fragile and unstable country in Africa due to political instability, social tensions and cyclic coups d'état. The international community including the Southern African Development Community (SADC), African Union (AU) and the United Nations (UN) have made efforts to assist the country after the 2009 coup to end the crisis. A Roadmap was drafted and adopted. This important document underlines elections as fundamental to ending the political crisis and to return the country to constitutional democracy. Madagascar held presidential and legislative elections in 2013. These elections have become a reference for democratic elections in francophone African countries. The context in which these elections took place was unique due to the political crisis/instability. Internal and

[107] Electoral & PCRD Officer, African Union Liaison Office in Madagascar

[108] "Election (political science)," Encyclopaedia Britanica Online. Retrieved 18 August 2009

external factors played a role in overcoming challenges, addressing flaws in the legal framework and monitoring political trends in order to hold fair and transparent elections in 2013.

This paper does not aim to report on all aspects of the 2013 elections in Madagascar. It will highlight key elements in different phases of the electoral cycle that can be regarded as good practices in developing and maintaining a democratic electoral process. It also reflects on lessons learnt from this particular electoral experience as well as challenges encountered.

Background Information on Political and Social Context

Madagascar is an Island situated in the Indian Ocean. Its population is estimated at 22 million, composed of 18 ethnic groups each with its own independent kingdom during the pre-colonial period. These kingdoms were annexed through a series of invasion wars by successive Merina (Malagasy from Highland) Kings in the 18th century over the so called 'Côtiers' (Malagasy from coastal). Over the years, the political, social and economic environment, dynamics and tensions in Madagascar have been informed by the pre-colonial, colonial and post-independence culture which is defined by bitterness, resentment, feelings of vengeance and reinforced by socio-economic injustices, poverty and bad governance.

Madagascar is well known for its cyclic political crises due to coup d'états occurring almost every decade (in 1973, 2002, 2009). It is a country where four (4) former Heads of state (Didier Ratsiraka, Albert Zafy, Marc Ravalomanana and Andry Rajoelina), including the President of the transition are still alive and politically active. The last two came to power by overthrowing the sitting governments. Rajoelina removed Ravalomanana from power. In such retaliatory and personalized politics the bitterness and feeling of vengeance informs every move of the politicians.[109] The last coup of 2009 was orchestrated against President Marc Ravalomanana during his 2nd term. The security forces (army, police and gendarmerie) were obviously involved[110], despite the fact that power was handed over to a civilian[111] and leader of the public demonstrations movement called the 'Orange Movement', Andry Rajoelina who became the President of the Republic. The 181st Meeting of the Peace and Security Council of the African Union (AU/PSC) noted that:

"Following the resignation of President Marc Ravalomanana, under pressure from the civilian opposition and the armed forces, the transfer of power was made in violation of the relevant

[109] Madagascar: From protracted crisis to sustainable peace-Taking stock and rethinking of future policy option; SADC-CNGO Policy paper 6, November 2011, page 7

[110] Ordonnance No 2009/001 of 17 March 2009 (The President Marc Ravalomanana issued the Ordonnance dissolving the Government and giving full power to a Military Directorate.

[111] Ordonnance No 2009/002 of the same day 17 March 2009(The Military Directorate conferring full powers to Mr. Andry Rajoelina)

provisions of the Malagasy Constitution, and that the subsequent decisions to confer the Office of the President of the Republic to Mr Andry Rajoelina constitute an unconstitutional change of Government"[112].

The AU/PSC decided, in accordance with the Lomé Declaration on Unconstitutional Changes of Government and the Constitutive Act of the AU, to suspend Madagascar from participating in the activities of the AU until the restoration of constitutional order in the country[113]. This was followed by suspension from other institutions such as the SADC, Common Market for Eastern and Southern Africa (COMESA), l'Organisation internationale de la Francophonie (OIF) and other programmes related to the European Union (EU) and the African Growth and Opportunity Act (AGOA) were interrupted. The AU also adopted targeted sanctions against 109 political personalities [114]. Different actors and players from the international community unsuccessfully attempted to resolve the conflict until 2011. The lack of coordination and competition amongst these actors contributed towards this failure. It was only later that the political support of the AU (special envoy of the Chairperson of the African Union Commission (AUC) Ablassé Ouedraogo) and the UN (Special envoy of the General secretary of UN Eden Kodjo) in collaboration with the SADC mediator (former president of Mozambique Joachim Chissano) yielded results. Their interventions facilitated negotiations amongst Malagasy parties, particularly the four major political movements aligned to four former presidents and other political formations. Malagasy parties reached an agreement and signed a Roadmap on 16 September 2011. Civil society organizations and churches played a significant role, despite being weakened by politicians and lack of resources. As usual, they were accused of being partisan. However, their efforts and role were acknowledged in the Roadmap. Article 13 of the Roadmap stated that:

"Civil society is invited to observe the elections and to monitor and watchdog political actors who will violate the code of conduct during the political transition. The international community is called upon to strengthen the capacity of civil society."

Legal Framework

1. Roadmap

The 2013 presidential and legislative elections in Madagascar were held in a particular political context. Major political parties, including mouvances that signed the political agreement called the 'Roadmap' mainly sought to expand the composition of transitional institutions (Le Conseil Supérieur de la Transition/High Transitional Authority, le Congrès de la Transition/Congress of the Transition, la CENIT etc.) and to have a neutral, inclusive and consensual process which would lead to credible, transparent and free elections (Article 2).

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[112] PSC/PR/COMM.(CLXXXI) PEACE AND SECURITY COUNCIL 181st MEETING 20 MARCH 2009 ADDIS ABABA, ETHIOPIA

[113] PSC/PR/COMM.(CLXXXI) ibidem

[114] The 394th meeting of the Peace and Security Council (PSC/PR/COMM.(CCCXCIV)

Article 10 to 14 of the Roadmap laid down the foundation of the electoral legal framework and stated that a new election management body must be put in place, new laws must be adopted, a special electoral court must be established and United Nations experts should assist in the establishment of the electoral framework which must be neutral, transparent, independent and based on respect of fundamental human rights and international norms.
As part of the expansion of the above-mentioned institutions, the Roadmap highlighted the following issues:

- Expansion of the composition of CENI (election management body), expansion and review of its mandate and powers and a balanced representation of political actors to prepare, organize and manage the presidential, legislative and municipal elections (Art.10.a);
- Revision of the electoral code (art.10b);
- Adoption of a code of conduct for political actors (art.10.c);
- Establishment of a Special electoral court as a special and temporary measure (chamber within the Constitutional High Court) (art.11);
- Adoption of a new law on political parties and status of the opposition (art.12).

Unlike some SADC countries such as DRC (Global and inclusive Agreement (also called the Sun City Agreement) in 2001) and Zimbabwe (Global Political Agreement), "Roadmap" political agreement in Madagascar was enacted into law[115].

2. The 2010 Constitution

After the coup, the Transitional President Andry Rajoelina ruled the country through Ordinance No 2009/003 of 19 March 2009. The High Constitutional Court validated the three decisions following the coup by letter No 79: HCC/G of 18 March 2009 and declared that Mr. Andry Rajoelina should exercise the functions of the President of the Republic as stipulated. The Transitional President then conducted national and regional consultations or meetings in 2010 followed by a very controversial constitutional referendum on 17 November 2010 that was adopted on 11 December 2010 by the High Transitional Authority. This referendum was challenged by political and civil society actors. The international community did not have room to influence the process, except by increasing sanctions (membership suspension, freezing of assets, political isolation, non-acknowledgement of the government) against the new regime. This led to the signing of the Roadmap on 16 September 2011.

For the purposes of this paper I will review the electoral process which led to the election of the President of the Republic and Members of Parliament in 2013. The President of the Republic and Members of Parliament are elected in direct suffrage for 5 years (Articles 45 and 69 of the Constitution). The President is elected for a 5-year period renewable once (Constitution, Article 45). This constitutional practice to limit presidential terms has been accepted and inserted in most African countries' constitutions. Unfortunately, legislators under the influence of the governing parties

[115] La Loi N0 2011-014 du 28 décembre 2011 portant insertion dans l'ordonnancement juridique interne de la Feuille de route signée par les acteurs politiques malgaches le 17 septembre 2011.

have found a way of manipulating the constitutions by either amending the provision or calling for constitutional referenda a few months or years before the end of their terms. The African Union is conscious that pre and post electoral conflicts are one of the causes of instability and unrest on the continent, but it does not stand firm and clear in warning Heads of State who attempt to change constitutions to extend their terms. Presidents such as Kabila in the DRC, Denis Sassou Ngueso in Congo-Brazaville, Kagame in Rwanda, Eduardo Santos in Angola and Pierre Nkurunziza in Burundi must be monitored as they are serving their last terms in office. For instance, vigilant civil society in Burkina Faso did not allow former President Blaise Compaore to amend the constitution through the National Assembly as they managed to block the process. He was forced to step down and is now sadly in exile in Ivory Coast. The Madagascar constitution stipulates that a sitting president who intends to stand as a candidate for an upcoming election must *resign 60 days before the Election Day*. The President of the Senate (upper house) is then sworn in as caretaker President until a new president is elected. If the President of the Senate is also a candidate, then the power and functions of the president is vested in the government collegially. Article 47 of the Constitution states that the presidential election must take place between 30 to 60 days before the end of term of the sitting president. To be a presidential candidate a citizen must be established (residing) in the country for at least 6 months before the last date of registration of candidates (Article 46,al.2).

Members of Parliament are elected through direct suffrage for a 5-year term (article 69). There are no term limits for Members of Parliament. Article 72 prohibits an elected Member of Parliament during his/her term from crossing floors. This provision seeks to prevent bad practices by politicians who lack ideology and change their political positions based on personal interest rather than public interest and political conviction. This phenomenon is called *'political prostitution'* in local parlance. In Madagascar, the Miaraka Amin i Prezida Andry Rajoelina (MAPAR) of Andry Rajoelina, lodged a complaint before the High Constitutional Court (HCC) to seek the recall of 6 of their Members of Parliament who failed to follow political party disciplinary requirements and joined the Presidential majority movement. The HCC in its first decision rejected the petition on technical grounds[116].

3. Electoral code (Loi organique N^0 2012-005 du 22 mars 2012)

The Roadmap recommended the drafting of a new electoral code to address problems in existing legislation, particularly with regards to the voters' roll as well as the management of ballot papers. The voters' rolls had always been a source of electoral dispute and political conflict in Madagascar.

[116] Décision n°23-HCC/D3 du 22 avril 2015 relative à une requête aux fins de déchéance de Députés.

a. Registration and voter rolls

The new electoral code provided significant changes such as:

- Every public servant, civilian or military officer who is a candidate in an election is relieved from his/her duties once the list of candidates is published. He/she may get back his/her position if not elected. All political office bearers must resign upon the publication of the list of candidates (article7);
- According to article 10 of the electoral code, the CENIT establishes at the lowest level of administration called 'fokontany' (ward) a local registration committee composed of members of fokontany, political parties and civil society organizations. They are appointed and supervised by the CENIT (CEC).
- The CENIT district office (CED) as the appointing authority will draw the list of voters for each 'fokontany'(EC. Article 13). And the same list of voters will be displayed at each and every fokontonay for voters, members of the public, administrative and judiciary authorities, Non-governmental organizations and political parties to double check. All claims are recorded in a special register at Fokontany level (EC.article 20). Every citizen who is missing from the list has got a window period of 20 days to contest or correct an error. The CED has got 7 days to respond to a complainant; otherwise the complainant can submit a request within 30 days after the expiration of the first time limit to the magistrate court.

Due to a history of contestations over the voters roll, the new electoral code tries to address these aspects by taking the following actions:

- Decentralising the registration process to the lowest level in order to reach all eligible citizens
- Giving the authority to register as well as to address claims at local level in a short period of time and free of charge;
- Giving the responsibility to citizens to check the voters' list within a stipulated period and not processing claims after the prescribed deadlines

A registered voter is allowed to cast his/her vote using a national identification card (CIN) or voter's card as identification as long as he/she is on the voters' rolls. As such at one point the technical steering committee had a debate about the importance of printing voters' cards. This was seen as an extra cost in the CENIT's budget. It was estimated that 800 thousands potential voters were in need of an ID card (CIN) to register for elections.

In my view, we should not overlook the importance of a voter's card for two reasons, namely that:

- It clearly indicates your voting ward and serial number;
- It is some kind of acknowledgement of being a good citizen who fulfills his/her civic obligations.

The CENIT with support from OIF and Projet d'Appui au Cycle Electoral pour Madagascar (PACEM) set up the Centre National des Traitements des Données Informatiques/Informatic national center of data and results management (CNTDI) to assist in verification of registered voters and consolidation of the voters' roll. The CENIT offices at the district level (CED) were equipped with kits to assist in capturing

all data (consolidated list of voters, scanning and transmitting of electoral results) and printing of the voters' roll.

"It was the first time in the electoral history of Madagascar to have an accurate electoral list/voters roll and computerized data."[117]

b. Ballot paper

In the past, each presidential candidate used to print his/her ballot papers, then give them to the Ministry of Home Affairs (mandated to organize electoral operations (delimitation of constituencies, registration of voters etc) or dispatch them to all polling stations. Consequently, there were many missing ballot papers on the voting day. In many cases, the public servant (from the Ministry of Interior) under pressure and orders could not take all valid ballots that were in favor of the opposition parties. Madagascar experienced the use of a single ballot paper for the first time during the presidential and legislative elections of 2013. As a result, there was a lot of fear of spoiled ballot papers before the elections. However, voter education and sensitization were conducted countrywide. The CENIT printed a lot of sample ballot papers with symbols and faces of candidates for voters to familiarize themselves with this tool. Representatives of candidates observed a rundown draw to determine how the faces and symbols associated with their candidates would be displayed on the single ballot paper (article 56)

c. Recommendations:

- It is always important to have consensus on the electoral legal framework. In the case of Madagascar, the following were noted as best practices in electoral legislation:
- Inclusion of the political agreement (Roadmap) in national legislation for the first post conflict elections. Unfortunately it somewhat weakened state sovereignty by allowing interference by the international community;
- Support (political, technical and financial) and coordination mechanisms from the international community to monitor trends, progress and maintain pressure under AU leadership by setting an International Contact Group for Madagascar (GIC-M changed to GIS-M);
- Effective electoral assistance under UNDP/PACEM in institutional strengthening and capacity development of CENIT which provided wide ranging assistance with real deliverables and impact on the democratic development of the partner country;
- Putting in place presidential term limits as well as setting the period in which the elections have to take place i.e. before the end of the term of the sitting president;
- Providing the opposition with one of the 6 deputy house speaker positions and presiding over at least one parliamentary commission in the National Assembly (Article 78);

[117] Statement from the Chairperson of the CENIT, Mrs. Beatrice Atallah on 23 February 2013

- Limiting presidential terms, resignation of the sitting president if he/she is standing in an upcoming election and setting the period within which the presidential elections must take place ahead of the expiry of the term of the sitting president are essential provisions to maintain in the constitution. However, the National Assembly and the Judiciary must each play their role in the interest of public interest and social cohesion.

- Despite criticisms leveled against the judiciary, political parties and other groups must still sue the government or challenge government decisions in the courts. This helps in discouraging illegal means of protests, which may result in conflict and degenerate into violence.

- Public debates by candidates on their policies and manifestos during and before the 2nd round of presidential elections must be encouraged. This does not only help in highlighting the policy direction of the candidates and their party but it also helps in educating the people on public affairs.

- The use of IT in managing the voters' roll is probably a way forward in consolidating and cleaning the voters' roll. This also makes it easier for other stakeholders to investigate issues and get information. For instance, the CENIT provided a copy of the voters' roll on CD with the location of polling stations. This was unlike in Zimbabwe, where the voters' roll could not be made available to contesting political parties ahead of the July 2013 presidential and legislative elections. Such an occurrence does not bode well for transparency and accountability.

- The use of a single ballot is a positive development and has become common in most African countries. It also helps logistically, reduces costs and assists in curbing fraud.

However, all these legal provisions can be of little value if there is no political will to implement them by the governing regime. The judiciary must be independent to ensure that there is proper interpretation of the legal provisions. Following the successful presidential and legislative elections in Madagascar in 2014, which were acknowledged by the international community, the elected president was immediately challenged to appoint the Prime Minister who would in turn form the new government. It took the new President two months to appoint a Prime Minister. The President wanted to cut ties with the MAPAR of the former transitional president Andry Rajoelina. Yet this was the same group that had worked with him to win the election. The President also employed unfair tactics by allowing MPs to form what he called a 'Presidential Majority' when he did not have a single MP under him. A controversial interpretation of Article 54 of the constitution by the high constitutional court allowed him to appoint his Prime Minister outside the rules of the political agreement.

Pre-Electoral Environment

1. **Monitoring of electoral and political processes by the international community (art.37 Roadmap)**

The monitoring of political and electoral processes by the international community remains important. This is because political and electoral process are highly interconnected, particularly for a country emerging from conflict. The AU Commissioner of Peace and Security Ambassador Lamamra in consultation with the SADC Mediator President Chissano and other International Community actors maintained pressure on the Malagasy transitional government and other actors to encourage them to return to constitutional normalcy. At a time when the process was blocked due to the candidacy of Lalao Ravalomanana (wife of ousted President) and Andry Rajoelina (Transitional President), the AU Commissioner Ambassador Lamamra and President Chissano headed several field missions to consult with various stakeholders between May to July 2013 in Madagascar. This helped in unlocking the implementation of the roadmap, particularly on election matters. They came up with the "7 points/recommendations" for exiting from the electoral process crisis (7 points de sortie de crise pour le processus electoral).
Two key aspects of the seven recommendations were as follows:

- A request to all former heads of state, sitting president and Marc Ravalomanana's wife to withdraw their candidacy and be replaced by another person of their choice;
- Termination of contracts of judges of the special electoral court and amendment of the law on appointment of new judges of the special electoral court.

2. **Stakeholders dialogue with the CENIT**

The CENIT held several meetings with different interest groups (political parties, media, civil society, technical and financial partners). The nature of engagement between the CENIT and these groups created a transparent environment and accessibility/availability of information on preparedness, operational issues and shortcomings. The CENIT circulated a report on meetings held to all participants.
The CENIT did not only organize meetings but also conducted trainings for special groups, such as the media, civil society and women's organizations. Representatives of political parties were briefed on each of the important steps if necessary.

3. **Inevitable tensions and challenges**

In the second round of Presidential elections, there were two contestants, namely Hery Rajaonarimampianina (former Minister of Finance during Andry Rajoelina's transitional government) and Dr. Robinson (former Minister of Health under Marc Ravalomanana's term). The international community did its best to avoid confrontation between and amongst former Heads of State by prohibiting them from standing for presidential elections. Unfortunately, the confrontation through their 'intermediaries' was inevitable. Andry Rajoelina with his political network and movement, the MAPAR backed Hery Rajaonarimampianina. Marc Ravalomanana with his Tiako I Madagasikara (TIM), business and political connections backed Dr. Robinson.

A former Prime minister and army general and presidential candidate Camile Vital imported 350 brand new 4x4 vehicles to run his electoral campaign. Customs requested some documents to release the cars but unfortunately all vehicles were eventually impounded. Camil Vital complained to international partners and observers that the government was interfering and blocking him from campaign by impounding his vehicles. Questions were raised about his source of funding and the possibility of money laundering. However international partners and observation missions refrained from taking positions on this delicate issue.

The Election Management Body- 'CENI-T' (Loi No 2012-004 fixant l'organisation, le fonctionnement et les attributions de la CENIT)

The CENIT is a product of political consensus. The CENIT is composed of 24 members from the following sectors:

Category A: the President or Chairperson of the commission is elected in respect of the law;

Category B: 10 Representatives of civil society as follows:

- ✓ 3 from election observation organizations
- ✓ 1 from civic education
- ✓ 1 from human rights defenders
- ✓ 1 from journalists/media platform
- ✓ 1 from the administrative public servants corps
- ✓ 1 from the national bar association
- ✓ 1 from lecturers' association, particularly the faculty of law
- ✓ 1 from magistrates' trade union
- ✓ 1 from the Senior public servants entity/corporation/association

Category C: 2 Representative of public Administration

- ✓ 1 from territorial administration of Interior Ministry
- ✓ 1 from the Ministry in charge of Decentralization

Category D: 1 Representative from each of the 11 signatories of the Roadmap

As a result of its composition, the CENIT is a mixed elections management body. There are politicians, public servants, academics and civil society actors. Despite the presence of politicians representing parties to the Roadmap, the Chairperson Madame Atallah Beatrice set a good precedent of leading by example in managing the CENIT with transparency and independence leading to the building of trust, respect and credibility of the institution by all stakeholders (state and non-state actors).

She was able to work collaboratively with all commissioners to achieve roadmap goals and maintain dialogue with national and international stakeholders.

For instance, all commissioners had to be in the field to train trainers and supervise electoral operations such as voter registration; delivery of ballot papers from the district to communes, to escorting duly signed and dated electoral results in sealed envelopes.

In my view, four main factors contributed to a good record of the CENIT as follows:

- Remarkable leadership of the Chairperson who has a strong personality and was impartial (former magistrate): For instance, 4 Church leaders of the

ecumenical council of Christian churches called the Fiangonana Katholic Eto Madagasikara (Conseil Chrétien des Eglises à Madagascar) (FFKM) were not keen to support the electoral process without national reconciliation. The Chairperson met with them secretly to seek their support and blessings and they finally agreed and released a communiquè calling for peoples' participation in the electoral process;

- Respect for rules and laws: The Chairperson managed to instill/promote discipline and get all members to deliver positively on agreed commitments. She was herself prepared/committed to be bound by the principles and decisions of the CENIT plenary assembly. On one occasion, she reported that she was against the scheduling of the 2nd round of presidential election on 20 December 2013, but was bound by the decision of the assembly and had to accept that decision.
- Communication skills and strategy of the chairperson: She made efforts to honour all invitations to address the media and the public on preparedness, challenges and shortcomings of the elections, even if the invitation came from the Government side regardless of her relationship with the president of the transitional government and later on, the elected president. Observers also noted with satisfaction, the holding of regular steering committee meetings between the CENIT, PACEM and FTP, sharing of information and providing guidance on future electoral operations/ electoral business.
- Long-term commitment of the United Nations electoral assistance in conjunction with other international partners/advisors (AU, OIF, EU). In this respect the International Institute for Democracy and Electoral Assistance (IDEA) has been a leading voice advocating for a paradigm shift from supporting elections as technical events to supporting the entire electoral cycle – from the design of a country's legal framework, to the holding of an election, and through to subsequent reform processes[118].

I cannot end this section without pointing out one major weakness of the CENIT. Other than commissioners and the administrative and technical staff at national level, all members of the CENIT at regional (CER), district (CED) and communal (CEC) level are not permanent staff. Consequently, it becomes hard to motivate and retain competent staff. They work part-time and on a temporary basis, which can lead to lack of commitment and weak capacity of CENIT local structures. Even the permanent Bureau of CER, CED and CEC that are composed of 1 chairperson, 1 Vice chairperson and 2 Rapporteurs are not effective, motivated and permanent. As a result all the burden of work is on one or two staff members only, the others come in only for specific operations considering that they are paid for tasks performed. As such, there is need to strengthen the institutional capacity, operational tools and administrative structures at local level for the sake of continuity and retention of institutional memory.

[118] IDEA: Electoral Assistance, http://www.idea.int/elections/eea/index.cfm (visited on 12 may 2015)

Electoral Justice And Prevention Of Electoral Disputes

Electoral justice is at the cornerstone of democracy in that it safeguards both the legality of the electoral process and the political rights of citizens. It plays a fundamental role in the continual process of democratization and catalyses the transition from the use of violence as a mean for resolving political conflicts to the use of lawful means to arrive at a fair solution[119].In Madagascar, there are three mechanisms of electoral dispute resolution: Administrative authority, Special electoral court and electoral mediators (informal)

1. **Administrative procedure/Authorities**

In certain circumstances the mere formal recognition that an irregularity was committed requires a form of redress by the administrative authorities. For instance, a citizen who has been wrongly denied the right to register as a voter could bring the complaint within 20 days after the display of the voters roll (Article 17 of electoral code). Article 20 states that the complaint is registered at the Fokontany office in a special register and brought to the local registration commission to decide on within 7 days, failing which the matter is brought before the Tribunal of first instance (Magistrate's Court). The same procedure applies for a citizen who has been denied the right to be a candidate by the Organe chargé de la verification et de l'enregistrement des candidatures (OVEC). He/she can complain to the CENIT at national level to review his/her application and if not satisfied with the outcome can approach the tribunal. In the event that he/she has been accepted as a candidate, a certificate of enrolment (certificate d'enregistrement de candidature), which denotes authorization/acceptance is issued to the candidate.

2. **Special Electoral Court (Loi No 2013-008 modifiant et complétant certaines dispositions de la loi No 2012-014 du 30 juillet 2012 portant création d'une chambre spéciale dénommée "Cour Electoral Spéciale" (CES) au sein de la Haute Cour Constitutionnelle.**

In terms of article 11 of the Roadmap, CES should be established as an exceptional and temporary court to deal with electoral disputes relating to presidential and legislative elections due to mistrust and perceptions of a corrupted judicial system in Madagascar. Participants during a national conference on reconciliation highlighted bad political practices as one of the root causes of instability in Madagascar[120]. Over the years, the Judiciary has been used by every President who comes into power for their own political ends. They try by all means to control the judges of the High Constitutional Court, the Council of State (Conseil d'Etat) to remain in power and silence political dissidents. The mandate of the CES is to register and validate presidential candidates, deal with electoral disputes for presidential and legislative elections and proclaim final results of presidential and legislative elections[121]. It can

[119] Electoral Justice: The International IDEA Handbook 2010, page III

[120] Report of the National Conference on reconciliation : 28 April -2 May 2015, CCI Ivato, Antananarivo, Madagascar

[121] Article 1 of Loi No 2013-008 modifiant et complètent certaines dispositions de la loi 2012-014 du 20 juillet 2012 portant citation d'une Chambre spéciale

invalidate, annul, revoke or modify electoral operations, actions or decisions on electoral issues. Despite the political consensus in establishing a neutral and independent institution to deal with electoral disputes, the first decision of the CES[122] was a disappointing one when it accepted two controversial and illegal presidential candidates[123] despite not meeting the requirements. These are:

- ***Marc Ravalomanana's wife**:* she was allowed to enter the country on humanitarian grounds after SADC's intervention requesting Andry Rajoelina to allow her to visit her ailing mother. Unfortunately, she used the opportunity to organize political meetings and register as a presidential candidate in violation of the terms and conditions of the authorization of her entry into the country and without residing in the country for at least six months.

- ***President of the transitional government Andry Rajoelina**:* he did not intend to stand as a candidate, but he did so (filled his application) after the deadline when he learned that Marc Ravalomanan's wife, Mrs. Lalao Ravalomanan had registered as a candidate for the presidential elections. His argued that Lalao Ravalomanan represented her husband who was forbidden like him by the international community from running for president.

The international community, particularly the AU and SADC had to put pressure and rescue the situation. This is how the 7 points to exit from the electoral process crisis were elaborated. Andry Rajoelina, President of the transitional government had to accept and amend the CES Decree (Loi No 2012-014 of 30 July 2012) as well as the Decree on the appointment of new judges (Loi No 2013-008). The rationale for this was to legally restore the credibility of the Court and reassure political actors. 10 out of the 19 judges were nominated by the signatories of the Roadmap. Following a different decision by the special electoral court (new version) to disqualify illegal candidates(Andry Rajoelina and Lalao Ravalomanana) and the release of the new final list for presidential candidates and the new electoral calendar by the National Independent Electoral Commission for the Transition(CENI-T), progress was seen in the country. The African Union Commission during the 394th meeting of the Peace and Security Council (PSC/PR/COMM.(CCCXCIV) lifted the targeted sanctions on the 109 Malagasy political personalities. The AU and the International Group of Contact for Madagascar (GIC-M) during the 8th Consultative meeting held in Addis Ababa, Ethiopia called for political support and encouraged donors to resume their support to the CENI-T. They also encouraged the Transitional Government to provide necessary support towards the holding of free, fair, credible and peaceful elections.
The CES received 114 petitions in the first round of presidential election. 50 petitions were received for the second round and 580[124] petitions were received on the

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dénommée "Cour Electoral Spéciale"(CES) au sein de la Haute Cour Constitutionnelle

[122] CES/Decision No 01 du 03 may 2013

[123] CES/Decision No 01 du 03 may 2013

[124] Rapport final : Union Européenne Mission d'Observation Electoral Madagascar 2013, page 33-34

legislative elections. However, the CES confirmed that they had ruled on 609 petitions before the proclamation of the final and definitive legislative results.

3. Electoral Mediators

This is an informal and non-legally binding body composed essentially of civil society organizations to mediate in electoral conflicts on matters that they feel can be resolved at local community level and in a friendly way. The PACEM trained and deployed 463 electoral mediators countrywide in 119 districts. In my view, this number was insignificant and most regrettably the mediators were not deployed according to a mapping of potential hot-spot areas. However, the coordination mechanism was well designed and effective in preventing violence during the electoral campaign and voting day. The incident and conflict coordination centre was located at the CENIT building, which allowed for easy communication on incidents and conflicts with senior electoral staff, commissioners and security to deal timeously and effectively with disturbances.

Lawyers' training on electoral disputes

It is also important to highlight that the PACTE consortium of international and regional organizations (EECE, Electoral Institute For Sustainable Democracy In Africa (EISA) and Electoral Reform International Services (ERIS)) in partnership with local organizations conducted one national and 3 regional workshops to train lawyers on electoral disputes and procedures. This enabled lawyers to assist candidates, political parties and other stakeholders in filing their applications in court.

4. Observations

- The above analysis shows how critical the judiciary in general and the electoral justice system in particular, and their decisions are on the whole electoral process and the political environment.
- The number of petitions in my view shows not flaws, but most importantly the consensus to use legal mechanisms to address any electoral disputes. The SADC Mediator, President Chissano stated:

"*We are here to help Malagasy to hold acceptable not perfect elections.*"

Surprisingly, these elections had a higher level of transparency and credibility than many held in the SADC region and many African countries.

- It is also important to establish alternative electoral dispute resolution (AEDR) mechanisms that operate outside the legally established system. But their existence must be known by all electoral stakeholders and they should be approved by the elections management body.

Presidential And Legislative Elections

1. Electoral campaign

As mentioned above, the CENIT managed to fairly and equitably apply the airtime to each of the presidential and legislative candidates for their campaigns.

According to article 48, the CENIT sent out an open invitation to all partners and interested parties, including financial and technical partners to witness the rundown

draw of envelopes in which airtime and use of public authorized venues were allocated for candidates.
Electoral public meetings are regulated by a prior written notification to the competent authority in which the meeting is supposed to take place.

2. Election observation

According to article 7 of the Act, the CENIT is the sole institution to accredit domestic and international election observers from all recognised national and international bodies that apply and meet the requirements (application, list of observers and identity card or passport and ID photo). No political interference was noted during the accreditation process. The CENIT convened a briefing meeting for all international observers in line with best to brief observers on the preparedness, readiness and context of the elections. The CENIT appealed to the government to grant visas and facilitate administrative processes for observers. The Note Verbale N^{0}13/666 AE/M (Foreign Affairs of the Republic of Madagascar dated 19 September 2013) stated that an international observer is granted *6 months courtesy visa (free of charge)* at the Embassy or port of entry endorsed *'electoral observer'*.

Article 126 (2) states that:

"They (electoral observers) are entitled during their stay to the status of resident for prices of hotels, transport, car rental and any other services".

In fact, Air Madagascar (the national airline) offered a 60% discount on resident rate for each ticket purchased by an electoral observer. For instance, the price of a *return ticket from Antananarivo to Diego (DIANA) was reduced from $502 to $200.* This was unheard of especially considering that the country was struggling to recover from a long economic crisis due to 2009 political crisis.

The Joint Mixed Operation Electoral Security undertook a round of meetings to brief international election observers on the security measures that were in place, hotspots and provided security contacts sheets with information on the responsible persons countrywide to be reached in case of security emergency. There were in total 1.163 domestic and international observers mainly from 36 entities of national civil society organizations, the AU, SADC, EU, OIF, IOC, COMESA, Carter Center, EISA and accredited embassies in Madagascar (USA, Japan and China). These international missions deployed long term and short observers who observed the pre, electoral and post-electoral process. These efforts were commendable because it is important for transparency and credibility that the host country not only invites observers, but also facilitates administrative procedures and guarantees the safety and security of observers on the ground.

3. Electoral process

All electoral aspects and operations are important and should be well planned in order for citizens to exercise their right to vote in acceptable conditions that respect international and regional norms and standards as well as national legal frameworks.

3.1. Key logistical aspects

Electoral logistics and planning can be a challenge, yet these are crucial.

The CENIT deployed at least one national commissioner in all 22 regions of the country to supervise the reception of sensitive electoral materials. They were tasked to double check the quantity of sensitive electoral materials and supervise their deployment to each district and from the district to the commune and from the commune to polling station. Their capabilities made it possible to timeously deal with challenges. For instance, there was a case of shortage of ballot papers in one of the communes. The commissioner in charge was able to bring the information to the attention of the coordination team and request the nearest commune to re-allocate a specific number of ballot papers.

3.2. Voting and counting processes

The use of airplanes to deliver sensitive electoral materials and collect election results from remote areas: This was made possible through SADC contributions. CENIT hired helicopters and airplanes, which made it possible to reach remote areas and allow for the tabulation of election results in those areas without delays. The voting process was smooth and was done in the presence of electoral agents, observers and political party agents. According to article 98 of the electoral code, the counting takes place at a voting station immediately after the closing of the station. Party agents, candidates' representatives, journalists, observers and witnesses chosen among voters may be present. Results are posted outside the polling station by the presiding officer and transmitted to the compilation center at CEC. From the CEC results are sent to the CER and thereafter transported to the CENIT.

3.3. Transmission of electoral results

The minutes of electoral results were collected from Polling stations to CEC, then from CEC to CER where a scan kit scanned and sent the minutes' results without analyzing them to CNTDI by very small aperture terminal (VSAT). After that all results were duly sealed in packages and were collected by assigned persons to escort the physical minutes (original hard copy) to the capital city where the CENIT headquarters are located for verification and analysis before they could be approved and captured as preliminary results at CNTDI.

3.4. Announcement of preliminary results

The Chairperson of the CENIT announces the preliminary results of presidential elections within 10 days after receiving duly sealed results[125]. The same timeframe is allocated to the CENIT for the legislative results.[126] The results are published by polling station.

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[125] Article 26 of Loi N0 2012-015 relative à l'élection du premier Président de la République de la Quatrième République

[126] Article 53,1 of Loi N0 2012-016 du 1er aout 2012 relative aux premières élections législatives de la Quatrième République

During the elections, the CENIT displayed a big screen at it headquarters for accredited observers and officials to access, follow and monitor progress on the results processing and announcement.

3.5. Proclamation of final results

All complaints on both presidential and legislative elections are made before the special electoral court. The court has 15 days starting from the date preliminary results are received from the CENIT to proclaim the final results for the presidential elections[127] and 30 days to proclaim the final legislative results[128]. As indicated above, all petitions should be addressed prior to the announcement of final results.

4. Good practices

The voting process in the 2013 Malagasy elections followed the rules and was in accordance with good practices as detailed below:

- The allocation of a timeframe for the announcement of the preliminary results by the CENIT as well as the final results by the special electoral court was important. This balanced the expectations of the voters to have the results timeously and the need to guard against electoral fraud and errors
- The results were announced and published by polling station for transparency. This allowed any person to monitor and contest the results if they were not announced as displayed at the polling station after the voting process;
- The provision of a copy of the results minutes for each polling station to clearly identified institutions or entities meant that there was transparency as well as checks and balances.

Post-Electoral Process

It is a good practice for the Election Management Body to undertake an internal and external evaluation and assessment exercise on lessons learnt and success stories in order to amend and rectify mistakes and better plan for future operations.

The Chairperson of the CENIT took her team and institution with support from the PACEM/UNDP and OIF on this accountability exercise. The first exercise was done internally, thereafter an evaluation seminar was convened to publicly discuss successes, shortcomings, challenges and the way forward. A final report on CENIT's activities was drafted, handed over to the President of the Republic and an audit of assets was undertaken.

According to Article 73 of the CENIT law (Loi N0 2012-004), the President of the Republic terminates the general mandate of the CENIT and its branches by a decree approved by the Council of Ministers. It is my view that the elected government should capitalize on the experiences and skills gained by the CENIT's employees

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[127] Article 27 of Loi N0 2012-015 relative à l'élection du premier Président de la République de la Quatrième République

[128] Article 53,2 of Loi N0 2012-016 du 1er aout 2012 relative aux premières élections législatives de la Quatrième République

during the 3 years of international electoral assistance. The human resources are a legacy of CENIT and the international community to be utilized in establishing the new EMB. Part of the recommendation of the seminar was to strengthen the capacity of the CENIT. In June 2014 The African Union/Electoral Unit organized a one-week BRIDGE training for national commissioners. The training offered an opportunity to reflect on what the CENIT had achieved and how best to improve in future.

Conclusion

It is true that elections have become the cornerstone of democracy. Considerable resources (financial, material, human) are invested in the electoral process. Most developing countries seek international support in organizing their elections. Africa should move away from financial dependency on donors for elections whilst its leaders loot state resources for selfish reasons and political gain. Unfortunately, it has also been observed that elections have become one of the causes of political crises and conflicts affecting the Africa continent, often leading to armed conflict. As a result, citizens may ask why a country should spend a lot of money on elections whilst people are suffering, do not have clean water, safe roads, healthcare or schools.

An electoral legal framework that is in line with international and regional norms and standards is critical. It is also equally important to have elected representatives in a country so as to strengthen democratic institutions as well as political and technical leaders in government and the EMB who apply the law, while promoting discipline and dialogue with all stakeholders regardless of their opinion and political affiliation. Elections often create tensions amongst citizens and sometimes within and amongst institutions. The EMB and the country as a whole should be equipped to prevent conflicts or resolve these through legal or other agreed legitimate mechanisms of electoral dispute resolution.

Civil society organizations must be allowed to monitor and observe the electoral process. The political parties should allow more women candidates and bring democratic rules in the functioning and management of their political parties to improve the level of democracy and responsibility when they come into power.

It is not possible to strengthen democracy in Africa if countries, member states of regional economic communities and the African Union do not seek the observance of fundamental human rights, do not improve the social and economic situation of their citizens and do not impose strong sanctions against sitting presidents who change their countries' constitutions for their personal ego and interest and perpetrate gross human rights violations.

The Role of the Legal Profession in Promoting Democratic Elections in the Southern African Development Community (SADC) Region

By Makanatsa Makonese[129]

Introduction

The role of the legal profession in the electoral processes of any country cannot be over-emphasised. This is because elections by their nature are a legal process and lawyers by virtue of their legal training and expertise on legal issues become an indispensable part of the process. As Mamman Lawan Yusufari has said:

"The electoral process is all law-woven: it is set in motion by law; it is expected to be carried out according to law; and any disputes arising from it are settled by law"[130]

In essence therefore the role of the law and the legal profession is infused in the whole electoral cycle from beginning to end. It is in light of this realisation, that I will discuss the role of the legal profession at the different stages of the electoral cycle, i.e. in the pre-election period, during the election period and in the post election period.

It has to be realized however that in carrying out their responsibilities, lawyers like any other citizens will be carrying out their patriotic duties and therefore their contribution should be viewed in that light. The only difference is that they are able to provide technical input into the whole electoral system and process and in the process provide specialized contributions. In the same vein, there are other professions that make equally important and specialized contributions in the electoral processes in any country. The media and media professionals for example play an important role in ensuring access to information on key issues and ensuring that citizens have the requisite information to allow them to make informed electoral choices and shape their participation options in electoral processes. The focus on the legal profession in this paper is therefore not meant to portray this profession as more important or more critical than other professions or the rest of the citizenry involved in elections in one way or another. The focus on the legal profession on the other hand is meant to portray the specialized role that lawyers can play, which however is only a limited aspect of a multi-dimensional process. The role of the legal profession is detailed herein using the various stages of the electoral cycle as an analytical platform. The electoral cycle is an important tool to utilise in assessing and analyzing the role of the legal profession in the electoral process because it is:

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[129] Executive Secretary/ Chief Executive Officer, SADC Lawyers' Association

[130] http://www.gamji.com/article6000/NEWS6867.htm

"built upon the premise that elections are comprised of a totality of interacting elements where a wide range of legal, technical and organisational aspects must be considered simultaneously"[131]

Whilst the reference to organisational aspects in this instance could relate to organisations that are directly tasked with the running of elections and state linked entities that support such a mandate as dictated by law, it must also be accepted that in modern democracies, there are many non-state actors that are allowed to play a role in electoral processes.

1. Lawyers and the Pre-Election Period

The pre-electoral period often focuses on the planning and implementaion as well as training and education aspects of an election. The pre-election period in any country is a very sensitive phase in the electoral cycle as processes that take place during this phase have a significant bearing on how the elections will be managed and the acceptability of the result by relevant actors and structures, from ordinary citizens, political players and the international community. During this period, lawyers would often be expected to step in through their conventional role as litigators in the event of disputes spilling into the courts. However, lawyers are also often contributing towards electoral processes during the pre-electoral process through other non-conventional initiatives, especially those related to civic education. This is particularly important in an age where electoral laws allow organisations other than those that are state linked to carry out voter and civic education, albeit under the watchful eye of the election management body. In addition, lawyers can also participate in alternative dispute resolution mechanisms, in contributing towards legal and constitutional reforms and even participating as politicians in the electoral process.

1.1 Lawyers as litigators in the pre-election period

Electoral disputes often spill into the courts and lawyers are called upon to take up these disputes on behalf of clients. This may be in ordinary courts or in electoral courts that are established to deal specifically with election related cases. With increased voter and civic education in the region and efforts to ensure that citizens are interested in their own governance, the area of electoral law and with it attendant disputes have been very complex and wide ranging. As a result, whilst only a few years ago, citizens, political parties and other actors in elections may have allowed many election related anomalies to go without contestation, there is increased scrutiny and attendant challenges to ensure that every anomaly is properly addressed. However, it is widely aknowledged that most election related litigation takes places during the electoral period as this is when most of the contestations take place.

1.2 Lawyers in Alternative Dispute Resolution

[131] Bargiacchi F et al, (2011). The Electoral Cycle Approach: Effectiveness and Sustainability of Electoral Assistance. ISPI - Istituto di Studi di Politica Internazionale – Working Paper

Whilst lawyers are often viewed as litigators, there is also a growing area of legal practice that deals with alternative dispute resolution, in particular mediation. That area of practice is particularly important in the field of elections in that non-adversarial methods of resolving election disputes often lead to the creation of a peaceful environment, pre, during and after elections.

Some of the electoral laws in the region already have provisions for dispute/conflict resolution, particularly at political party and/or electoral commission level[132] thereby signifying the importance that is placed on creating understanding, resolving disputes amicably where necessary and possible and creating a peaceful environment during electoral processes. It must also be realised that ADR plays an important role in Africa where court based dispute resolution is often slow, expensive and inaccesible to many who may require it. At the same time, it must however be realised that often the electoral court and litigation system is developed in a way that allows for speedy resolution of electoral disputes, with time limits set for the lodging of electoral petitions and the rendering of rulings by the courts. In electoral processes, where citizens are desirous of certainty and immediate outcomes, it is important therefore to have dispute resolution mechanisms that are quick, efficient and that provide answers to allow citizens to move on, either with the campaigning, voting or even with their lives after the elections. ADR therefore is important throughout the electoral cycle and lawyers can play an important role in this regard, especially with the creation of clear laws that spell out the role and processes for ADR and the role of various actors therein. While ADR appears to have been developed as a concept at international level, it must be realised that it is in fact an African principle and

"fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation."[133]

It is therefore a concept that resonates with many of the citizens within the African context, which must be nurtured and encouraged in the spirit of devising African solutions to African problems.

Although some scholars have argued that there is no place for ADR within the election context, it has to be realised that the two cannont be separated, especially

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[132] For example, Section 5 (1) of the Electoral Commission Act of South Africa, gives the Electoral Commission powers to "establish and maintain liaison and co-operation with parties". Using this provision and Section 23 of the same Act which allows the Commission to make regulations, the Electoral Commission of South Africa made the Regulations on Party Liaison Committees, 1998. In Zimbabwe, the Electoral Act, Chapter 2:01 also provides for multi-party liaison committees in section 160 A-D and there is an Electoral Code of Conduct for Political Parties and Candidates. The aim of these legal provisions is to address conflict in electoral processes.

[133] Uwazie E. E (2011). Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability. Africa Security Brief. A Publication of The Africa Center For Strategic Studies, No 16, November 2011

with the realisation that elections themselves are a form of dispute resolution.[134] Electoral laws must therefore clearly spell out the role and place of ADR in electoral dispute resolution as well as spell out the roles of various actors including the legal profession. The added advantage of including the legal profession in the process are that:

1. many of them are already trained in ADR mechanisms and would require minimum specific training to be able to deal with election-specific ADR
2. The profession is one of the most organised ones at national and regional level in SADC and working through the law societies can help in identifying experts, some of whom are prepared to undertake work on a pro-bono basis.

The net result however is that both litigation and ADR have their own benefits and challenges. As such their utility and usefulness must be weighed in different settings to determine the most appropriate at any given time but actors in electoral processes must be open to the utilisation of various methods and systems and involve various stakeholders including the legal profession in the process.

1.3 Lawyers' role in constitutional and electoral law reforms

Electoral law and constitutional reforms are in many instances a precursor to elections in many of the countries in the SADC region. The changes are often necessitated by identified gaps in previous elections which are brought forward by citizens, election observation teams, political parties, the electoral management bodies and other institutions. Electoral law and constitutional reforms are also necessary in post-conflict situations, where the aim is to resolve contentious issues that might have sparked strife. The aim is to create a legal and constitutional environment that makes it possible for citizens and other interested parties to exercise their rights in a free and conducice environment.

Recent developments in the SADC region have shown that constitution making and electoral law reform are now a public process that requires the full participation of citizens. Following the highly contested 2008 elections in Zimbabwe, one of the major tasks that were given to the resultant Government of National Unity was the promulgation of a new constitution and the review of electoral laws in preparation for the next elections that were held in 2013. Although the constitution-making process was not without controversy, a positive development was that it was developed through public participation processes, which included consultations before and during the drafting of the constitution and a referendum to determine its acceptability by the citizens. The electoral law reform process was less participatory. In Zambia, a public constitution making process was also embarked on in 2011 but it soon degenerated into a constitution-making crisis when government dragged its feet on the finalization of the process. The process has now stalled and four years

[134] Green R (2012). Mediation and Post-Election Litigation: A Way Forward. Downloaded from http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2535&context=facpubs on 25 May 2015

down the line, Zambia does not have a new constitution. In Tanzania, a similar process was embarked on in 2011 with the promulgation of the Constitutional Review Act. The new constitution is yet to be adopted after delays with voter registration led to the postponement of a national referendum on the new constitution, which was meant to be held on the 30th of April 2015.

The most important aspect of all the above-mentioned constitutional review processes was/is public participation. Whilst law societies and lawyers participate in these processes as part of broader civil society, it is also important to acknowledge the specialized technical input that the legal profession can make into these processes by virtue of their legal training. In many instances, the legal profession is approached by the relevant government departments to provide specific inputs into the constitution making and law reform process as individuals but also as the organised profession. Sometimes the legal profession is approached by civil society to advise on civil society led initiatives to contribute in the constitution making or law review processes. In other instances, the profession has been pro-active and produced public documents, alternative drafts and model constitutions and laws for presentation to the public and relevant state institutions for consideration. Some Legal Practitioners Acts in the region provide that law societies should have as part of their roles, the representation of the views of the legal profession and the promotion of law reform[135] thereby giving the legal profession the mandate to participate in constitutional and law reform processes, often as an impartial and independent body. The Law Society of Zimbabwe embarked on a process to draft a model constitution in 2009, following the announcement by government of the commencement of the constitution making process. The Law Society justified its involvement in the process and in this manner by stating that:

"There can be no greater reform in the law than the preparation of a new constitution, and the Law Society and its members have a vital interest in the process…….. Moreover, the Law Society is in a unique position to aid the constitutional process. It is a non-political body, so its decisions are not affected by partisan politics. Through its members it is the greatest repository of legal skills in the country, and through its contacts with other professional bodies it can call on legal expertise from elsewhere in the region."[136]

To ensure the participation by as many members as possible during the model constitution making process, the Law Society of Zimbabwe adopted the following methodology:[137]

i. Consulted with members on the need for the law society to participate in the constitution making process during their winter school in 2009
ii. Following an endorsement by the members, they identified 17 researchers to study the 17 thematic areas that had been identified by the constitutional parliamentary committee to drive the constitutional making process

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135 Section 53 of the Legal Practitioners Act, Zimbabwe,
136 Foreword by the then President of the Law Society of Zimbabwe, Mr Josphat Tshuma to the Law Society of Zimbabwe Model Draft Constitution.
137 Ibid

iii. After much debate and discussion, these themes were discussed during the law society summer school the same year. A conference was convened to run concurrently with the summer school, specifically dealing with the draft model constitution
iv. Constitutional experts from within and outside Zimbabwe were identified to lead the discussions.
v. The Law Society council then identified drafters from amongst their members to capture the views that had been expressed during the research and consultative processes into a draft model constitution
vi. Another conference was convened for the profession to discuss the draft model constitution leading to a refinement process and the release of the model constitution for further public debate and utilisation in the constitution-making process.

In the same vein, law societies from other jurisdictions in the region can engage in similar processes to ensure that their expertise is put to good use for the development of the region and the public interest. There have been arguments at times that the legal profession is not necessarily neutral in its engagement with national processes but that they do so from a partisan approach and in order to push identified political agendas. It must be accepted that lawyers as individual citizens often have personal political positions and opinions, with many openly supporting or engaging in activities of political parties. However as the organised profession and as an institution, the law society or bar association is required to be neutral and non-partisan in dealing with political and national processes to ensure the intergrity of the profession and respect for its views on political and national processes such as elections as well as its role in promoting human rights and the rule of law.

2. Electoral Period

The electoral period, i.e the few weeks before and after election day as well as election day itself can often be highly charged and highly contested. The ACE Project[138] describes the electoral period as the time when candidate nominations take place, campaigning is undertaken, voting takes place and the votes are counted, results tabulated and also announcements made. It can be a tension filled environment leading to serious contestations and in bad scenarios to physical violence and other forms of violations by citizens against each other, by the state against citizens and political parties against each other, the state and state institutions and individual citizens. The legal machinery is therefore often set in motion in both the criminal justice system and the electoral courts/ civil courts to address these contestations. Lawyers would therefore again be on high alert to act as counsel or to give legal advice to the various parties involved in these contestations. Other than being engaged as counsel, lawyers can also assist by giving public legal opinions on electoral issues not only during the electoral period but throughout the electoral cycle. In situations where there are breaches of electoral laws, or the fundamental rights of citizens by political office contestants or other actors in the electoral process, a position statement from the law society not only

[138] http://aceproject.org

helps in setting the record straight but also in explaining the legal position for the benefit of members of the public and other interested parties. Where the public position or explanation by the legal profession is contested by political or other actors, as is often the case, it however still helps in creating and sustaining public debate on the contested issues.

2.1 Lawyers as Election Observers

In recent years, it has become increasingly important and even necessary for lawyers and law societies to participate in election observation. In this regard, the SADC Lawyers' Association has been driving election observation in the SADC region by the legal profession. Over the past few years, the SADCLA has partnered with the Law Society of Zimbabwe, Law Association of Zambia, Law Society of Swaziland, Law Society of Botswana, the Mozambique Bar Association, the Law Society of South Africa and the Lesotho Law Society in election observation in the region. It is acknowledged that there has been an increase in the number and sizes of election observation missions in the region over the years leading to questions being asked about the added value of these missions to the region especially when this is juxtaposed against the resources that have to be expended in order to deploy an election observation mission. Questions therefore have been asked about whether the increase in the number and sizes of election observation missions has helped in improving the democractic space in the region or whether such processes have become superfluous. These questions are legitimate and need to be seriously considered by all actors and be adequately addressed.

In answering this question, I argue that it is important for all actors in election observation to identify their niche area and go into elections with a clearly defined contribution that an election observer mission can make in the electoral process. In light of this reality, the legal profession in SADC through the SADC Lawyers' Association is increasingly realising their role in assessing the level of compliance with electoral laws by the various actors in elections and their role in election reform. This calls for the legal profession to adopt a long term view on election observation as opposed to mere deployment of lawyers in a country around election day. This long term view can be realised by ensuring that the legal profession adopts the following strategies in its election observation work

- Engagement with the election management bodies, governments and civil society actors well ahead of elections
- Rooting election observation in grounded research on electoral laws, institutions and processes and advancing recommendations for reform where necessary well ahead of the elections
- Focusing election observation on assessing compliance with national laws as well as international instruments on elections and democracy such as the SADC Principles and Guidelines Governing Democratic Elections and the African Charter on Democracy, Elections and Good Governance
- Providing recommendations on electoral law and constitutional reform as well as compliance with international and regional instruments on elections and good governance.

3. Post Electoral Period

Like the pre electoral and electoral period, lawyers are involved in litigation and ADR in the post electoral period. However increasingly lawyers at this stage are also engaged in national debates on issues such as reconciliation, electoral reform and using legal and constitutional provisions to create national cohesion and allowing the country to move on post elections.

4. Challenges

In taking up election related duties as part of civil society, as the organised legal profession and as individuals, lawyers have also met challenges along the way. Some of the challenges are minor and can be dealt with by the shrugging of shoulders but many have been serious and in some instances life threatening. The challenges that the SADCLA has identified in relation to lawyers working on elections and electoral processes include the following:

- Labelling of lawyers: Often lawyers are identified with their clients' causes and labelled as members of the political parties that they will be representing or the political parties to which their clients belong. This happens against the provisions of the United Nations Basic Principles on the Role of Lawyers which state that:

"Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."[139]

Where lawyers are labeled as belonging to one or other political association as a result of carrying out their professional duties, the consequences are that they can be abused by political party supporters and other members of the public in the event that they do not agree with the perceived party or individuals that the lawyers will be representing. The abuse can be verbal, emotional and even physical. Often the abuse can extend to family members and other associates and can include exposing the lawyers' private lives for "maximum effect".

- **Withholding of Work**

The act of defending or providing legal assistance to an opposing party or individual in elections also means that the other side (s) will withhold work from a lawyer or their law firm. In any country it is well-known that the government is the biggest consumer of goods and services, including legal services. Often lawyers that have represented opposition political parties in election related matters are denied government work by the ruling party once it emerges as such. The result is that by exercising their professional duties and their right to work and earn a living, lawyers end up being denied the same right, choking their businesses in the process. In fear of such reprisals, lawyers end up refusing to represent some actors in electoral processes with far reaching consequences on the lawyers and their practices, but

[139] Article 18 of the UN Basic Principles on the Role of Lawyers (1990)

also on the clients who are then denied an opportunity to be represented by a lawyer of their choice.[140]

- **Threats of arrest and detention on politically motivated charges**

Representing clients in electoral petitions and related cases can also pose challenges in relation to the liberty of lawyers as charges are often trumped up to scare, silence and stop lawyers from representing certain candidates. Following the 2013 Zimbabwean harmonised elections, a court handling an electoral petition in the case of Morgan Tsvangirayi vs. the Zimbabwe Electoral Commission and Others[141] ordered the arrest of lawyers who were handling the case on behalf of the petitioner for contempt of court arising out of an affidavit that had been deposed to by their client. In reaching this decision, the court reasoned that:

"I cannot however conclude my judgment without expressing my displeasure at the unwarranted attack on the integrity and dignity of this court and the entire judiciary of this country perpetrated by the applicant and his lawyers by association…….Having aligned themselves with their client's views and his perception of this court and the entire judiciary by filing the despicable dossier of papers in court, the applicant's lawyers cannot seek to dissociate themselves from their client's contemptuous conduct. They must share collectivity responsibility as they appear to have acted in common purpose and seek to justify and sustain those views in a court of law"

With that, the court directed that the order be served on the Attorney General and the Director of Public Prosecutions in Zimbabwe for appropriate action to be taken against the lawyers. The effect of this pronounciation by the court was to identify the lawyers with the cause of their client and to seek to punish them for representing that client. The ruling was however overturned on appeal to the Supreme Court.

- **Threats to Life**

The work of lawyers in the area of elections also has implications on the security of lawyers and their right to life. Often the threats to personal security and subsequent deaths cannot be linked directly to the lawyers' work in the area of elections and constitutional issues, and neither can the perpetrators of the violence and assasinations be identified. It is however a worrying development to the profession when lawyers that are directly involved in elections and governance related work are attacked, physically abused or killed at a time when they are actively involved in such work. The conclusion that any reasonable person can draw under the circumstances is that such attacks are directly linked to their work. On the 3rd of March 2015, Mozambique lost one its most prominent constitutional law experts in a cold blooded murder on the streets of Maputo. Professor Gilles Cistac was a lecturer at the Universidade Eduardo Mondlane in Maputo and was involved in public debates on how the constitution of Mozambique could be used to support the demand for

[140] Article 1 on the UN Basic Principles on the Rights of lawyers state the entitlement of all persons to call upon the assistance of a lawyer of their choice to protect and establish their rights

[141] Case Numbers EC 6, 27 and 28 of 2013

decentralization by the opposition Resistência Nacional Moçambicana (RENAMO) following the October 2014 elections. Professor Cistac had been attacked through social media by a Facebook account holder who called him/herself *"Calado Calachnikov"* which could be interpreted to mean "secret machine gun" who accused him of being a spy[142]. He also openly received opposition to his views from other political actors. As such when Professor Cistac was eventually shot and killed at a time when the debate was raging, it was difficult not to link his death to the election related and constitutional arguments that he was publicly advancing.

The effect of these various threats on lawyers is to discourage those actively involved and those considering active involvement in electoral, democracy and good governance work from continuing or participating in such work. This in turn leads to the stifling of public debate and proffering of legal opinions on key electoral and governance issues of concern to any country.

5. Conclusion and Recommendations

Lawyers and civil society actors in general play an important role in promoting democractic and credible electoral processes in any country. Their role should therefore be viewed as that of mutually reinforcing state institutions and other actors in political and electoral processes and not be seen as a threat to such processes. Collaboration between the legal profession and state institutions at national and regional level in the SADC region should therefore be vigorously pursued to ensure the realisation of free, fair and credible elections that can only be achieved through the development and implementation of credible electoral laws as well as the creation and strengthening of viable electoral and related institutions. It is therefore important that the following recommendations be taken forward to achieve these objectives:

- that there be stronger relationships between electoral management bodies, other state institutions working on elections and the legal profession at national and regional levels
- that the legal profession be given an opportunity for direct input in the creation and/or reviewing of national electoral laws, constitutions and regional instruments on elections, democracy and good governance given their training and expertise.
- whilst cooperation with individual lawyers can help in meeting the stated objectives, a lot more can be achieved when the legal profession is approached for intervention as an organised entity and through the lawyers' bodies such as the law society or bar association. Other specialised lawyers' organisations such as the women lawyers' associations, human rights lawyers associations etc can also provide targetted and specialist legal and human rights services.
- Although lawyers are trained in litigation and alternative dispute resolution, they can also work with the national election management body towards elections to receive specialised training to equip them to deal with election related disputes.

[142] http://allafrica.com/stories/201503040921.html