



Constitutionalism, the Electoral System and Challenges for Governance and Stability in Zimbabwe

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Abstract

In February 2000, Zimbabweans went to the polls to vote on a draft constitution for their country. The draft contained some important provisions, amongst other things, for the reform of the country's electoral system. The draft was rejected and a bitter *general election* campaign ensued in the second quarter of 2000. The general election held in June 2000 and the presidential elections in March 2002 were the most violent in Zimbabwe's electoral history. These developments raise significant questions relating to constitutionalism and the electoral process in Zimbabwe. It was an admission that both constitutional and electoral reform were imperative and indeed overdue that a state-appointed *Constitutional Commission (CC)* was set up in 1999 after a civil

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society-driven one, the National Constitutional Assembly (NCA) had been founded earlier in 1998. In particular, the political developments since 2000 have pointedly highlighted the challenge to address the increasing deficit in democratic governance and stability in Zimbabwe. This paper attempts to assess critically developments relating to constitutionalism and the electoral system, the linkages between them, and their significance for governance and stability.

Introduction

This article investigates the interconnectedness of processes of constitutionalism, electoral system and democratic governance in Zimbabwe. It begins by outlining the post-independence political and constitutional history of Zimbabwe. It considers the significance of the methods of coercion and violence inherited from the liberation struggle for the political process after independence. The centrality of the Lancaster House independence constitution in limiting the flexibility of the post-colonial state in the political and economic spheres is considered. In the second section of the paper, the issue of constitutionalism is then addressed showing the absence of a participatory process in constitution making and the making of constitutional amendments. This is highlighted in the account of the debate over the process of constitution making in 1999-2000.

The electoral system is then outlined, and its strengths and weaknesses assessed in the light of the elections held in the 1990s, in 2000 and 2002. The reforms that were proposed to make the system transparent, autonomous, efficient and fair are next examined. There were conflicts generated in the system especially in the 2000 and 2002 elections but unfortunately constructive conflict management and resolution mechanisms had not yet been put in place. However, some comparative examples of such mechanisms drawn from other countries' experiences are outlined as a first step in considering possible options. The last part of the paper considers the key challenges for democratic governance and stability in Zimbabwe in the light of the gaps in its constitutional and electoral systems.

The Political and Constitutional Background

Zimbabwe's political and constitutional history is largely textured by the form, which nationalism and the liberation struggle took in the 1960s and 1970s, and the constitutional settlement negotiated at Lancaster House in 1979. A conventional nationalist movement which arose in the 1950s was confronted by an obdurate white minority regime that refused to concede independence but instead went on to declare a unilateral declaration of independence (UDI) in 1965. The regime used repressive means to try to contain African nationalism but was ultimately unsuccessful. The nationalist movement then mutated into a liberation movement that grew in strength and spread its tentacles in the 1970s and subsequently forced the minority regime to the negotiating table.

Analyses of post-independence political developments should not underestimate the role which violence and other forms of coercion played in colonial regime strategies to block independence, and in nationalist politics themselves. The use of detention, torture and killings was perpetrated by the colonial regime but nationalists also utilised violence and intimidation in mobilising and competing for supporters (Ellert 1989, Sithole 1999). In the 1960s, there was intense rivalry between the Zimbabwe African People's Union (ZAPU) under Joshua Nkomo and the Zimbabwe African National Union (ZANU) led by Ndabaningi Sithole. The liberation struggle itself, which commenced in the mid-1960s, claimed more than 30 000 lives, while many were injured, traumatised and displaced. Violence thus became ingrained in the Zimbabwean political culture, and this would have long-term consequences for the shaping of post-independence politics. Just as state violence as a method of repression had been a prominent feature of the minority regime before 1980, so it would also be employed in the suppression of political dissent in the Matabeleland provinces in the early 1980s. Elections were also tainted with coercion and violence in the 1980s and 1990s although the levels varied.

An explanation has been proffered to explain the continuity in the political culture of repression which relies on coercion and violence rather than peaceful resolution of differences and contestation. It is that intense colonial repression and war ruled out:

open, democratic practice and tolerance and alternative views. It fostered what could be termed a 'culture of authoritarianism' that was

certainly compatible with state socialist ideology of nationalist leaders at the time, as well as a 'traditionalist' discourse which stressed strong leadership and unquestioning loyalty.... Violence in post-independence Zimbabwe was the consequence of a strong state, itself in many ways a direct Rhodesian inheritance, and a particular interpretation of nationalism (Alexander, McGregor & Ranger 2000).

This is, however, to anticipate a discussion in a later section on the electoral system and the coercion and violence that accompanied the key elections held in 2000 and 2002. What have been the principal developments in the political arena since independence in 1980? The 1980 elections ushered in Zimbabwe's first black government which was internationally recognised. The proportional representation (PR) system was used in those elections. A five per cent threshold was used in allocating seats in eight provinces. Three parties, ZANU-PF (Patriotic Front) under Robert Mugabe, PF-ZAPU under Joshua Nkomo and the United African National Congress (UANC) led by Abel Muzorewa won the black-contested seats. ZANU-PF won 57 of the 80 common roll seats, PF-ZAPU 20 seats and the UANC three seats. However, this was the last election in which the PR system was used. The subsequent elections in 1985, 1990, 1995 and 2000 were held on a 'First-Past-The-Post' (FPTP) system following an amendment to the Electoral Act. After further amendments to the Lancaster House constitution itself, an Executive Presidency replaced a ceremonial presidency in 1987, and the 20 seats specially reserved for the white minority were abolished.

In the 1985 elections, ZANU-PF increased the number of its parliamentary seats to 64 while PF-ZAPU saw its own decline to 15, and ZANU-NDONGA won only one seat. As we observed elsewhere, the introduction of the FPTP system provided a clear advantage to ZANU-PF (Sachikonye 2001). However, the overall context in which political competition existed between ZANU-PF and PF-ZAPU was one of conflict in the form of a civil war in the Matabeleland and Midlands provinces between 1982 and 1987. A negotiated compromise was reached in 1987 to ensure a cessation of hostilities, and pave the way to a Unity Accord to cement a merger between the two parties. Following the merger in 1989, the new party, still called ZANU-PF, easily dominated in the elections in 1990 and 1995. It won 117 seats out of the 120 directly elected seats in both 1990 and 1995. ZANU-PF had attained a dominant-party status but demands began to be made for a review of the constitution and electoral system in the mid-1990s. These

demands emanated from opposition political parties and civil society organisations. The decline in faith in the constitutional and electoral set-up was expressed in the boycott of the 1995 and 1996 elections by some parties.

Let us relate these political developments to the constitutional context. As we have already observed, Zimbabwe's independence constitution was negotiated and crafted at Lancaster House in 1979. It bore resemblance to most independence constitutions that were the outcome of an agreement between a colonial power and representatives of the colonised peoples. There was no broad participation in this model of constitution making. Nevertheless, the Lancaster House constitution was premised upon a recognition of liberal notions of constitutionalism. Hence its incorporation of the concepts of separation of powers, independence of the judiciary, supremacy of the legislature over the executive, public service neutrality and governmental accountability (Ncube 1991). The constitution therefore sought to place extensive limitations on powers of government vis-à-vis individual rights, and sought to check the powers of the executive arm of the state.

A provision stipulated that the constitution should not be changed substantially for the next ten years. This was designed to ensure that the transition to independence would not entail a substantial shift in social and property relations. This was to have far-reaching implications especially in the realm of land rights for a country whose rural population constitutes about 65 per cent of the total population. In retrospect, the Lancaster House constitution, like most constitutions, was no more than a compromise between competing interests. The absence of wider and popular participation in its making robbed it of broader legitimacy amongst the generality of Zimbabweans. As it was later observed, while the constitution served an important purpose of transferring power from a minority to a majority government, it was not necessarily a foundation for good governance (Agenda 1998). The constitution was described as 'an outdated, imposed and transitional instrument...which does not represent the aspirations of the people for good governance and development' (Hlatshwayo 1998).

Clearly, there were notable imperfections in the constitution with respect to clauses on political and economic arrangements. At the same time, however, the post-independence government did not prove to be an ardent reformer in terms of democratisation. While majority rule for the first time extended voting rights and participation in the electoral process to all Zimbabweans, democratic values of tolerance and respect for the 'rule of law' were not strictly observed by the Mugabe government. The emphasis of the

ruling ZANU-PF party was largely on the consolidation of its hegemony over every layer of society. Dissent was frowned upon, if not crushed. It did not take long before a government of national unity collapsed under the weight of tensions between ZANU-PF and PF-ZAPU, resulting in the above-mentioned civil conflict between 1982 and 1987. Many human rights violations were committed during that conflict, in which thousands were injured, killed and displaced. The repressive tendencies of the post-independence government were given full vent during that period.

The quest for hegemony also took the form of an orchestrated campaign for a *de jure* one-party state by ZANU-PF in the late 1980s. This was aimed at self-perpetuation in power, but it was hardly original, as most other African countries were then still under one-party state rule. There was a strong constituency in the ruling party for this type of authoritarian political arrangement, and the political leadership pandered to this undemocratic sentiment. However, it was largely due to concerted opposition from civil society and opposition political parties that the one-party state project was shelved in the early 1990s (Mandaza & Sachikonye 1991). In the process of a spirited campaign against the project, student and labour union activists were swept into detention. However, through manipulation of the electoral system and monopoly access to state resources for campaigning purposes, ZANU-PF was successful in ensuring a *de facto* one-party state. By the 1990s, political hegemony was nevertheless insufficient in creating conditions for stability and economic growth. Indeed, the economy began to decline precipitously in the late 1990s. By the close of the decade, there was a groundswell of opinion that sought change from conditions of authoritarianism as encapsulated in the *de facto* one-party state and from the unmitigated economic decline. This was the broad context in which the movement for constitutional reform originated.

Constitutionalism: The Debate over a New Constitution

The subsequent debate about constitutional reform was sparked by what was viewed as arbitrary amendments to the Lancaster House constitution for the purpose of concentration of power in the presidency. The most far-reaching was the 1987 amendment which created the executive presidency. Yet there was no participatory process encouraged in this substantial amending of the constitution. As it was observed:

the very centrality of the constitution would demand that the process of its development would be inclusive and truly 'national'. The process leading to the making of the Lancaster House constitution was widely perceived as weak.... As a result, numerous amendments were effected – many of which were also perceived to have largely entrenched the executive branch of government. It is significant, that the people were never actively involved in any of the amendments since none of the 15 amendments were subject of official public discussion beforehand nor was there extensive debate in Parliament itself (Centre for Democracy and Development 2000).

It was against this background of dissatisfaction with the mode of approach to constitution making via executive amendment that the chorus grew for reform. In sum, the question raised was whether the idea of constitutionalism as a means of regulating and limiting the exercise of political power had found root in Zimbabwe's system of government (Ncube 1991).

As we observed above, the ZANU-PF government approached the matter of constitution in a haphazard manner. A total of 15 amendments had been made to the constitution by 2000 with most of them aimed at centralising power within a powerful presidency. Amongst some of the far-reaching amendments were the following:

- The repeal of dual citizenship in 1983,
- Award of powers to the President to appoint members of the Judicial Services Commission, the Electoral Supervisory Commission (ESC) and the Attorney-General in 1984,
- The abolition of the Senate and the creation of a 150-seat Parliament of which 30 seats were appointed by the President in 1989, and
- The compulsory acquisition of land for resettlement in 1990.

In particular, the president's powers of patronage and autocracy were enhanced with the provision to appoint up to 30 members of parliament.

Although the provisions which restricted changes to the Lancaster House constitution expired in 1990, the government was somehow not keen to change it to improve conditions for democratisation. There did not exist a political vision relating to how to craft a more responsive constitution in the post-Lancaster House era. Issues such as electoral reform, land redistribution and gender equity were not addressed through a constitutional review during

the early 1990s. This was partly explicable in terms of a weak political opposition in the aftermath of the merger between ZANU-PF and PF-ZAPU in 1989. Furthermore, civil society was not as active and strong as it would become in the late 1990s.

It was therefore not surprising that the initial clamour for constitutional review emerged from outside the ruling ZANU-PF party. Civil society organisations and opposition parties sought constitutional reform because the existing one was seen as serving the interests of the elite in power. In their view, no significant political and social change could occur without the rewriting of the constitution. More generally, the regional conjuncture was one in which progressive constitutions were being crafted in such countries as Botswana and South Africa. The first salvo was fired by a broad alliance of civil society organisations that founded the National Constitutional Assembly (NCA) in 1998. The NCA spelt out its objectives as follows:

- to identify shortcomings of the current constitution and to organise debate on possible constitutional reform,
- to organise the constitutional debate in a way that allows broad-based participation, and
- to subject the constitution-making process in Zimbabwe to popular scrutiny in accordance with the principle that constitutions are made by and for the people (National Constitutional Assembly 1997).

Some of the more obvious shortcomings of the existing constitution have already been referred to in preceding sections. More specifically, the NCA singled out several clauses in the constitution which it argued were not justifiable in a democratic society. It was observed, for example, that the protections in the Bill of Rights were not as wide as is desirable in a democratic society (National Constitutional Assembly 1998). It was further argued that the electoral process as defined and prescribed in the constitution was not conducive to the holding of 'free and fair elections'. Some 14 amendments had been made in a space of 17 years and such a process undermined the constitution, it was asserted. It was against this background that the NCA strongly argued that 'any changes or amendments to the constitution need the participation and approval of the people'.

How did the ZANU-PF government respond to this growing pressure for constitutional reform? It was reluctantly persuaded that such reform was overdue but its authoritarian tendencies made it difficult for it to craft a

consensual approach to reform with other parties including the NCA. Not surprisingly, the government sought to monopolise the process at every stage. There were at least three positions, at the beginning of 1999, on how constitution making should be conducted. Two of the positions emanated from within ZANU-PF itself. The first was termed the 'Mugabe Way' that drew from President Mugabe's approach that:

the procedure which all along I thought we would adopt is one which would first enable our party at the provincial and then at Central Committee level to address the matter and come to some initial conclusions on the various parts of the constitution needing amendment. The views of other organizations will be collected in the process but only for consideration by us and in comparison with our own... (Mugabe as quoted on 21 March 1998).

Broadly speaking, this was the position and intention of the Zimbabwean leader and some of his party's top leadership on constitution making. It was a position which could be described as 'constitution making from above', a process that would largely be driven by the ruling party. A party congress resolution reflected this paternalistic sentiment.

A variant of this approach was the 'Zvogbo Way' named after the then leading constitutional expert in the ZANU-PF party, Eddison Zvogbo (Hlatshwayo 1998). The 'Zvogbo Way' sought to integrate the party congress resolution with a parliamentary resolution that called on the Executive to introduce a mechanism to review the constitution. The position conceded that ZANU-PF should not monopolise the constitution-making process entirely but should instead allow other players to contribute to the process. However, it was also a position which envisaged that ZANU-PF would still be the dominant player in the process.

This left the NCA approach as the main challenge to the envisaged 'constitution making from above'. Arguing for a broader participatory constitution-making process ('constitution making from below'), it was envisaged that the process would be inclusive and open. While there was basic agreement on the case for a new constitution, there was polarisation of positions on the process to follow in crafting one. The resultant stalemate on this issue led to an unprecedented constitution-making exercise. The ZANU-PF dominated exercise was represented by a government-appointed Constitutional Commission that consisted of 400 members of whom 150 were parliamentarians. The Commission gathered views from the public for six

months in 1999 and then submitted its findings to President Mugabe. However, the provisions under which the Commission was set up still gave considerable powers to him to amend the draft constitution. This is what subsequently transpired.

The NCA exercise involved an extensive civic education campaign to explain why it had begun to write a new constitution. It identified the limitations of the Lancaster House constitution and solicited suggestions and proposals on what a new constitution should contain. Like the Constitutional Commission (CC), it also conducted an extensive outreach programme in different parts of the country on what should form the content of the new constitution. Admittedly, the NCA outreach exercise was not as extensive as that of the CC but it had greater depth as a consequence of its preceding civic education programme. Indeed, there was a strong element of competition in the gathering of views in the two outreach exercises. The findings from the parallel processes were subsequently woven into two different constitutional drafts.

Eventually, the credibility of the CC exercise was thrown into serious doubt when its draft omitted and misrepresented some of the citizens' views on what the new constitution should contain. For instance, consistent sentiments had been expressed in public hearings and in other submissions that the extensive powers of the President should be reduced considerably, that the legislature should be strengthened significantly, that the size of the Cabinet should be reduced to between 12 and 15 posts, and that an independent electoral commission should be appointed. Most of these and other recommendations were ignored or fudged, and the public and voters were not amused. To complicate matters, the President himself made critical statements about certain provisions including those relating to land. The draft of the CC was decisively rejected in a vote in February 2000. The NCA had contributed to that rejection through its 'no' campaign which found resonance amongst the electorate. What followed was a stalemate on the future direction of the reform process.

While ZANU-PF has now shelved the process by cynically stating that it was no longer 'a priority', the pressure for movement grows from the NCA and opposition parties including the Movement for Democratic Change (MDC). Constitutional reform cannot be postponed indefinitely. Sooner or later, ZANU-PF will have to respond to the intensifying pressure. Several possible scenarios have been posited. One is that a bi-partisan committee of Parliament should be appointed to review the rejected draft, and then submit

a revised draft to Parliament. Another scenario is that, based on public debates on the draft, memoranda should be invited from the public to a representative committee with membership drawn from parliament and outside it. The committee would then be tasked to produce a new draft within six months (Centre for Democracy and Development 2000). A third option would be the appointment of a new constitutional commission to start the process all over again.

Review of the Election Management and the Electoral System

One of the principal arguments of those who advocate constitutional reform is that Zimbabwe's election management body (EMB) is defective and prone to patronage. By being part of the state bureaucracy, the election management body is viewed as being out of line with the trend towards *autonomous election commissions* in Southern Africa. However, we need to begin by outlining the main features of the EMB. As laid out in the Electoral Act, the principal *institutional framework for election management* is as follows:

- The Delimitation Commission,
- The Electoral Supervisory Commission,
- The Election Directorate, and
- The Registrar-General.

Sitting at five-yearly intervals prior to a general election, the *Delimitation Commission determines the limits of constituencies* in Zimbabwe. The Commission submits to the President a report containing a list of constituencies delimited, with the names and boundaries assigned to each one, and a map showing the constituencies (Delimitation Commission 1995). In dividing Zimbabwe into constituencies, the Commission takes into account, in respect of any area, its physical features, the means of communication in the area, the geographical distribution of voters registered on the common roll and the community of interest between them.

A *major limitation of the Delimitation Commission* is that there is no involvement by interested stakeholders in the delimitation of constituencies. Such stakeholders include political parties, civic groups, women and youth organisations. Thus the limitation relates to an absence of a constitutional provision for public participation in the delimitation process. The Commission

report is submitted to the President who may raise objections if he is in any way dissatisfied with it, but the public is denied the same privilege (Electoral Supervisory Commission 1997). In the same way and for the same reasons as voters rolls are subject to public inspection, a report of the Commission should be inspected and verified by members of the public before it is finalised.

A perennial problem encountered by Delimitation Commissions in their tasks has been that voters' rolls have not been up to date. This is a handicap to the Commission in the drawing up of constituencies. There have therefore been several recommendations made to improve the transparency and effectiveness of the Delimitation Commission. First, the consultation process in the appointment by the President of the Commission members should be more broadly based. The Judicial Service Commission, rather than the Chief Justice alone, should be the body to be consulted. Second, a preliminary Delimitation Commission report should be published in the Gazette, and be open for inspection and comments by the public before the submission of the report to the President. Third, the Commission should be convened well in advance of a general election to allow sufficient time for proper performance of its functions with the participation of the public (Electoral Supervisory Commission 1997). The credibility of future Delimitation Commission reports will hinge on whether they meet these basic conditions and expectations.

Unlike in other countries in Southern Africa, the Electoral Supervisory Commission (ESC) is a body with little power although it is tasked with the responsibility of supervising the electoral process. Like the Delimitation Commission, it is appointed by the President and its functions are:

- To supervise the registration of voters and conduct of the election of the President, Members of Parliament (MPs), and of the governing bodies of local authorities, and
- To consider any proposed Bill or statutory instrument that may be referred to it and which relates to presidential, parliamentary or local authority elections.

The ESC is funded by Parliament through the Ministry of Justice, Legal and Parliamentary Affairs; its budget is thus determined by the Ministry which decides on how the allocated funds should be used. At the end of each election, the ESC submits a Report to the President on the conduct and outcome of the election. Previous reports have covered such issues as voter registration,

financing of campaigns, election monitoring, incidents of intimidation and violence, media coverage, vote counting and announcement of election results (Electoral Supervisory Commission 1995).

Some analysts have argued that the ESC is largely impotent because the Constitution does not extend any executive power to it (Compagnon & Makumbe 2000). In view of its limited and ambiguous powers, meagre budget and resources, the ESC is constrained in exercising its supposedly 'supervisory role' in the electoral process. The powers, authority and resources that should have accrued to the ESC have instead been dispersed to the Election Directorate and the Registrar-General of Elections. In sum:

The ESC has been rendered useless in Zimbabwe as it only supervises and does not run elections. Election administration and management is split among many organs, which compromises co-ordination and the quality of the decision-making process. The election process is not managed, administered and controlled by the ESC, but by the Registrar-General. The impartiality of the Commission is compromised because the President, a contestant in the elections, appoints and can remove members of the Commission... (Zimbabwe Electoral Support Network 2002).

This state of affairs runs counter to the Southern African Development Community (SADC) Parliamentary Forum's recommendation that complete independence and impartiality of the Electoral Commission should be reaffirmed in the constitution, with the commissioners selected by a panel of judges in consultation with all stakeholders.

The third component of the electoral system is the Election Directorate. Created in 1990, it consists of civil servants who operate under the chair of the Public Service Commission (PSC). Its responsibilities are:

- co-ordinating the activities of ministries and departments of government in regard to delimitation of constituencies, the registration of voters, the conduct of polls and all other matters connected with elections;
- giving instructions and making recommendations to the Registrar-General in regard to the exercise of his functions under the Electoral Act; and other persons in the employment of the state for the purpose of ensuring the efficient and proper conduct of elections; and

- generally ensuring that elections are conducted efficiently, properly, freely and fairly (Government of Zimbabwe 1996).

Clearly, the establishment of the Election Directorate added to the number of players involved in the electoral process thereby splitting the responsibility further (Electoral Supervisory Commission 1997). The independence of the Election Directorate has been questioned by some analysts (Compagnon & Makumbe 2000).

Finally, the Registrar-General of Elections is actually the key player in the electoral system and process. A public servant whose office falls under the Ministry of Home Affairs, his functions in the electoral process, however, entail being answerable to the Ministry of Justice, Legal and Parliamentary Affairs. The Registrar-General is responsible for the whole electoral process which includes the following:

- The registration of voters;
- The provision of electoral staff;
- The declaration of election results; and
- The custody of election materials (Government of Zimbabwe 1996).

These extensive functions make the Registrar-General of Elections very central, and therefore powerful, in the entire electoral process. This centrality is enhanced by other provisions in the Electoral Act such as the one that the Registrar-General 'shall not be subject to the control of any person or authority other than the Election Directorate'. At the same time, any weakness or limitations in the discharge of these multiple functions would have negative ripple effects on the rest of the electoral process. The impartiality and efficiency of the Registrar-General's office have been questioned by opposition political parties, NGOs and the media, especially with regard to its conduct of the 2002 election. An example of this critique is that:

the transparency of the electoral process was fatally flawed by the refusal of the Registrar-General's office to make public, at any stage, a consolidated voters roll. This made it impossible for the public and political parties to inspect the roll and to raise objections, or even to assess the national electoral base. Such a fundamental failure in itself rendered the election open to abuse since it was impossible to identify voters or rectify the register (Zimbabwe Electoral Support Network 2002).

The number of complaints against the conduct of the Registrar-General's office has been steadily increasing since the mid-1990s. They grew to a *crescendo* during the 2002 presidential election campaign, and this significantly undermined the credibility of the electoral process. Other factors that have contributed to the erosion of credibility are the strictures that have been placed on NCOs that provide civic and voter education, and those involved in election monitoring.

What attempts have been made to reform the electoral system? The attempts can be traced back to 1997 when the ESC itself under the chairmanship of David Zamchiya organised a workshop to consider possible areas of reform. The workshop considered a commissioned study which observed that:

the political, economic and social climate of present-day Zimbabwe and the interest to be served have evolved to levels which have led the ESC to consider whether or not the existing machinery that has been 'patched-up' here and there over the years still adequately meets the expectations of the people for a system capable of delivering elections which they will readily endorse (*Electoral Supervisory Commission 1997*).

The 1997 workshop made several recommendations to overhaul the electoral system. In the main, however, it was argued that there be set up an 'Elections Commission' which would be independent and have the responsibility and authority for the entire electoral process. It was argued that:

an electoral machinery must, in a democratic system, ultimately be the tool of the people and in establishing it, no effort must be spared to avoid creating an institution which may be viewed as a tool of the government of the day. There is need to dispel the perception that the government and the ruling party manipulate the system at the expense of democracy (*Electoral Supervisory Commission 1997*).

In essence, a strong case was made for an autonomous Election Commission that would have constituted a radical departure from the prevailing set-up. The workshop recommendations were echoed in public hearings conducted by Parliament in 1997.

A second set of recommendations consisted of the provisions in the draft constitution crafted by the Constitutional Commission in 1999. They reflected broadly those made in the ESC workshop report and centred on the

establishment of what was termed an Independent Electoral Commission. The envisaged Commission would consist of six members appointed by the President. Its functions would be:

- To organise, conduct and supervise elections;
- To register voters and ensure the proper maintenance of voters rolls;
- To determine the boundaries of constituencies;
- To consider and advise on all proposals to alter the boundaries of wards or other electoral divisions of provincial council or authority areas; and
- To formulate and implement civic education programmes relating to elections (Constitutional Commission 1999).

Finally, electoral reform would have to address whether the present FPTP system should continue or whether it should be supplemented with a PR system. This was the recommendation of the Constitutional Commission draft. However, the NCA draft strongly had recommended a complete PR system. In a future review of the Constitution, a compromise would have to be sought between these two positions.

The Electoral System and Conflict Management

As we will observe in the next section, the Zimbabwean electoral system and process experienced extreme forms of strains and stresses in the 2000 and 2002 elections. Their weaknesses became clearer with exposure to both domestic and international observers. There were unresolved conflicts over electoral procedures between the main contending parties namely MDC and ZANU-PF. Yet there were no tried mechanisms for resolving those conflicts:

There are presently no conflict-resolution structures on election-related issues at the ESC, Election Directorate and Registrar of Elections Office. Election petitions and grievances are made to the High Court (Electoral Supervisory Commission 1996).

A petition could be made to the High Court on matters such as undue election of a Member of Parliament on grounds of corrupt practice, illegal practice, disqualification, irregularity or 'any other cause' by another candidate or registered voter in a particular constituency. Prior to 2000, the major landmark case of a successful election petition was that by the then

Harare South Independent candidate, Margaret Dongo, against Vivian Mwashita who had stood on a ZANU-PF ticket during the 1995 elections. The case provided an opportunity to scrutinise the manner in which elections are run administratively. The pertinent issues which came under the spotlight were the state of the voters' roll, the definition of who is an eligible voter, and the management of the polling and counting processes (Zimbabwe Council of Churches 1995). The case highlighted the need for an accurate voters' roll which was absent in this particular instance. The election was re-run and won by Margaret Dongo leading to the disqualification of Vivian Mwashita. This was the first time in Zimbabwe's electoral history that a successful challenge had been through an election petition.

This 1995 case was a harbinger of a spate of election petitions made following the 2000 parliamentary election. More than 30 petitions, mostly against ZANU-PF candidates, were filed in the High Court by the MDC. Most petitions cited vote buying, intimidation and violence and flouting of electoral regulations. The big number of petitions underscored the lack of respect of 'electoral rules of the game', and absence of conflict mediation mechanisms. This is the context in which one international observer mission enjoined that:

an internationally accepted Code of Conduct needs to be developed for political parties and party candidates... and that mechanisms for conflict management and conflict resolution need to be developed to resolve electoral violence, such as forums to encourage political party dialogue (Electoral Commissions Forum of SADC Countries 2000).

More recommendations on possible ways of conflict management emanated from bodies such as the Commonwealth Observer Group after the 2000 election. The case for a Code of Conduct was reinforced and it was pointed out that a clear demarcation should be made between the executive and the ruling party, especially in the use of government resources for political activities (Commonwealth Observer Group 2000). Furthermore, a Code of Conduct should apply to media coverage and advertising during the campaign and election period either under a specially created independent body or an independent electoral commission.

These recommendations for conflict management and resolution mechanisms were ignored when the 2002 presidential election was organised. Disputes over electoral irregularities increased and cast a dark shadow over the election outcome, apart from 54 politically related deaths. This led to a

rejection of the outcome by such influential observer groups as the European Union and the Commonwealth Observer groups and the SADC Parliamentary Forum. In particular, in its norms and standards for free and fair elections, the SADC Parliamentary Forum itself stressed that it was imperative to institutionalise conflict management, mediation and resolution structures. Reiterating that there was little consensus on the major national issues on the way forward in Zimbabwe, one NGO recommended the establishment of an electoral tribunal that would deal with election cases and appeals (Zimbabwe Electoral Support Network 2002).

One possible approach to conflict management is that embodied in political party liaison committees which operate during an election campaign period at national, regional and sometimes local levels in South Africa. They are the first levels at which political parties can bring up complaints about each other's actions. However, if these committees are to function effectively, they should not become the main forums for resolving disputes. This role should be undertaken by conflict resolution committees (CMCs) whose members include specialist NGO representatives, police and army officers and election commission staff and are established in each province about a month before polling (Pottie 2001). Their role is to mediate in complaints and disputes brought by contesting parties. These CMCs and independent electoral commissions can have an important and pro-active role to play in initiating and sustaining conflict resolution mechanisms so as to reduce instances of mistrust, intimidation and violence during and after election campaigns.

Challenge for Government and Stability

So far this paper has raised issues pertaining to constitutional and electoral processes and challenges. The issues of governance and stability have also been broached but in an implicit manner. In this section of the paper, we address the implications of the constitutional and electoral shortfalls for democratic governance and stability. In such a task, it is vital to outline briefly the contemporary context of governance in Zimbabwe, how it can be improved and other necessary measures for reform and reconciliation.

Let us however begin by defining our understanding of democratisation. It is a concept that relates to the process of creating and sustaining structures of democracy in a particular society. Democracy itself has been defined as a system or form of regime whose legitimacy derives from the principle of

popular sovereignty, that is to say, ordinary citizens are equally endowed with the right to rule themselves. The basic attributes of democracy therefore include the rights to vote, to belong to a party of one's choice, to freedoms of expression, movement and association. As we have already observed, the conduct of free and fair elections on a regular basis is an indispensable ingredient of a democratic system. Broadly speaking, there needs to be a wide consensus on 'rules of the game' of political competition so as to ensure the legitimacy and credibility of elections. Furthermore, the rule of law is an important foundation of democracy. However, by its very nature, democratisation is always 'work in progress'. No society can claim to be completely democratised! Countries can be at different stages of democratisation. History, economic development and culture make an imprint on the pace and quality of the democratisation process in a particular country.

The key attributes of democratic governance therefore include the right of citizens to hold decision makers accountable, the existence of inclusive and fair rules, institutions and practices, the institutionalising of gender equality in public and private spheres of life and decision making, and freedom from discrimination based on race, ethnicity, class, gender or any other attribute (United Nations Development Program 2002). In Zimbabwe, the conditions for democratisation appeared to have been improving between 1996 and 1999 against the background of the ferment in civil society for reform, and a certain level of tolerance on the part of the state. However, the conditions for reform were not sustainable. Authoritarian repression became pronounced in 2000 in the run-up to the election of that year, and it has not abated since.

In particular, the orchestration of intimidation and political violence especially by ZANU-PF from 2000 onwards reflected the slide into authoritarianism. This was consolidated by legislation passed in 2002 just prior to the presidential election of that year. The legislation was the Public Order and Security Act (POSA), the Access to Information and Protection of Privacy Act (AIPPA), the Citizenship of Zimbabwe Amendment Act and the General Laws Amendment Act 2002. Modelled on the Law and Order Maintenance Act (LOMA) of 1960, POSA criminalised criticism of the President and required any organiser of a meeting to give four days of written authority to the police or regulating authority. POSA was extensively used during the 2002 election campaign to prohibit public meetings and demonstrations. It substantially curtailed freedoms of movement, speech, expression and association which are guaranteed under the Constitution (Zimbabwe

Electoral Support Network 2002). Under AIPPA, foreign journalists were barred from working in the country, a new regime of licensing journalists was introduced and the freedom of expression by the media was threatened and curtailed. The Citizenship of Zimbabwe Amendment Act outlawed dual citizenship but was largely seen as targeting whites who were seen as supporters of the opposition (Zimbabwe Electoral Support Network 2002). Such prominent democrats as the late Sir Garfield Todd and his daughter, Judith Todd, were amongst those denied the right to vote in the 2002 election. Finally, the General Laws Amendment Act made it difficult for NGOs to receive registration to provide voter education (which in itself infringed Section 20 of the Constitution). Significantly for the electoral process, the Act made members of the Public Service the only persons qualified to be appointed election monitors. This meant that ordinary persons recruited and trained by civic organisations could not be appointed as monitors but only as observers (Zimbabwe Electoral Support Network 2002).

In combination, the above-mentioned legislation has narrowed whatever democratic space had existed prior to 2000. The legislation had the effect of creating conditions for a dictatorship. Hence the campaign for resistance from both domestic and international forces. For instance, the credibility of the 2002 election has remained disputed by domestic organisations such as the Zimbabwe Electoral Support Network (ZESN) and the MDC, and such international organisations as the SADC Parliamentary Forum, the European Union and the Commonwealth. The election outcome itself is being contested by the MDC in Zimbabwe's High Court. The immediate challenge for democratic governance in the country is the creation of 'an enabling environment' that creates a climate of confidence in which reform can take place. We saw how constitutional reform remained stalled, and how the credibility of the electoral process had declined. That confidence cannot be created and nurtured while repressive legislation remains on the statute books. As the Commonwealth Observer group enjoined:

The provisions of the General Laws Amendment Act, POSA and AIPPA which impede the freedoms of association, movement and speech should be repealed (Commonwealth Observer Group 2002).

In sum, the preconditions for democratic governance in Zimbabwe include the scrapping of repressive legislation on which the current government has relied upon to contain the situation. But this will not be enough. There needs to be

built a framework of trust and confidence between the main political parties namely MDC and ZANU-PF. An initial attempt at an inter-party dialogue between the two floundered due to persisting mistrust and continued state repression. It has been observed that election irregularities have sometimes led to serious instability as in Côte d'Ivoire, Lesotho and Madagascar amongst other countries. Several factors account for this, including disagreement over election rules and regulations, relative advantages which incumbents have over opposition parties, a feeling by people and political parties that they do not own the electoral process (The African Centre for the Constructive Resolution of Disputes 2002). These factors mar democratic governance in the Zimbabwean context, and so far restraint has ensured that widespread violence and instability do not occur.

Clearly, an important pillar for democratic governance will be a reformed electoral system. As we observed, there exists a consensus over the need for such a reform that would make the system transparent, fair and independent from political pressure. We concur with the sentiment that:

had a more transparent electoral process been established under a truly impartial authority, the credibility of the Presidential election could have been considerably enhanced (Commonwealth Observer Group 2002).

To restore credibility in the electoral process in Zimbabwe, a number of pre-requisites have been identified. These are:

- An Independent Electoral Commission which is adequately staffed and equipped to be fully responsible for all aspects of electoral administration and management;
- Legislation which provides for publication of a preliminary and subsequently final voters' roll in sufficient time prior to an election (Commonwealth Observer Group 2002);
- All parties should subscribe to a Code of Conduct regarding the activities of political parties and candidates during the campaign and election period;
- Regulations governing the use of public media by the parties and a Code of Conduct on media coverage and advertising during the campaign and election period need to be revised (Commonwealth Observer Group 2002);

- Review of the Constituency delimitation exercise and the number of polling stations attached to constituencies; and
- A well-organised and on-going voter education programme conducted by election officials, parties and civil society (Commonwealth Observer Group 2002).

In addition, in the context of constitutional reform, the issue of a mixed system of FPTP and PR ought to be revisited. Although the elections of 2000 and 2002 suggest that a two-party system appears to be emerging, the electoral system could benefit more from a mixed system that allows representation of smaller parties and minority groups.

By the beginning of 2003, the political climate in Zimbabwe had changed but unfortunately not for the better. Against the background of a deepening economic crisis, repression against political opposition and civil society activists intensified. Three senior MDC leaders were arraigned before a court for a plot to 'eliminate' President Mugabe. On the margins, there appeared reports of a proposal for 'a government of national unity' that would be preceded by Mugabe's retirement from office. There needs to be worked out an arrangement, which will provide a conducive environment for a national dialogue and reconciliation. That arrangement will necessarily require broad constitutional reform acceptable to both sides of the political divide, and a new electoral system under which a re-run of the presidential election would then be organised. Further, it also has been recommended that an independent body be set up to investigate political violence of the past few years as part of a process which leads to reconciliation and rehabilitation.

Conclusion

This paper has examined the electoral and constitutional systems and processes in Zimbabwe since independence, and the key challenges that the country faces in relation to democratic governance and stability. Zimbabwe finds itself at a crossroads in electoral and constitutional terms. There were half-hearted attempts at reform in the late 1990s but these were followed by a slide into authoritarianism that continues to block progress to democratic governance and both economic and social stability. The country continues to be in the regional and international spotlight largely because of the concern

that if reforms and political compromise remain elusive, the country could experience greater instability.

The paper begins by providing the historical, political and constitutional context that has shaped Zimbabwe's post-independence politics generally, and developments in the constitutional and electoral arenas more specifically. For instance, the legacy of violence as a political instrument of coercion can be traced back to methods used by the colonial state, and later by the post-colonial state to maintain a stranglehold on power. It is argued that coercion and violence are deeply ingrained in Zimbabwean political culture and this is illustrated by more recent legislation which gives extensive and arbitrary powers to state institutions to control the media, opposition parties and civic organisations.

The electoral system is then examined and its weaknesses identified. It is observed, for example, that there has been a domestic debate for the reform of the system, and that some of the proponents of that reform were the previous leadership of the Electoral Supervisory Commission. Other proponents for reform have included regional and international election observer groups. The controversial elections of 2000 and 2002, which were accompanied by considerable violence, highlighted further the imperative of electoral reform. The paper, however, shows that electoral reform cannot be undertaken in isolation from broad constitutional reform, an issue that has also been on the country's agenda in the past five years.

Zimbabwe's prospects for democratic governance and stability hinge on whether there are both electoral and constitutional reforms based on a national consensus. Conflict management and resolution mechanisms will need to be built into the electoral and constitutional structures and processes.

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