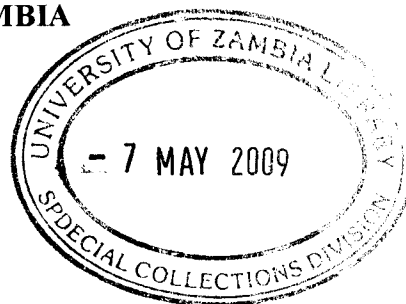


OBLIG 2009

**ELECTORAL DISPUTES: AN EVALUATION OF THE ELECTORAL DISPUTE
RESOLUTION SYSTEMS IN ZAMBIA**



BY

SIKAABA MULAVU

**An Obligatory Essay submitted to the University of Zambia, Law Faculty, in partial
fulfillment of the requirements of the Degree of Bachelor of Laws.**

The University of Zambia

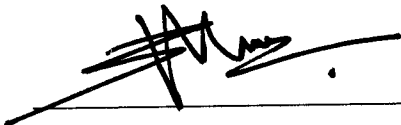
January 2009

P.O.Box 32379

LUSAKA

DECLARATION

I SIKAABA MULAVU solemnly declare that this work represents my own ideas and is not a production of any other work produced or submitted by any person to the University of Zambia or to any other institution.



SIKAABA MULAVU

11/02/2009

DATE

**AN ESSAY SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF A BACHELOR
DEGREE IN LAW- LL.B.**

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

I recommend that this Obligatory Essay prepared under my supervision

By

SIKAABA MULAVU

Entitled

**ELECTORAL DISPUTES: AN EVALUATION OF THE ELECTORAL DISPUTE
RESOLUTION SYSTEMS IN ZAMBIA**

**Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the
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Date:

Mr. John Sangwa

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I would also want to thank my Supervisor, Mr. John Sangwa, for the valuable guidance during this work. Typical of you, you rightly demanded for high quality work. I can only hope that I exceeded your expectations!

ABSTRACT

Electoral Disputes are a highly probable outcome in any competitive electoral environment. History attests of a number of countries that have been engulfed in electoral disputes. Electoral disputes have a negative effect on the development of any nation. Indeed, electoral disputes can plunge the country in untold conflict and attendant misery. There is, therefore, need to devise Electoral Dispute Resolution (EDR) Systems that can effectively mitigate and resolve electoral disputes whenever they arise. There are various types of EDR Systems namely:- The Ordinary Courts, Special Electoral Courts, Constitutional Courts, Election Management Bodies, and Political Systems. In order for an EDR system to be effective, it should embody certain essential attributes notably: - transparency, accessibility, timeliness, independence, impartiality, relevance, sanctions and enforceability.

Zambia has had its own fair share of electoral disputes particularly during parliamentary and presidential elections. These disputes have in certain cases been characterized with violence thereby threatening the peace and stability of the nation. Like most other countries, Zambia has a number of EDR Systems namely:- the Ordinary Courts, The Administrative System and the Political System. This essay made an evaluation of the effectiveness of these EDR systems in Zambia. A qualitative survey was conducted using purposive sampling. Individuals from thirteen (13) major organizations that are directly or indirectly involved in the electoral process were interviewed. The survey was augmented by a desk study on electoral disputes in general and the electoral laws and case law pertaining to Zambia in particular.

The EDR Systems in Zambia, to a large extent, do not embody the essential attribute of an effective EDR system. The Ordinary Courts take as long as three years before disposing cases on electoral disputes. This renders the whole process a mere academic exercise devoid of any practical value. This has also eroded the confidence citizens have in the ordinary courts as an arbiter in electoral disputes. The court system is also viewed as not being impartial. It is believed that Court decisions, particularly on presidential petitions have been skewed towards the ruling party. The credibility of the Conflict Management Committees (CMCs) established by the Electoral Commission of Zambia (ECZ) under section 111 (2) of the Electoral Act¹, has also been a subject of suspicion. A number of stakeholders interviewed view the CMCs as not being credible and impartial. Furthermore, the Committees do not have a mechanism to enforce agreements by parties to the conflict. With regards to the political system, membership to the Zambia Center for Interparty Dialogue (ZCID) is voluntary. The ZCID does not have any effective enforcement mechanism and implementation of its resolutions is entirely dependent on the good will of political parties, which good will usually shifts with any perceived threats to political fortunes. There is, therefore, need to come up with an effective EDR system in Zambia. It is hoped that the recommendations contained in this study would contribute towards this ambitious and yet noble goal.

¹ Chapter 13 of the Laws of Zambia

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	i
LIST OF ABBREVIATIONS.....	vi
INTRODUCTION	1
OVERVIEW OF THE STUDY	1
Statement of the Problem	2
Purpose of the Study	4
Significance of the Study	4
Methodology	5
Ethical Considerations	5
CHAPTER ONE: ELECTORAL DISPUTES	6
Major Causes of Electoral Disputes	7
The Effect of Electoral Disputes	13
CHAPTER TWO: ELECTORAL DISPUTE RESOLUTION SYSTEMS ...	16
The Ordinary Courts	16
Special Electoral Courts	18
Constitutional Courts	18
Administrative Systems	19
Political Systems	20

**CHAPTER THREE: ESSENTIAL ATTRIBUTES OF AN EFFECTIVE
ELECTORAL DISPUTE RESOLUTION SYSTEM ... 22**

Credibility	22
Transparency	23
Accessibility	23
Timeliness	24
Independence	25
Impartiality	26
Relevance	26
Sanctions and Enforceability	27

**CHAPTER FOUR: AN EVALUATION OF THE ELECTORAL
DISPUTE RESOLUTION SYSTEMS IN ZAMBIA.... 29**

The Ordinary Courts	29
The Administrative System	33
The Political System	35

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS 38

Conclusion	38
Recommendations	40

LIST OF ABBREVIATIONS

ACC	Ant Corruption Commission
CCZ	Council for Churches in Zambia
CMC	Conflict Management Committee
ECZ	Electoral Commission of Zambia
EDR	Electoral Dispute Resolution
FODEP	Foundation for Democratic Process
MMD	Movement for Multiparty Democracy
PF	Patriotic Front
SACCORD	Southern Africa Center for Constructive Resolution of Disputes
TIZ	Transparency International Zambia
UPNP	United Party for National Development
ZCID	Zambia Center for Inter-party Dialogue

INTRODUCTION

This essay addresses the issue of electoral dispute resolution with special reference to Zambia. The essay is divided into five Chapters. The first chapter will discuss electoral disputes in general. It will identify the nature and major causes of electoral disputes. The second chapter will discuss the various types of Electoral Dispute Resolution (EDR) Systems employed by most countries in the world. The third chapter will identify the essential attributes of an effective EDR System. This will form a standard benchmark upon which to evaluate the effectiveness of the EDR Systems in Zambia under Chapter 4 of the essay. The conclusion and recommendations of the essay are contained in the last chapter, Chapter five.

OVERVIEW OF THE STUDY

Elections play a vital role in any democratic society. They are a hallmark of democracy, the people's free will. This is ably articulated under Article 21 of the Universal Declaration of Human Rights thus: "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."¹ Elections are a crucial ingredient of democratic transformation as they create opportunities for the electorate to periodically choose national and local leaders who manage public affairs on their behalf. Elections provide one of the orderly ways of changing power in a democratic society and therefore contribute towards peace and stability of the nation. It dissuades members

¹ Article 21 of the Universal Declaration of Human Rights

of society from using none peaceful means of ascending to power such as violence or insurrection.

Elections are invariably a competitive process. This inherently makes them highly susceptible to disputes. Elections can therefore become a source of conflict particularly if the outcome of such elections does not appear to reflect the free will of the people. Recognizing the fact that conflicts are an inevitable possibility of any electoral process, the most important thing is how such conflicts are resolved. There is, therefore need to build EDR systems that resolve conflicts that are likely to arise during the electoral process. EDR Systems play a critical role in the electoral process. They contribute towards a free and fair election and a stable political system. This essay will focus on EDR systems with a special emphasis on EDR systems in Zambia. It will evaluate the effectiveness of the current EDR systems in the country.

STATEMENT OF THE PROBLEM

With the emergence of competitive politics in 1991, Zambia has witnessed a number of electoral disputes in both parliamentary and presidential elections. In particular, the opposition political parties disputed the 1996, 2001 and 2008 presidential elections.

Courts have traditionally and primarily been employed in the resolution of electoral disputes in Zambia. Meanwhile, the Zambian judiciary, like many others in the world, is faced with the now chronic problem of 'huge backlog of cases.' Electoral related cases have not been spared from this problem. The 1996 Presidential petition, *Akashambatwa Mbikusita Lewanika and Four*

*Others v Frederick J.T. Chiluba*² took one and a half years before the judgment was finally delivered. Meanwhile, the 2001 Presidential Petition, *Mazoka and Others V Mwanawasa and Others*³, dragged from January 2002 to 16th February 2005 when the Supreme Court finally delivered the judgment. These delays have had a negative impact on the Courts role in electoral dispute resolution. The dwindling confidence in the courts as the final and fair arbiter of electoral disputes was manifested in the 2006 elections. Notwithstanding the fact that the opposition Patriotic Front did not accept the results of the presidential elections, it clearly ruled out the option of going to Court. The party instead insinuated that it would form parallel governing structures. They argued that experience showed that going to court was a waste of time and an academic exercise that only served to legitimize an illegitimate regime. This attitude is not healthy as it is a signal that citizens have gradually lost confidence in the Courts as a viable avenue for electoral disputes. This provides an inescapable temptation to instead pursue unlawful means that may have a potential for civil strife.

Meanwhile, principal stakeholders in the electoral process have viewed the Conflict Management Committees (CMC) under the Electoral Act⁴ with great suspicion. Efforts to resolve disputes by political parties themselves have also produced less inspiring outcomes.

² (1998) ZR 49 (SC)

³ SCZ/EP/011/02/03/2002

⁴ Chapter 13 of the Laws of Zambia

PURPOSE OF THE STUDY

The study will identify the various EDR Systems and the essential attributes of an effective EDR System. The essay will then identify the available EDR Systems in Zambia and evaluate their effectiveness. The evaluation will be based on the essential attributes of an effective EDR System. In this regard, the research questions are: (1) what are the various EDR systems in the world and factors that may influence their effectiveness (2) what is the efficacy of the current EDR systems in Zambia? (3) What should be done in order to make the EDR Systems in Zambia effective?

SIGNIFICANCE OF THE STUDY

To date there has not been any focused and in-depth study on EDR Systems particularly in Zambia. This study will explore the various EDR Systems in the world. The study will evaluate the effectiveness of the EDR Systems in Zambia. The recommendations arising from the study will, therefore contribute towards an effective resolution of electoral disputes in the country. This will in turn contribute towards mitigating electoral related violence that has characterized elections in Zambia.

METHODOLOGY

The study will be undertaken by desk research and interviews. Various documents pertaining to the electoral process including electoral laws that govern elections in Zambia will be reviewed. Interviews will be conducted with persons in organizations that are either directly or indirectly involved in the electoral process such as the Electoral Commission of Zambia (ECZ) , Political Parties, Church mother bodies, the Ministry of Justice as well as Non Governmental Organizations such as the Forum for Democratic Process (FODEP) and the Southern African Center for Constructive Resolutions of Disputes (SACCORD).

ETHICAL CONSIDERATION

There are no ethical considerations in the study.

CHAPTER ONE: ELECTORAL DISPUTES

There could be no better way of starting this first chapter than stating the pragmatic words of Khabele Matlosa when he stated thus: "Let us accept right from the outset that elections are a high stakes contest and that conflict is likely. The conflict cannot be wished away and bemoaning its occurrence is not enough. The solution is to devise institutionalized mechanisms that manage the contest constructively. In short, elections related conflicts and disputes are a reality of politics."⁵ Reverend Susane Matale of the Council for Churches in Zambia (CCZ), in her usual tone full of conviction, also aptly observed thus: "Electoral disputes will always be there because it is always difficult to accept defeat."⁶

Electoral Disputes refer to any challenge to the legality of certain actions with regards to the electoral process. Electoral Disputes are instituted by those interested in the outcome of the electoral process or any such persons as may be stipulated by law. Electoral Disputes can arise at any stage of the electoral cycle such as at the time of demarcation of constituencies, voter registration and indeed during the nomination of candidates. Nonetheless, it is noteworthy that most electoral disputes arise after the elections results are announced. This chapter will highlight the major causes of electoral disputes as well as the effect of electoral disputes.

⁵ Khabele Matlosa, 'Democratization at Crossroads: Challenges for the SADC Principles and Guidelines Governing Democratic Elections' ISS Paper 118 (October 2005), 2

⁶ Interview: Reverend Susane Matale, 8th December, 2008

MAJOR CAUSES OF ELECTORAL DISPUTES

Causes of electoral disputes are varied. Any attempt to come up with an exhaustive list is clearly a futile exercise. Nonetheless, it is instructive to outline some of the major causes of electoral disputes. Identification of major causes of electoral disputes is important, as any effective EDR system should be responsive and alive to the underlying causes of electoral disputes in a given environment. Whilst an attempt has been made to list some of the major causes as distinct, it is submitted that these causes are, more often than not, interrelated.

The Electoral System

The type of electoral system or model employed can have a bearing on electoral disputes. For instance, the First-Past-The-Post (FPTP) employed in Zambia, where the winner takes it all, is more likely to breed conflicts than the Proportional Representation (PR) system used in countries such as South Africa. According to Jeff Fischer, “representation conflict can occur when elections are organized as a “zero sum” game and “losers” are left out of participation in governance.”⁷ The insightful question of Khabele Matlosa is instructive in this regard: “what are direct and indirect linkages between electoral systems and conflicts in the region?”⁸ Perhaps the answer lies in these words:

Following the 1998 electoral dispute, Lesotho underwent a major reform of its electoral model away from the “first-past-the-post” system and adopted the new Mixed Member

⁷ Jeff Fischer, Electoral Conflicts and Violence: ‘A Strategy for Study and Prevention’ IFES White Paper, (2002), 3

⁸ Khabele Matlosa , ‘Electoral Systems, Constitutionalism, and Conflict Management in Southern Africa’ African Journal on Conflict Resolution, Volume 4, Number 4 (2004), 40

Proportional System, which was used for the first time in the country's 2002 general elections. Since the adoption of this electoral model, violent conflicts have been redressed and today peace, stability and national harmony prevail in the mountain kingdom of Lesotho.⁹

Thus the Proportional representation model has been found to be extremely useful as a conflict resolution mechanism especially for countries emerging from violent conflicts. As ably summed up by Lee Habasonde, the Executive Director of the Southern Africa Center for Constructive Resolution of Disputes (SACCORD), "winner takes it all system is not good; it marginalizes the already marginalizedmixed member proportional representation must be used."¹⁰

The Legal Framework

Electoral laws particularly the Constitution and other laws specifically governing elections in a given country govern elections. The constitution forms a firm foundation for elections as a fair and legitimate method of selecting and replacing government. Electoral laws dictate the environment that governs the electoral process. The manner in which the stakeholders in the electoral process perceive this environment can be a potential source of electoral disputes. If stakeholders believe that the electoral laws are skewed in favor of say the ruling party, as is usually alleged, they are less likely to respect the outcome of the electoral process. For example, it is widely perceived that the Constitution of the Republic of Zambia as amended by Act No. 18

⁹ Khabele Matlosa , 'Electoral Systems, Constitutionalism, and Conflict Management in Southern Africa' African Journal on Conflict Resolution, Volume 4, Number 4 (2004), 49

¹⁰ Interview: L. Habasonde, 8th December 2008

of 1996 was targeted at barring the former President Dr. Kenneth Kaunda through the parentage clause under Article 34(3) (b) of the Constitution.¹¹ Refereeing to this clause, Richard Sakala, in the book *Beyond Political Rhetoric* states that: “in a meeting with ambassadors of the Commonwealth countries to Zambia as well as with the ambassadors of the European Union in Zambia, a unanimous view emerged that the third-generation and two-term clauses were basically unfair and that these clauses could be a harbinger of conflicts and could undermine peace and security.”¹² Indeed, this later became a source of conflict and the opposition United Independence Party (UNIP) boycotted the elections. The above position is summed in the following words:

Any credible electoral process is dependent upon a sound political and constitutional dispensation that nurtures the electoral regime and its supporting institutions. Thus constitutional and legal frameworks are the cardinal documents that inform the context within elections are conducted.¹³

Similar words were echoed by Khabele Matlosa when he stated thus:

Elections are governed by the constitution of a given country. The constitution thus forms a firm foundation for elections as a fair and legitimate method of selecting and replacing governments. Constitutionalism ensures the necessary confidence of the electorate in the state and government, thus adding value to political stability and the constructive management of conflicts.¹⁴

¹¹ Chapter 1 of the Laws of Zambia

¹² Richard Sakala, *Beyond Political Rhetoric: Balancing Political and Economic Reform*. (Lusaka: ZPC Publications, 1998), 140

¹³ Peter Tendaiwo Maregere and Brenda Mofya, 'Electoral Reforms: Managing Electoral Conflicts in Zambia' *Conflicts Trends*, (2002), 29

¹⁴ Khabele Matlosa, 'Electoral Systems, Constitutionalism and Conflict Management in Southern Africa' *African Journal on Conflict Resolution*, Volume 4, Number 4, (2004), 9

Election Management Bodies

One of the major causes of electoral disputes is the perceived failure by the institutions given the mandate to superintend over the electoral process. Electoral management bodies play a fundamental role in any election. They are the referees in the electoral process and should ensure that all the players adhere to rules laid down through the constitution and other electoral laws. Election management bodies should not only be impartial, credible and independent, they should actually be seen to be such by all the stakeholders in the electoral process. However, there are usually strong suspicions that ruling parties have a unbridled propensity to manipulate the electoral process using the very institutions set up to superintend such elections in total disregard of the “independent and autonomy provisions.” This suspicion invariably undermines the confidence principal stakeholders have in the electoral process thereby predisposing it to electoral disputes.

Abuse of Public Resources

Whilst it appears that there is an agreement that political leadership is about service to the people, the reality is that most individuals are propelled into politics by possibilities of personal gains. They invest their valuable resources in order to ascend to a political office with a view to “reaping on their investment.” With this attitude, politicians are inclined to violate clearly laid down regulations, if that would make them attain their set out mission. This is ultimately manifested in vices such as electoral corruption and abuse of government resources that may trigger electoral disputes. It is amazing, well perhaps interesting, that in the case of *Mazoka and*

*Others v Mwanawasa and Others*¹⁵, the Supreme Court appears to have given a stamp of approval to the abuse of public resources when it stated that Section 7(k) of the Electoral Code of Conduct¹⁶ did not place any restriction on the President or the Vice President as to whom he can carry or not carry on his campaign trips.

The above scenario is epitomized in the candid words of Lise Rakner: "three consecutive elections in Zambia have been skewed in favor of the incumbent through the governing party's blatant misuse of state funds for election campaigning."¹⁷ Referring to the Zimbabwean situation, Khabele Matlosa stated thus: "opposition parties constantly complain of an uneven political playing field during campaigns due in part to the automatic advantage enjoyed by incumbent parties."¹⁸

The Political Culture and Environment

The political culture and environment can also have a bearing on electoral disputes. In most African countries, there is a lot of hostility between political parties. This is a manifestation of the mutual mistrust amongst political parties, which is in turn a recipe for electoral disputes. In Zambia, attempts to reduce tension amongst political parties have been undertaken through the establishment of the Zambia Center for Inter-Party Dialogue (ZCID). It is, nonetheless, clear that the ZCID, good as its intentions are, has not managed to reduce the political tension in the country particularly among major political parties. Indeed, Africa seems to be more inclined to

¹⁵ SCZ/EP/01/02/03/2002

¹⁶ SI No. 179 of 1996

¹⁷ Lise Rakner, *Stuck in Transition: Electoral Process in Zambia 1991-2001*, (2002), 11

¹⁸ Khabele Matlosa, 'Democratization at Crossroads: Challenges for the SADC Principles and Guidelines Governing Democratic Elections' ISS Paper 118 (October 2005), 14

an adversarial and intolerant political culture and therefore predisposed to politically motivated disputes.

The Media

The media has also been a source of contention during elections. The media plays an important role in any elections. It helps candidates communicate their message to the voters. In most countries, most of the media is owned and controlled by government. During elections, the government media is perceived to have biased coverage towards the ruling party candidate. Some countries have attempted to mitigate this through legislation. After observing that the media played a significant role during elections, the Electoral Reform Technical Committee appointed to review the Electoral System in Zambia recommended thus: "the media should, during the period of an election campaign, provide fair and balanced coverage of campaigns, rallies, meetings and press conference, to all political parties and candidates participating in an election."¹⁹

The Law Enforcement Agencies

The role of law enforcement agencies during elections cannot be over emphasized. Law enforcement agencies should be seen to be fair and impartial in their enforcement of the law. However, in certain cases, these law enforcement agencies have been accused of being biased towards the ruling party. They have also been accused of being involved in rigging elections on

¹⁹ Government of the Republic of Zambia, Report of the Electoral Reform Technical Committee, appointed to review the Electoral System in Zambia, (August, 2005), 68.

behalf of the ruling party. Clearly, the above are perceptions, but in politics perceptions can trigger a dispute just as much as a fact would.

THE EFFECT OF ELECTORAL DISPUTES

Electoral disputes have the potential of plunging the country into a spiral of conflict and violence that inevitably brings about untold misery onto the citizenry. Electoral disputes and the attendant conflicts detract the government's efforts to pursue the noble course of economic development. Indeed paragraph 9 of the preamble to the constitutive Act of the African Union, the continental body, recognizes that "the scourge of conflicts in Africa" was a major impediment to the social-economic development of the continent.

With the emergence of competitive politics in 1991, Zambia witnessed electoral disputes at both parliamentary and presidential elections. The most notable ones are the presidential elections held in 1996, 2001, 2006 and indeed the very recent presidential elections held on 30th October, 2008 following the death of President Patrick Levy Mwanawasa SC. In 2001, police were turned out to control the crowds. Shops were closed and twenty (20) arrests were made.²⁰ "The 2001 swearing in ceremony was heavily guarded by paramilitary and regular police who blocked the way to the Supreme Court premises where it was taking place. This was a result of spontaneous protests by some members of the public and opposition party cadres against the swearing in of the president elect Mr. Patrick Levy Mwanawasa who they accused of having been elected

²⁰ CNN.com, "New Zambian ruler warns protesters, January 3, 2002.

through fraudulent elections.”²¹ Similar violence characterized the post 2006 elections in Zambia.

In Kenya, the 2007 electoral dispute left “1,300 persons killed, 300,000 persons displaced”²² and the country’s hitherto vibrant tourism sector virtually brought to a halt. In Sri Lanka, the 2001 elections left sixty one (61) people dead and hundred (100) wounded in election violence.²³ Following the 1998 elections in Lesotho, the country was plunged into political instability as a post election violent conflict erupted. In 2000, thirty two (32) people were killed in electoral violence in Zimbabwe by the so-called “war veterans” associated with President Mugabe’s ZANU-PF party.²⁴

Khabele Matlosa aptly observes thus: “With the benefit of hindsight, it is abundantly evident that elections in the SADC region have triggered various types of conflicts thus undermining in the process constitutionalism and constitutional rule.”²⁵ The devastating effect of conflicts, admittedly most of which is caused by electoral disputes, has been clearly stated as follows:

No single internal factor has contributed more to the present social-economical problems on the continent than the scourge of conflicts within and between our countries. They have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope.²⁶

²¹ Foundation for Democratic Process (FODEP) , Zambia’s 2001 Tripartite Elections, 2001, 51

²² The Post 25th January, 2009

²³ Associated Press, “Election Violence in Sri Lanka,” December 5, 2001

²⁴ Swan, Craig, BBC News, “Mugabe sued for election violence,” April, 23, 2001.

²⁵ Khabele Matlosa , Electoral Systems, Constitutionalism and Conflict Management in Southern Africa’ African Journal on Conflict Resolution, Volume 4, Number 4 (2004), 11

²⁶ Kithure Kindiki, ‘The Increasing Role of African Intergovernmental Organisations in Issues of Regional Peace, Security and the Protection of Human Rights’ Zambian Law Journal Volume 35, (2003), 83

The world can no longer afford to ignore electoral disputes positing that they were merely expressions of disgruntled politicians whose ego could be too demanding to accept the verdict of the people.

CHAPTER TWO: ELECTORAL DISPUTE RESOLUTION SYSTEMS

Given the intensity of political competition and the propensity of politicians to win an election, conflicts in the electoral process have to be anticipated and institutions and systems to manage them put in place. One of the challenges for the emerging and established democracies alike is to ensure that any dispute is resolved in a timely, fair, and effective manner. Therefore, it is essential that the electoral process embodies an effective and efficient EDR system.

There are different types of EDR systems employed by different countries. These systems usually co-exist and may be interrelated. This chapter will outline and discuss the various EDR systems. These systems are broadly categorized as Ordinary Courts, Constitutional Courts, Electoral Tribunals, Administrative Systems and Political Systems.

THE ORDINARY COURTS

This is the conventional EDR system. It is actually in consonance with the traditional role of the Courts to resolve conflicts in society. The system is inherently well structured with formal rules and procedures. In certain instances, the courts are given exclusive mandate to resolve certain types of electoral disputes. For instance, Presidential petitions in Zambia can only be referred to the full bench of the Supreme Court. This is provided under section 21 (3) of the Electoral Act.²⁷ Furthermore, under section 93 (1) of the Electoral Act²⁸, it is only the High Court that has the original jurisdiction for petitions arising from parliamentary elections.

²⁷ Chapter 13 of the Laws of Zambia

²⁸ Chapter 13 of the Laws of Zambia

The distinct advantage of resolving electoral disputes through ordinary courts is that decisions of the Courts are legally binding. This entails that any decisions arising from the petition are enforced. However, ordinary courts, particularly in Zambia, have been characterized with delays in disposing cases due to the backlog of cases. In some instances, cases could only be disposed years after lodging the petition, rendering the whole petition a mere academic exercise. Kemi Ogunsanya correctly observes thus: “traditionally, courts have dealt with election-related disputes, and decisions have been delayed due to a backlog of cases, which has contributed to electoral violence in specific circumstances.”²⁹ Furthermore, the rigid formal rules and procedures inherent in such a system may not be appealing to some potential petitioners. The cost of pursuing electoral disputes through Courts may also be prohibitive to the majority of citizens particularly in Africa.

This form of EDR system has, nonetheless, remained the most common one in many countries mainly because of the fact that the decisions of the courts are legally binding. Some jurisdictions have attempted to ameliorate delays in disposing electoral petitions by providing a time frame within which such cases should be disposed of. Section 102(1) of the Electoral Act³⁰ of the Laws of Zambia is illustrative in this regard. However, it is noteworthy that the above provision does not apply to Presidential petitions.

²⁹ Kemi Ogunsanya, ‘Benchmarks for Credible Elections in the SADC Region’ *Conflict Trends* (2005), 37

³⁰ Chapter 13 of the Laws of Zambia

SPECIAL ELECTORAL COURTS

Some countries have established special electoral courts whose function is exclusively to address any issues related to electoral disputes. This form of EDR system eliminates the problem of delays inherent in ordinary courts whilst at the same time maintains the advantage of passing decisions that are legally binding. They are also more likely to be staffed with adjudicators that are well vested with electoral laws of a particular country. However, Special Courts, to a large extent, still retain rigid rules and procedures characteristic of ordinary courts. Furthermore, it may be argued that special courts can be costly, as they exist in parallel with the ordinary courts. However, this argument is not tenable particularly that in most cases these courts are only operative as and when circumstances demand. Moreover, experience has clearly shown that the cost of not addressing electoral disputes in a timely and satisfactory manner can be extremely high and in some cases immeasurable due to loss of lives. Therefore, any EDR system that provides an opportunity for an effective resolution of disputes can hardly be justifiably disposed of solely on the basis of cost.

CONSTITUTIONAL COURTS

The function of Constitutional Courts is to resolve disputes that have a constitutional dimension. Elections are constitutional matters and are therefore taken before the Constitutional Court. Constitutional Courts have the advantage of disposing cases in a timely manner as they are specialized to handle only selected cases. They are also more likely to have specialized Judges conversant with electoral laws. Their decisions are also legally binding. However, like

specialized Courts, they tend to have rigid procedures and rules that may not be appealing to some section of potential petitioners. Costs for accessing such courts could also be prohibitive, particularly in the country such as Zambia where poverty levels and illiteracy is high.

ADMINISTRATIVE SYSTEMS

Administrative Systems are another common form of resolving electoral disputes. This form of electoral dispute resolution is usually managed by Election Management bodies such as the Electoral Commission of Zambia established under Article 76(1) of the Constitution³¹. The commission has powers to establish Conflict Management Committees (CMCs) as stipulated under Section 111 (1) of the Electoral Act.³²

The credibility of the decisions of such CMCs clearly depends on the confidence and trust the various stakeholders have in them. There is usually a general public outcry over the autonomy, organizational efficiency and independence of these CMCs.

Administrative systems may be more expeditious in their resolution of disputes. However, such bodies are usually viewed as not being an impartial arbiter and do not have effective enforcement mechanisms. Hassan O. Kaya aptly observed thus: "since the coming of multi-party, elections have been a major source of discontent. It seems that the electoral laws are deficient and the electoral commissions do not inspire confidence in their independence."³³

³¹ Chapter 1 of the Constitution of Zambia

³² Chapter 13 of the Laws of Zambia

³³ Hassan O. Kaya, 'Electoral Violence, Political Stability and the Union in Tanzania' African Journal on Conflict Resolution, Volume 4, Number 4, (2004), 167

POLITICAL SYSTEMS

Political systems are usually spearheaded by political parties in a particular country for the purpose of creating a forum for discussing and addressing any disputes that may arise. Political parties may also specifically establish a forum in order to resolve a specific electoral dispute. Indeed, this was the case in Lesotho where following the post election conflict, all political parties formed a forum to resolve the dispute. Such a forum may also discuss issues of common interest other than electoral disputes. A typical example of such a forum is the Zambian Center for Inter-party dialogue (ZCID). Membership to such an entity is voluntary and political parties can join and leave it as they wish. Political Systems also include efforts made by civil society and other non-governmental organizations in resolving electoral disputes by bringing different political parties together with a view to arriving at an amicable solution over their differences.

It may be observed that one of the advantages of this form of EDR system is that it is capable of addressing disputes at an early stage as there is a forum to facilitate constant communication between the different political players. Moreover, political systems tend to be highly accessible to the various stakeholders in the electoral process. The biggest weakest of such a system is the fact that enforcement of its decisions is entirely dependant on both good faith and good will of the members since such decisions do not have any legal force. If one party does not accept the decision, then the whole exercise would be a waste of time and resources. Experience shows us that if there is one group of persons you may not rely on their good will, it is the politicians. They are normally driven by political expediency as well as the obtaining political imperatives and therefore do not exhibit any level of consistence. They are more than willing to change

positions in order to consolidate their political fortunes notwithstanding any past undertakings or commitments.

In conclusion, it may be observed that EDR systems usually co-exist. Each system has its own advantages and disadvantages. Deciding on which EDR System could be employed should take into account factors such as the country's political, cultural and economic environment. As Ben Reilly and Andrew Reynolds aptly stated: "The optimal choice for peacefully managing conflict depends on several identifiable factors specific to the country, including the way and degree to which ethnicity is politicized, the intensity of the conflict, and the demographic and geographic distribution of ethnic groups."³⁴

³⁴ Ben Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies*. (National Academic Press, 1999)

positions in order to consolidate their political fortunes notwithstanding any past undertakings or commitments.

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³⁴ Ben Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies*. (National Academic Press, 1999)

CHAPTER THREE: ESSENTIAL ATTRIBUTES OF AN EFFECTIVE ELECTORAL DISPUTE RESOLUTION SYSTEM

In order for an EDR system to be effective, it should possess certain essential attributes. These attributes can be used as a benchmark when assessing the effectiveness of any EDR system. This chapter will outline the essential attributes of an effective EDR system. The major essential attributes are Credibility, Transparency, Accessibility, Timeliness, Independence, Impartiality, Relevance and Sanctions & Enforceability.

CREDIBILITY

An EDR system is said to be credible if those who may be subjected to it perceive it as being capable of consistently producing what may be termed just results. The system should, therefore, motivate the parties to invoke it in order to seek redress on matters pertaining to electoral disputes. The challenge about EDR systems is that their credibility is not necessarily based on facts; it may be based on mere perception. Different parties may view the system differently based on their divergent interest or indeed their past experience with the system. Factors such as delays in disposing disputes and indeed the association and reputation of those superintending over the dispute resolution process can have a bearing on the credibility of the system. It is, therefore, important that efforts are made to ensure that the system is not subjected to situations or circumstances that could easily compromise its credibility.

TRANSPARENCY

Transparency refers to the extent to which the operations of an EDR system is made known to all and particularly those who may be subjected to it or indeed those who may elect to use it as an avenue for resolving electoral disputes. All information pertaining to the functions as well as operations of the system should be readily accessible to everybody. The operational procedures should be known in advance and should be consistent regardless of the parties involved in the dispute. Information regarding an EDR system should be communicated in a form that is clear and easy to comprehend by all without any discrimination. The proceedings should be conducted in an open manner devoid of any undue secrecy. Decisions arising from the EDR system should be readily available to all interested parties and the enforcement mechanism should be known and enforced in an open manner.

ACCESSIBILITY

In order for any EDR system to be of value to the community it serves, it should be readily accessible by all. A system that is not readily accessible will invariably dissuade those who may want to use it from doing so. Such parties will instead seek other avenues, some of which may ultimately end up aggravating the conflict. One of the factors that affect accessibility is costs involved in seeking redress through the EDR system. The cost should not be prohibitive. It should take into account the income levels in a given country or society. Denis Petit rightly observed thus:

The complaints procedure should be free of unnecessary obstacles, especially as regards the cost of bringing the action to court. Wherever possible the complaints procedure should be accessible without charge to the complainant. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.³⁵

The complaints procedure should be simple and easily understandable. Accessibility can be improved through strategies such as civic education campaigns as well as publications.

TIMELINESS

There is need to resolve electoral disputes timely and within a specified and transparent timeframe. This is epitomized in the old adage “justice delayed is justice denied.” Violaine Autheman underscores the need for timeliness in the following words: “Disputes related to election results are extremely time-sensitive, and their resolution is therefore an extremely time-intensive exercise.”³⁶ The American 2002 presidential election provides a good example of rapid response mechanisms used by the courts to settle all disputes in the aftermath of an election. It only took a month for the US Supreme Court to provide a final resolution of the dispute. You may compare this with Zambia where the 1996 and 2001 presidential petitions dragged for years in the Supreme Court. In electoral disputes, any delays in disposing of the matter may simply render the process a mere academic exercise devoid of any practical importance. Indeed, in the case of *Mazoka and Others v Manawasa and Others*³⁷, the Supreme Court correctly observed that matters pertaining to elections must be determined very expeditiously, lest they be rendered an academic exercise at the end. Furthermore, delays in disposing of cases discourages the

³⁵ Denis Petit, ‘Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System’ (2000), 11.

³⁶ Violaine Autheman, ‘The Role of the Constitutional Court in Resolving Election Result Disputes through a Transparent Adjudication Process’ *IFES Rule of Law Conference Series*, (2004), 2

³⁷ SCZ/EP/01/02/03/2002

aggrieved from pursuing their case. Amelia Pio Young ³⁸aptly notes thus” Because of the well-known delays in the court system, certain cases that should have been brought to court are not, for the simple reason that the aggrieved is discouraged by the prospect of such delays.”

INDEPENDENCE

The key to the legitimacy and integrity of an EDR system is to ensure the independence of the dispute resolution body. Independence means that the system is free from any outside influence, intimidation or control. The system should actually be seen to be independent by the parties that may be subjected to it. Parties should be confident that the decisions arising from the EDR system are not influenced by extraneous considerations. Perception on the independence of an EDR system can be influenced by factors such as the composition of the body reposed with the responsibility to superintend over the system. The laws governing the system may also influence the independence of the EDR system. It may further be influenced by the manner in which resources are availed to the body managing the system. In this regard, governments are seen to have an undue influence on EDR systems as they are the major providers of resources to these systems. The independence of an EDR system may also be influenced by the manner appointments are made to positions on the EDR system.

³⁸ Amelia Pio Young, ‘Alternative Dispute Resolution and its Place in the Zambian Judicial System’ Zambian Law Journal Volume 32, (2000), 76

IMPARTIALITY

In order for an EDR system to be credible, it should be viewed as being impartial. Impartiality is key to building public confidence in the EDR system. It is only when the citizens view the EDR system as impartial that they can be willing to use it as an avenue for resolving electoral disputes. As with other attributes, impartiality is based on perception, which may in turn be influenced by factors such as previous experience with the system or indeed what the party might have learnt about the system from other sources. Perception is also naturally influenced by the way parties view the individuals superintending over the system. Referring to the role of the civil society in resolving the electoral dispute following the disputed elections in Lesotho, Francis Kopona Makoa observed thus: "...but these have been ineffective largely because of lack of formal recognition by the state, deep-seated animosities and mutual distrust among the Lesotho people, and *doubts as to their neutrality*." ³⁹

RELEVANCE

The EDR system should take into account the political and social culture. The operating procedures, the sanctions as well as the enforcement mechanism should be informed by the political realities in a given society. For instance, a system that has complicated procedures and expensive may not be effective in a society where most individuals are illiterate and poor. This explains why EDR systems that are effective in one country may not necessarily be effective in

³⁹ Francis Kopona Makoa, 'Electoral Reform and Political Stability in Lesotho' African Journal on Conflict Resolution, Vol. 4, No. 4, (2004), 79

other countries. An EDR that is relevant and therefore responsive to the political and social environment is likely to detect early signs of conflicts and more likely to be effective.

SANCTIONS AND ENFORCEABILITY

Sanctions provide both a relief to the affected party as well as a deterrent to those who may have intentions to commit similar acts. Bodies with the jurisdiction over election disputes should be vested with the power to enforce their decisions within a reasonable timeframe. It should also specify unambiguously the legal sanctions which can be imposed and enforced, including fines, imprisonment, suspension or disqualification of a candidate. Such sanctions should not be selective and should be commensurate with the nature of the offense. Sanctions should be visible and heavy enough to serve as a deterrent to those contemplating to involve themselves in similar acts.

Any EDR system that does not provide for sanctions and their timely enforcement is likely to lose its efficacy as parties would not have any motivation to invoke it. As aptly stated by Denis Petit, “the proper and timely implementation of decisions taken by courts and electoral bodies is critical to the effectiveness of the electoral dispute resolution system.”⁴⁰

In conclusion, the essential attributes of an EDR system determine the effectiveness of such a system. These essential attributes are interrelated. For instance, an independent EDR system is more likely to be transparent and credible. These attributes are highly influenced by perception

⁴⁰ Denis Petit, ‘Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System’ (2000), 7

and not necessarily factual situations. It is certainly difficult to address perception due to its subjective and highly illusionary nature. Nonetheless, efforts should be made to address parameters that influence perception such as appointments to the body superintending the EDR system. Admittedly, not every EDR system may possess all the essential attributes discussed above. However, the effectiveness of any EDR system is largely determined by the extent to which it embodies some of these essential attributes.

CHAPTER FOUR: AN EVALUATION OF ELECTORAL DISPUTE RESOLUTION SYSTEMS IN ZAMBIA

This Chapter will evaluate the effectiveness of the current EDR Systems in Zambia: - The Ordinary Courts, the Administrative System and the Political System. The evaluation will be based on the essential attributes of an effective EDR System as discussed in chapter three namely:- Credibility, Transparency, Accessibility, Timeliness, Independency, Impartiality, Relevance and Sanctions & Enforceability.

THE ORDINARY COURTS

In Zambia, the ordinary courts have an exclusive jurisdiction on petitions arising from elections. This entails that other EDR systems can only be employed as an avenue for electoral disputes prior to declaration of results. The 2006 elections in which a candidate, Emmanuel Munaile was erroneously declared winner in Malole constituency is instructive in this regard. Notwithstanding the fact that the Electoral Commission of Zambia acknowledged the error, the matter had to be referred to the High Court where the petitioner, unfortunately, lost the case on technical grounds.

Section 93 (1) of the Electoral Act⁴¹ provides that “No election of a candidate as a member of a National Assembly shall be questioned except by an election petition presented under this part (Part IX).” Furthermore, Section 102 (1) of the Electoral Act⁴² provides that “An Election

⁴¹ Chapter 13 of the Laws of Zambia

⁴² Chapter 13 of the Laws of Zambia

Petition shall be tried and determined by the High Court in an Open Court, within one hundred and eighty days of the presentation of the election petition.”

Meanwhile, Article 41 (2)⁴³ provides thus: “Any question which may arise as to whether any provision of the constitution or any law relating to elections of a President has been complied with or any person has been legally elected as President under Article 34 shall be referred to and determination by the full bench of the Supreme Court.” Section 21 (3) of the Electoral Act⁴⁴ contains a similar provision. The question is, how effective have the Courts been in resolving Electoral Disputes referred to them as stipulated by both the Constitution and the Electoral Act?

Disposal of petitions, particularly presidential petitions takes too long. The 1996 Presidential petition, *Akashambatwa Mbikusita Lewanika and Four Others v Frederick J.T Chiluba*⁴⁵ took one and a half years before the judgment was finally delivered. Meanwhile, the 2001 Presidential Petition, *Mazoka and Others V Mwanawasa and Others*⁴⁶, dragged from January 2002 to 16th February 2005 when the Supreme Court finally delivered the judgment. This translates to a period of three years and one month, a period more than half the presidential term of office. Parliamentary elections have not been spared from these delays notwithstanding the provision to the effect that such disputes should be disposed within a period of one hundred and eighty days (Section 21 (3) of the Electoral Act⁴⁷). Referring to the delays in disposing cases on electoral petitions, M. Chipenzi of the Foundation for Democratic Process observed thus: “court

⁴³ The Constitution, Chapter 1 of the Laws of Zambia

⁴⁴ Chapter 13 of the Laws of Zambia

⁴⁵ (1998) ZR 49 (SC)

⁴⁶ SCZ/EP/011/02/03/2002

⁴⁷ Chapter 13 of the Laws of Zambia

cases are merely an academic exercise-they take long and by the time the case is heard and disposed of, the term of office would have been almost served – so what is the purpose?”⁴⁸

The credibility of the Courts as the final arbiter of electoral disputes is also in question. This was manifested following the 2006 presidential elections. The Opposition Patriotic Front disputed the results of the presidential elections. However, the party stated that it could not seek redress from the Courts of Law, as this would simply be an academic exercise that could only serve to legitimize an illegitimate regime.

Furthermore, principal stakeholders perceive the court system as *not being independent*. This view has been prominent in presidential petitions. It is strongly believed that the sitting President controls the judiciary and it would therefore take an exceptionally brave judiciary to come up with a ruling against the incumbent president. Two issues give credence to the proposition that the court is under the control of the sitting President and therefore not independent.

Firstly, the events that led to the eventual resignation of the then Chief Justice Mathew Ngulube is an affirmation of the extent to which the judiciary had lost its independence. The Chief Justice received favors in the form of funds from the then sitting President, Dr. F.T. Chiluba. This unfortunate incidence only served to confirm fears that the executive uses its unbridled powers and unfettered access to national resources to systematically influence the judiciary.

Secondly, according to Article 41 (1) of the Zambian Constitution⁴⁹, the Chief Justice is the returning officer for the purpose of elections to the office of President. Meanwhile, as stipulated

⁴⁸ Interview: M. Chipenzi, 8th December, 2008

under Article 41 (2) of the Constitution⁵⁰, presidential petition are to be brought before the full bench of the Supreme Court and the Chief Justice presides over the same. One then wonders how the Chief Justice can reconcile his role as a returning officer and an adjudicator over the same elections in which he declares one candidate “duly elected as President” as provided for under Article 34(8) of the Constitution.⁵¹ As aptly observed by Rhoda Nsama, of the Patriotic Front, “the Chief Justice is the same person who swears in the winning candidates and presides over petitions; there is no objectivity...history shows that petitions do not get enough attention.”⁵²

Whilst Parliamentary petitions clearly stipulate the relief that may be claimed in an election petition, this is not the case with presidential petitions. Without clear provisions, one may tend to appreciate why the court has been reluctant to nullify presidential elections, as such a decision would be devoid of an enforcement mechanism. In the *Mazoka case*, *supra*, the court acknowledged that there were malpractices, but they could not do more than that.

Electoral petitions in the courts are *inherently expensive*. Therefore, some individuals may opt not to petition on grounds that they cannot afford the cost associated with such petitions. For instance, the petitioner may need to procure the services of a lawyer due to technicalities and procedures inherent in the High Court and Supreme Court. In a country such as Zambia, where poverty levels are high, such costs can clearly prohibit a number of citizens from seeking redress on electoral disputes through the courts of law.

⁴⁹ Chapter 1 of the Laws of Zambia

⁵⁰ Chapter 1 of the Laws of Zambia

⁵¹ Chapter 1 of the Laws of Zambia

⁵² Interview: Rhoda Nsama , 5th December, 2008

THE ADMINISTRATIVE SYSTEM

Election management bodies superintend administrative systems. The election management body in Zambia is the Electoral Commission of Zambia (ECZ). The Commission is established under article 76 of the constitution.⁵³ Section 111 of the Electoral Act⁵⁴ gives the commission powers to constitute Conflict Management Committees (CMCs) for the purpose of resolving electoral disputes. The ECZ has since established a National CMC as well as District CMCs. These Committees play the role of a mediator or conciliator. They provide a forum to the parties to the dispute to meet and discuss the subject of the dispute. The Commission can also resolve electoral disputes through conciliation or mediation. This is provided for under section 110(1) of the Electoral Act which provides thus:

Whenever the Commission, the Director of Elections, an election officer or any person is required under this Act to decide an objection, dispute, complaint or an appeal, the Commission or that person may attempt to resolve the issue, that is the subject of the objection, dispute, complaint or appeal, through conciliation or mediation.

We now ascertain how effective the above provisions have been in resolving electoral disputes in the country.

As stated above, the ECZ establishes CMCs. Meanwhile, principal stakeholders view the ECZ as *not being independent*. In the words of Mr. Sikwindi Sitwala, the Presidential Campaign Coordinator of the United National Party for National Development (UNDP), “the *Electoral Commission of Zambia is not independent, not credible and not transparent*.”⁵⁵ Furthermore,

⁵³ Chapter 1 of the Laws of Zambia

⁵⁴ Chapter 13 of the laws of Zambia

⁵⁵ Interview: Sikwindi Sitwala, 5th December 2008

during the 2008 presidential elections, the opposition Patriotic Front (PF) demanded for the removal of the Director of the ECZ, Mr. Danny Kalale from his position, as he was perceived not to be impartial and therefore incapable of superintending over a free and fair election. The fact that the ECZ establishes CMCs has affected the manner in which principal stakeholders perceive these Committees. The Committees have mostly been perceived as not being impartial and influenced by the ruling party.

During the 2008 presidential elections, the opposition Patriotic Front indicated that the National CMC could not address its complaint *impartially* as the chairman of the committee Mr. Miles Banda, was related to the ruling party candidate, Mr. Rupiah Banda.⁵⁶ The independence of the CMC is further compromised by section 111 (2) of the Electoral Act⁵⁷ that gives the ECZ powers to appoint members of the CMCs. Furthermore section 111 (3) of the Electoral Act⁵⁸ provides that the Commission shall appoint the Chairperson of the Committee.

The study further reviewed that some Chairperson of these Committees were actually members of political parties. It is a notorious fact that most disputes are brought before the Committee by political parties. Therefore, in the event that the chairperson is a member of a political party, the *impartiality and indeed credibility* of such a Committee is compromised. As ably observed by Nchimunya and Rev Paul Simfukwe, “the Commission should make a deliberate move that all

⁵⁶ The Post, 11th September 2008

⁵⁷ Chapter 13 of the Laws of Zambia

⁵⁸ Chapter 13 of the Laws of Zambia

chairpersons should come from the Non Governmental Organizations and not political parties as these are the most causes of confusion.”⁵⁹

Although mediation or conciliation may be highly attractive in a commercial environment due to factors such as confidentiality, low costs and the need to maintain a sound relationship between parties to the dispute, it is less appealing in a political environment, particularly in Zambia due to the problem of enforceability. Whereas commercial enterprises are more likely to respect the decisions arising from the mediation process, this is less likely with political parties particularly in Zambia. Firstly, the Committee does not have powers to compel parties to the conflict to appear before it. In the event that a party to the dispute decides not to appear before the Committee, the Committee cannot institute any action against such an ailing party. Secondly, even where it is proved that a party has grossly undermined the provisions of the electoral laws such as the Electoral Code of Conduct Regulations, the Committees cannot impose sanctions such as disqualifying the party from participating in the elections. Thirdly, even when parties to the dispute sign a document outlining what had been resolved, the Committees do not have powers to compel parties to the agreement to abide by their own agreement.

THE POLITICAL SYSTEM

Political systems are efforts spearheaded by political parties themselves aimed at enhancing inter-party communication and serve as a platform for resolving disputes. The political system provides a more flexible dispute resolution mechanism. It is inherently able to detect disputes at

⁵⁹ Chimunya and Rev Paul Simfukwe , “Report of the Conflict Management Briefing in Mongu”, 19th September 2008, 1

an early stage and therefore resolve them before they get out of proportion. The Zambia Center for Inter-party Dialogue (ZCID) is one such entity in Zambia.

The ZCID is registered as a trustee and governed by a trustee deed. Membership is voluntary and open to all registered political parties. The Supreme body of the ZCID is the Summit of presidents, which comprises of presidents of the various political parties that are members of the ZCID. There is also a Board of Trustees that comprises of Secretary Generals or equivalent of political parties that are members of the ZCID. The Chairperson of the Board is an independent person. The current chairperson is Justice Frederick Chomba.

As an EDR system, ZCID provides a platform for dialogue. Dialogue is essential in the detection of potential disputes as well as resolution of disputes where they arise. Members of the ZCID can bring complaints to the Secretariat of the ZCID. ZCID can then convene a meeting of the Board of trustees. In this respect, ZCID provides a platform to resolve any disputes between and amongst political parties including disputes that are related to the electoral process. The Secretariat may, on its own volition, convene a meeting of the Board of Trustees where, in its opinion, there is need to resolve a certain political impasse in the country.

As a dispute resolution system, the ZCID has a number of shortcomings. Firstly, membership is voluntary. In most cases the major political players join and leave the ZCID as and when it is expedient to do so. Secondly, observance of the decisions of the ZCID is entirely dependant on the good will of the parties to the dispute. The matter concerning the Constitutional making process is instructive in this regard. The Summit of presidents, that included the president of the

Patriotic Front agreed to proceed with the constitutional making process in line with what later became the National Constitutional Conference (NCC). However, the Patriotic Front later changed its position and categorically indicated that it was not going to support any constitutional making process in the framework of the NCC. The party even attempted to expel its members of parliament that decided to participate in the NCC as provided for in the National Constitutional Conference Act⁶⁰ The failure by political parties to observe their own decisions was aptly captured in the words of J. Mubita of the ECZ when she stated thus: “they usually agree then disagree again; they usually go back on their words”⁶¹ Indeed, one of the interviewees observed thus: “the inter-party dialogue was cost effective and better than the court system but required trust, confidence and should not be administrative but given legal backing.”⁶²

During the study, it was observed thus: “the ZCID could stop availing grants to members that do not respect its decisions.”⁶³ It is submitted that this is still not an effective enforcement mechanism as political parties may simply decide to source funds through other avenues.

⁶⁰ Act No. 19 of 2007

⁶¹ Interview: J. Mubita , 5th December, 2008

⁶² Interview: Mr. Samusungwa, 9th December, 2008

⁶³ Interview: Mr. Chilando

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

CONCLUSION

Electoral disputes clearly present a danger to the peace and stability of any nation. Meanwhile, electoral disputes are inherent, particularly in a competitive political environment such as Zambia. It is, therefore, prudent that special recognition is given to the manner in which such disputes are addressed. EDR systems play a decisive role in ensuring the stability of the political system and invariably the peace and stability of a nation. Measures should, therefore, be taken to facilitate the resolution of such disputes in an expeditious and transparent manner using EDR systems that are not only independent and credible but are perceived as such by principal stakeholders in the electoral process.

In Zambia, we have three major EDR Systems namely:- The Ordinary Courts, the Administrative System, that is superintended by the ECZ, and the Political System that is spearheaded by the ZCID. The Ordinary Courts have an exclusive jurisdiction on electoral petitions. The Administrative system and the political systems can, therefore, only be deployed prior to declaration of results of the elections that are the subject of the dispute. Based on the essential attributes of an effective EDR system namely:- Credibility, Transparency, Accessibility, Timeliness, Independency, Impartiality, Relevance and Sanctions & Enforceability, an evaluation of the EDR systems in Zambia reviewed that these systems do not embody most of the essential attributes of an effective EDR system.

The Ordinary Court system has been characterized with a lot of *delays* due to the “case back log” in our Courts. In particular, presidential petitions have dragged for as much as three years before determination of the same. These delays have invariably reduced the *relevance* of the ordinary court system as an avenue for resolving electoral disputes. Furthermore, principal stakeholders believe that the ordinary court system was *not impartial* and was heavily controlled by the executive and would therefore not make a ruling against the incumbent president. This position has been reinforced by the fact that the president elect is sworn in before the presidential petition is disposed of thereby giving him unbridled executive powers. Indeed, in a country such as Zambia, where the powers of the executive are overwhelming and overbearing, it would require extraordinary courage for Judges to decide against an individual who has already been given such executive powers. Furthermore, the Court System is inherently expensive due to costs such as legal representation. This makes the Ordinary Court System *less accessible* to the majority of the citizenry.

Meanwhile, the Administrative system under the ECZ has been viewed with a lot of suspicion. Some stakeholders interviewed indicated that the ruling party controlled the Commission. As a corollary, the *impartiality* of the CMCs is also questioned. This inevitably affects the *confidence* citizens have in the CMCs as arbiters in electoral disputes. They view the CMCs as not being *credible* enough to mediate on electoral disputes. Furthermore, parties to the agreement arising from the mediation by the CMCs may not observe the agreement. CMCs do not have an *enforcement mechanism* that ensures that the parties to the agreements observe the terms of such agreements.

The Political System is inherently characterized with an informal structure and mode of operation. For instance, Political parties are not bound to be part of the Zambia Center for Interparty Dialogue (ZCPD). Indeed, even those who are members can opt out of the group at any time without any consequences. There is also mutual distrust amongst political parties that makes it difficult for them to effectively resolve any electoral disputes. Furthermore, decisions of the ZCID are devoid of any legal force and political parties may choose not to abide by such decisions.

RECOMMENDATIONS

In view of the above shortcomings in the EDR Systems in Zambia, the paragraphs below provide a number of recommendations.

The Role of the Chief Justice during Elections

1. The Chief Justice should not be the returning officer for presidential elections as this has a potential to compromise his perceived impartiality when presiding over a presidential petition. It is submitted that the Chairperson of the ECZ should be the returning officer as proposed under Article 125(7) of the Draft Constitution of the Republic of Zambia. Indeed this is the case in other jurisdictions such as Ghana.

Swearing in of President elect

2. The President elect should not be sworn in until all the electoral disputes are resolved. This will reinforce the need to dispose such matters expeditiously and also provide confidence in the judiciary, as none of the contending parties would be perceived to have control and influence over the judiciary. Furthermore, this will remove the apparent current dilemma where the courts seem not to be sure of the implication of nullifying the election of a President who had already been sworn in and was undertaking functions of a president from the time of swearing in as President.

Powers of the Electoral Commission of Zambia (ECZ)

3. The ECZ should take action on those who flout the electoral regulations. It should, for instance, have powers to prosecute those who violate electoral laws. Furthermore, the Constitution should give the ECZ powers to disqualify candidates from contesting as proposed under Article 107(4) (d) of the Draft Constitution of the Republic of Zambia. The law should include an appeal mechanism in place in order to avoid any abuse of such powers by the Commission.

Electoral Tribunals

4. A Presidential Electoral Tribunal must be established to specifically expeditiously address presidential electoral disputes. The decision of such tribunal should be final. In the alternative, the Constitutional Court can be given powers to determine presidential petitions as provided for under Article 127 (1) of the Draft Constitution of the Republic of Zambia. Furthermore, an ad hoc Parliamentary Electoral Tribunal must be established to specifically expeditiously address parliamentary electoral disputes. The decisions of the tribunal should also be final.

Timeframes for Resolving Disputes

5. There is need for specific and transparent timeframes within which electoral disputes should be resolved. Such timeframes should be matched with the necessary resources to ensure that they are tenable and strictly adhered to. It is instructive to note that the Draft Constitution of the Republic of Zambia⁶⁴ provides a period of ninety days for petitions pertaining to Presidential (Article 127 (4)), parliamentary (Article 165 (4)) as well as local government (Article 240 (4)) elections.

National and District Conflict Management Committees

⁶⁴ Government of the Republic of Zambia, Draft Constitution of the Republic of Zambia, 2005

6. The ECZ should not appoint members of the National and District CMC. Instead, all the principal stakeholders should participate in the appointments in order to foster inclusiveness as well as independence and credibility of the Committees.
7. A member of a Political Party should not be appointed as a chairman of a Conflict Management Committee. In this regard, section 111 (3) of the Electoral Act should expressly state this position.
8. CMCs should be given powers to compel any party to the dispute to appear before it. This should be provided for in the Electoral Act⁶⁵.
9. The Electoral Act⁶⁶ should provide for a mechanism on the enforcement of agreements arising from the mediations by CMCs.

The Political System

10. The Electoral Act⁶⁷ should recognize the Political System as an avenue for resolving electoral disputes and provide for a formal mechanism for its operation. The formal procedure, should, nonetheless not compromise the inherent flexibility of the Political System. The procedure should provide for sanctions and enforcement mechanism.

⁶⁵ Chapter 13 of the Laws of Zambia

⁶⁶ Chapter 13 of the Laws of Zambia

⁶⁷ Chapter 13 of the Laws of Zambia

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