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DEDICATIONS

I dedicate this work in memory of my late beloved wife, Clara Fuyayu Sasokoloke-Mwaba, my
dear late father, Evans Mwaba Kankomba, my dear late grandmother, Mandalena Chibwe
Chibale-Sokoni, my late auntie, Mrs. Veronica Kabole Sokoni-Kalasa for their love. And to my
ABSTRACT

The Electoral Commission of Zambia (ECZ) is the constitutional public institution established for the purpose of primarily conducting presidential and parliamentary elections in the Republic of Zambia. The ECZ consists of 5 full time commissioners, inclusive of the Chairperson, all of whom are directly appointed by the Republican President.

The ECZ has come under severe criticism at each and every general election held in Zambia since 1996 on suspicion of being a political tool for the political party in power. These persistent attacks on the credibility of the ECZ are related to various reasons. The ECZ is perceived not to be independent and autonomous because it suffers from both direct and indirect interference by the executive arm of government in the electoral process when at the same time the executive are active political players in the race for political power. One of the major criticisms is the direct role the President plays as the sole appointing authority of the commissioners including the chairperson. The integrity of the ECZ in the conduct and management of elections has thus continued to be questioned by stakeholders, the main assertion being that the ECZ is not independent in the conduct of its mandate.

This obligatory research essay examines the legal framework of the ECZ with the aim of finding a lasting solution which can help restore the institution’s credibility in the eyes of all the stakeholders and the public at large. This task starts by carrying out a general overview of the legal framework of the institutions responsible for the management and administration of elections, generally classified as Electoral Management Bodies (EMBs). The purpose of this study is to critically analyze the independence of the ECZ in order to establish the extent of the adequacy of the legal framework that governs its independence. The study therefore aims at making recommendations on how the lacuna and weaknesses in the electoral legislation can be addressed to ensure the independence of the ECZ in exercise of this mandate. This analysis is
targeted at the law and the legal environment under which the Commission operates and the electoral system under which elections are ultimately conducted.

Further, a comparative case study of electoral bodies in three selected countries, Nigeria, India and the United Kingdom has been conducted. This has been done in order to make an informed understanding of the legal framework that runs the electoral machinery in Zambia. The comparative case studies of the three countries compare and contrast the ECZ legal framework

Some guiding principles identified for a successful ECZ include constitutional and legal independence; operational independence; financial independence; appointment and dismissal procedures and; tenure of members.

The study finally draws recommendations gathered through conducted interviews of some key stakeholders and also from research literature. The conclusion drawn is that the problems of independence and autonomy at the ECZ are not peculiarly internal but that much of it is external. The political players themselves have much to learn about democratic ideals and good governance.
ACKNOWLEDGEMENTS

I would like to express my thanks to my supervisor, Mr. Mavuto Sakala, for his comments and guidance during this laborious but academically fulfilling research essay.

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My thanks also go to Mr. Chomba Chellah, the Executive Director of the Zambia Centre for Inter-Party Dialogue (ZCID) for sparing part of his valuable time to give me an interview and his recommendations were very valuable to my project. My other thanks go to Mr. Langtone Sichone, General-Secretary of the United Liberal Party (ULP), for sparing his time to give me an interview. His input as a politician has added an insight from the politician’s point of view on this subject matter.

I also sincerely thank my children for cleaning up my study room and rearranging my books and material back on the book shelves.

I praise my Heavenly Father, GOD Almighty, without whom I could not have achieved anything and come this far.

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ACRONYMS AND ABBREVIATIONS

AVAP - Anti-Voter Apathy Project
CFCR - Citizens Forum for Constitutional Reforms
ECI - Electoral Commission of India
ECZ - Electoral Commission of Zambia
EISA - Electoral Institute for Southern Africa
EMB - Electoral Management Body
ERTC - Electoral Reform Technical Committee
FODEP - Foundation for Democratic Process
FPTP - First Past the Post
IDEA - Institute for Democracy and Electoral Assistance
IEMB - Independent Electoral Management Bodies
INEC - Independent National Electoral Commission
NAB - National Assembly Bill
NCC - National Constitutional Conference
NGOs - Non Governmental Organizations
PF - Patriotic Front
PPERA - Political Parties, Elections and Referendums Act, 2000
SACCORD - South African Centre for Constructive Resolution of Disputes
ULP - United Liberal Party
UNIP - United National Independence Party
UPND - United Party for National Development
ZCID - Zambia Centre for Inter-Party Dialogue
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(2) Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia
(3) Constitution of Zambia (Amendment) Bill, National Assembly Bill (N.A.B.) No. 60 of 2010
(4) Electoral Act No. 12 of 2006
(5) Electoral Commission Act, No. 24 of 1996
(6) Local Government Elections Act, 282
(7) Referendum Act, Chapter 14 of the Laws of Zambia
CHAPTER 1 - INTRODUCTION

1.1 OVERVIEW

An election or direct democracy poll – such as a referendum – is often one of the largest single activities that are ever organized in a country1. It is a very complex administrative task, implemented in a politically charged atmosphere2. The complexity and specialist skills necessary for electoral management require that an institution or institutions be responsible for electoral activities3. What makes the administration of elections complex and sensitive is the fact that elections are the life blood of democracy4. Regular ballots give citizens the opportunity to register their approval or disapproval of the government in power, to stand by their leaders, to reject them or to choose new ones5. To be successful and meaningful, any election must be owned by the people, it therefore involves a more emotional rather than rational period, when people are mobilized to express their political will and choice6. The conduct of legitimate elections that are accepted as free and fair by stakeholders, namely the electorate, political parties, civil society and government, is considered to be one of the cornerstones of any country’s democracy. The institution that manages elections has the critical responsibility of being the guarantor of free, fair and transparent elections by virtue of its role to conduct elections.7 However, the honesty and integrity of elections managers especially in Africa, is always being questioned and Zambia is no exception. It is for this reason that the status, powers and independence of election managers, and their impartiality and transparency are fundamental to the integrity of an election. The mandate and status of election managers should thus be provided for and clearly defined in the legal framework to ensure that they are independent.

The institutions legally responsible for the management and administration of elections are generally classified as Electoral Management Bodies (EMBs)8. The titles of EMBs vary and include Electoral Commission, Electoral Unit, Office of the Electoral Commissioner,
Department of Elections, Electoral Council and Electoral Board. The legal framework provides for the establishment and governing of an EMB and there are three types or models of electoral management; the Independent, Governmental and Mixed Models. The Independent Model EMB is institutionally independent and autonomous from the Executive Branch of Government, has and manages its own budget. The independent model is not accountable to a government ministry or department but may be accountable to the Legislature, the judiciary, or the Head of State. The governmental model is an appendage of a government ministry or department and is accountable to the ministry. The mixed model of electoral management usually has two component EMBs, and dual structures exist: a policy, monitoring or supervisory EMB that is independent of the executive branch of government (like an EMB under the Independent Model) and an implementation EMB located within a department of state and/or local government (like an EMB under the governmental EMB). The degree of financial autonomy and accountability of independent EMBs will vary as will the levels of performance accountability.

The return to multi-party politics in Zambia in 1991 was one of the driving forces for the establishment of an autonomous electoral management body independent from the control and supervision of the Executive. Zambia adopted the independent model and has been classified as such by the Institute for Democracy and Electoral Assistance (IDEA). Prior to the establishment of an independent electoral body the part-time Electoral and Local Government Commissions and Elections Office were responsible for the conduct of the Presidential and Parliamentary elections and the Local Government elections respectively under the Office of the Vice President.

Wall et al (editors), Electoral Management Design: The International IDEA Handbook, p. 6
Wall et al (editors), Electoral Management Design: The International IDEA Handbook, p. 8
1.2 INTRODUCTION OF THE PROBLEM SUBJECT MATTER

The Electoral Commission of Zambia (ECZ) was established as an autonomous elections management body in October 1996 under Article 76(1) and (2) of the Constitution of Zambia\textsuperscript{17} in response to opposition political parties' and other stakeholders' demand that for the November 1996 Presidential and National Assembly elections government appoint an autonomous Electoral Commission to count ballot papers at polling stations.\textsuperscript{18} The Constitution therefore established the ECZ and provides for the promulgation of legislation to determine the composition and operations of the ECZ as per the Electoral Commission Act No. 24 of 1996. The Commission consists of a Chairperson and not more than four other members appointed by the President, subject to ratification by the National Assembly\textsuperscript{19} for a term not exceeding seven years\textsuperscript{20}. Article 76 of the Constitution of Zambia lays out the constitutional functions as follows:- to supervise the registration of voters, to conduct presidential and parliamentary elections and to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly\textsuperscript{21}. In addition to the functions given to the Commission by the Constitution, the ECZ has the following statutory functions to perform; to supervise a Referendum\textsuperscript{22}; to conduct and supervise the local government elections\textsuperscript{23}; to conduct voter education\textsuperscript{24}; to formulate and review electoral general regulations\textsuperscript{25}; to resolve election disputes through establishment of conflict management committee\textsuperscript{26}; and to perform any other statutory function for which the National Assembly may call upon it. The Electoral commission Act sets out the circumstances under which the President may remove a member of the Commission\textsuperscript{27}. The Chairperson and members of the commission serve on a full time basis. The Commission has regulatory powers to determine how all the elections activities shall be run. The Electoral Act\textsuperscript{28} empowers the Commission to make such regulations vis-a-vis the registration of voters, presidential and parliamentary elections, elections offences, electoral code of conduct and

\textsuperscript{17} Chapter 1 of the Laws of Zambia
\textsuperscript{19} Section 4(3) of the Electoral Commission Act 24 of 1996
\textsuperscript{20} Section 5 of the Electoral Commission Act 24 of 1996
\textsuperscript{21} Clause (1) of article 76 of the Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia
\textsuperscript{22} Referendum Act, Chapter 14 of the Laws of Zambia
\textsuperscript{23} Local Government Elections Act, 282
\textsuperscript{24} Electoral Act No. 12 of 2006
\textsuperscript{25} Electoral Act
\textsuperscript{26} Electoral Act
\textsuperscript{27} Section 5(3), Electoral Commission Act 24 of 1996
\textsuperscript{28} Chapter 13 of the Laws of Zambia
penalties, elections petitions and the hearing and determination of applications relating to parliament. The Local Government Act\textsuperscript{29} also provides for the Commission to administer the local government elections.

1.3 STATEMENT OF THE PROBLEM

Since the inception of the ECZ in 1996, it has continued to face the challenge of stakeholders questioning its independence and credibility in the conduct of its mandate. The mode of appointment of the Commission members remains contentious. The election petitions following the 2001 and 2006 tripartite elections and in particular the 2006 elections remained a source of concern, as it gave rise to questions as to whether the ongoing electoral reforms which included the revision of the Electoral Act and the Electoral Code of Conduct in 2006 had any effect at all in addressing stakeholders’ concerns with the ECZ and the electoral process as a whole.

The ECZ has come under severe attack at each and every election held in Zambia for being a tool for the political party in power. This attack more so often is related to appointments of the Commission Chairpersons and Commissioners, and also the alleged direct and indirect interference by the executive arm of government during elections when members of the executive are active political players in these elections. The integrity of the ECZ in the conduct and management of elections has thus continued to be questioned by stakeholders, the main assertion being that the ECZ is not independent in the conduct of its mandate. Stakeholders’ perception of the ECZ cannot be ignored because if the stakeholders have no confidence in the electoral body then, no matter how well the ECZ performs, it will still not be deemed to be a credible manager of the electoral process, as a negative perception may indeed arise from a genuine concern. An illustration of allegations leveled against the ECZ of not being an autonomous body and independent of the government is captioned below:

\textit{Zambian opposition leader Anderson Mazoka has declared himself the winner of Thursday’s presidential election, and alleged the government was trying to rig the election. The wealthy businessman said European Union observers monitoring the election had given him 36\% of the

\textsuperscript{29} Chapter 282 of the Laws of Zambia
vote in contrast to his main rival ruling party candidate Levy Mwanawasa's 23%. He also warned of "chaos in this country" if the Electoral Commission failed to confirm the result.

**Confusion**

Latest results from the Electoral Commission for 74 of 150 constituencies gave Mr. Mazoka, of the United Party for National Development (UPND), 274,380 votes against 265,919 votes for ruling party candidate Levy Mwanawasa. Mr. Mwanawasa is current President Frederick Chiluba's chosen heir.

A few more illustrations:

**Lusaka —** The Electoral Commission of Zambia (ECZ) is once again under fire from opposition political parties and some civil society organizations, which accuse it of bias in favour of the ruling party during elections. The opposition United Party for National Development (UPND), which is in a pact with the Patriotic Front (PF), and last month won a parliamentary by-election, wants the ECZ disbanded. 'The ECZ is made up of commissioners who are loyal to the appointing authorities we know these facts,' says Charles Kakoma, UPND spokesperson.

Father Frank Bwalya, executive director for Change Life Zambia, a civil society organization fighting for a fair socio-economic and political environment in the country, says the ECZ has on several occasions failed to act against the ruling party even when it is clear that they have failed to adhere to the provisions of the Electoral Code of Conduct. Among the accusations he levels against the ruling Movement for Multi-Party Democracy (MMD) include: use of government resources such as motor vehicles during campaigns; and making "donations" to voters, and also to schools and churches, in a particular constituency during elections. This is against the Electoral Code of Conduct. He further accuses the MMD government of issuing National Registration Cards to those ineligible to vote, including refugees.

Bwalya says while the laws governing the conduct of elections in the country are clear, the government has always compromised the ECZ because of the many powers vested in the president who appoints its commissioners. "The government should disband the ECZ and create an independent body, one which will not feel that it owes its allegiance to the appointing authority," he says.

All general elections that have been held from 1991 have resulted in petitions in the Supreme Court. While a few Parliamentary elections results have been nullified, no presidential election result has been over-turned. Last year, Michael Sata, leader of the opposition Patriotic Front (PF) withdrew an election petition against President Rupiah Banda in the Supreme Court, saying he did not trust the independence of the judiciary because the chief justice is the presiding officer for presidential elections, and also forms part of the bench in the event of an election petition.

"The chief justice is the returning officer in an election, and also a member of the Supreme Court, in this case Justice Florence Mumba is chairperson of the Electoral Commission Zambia. It is therefore wishful thinking that the Supreme Court can rule against itself," Sata said.

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30 Barnaby Phillips, extract from the British Broadcasting Corporation (BBC), 2001
The ECZ has always been headed by a judge, who like any other High Court or Supreme Court judge in the country, is appointed by the president. The ECZ’s journey has been bumpy in past years. All elections held from independence right through to the post 1991 historic multiparty polls have been characterized by inefficiency and mismanagement.

Zambia: The Electoral Commission of Zambia says it is autonomous
The Electoral Commission of Zambia has dismissed the assertion by Mission Press Director, Father Miha Dravensik that the Commission is not independent and acts on the instructions issued by the government. ECZ Public Relations Manager Chris Akufuna said the Commission is an autonomous institution and that it does not get instructions from any individual, body, institution or authority in its decision making and operations. Mr. Akufuna further said it only consults government when seeking funds from the national treasury because elections are a national exercise, which cannot be funded by any other body other than government. He said this in a press statement released to ZANIS in Lusaka today.

He said the accusations and counter-accusations of malpractices are dealt with by the District Conflict Management Committees, of which all registered political parties in, the respective districts are entitled to membership. Meanwhile, Mr. Akufuna has said the committee members choose their own chairperson while the council secretary, who is the District Electoral officer, serves as the secretariat and coordinates all conflict management activities. He said that conflict management committees are independent entities and make their decisions based on their own assessment of the issue at hand.

The above illustrations are clear indications that all is not well in the manner the public perceive the ECZ. It is blamed for almost every problem arising from the elections results. There is an outcry to have the ECZ disbanded. This perception of lack of autonomy and independence has a direct result of the Commission lacking legitimacy. Any public institution that has not been accepted by the people as its legitimate body can never be trusted no matter how much work and openness it puts in. The Mung’omba Constitution Review Commission Report also rightfully observed that stakeholders have persistently criticized the Electoral Commission for inefficient management of elections. This criticism of the ECZ has even suffered the death knell by the Supreme Court finding in the 2002 presidential election petition that ‘there were flaws, incompetence and dereliction of duty in the conduct of the 2001 elections on the part of the Electoral Commission of Zambia.’ Hence, a review of the whole set up of the Commission is paramount. The Foundation for Democratic Process (FODEP) in its report of the 2001 Tripartite Elections sums up the whole issue surrounding the ECZ, thus, ‘The Electoral Commission of Zambia must be re-organized into an independent, professional, efficient and pro-active institution that will be receptive to views, ideas and complaints of all stakeholders.’

1.4 PURPOSE OF THE STUDY

The purpose of this study is to critically analyze the independence of the ECZ in order to establish the extent of the adequacy of the legal framework that governs the independence and mandate of the ECZ in the exercise of its powers and functions particularly in the administration of election results and enforcement of the Electoral Code of Conduct. The study will make recommendations on how the lacuna and weaknesses in the electoral legislation can be addressed to ensure the independence of the ECZ in exercise of this mandate. Questions to be answered include the following: (a) whether or not the ECZ is an autonomous public institution and independent of political interference from the executive arm of government; (b) To highlight the ECZ’s structures, functions and mandate and establish whether these have contributed to the perceived lack of independence and autonomy; (c) To critically analyze the role played by the executive arm of government, direct or indirect, in the functions of the ECZ and establish whether there is indeed interference or not; (d) To propose the relevant legislative and administrative framework changes to be made in order to achieve independence and autonomy of the ECZ.

1.5 SIGNIFICANCE OF THE STUDY

The study is significant as it comes at a time when once again in less than a year or so Zambia will be holding the next Tripartite General Elections, i.e. Presidential, Parliamentary and Local Government elections under a legal framework that still does not provide for complete independence of the ECZ as an electoral management body. This is in spite of the electoral reforms that were embarked upon which include the recently concluded review of the Republican Constitution, the revision of the Electoral Act and Code of Conduct following recommendations from the ERTC and consultations with stakeholders. The study is also in the face of mounting political violence that has been experienced in the recent past during parliamentary by-elections. The research seeks to identify the legal framework weaknesses and opportunities in order to eradicate the current challenges faced by the ECZ and more importantly to build its image as an impartial player in the conduct of general and other elections that are held in Zambia. The added significance of this study is that it provides a practical solution to the
political players themselves to the extent that once the image of the ECZ is restored there will be less suspicion during elections and as such elections results as announced by the ECZ will be respected by the stakeholders and therefore foster peace in the nation.

1.6 METHODOLOGY

This research will be done mainly by analyzing relevant literature on the institution. Published, and where necessary unpublished, works will be consulted. Direct interviews with some of the political leadership of political parties represented in parliament, leading civil society organizations among them AVAP, FODEP, and ZCID. The Chairpersons of the ECZ (if possible) both past and present will also be interviewed. Some senior officers in the institution and a review of their publications and cases they have dealt with or are currently dealing with will be conducted. This will thus involve making academic visits to the institution and witnessing firsthand the realities of their operations. Authoritative materials from the internet will also be consulted. The research objectives will thus be achieved using the above means.
CHAPTER 2 – LEGAL FRAMEWORK OF ECZ

2.1 CURRENT ELECTORAL PROCESS IN ZAMBIA

The system under which elections are ultimately conducted is an electoral process. The electoral process embraces all activities of Parliament, in terms of legislation, Electoral Commission, political Parties, NGOs, Churches and the electorate vis-a-vis elections. Electoral processes in various countries have a variety of electoral systems. An electoral system covers the legal and practical realities of voters’ registration and election administration as well as the precise rules and the method used to translate votes for candidates and parties in an election into an allocation of seats.

Zambia gained its independence from Britain in 1964 and adopted the First Past-The-Post (FPTP) Electoral System\(^\text{32}\), a Colonial legacy that has remained in place to date. Attempts have been made to introduce the Proportional Representation system but this has been accorded a mixed feeling kind of reception. This electoral system is based on the principle of the conscious translation of the overall votes of a party into a corresponding proportion of seats in an elected body\(^\text{33}\). The main reason advanced by the supporters of this electoral system is that it promotes fair representation of political parties, women, minorities and interest groups\(^\text{34}\). The unfairness of the FPTP system in the allocation of seats can be demonstrated by the fact that one of the parties in 1996, National Lima Party which obtained 10% of the national vote did not win a single seat in parliament and yet Agenda for Zambia that had 2% of the national vote won two seats\(^\text{35}\).

However, under the First-Past-The-Post System, Zambia has its Electoral Commission establishment enshrined in its Constitution\(^\text{36}\). For this body, which is charged with the responsibility of pioneering Zambia's electoral process to perform, the Constitution has put in place provisions for promulgation of Electoral Acts within which the Commission must operate\(^\text{37}\).

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\(^{35}\) Neo Simutanyi, A paper on the Zambian Electoral System – Issues and Challenges, (Lusaka, 16th and 17th August, 2010), p. 6
\(^{36}\) Constitution of the Republic of Zambia, Cap. 1, Article 76
\(^{37}\) Constitution of the Republic of Zambia, Cap. 1, Article 76(2)
Generally, the cycle of the electoral process in Zambia starts with delimitation of constituencies, wards, and polling districts. Then the registration of voters’ exercise follows. Then the elections follow and the conversion of the elections results into the office of President and seats at the National Assembly or Local Government Councils. Zambia is divided into nine (9) provinces and 72 districts. Within these administrative areas are 150 Constituencies. At every general election each one of the 150 Constituencies retains only one Member of Parliament. The Constitution under Article 77 (5) requires that where a census of the population has been held and the Commission considers that the changes in the distribution of population reported in the census do not justify alteration in the boundaries the Commission shall so report to the President without entering upon a review of the boundaries of the constituencies. The last census exercise was in 1990 and 1991; the Commission on the strength of that census report increased the number of seats in the National Assembly from 125 to 150. The more recent census was conducted this year 2010. The National Constitutional Conference has approved in its Draft Constitution that the number of constituencies be increased to 225 and ultimately the number of seats in the National Assembly.

The Local Government Elections Act (CAP. 282) empowers the Commission after consultations with every council, by statutory order, to divide the area of each council into wards, defining the boundaries of the wards by reference to polling districts, and assigning names to the wards. The Act also stipulates that whenever the Minister alters the area of council or the numbers of councilors of a council the Commission shall after consultations with such council, by statutory order, make such alterations to the boundaries of the wards of such council. In 1998, the Minister of Local Government altered several council areas as a result of the creation of ten (10) district councils. This necessitated the ward delimitation exercise in the affected councils in readiness for the 1998 Local Government elections. The present number of wards country wide after the 1998 ward delimitation exercise stands at 1,287 and that is the number of council seats in the
country. The Registration of voter's exercise takes place before every general election. The exercise takes place at all the 4,610 registration centers during a specific period of time covering the dates prescribed by the Commission. A final and certified voters' roll is produced after inspection of the provisional registers for correction of errors.

The Constitution stipulates that there shall be general elections every five (5) years. This stems out of Article 35, which spells out the Presidential tenure of office to be five (5) years. Since the President and the National Assembly make up Parliament, it automatically follows that even the National Assembly tenure shall be five (5) years and the elections take place simultaneously. Article 38 provides that if the Office of the President becomes vacant by reason of his death or resignation or any other reason, an election to the Office of President shall be held within ninety (90) days from the date of the office becoming vacant. Article 67 also provides that when a vacancy occurs in the seat of a member of the National Assembly as a result of death or resignation of the member, a by-election shall be held within ninety days after the occurrence of the vacancy.

2.1.1 ELECTORAL SYSTEM

Zambia's Electoral System as alluded to above is the First-Past-The-Post. To date pure First-Past-The-Post systems are found in the United Kingdom and those countries historically influenced by Britain (by impact of British Colonialism). In a First-Past-The-Post System, sometimes known as a plurality system, the winner is the candidate with the most votes, but not necessarily an absolute majority of the votes. In theory he/she could be elected with two votes, if every other candidate only secured a single vote. Winning candidates get National Assembly/Council Seats regardless of the percentage of the vote they actually achieve.

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43 Report by FODEP on Zambia's 2001 Tripartite Elections, p. 55
44 Constitution of the Republic of Zambia, Cap. 1
45 Constitution of the Republic of Zambia, Cap. 1
46 Constitution of the Republic of Zambia, Cap. 1
2.1.2 CONSTITUTION OF ZAMBIA 1996

The Constitution in force at the time of the 1991 general elections was the Constitution of Zambia, Act 1 of 1991 (the Constitution). The Constitution has since been amended in accordance with the Constitution of Zambia [Amendment] Act 18 of 1996, which was signed into Law by President Chiluba on 28th May, 1996. Prior to 1996 there was a part-time Electoral Commission which had its directorate under the Office of the Vice President. However, with the Amendment to the Constitution in 1996 (No. 18 of 1996), a new independent Electoral Commission was established (Article 76) whose composition and operations are provided for in the Electoral Commission Act 24 of 1996, to conduct and supervise the second multi-party elections in 1996. The Electoral Commission was established as a full time Commission in October 1996 following the enactment of the Electoral Commission Act No. 24 of 1996.

Article 76 (1) of the Constitution\(^47\) provides for the establishment of an autonomous Electoral Commission and spells out the constitutional functions of the Commission. Notwithstanding the establishment of an autonomous electoral commission by the Constitution of Zambia, a lot of challenges dominate the actual independent nature of the commission. This is one of the major challenges that this paper is analyzing. Does this autonomy just end at the fact that it is so stated in the Constitution or there must be more to it? It is very well argued by constitutional legal scholars that a democratic constitution on paper is, however, in itself no guarantee of constitutional practice.\(^48\) This paper will therefore ascertain whether or not the Electoral Commission of Zambia is institutionally independent and autonomous from the executive branch of government.

The Constitution provides for three constitutional functions of the Electoral Commission.\(^49\) The first function is to supervise the registration of voters. The second function is to conduct Presidential and Parliamentary elections. The third function is to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National

\(^{47}\) Constitution of the Republic of Zambia, Cap. 1


\(^{49}\) Constitution of Zambia, Cap. 1, Article 76(1)
Assembly. Of the three constitutional functions, the second one is the most controversial, followed by the first one. The third function is less contentious.

Article 76 (2) empowers the President to appoint the Electoral Commission and provides for the composition and operations of the Commission by an Act of Parliament\textsuperscript{50}. It is noteworthy that the establishment of the Electoral Commission falls directly under Part V of the Constitution of Zambia, which Part deals with the Legislature. This picture apparently gives the legislative arm of government direct jurisdiction over the Electoral Commission. The contradiction arises from the fact that the ECZ is autonomous and therefore not a direct functionary of neither the Executive nor Legislature. As such it ought to sit independently in the Constitution in line with its adjective as an independent and autonomous body. For example, The Human Rights Commission which is also an autonomous body\textsuperscript{51} is captured in the Constitution under its own separate part, in Part XII. This contradiction of the legal jurisdiction under which the Electoral Commission operates is perhaps the biggest challenge facing the legitimacy of this institution in the public eye.

For the purpose of legislative elections, Zambia is divided into 150 constituencies, each of which returns one member of the National Assembly. Article 76 (1) of the Constitution grants authority to the Electoral Commission to determine the boundaries of the constituencies and article 77 of the Constitution specifies the criteria, which are supposed to be used for delimiting boundaries. Although this function of the Electoral Commission is the least contentious, some misgivings have been brought out that there is gerrymandering to favour the ruling party and its candidates.

2.1.3 ELECTORAL ACT NO. 12 OF 2006\textsuperscript{52}

The Act applicable to the 1991 elections was the Electoral Act No. 2 of 1991, enacted on 30\textsuperscript{th} August, 1991 (the Act) to repeal the Electoral Act of 1973. However, in 1996, the Electoral Commission Act No. 24 of 1996 was put in place with the Constitution of Zambia [Amendment] 18 of 1996 to apply in the 1996 General Elections.

\textsuperscript{50} Constitution of the Republic of Zambia, Cap. 1
\textsuperscript{51} Constitution of the Republic of Zambia, Cap. 1, Article 125
\textsuperscript{52} Chapter 13 of the Laws of Zambia
The Electoral Act No. 2 of 1991 did not repeal regulations made by the Electoral Commission established under the 1973 Constitution. Pursuant to an enabling provision in the Electoral Act [section 17] of 1973, the Commission promulgated certain electoral regulations that provided for the procedure and manner of conducting elections. However, with the coming into force of the Electoral Commission Act No. 24 of 1996 slight changes were imposed on the manner of conducting elections, such as ‘the counting of Ballot Papers shall be carried on at the polling station’ and ‘the voting time reduced from twelve hours to eleven hours’. The Electoral Act empowers the Electoral Commission of Zambia in matters relating to elections and enables the Commission to make regulations providing for the registration of voters\(^{53}\), conduct presidential and parliamentary elections\(^{54}\), election offences and penalties\(^{55}\). The Act also provides for elections’ petitions\(^{56}\) and the hearing and determination of applications relating to parliament\(^{57}\).

2.1.4 ELECTORAL COMMISSION ACT No. 24 of 1996

2.1.4.1 COMPOSITION OF THE ELECTORAL COMMISSION

The Electoral Commission Act 24 of 1996 provides for the composition of the Electoral Commission and its operations. The Commission consists of a Chairperson and not more than four other members appointed by the President, subject to ratification by the National Assembly [section 4 (2) (3)], for a term not exceeding seven years, subject to renewals and ratification by National Assembly. In addition, it sets out the circumstances under which the President may remove a member of the Commission. Noteworthy here is the fact that the Act provides the qualifications of the Chairperson of the Commission\(^{58}\); however, on the other hand the statute does not specify the qualifications for one to be a member of the Commission. The composition of the Commission and the actual qualifications of the members besides the manner of appointment are a source of the challenges of the autonomy and independence of the Commission.

\(^{53}\) Part II, The Electoral Act, Chapter 13 of the Laws of Zambia
\(^{54}\) Part III, The Electoral Act, Chapter 13 of the Laws of Zambia
\(^{55}\) Part VII, The Electoral Act, Chapter 13 of the Laws of Zambia
\(^{56}\) Part VIII, The Electoral Act, Chapter 13 of the Laws of Zambia
\(^{57}\) Part IX, The Electoral Act, Chapter 13 of the Laws of Zambia
\(^{58}\) Section 4(4), The Electoral Commission Act, 1996
2.1.4.2 FUNCTIONS

The statutory functions of the Commission are as specified in Article 76 (1) of the constitution of Zambia.\textsuperscript{59} The Article stipulates the constitutional functions of the Commission as follows: To supervise the registration of voters and review the voters Register/Roll; to conduct the Presidential and National Assembly Elections and; To review the boundaries of the constituencies into which Zambia is divided for the purposes of elections.

The Commission also has other statutory functions to perform:- To supervise a Referendum [Referendum Act Cap 14]; To conduct and supervise the Local Government [Local Government Elections Act 282]; To formulate and review Electoral (General) Regulations; to formulate and review Electoral (Code of Conduct) Regulations, and; To perform any other statutory functions that the National Assembly may call upon it.

2.1.4.3 POWERS

Subject to the provisions of the Constitution and the Electoral Act No. 12 of 2006 the Commission has been given powers to administer and enforce the Electoral Act\textsuperscript{60}.

2.1.4.4 LEVELS OF OPERATION

The Electoral Commission is established to administer the Presidential and National Assembly elections, and by statutory powers the referendum and the Local Government Elections.

2.1.4.5 INDEPENDENCE OF THE COMMISSION

Article 76(1) of the Constitution of Zambia establishes an autonomous Electoral Commission.\textsuperscript{61} It is also important to note that section 3(1) of the Electoral Act makes it mandatory that the Commission in the exercise of its constitutional and statutory functions it shall not be subject to the direction or control of any other person or authority. Compliance by the powers that be with this legal provision is another challenge on the shoulders of the Electoral Commission. This challenge becomes apparent when the electoral commission is

\textsuperscript{59} Section 4(1), The Electoral Commission Act, 1996
\textsuperscript{60} Section 3(1), The Electoral Act, Chapter 13 of the Laws of Zambia
\textsuperscript{61} Chapter 1 of the Laws of Zambia
undertaking such functions as the voter registration exercise. The ruling party is always accused of manipulating the Electoral Commission of over-registration of voters in ruling party’s strongholds and simultaneously under-registration in those areas where the opposition are perceived to be strong.

Other allegations against the Commission are that; of appointment of corrupt electoral officers during elections so that they can temper with the electoral process to produce a desired outcome; polling-day election rigging such as late or non-supply of election materials to opposition strongholds, delays in opening polling centres located in opposition strongholds, and stuffing of ballot boxes; and post-election rigging such as refusal to count ballots from opposition strongholds, changing the results between voting centres and collation centres, and declaration of false results.

2.1.5 THE LOCAL GOVERNMENT ELECTIONS ACT, CHAPTER 282
Zambia’s return to multi-party elections in 1991 saw the re-introduction of Local Government Elections in 1992\textsuperscript{62}. The first Local Government Elections took place in 1992 with 1,204 wards and 3,489 polling districts\textsuperscript{63}. However for some logistical reasons, the stipulated three (3) years term for councilors was long overdue when finally the next Local Government elections took place in 1998 with 1,287 wards and 4,610 polling districts\textsuperscript{64}. The next Local Government elections are due to take place in 2011 so are the Presidential and Parliamentary elections. In short the three elections will take place in 2011 simultaneously.

The Local Government Elections Act provides for the conduct of local government elections. It also establishes the Local Government Electoral Commission\textsuperscript{65} and specifies the functions of this Commission. Unlike the Electoral Commission which consists of five members, the Local Government Electoral Commission consists of a Chairman and two

\textsuperscript{62} Current Electoral Process in Zambia, p. 8
\textsuperscript{63} Current Electoral Process in Zambia, p. 8
\textsuperscript{64} Current Electoral Process in Zambia, p. 8
\textsuperscript{65} Section 3(1), Local Government Elections Act, Chapter 282 of the Laws of Zambia
other members who are appointed by the President. The qualifications for the Chairman are same as those for the Chairperson of the Electoral Commission of Zambia. Additionally, the Local Government Elections Act disqualifies for appointment as a member of the Commission any member of the National Assembly, or a Councillor, or an officer or any employee of the council.

2.1.6 THE REFERENDUM ACT, CHAPTER 14 OF THE LAWS OF ZAMBIA
The Referendum Act plays an important part when there is a Bill for the alteration of Part III of the Constitution of Zambia or the alteration of Article 79 of the Constitution of Zambia. In both cases before the first reading of the Bill in the National Assembly it has to be put to a National Referendum. Sometimes an important national issue may demand that the nation at large must exercise their vote in order to make that particular national issue a part of the laws of Zambia. In such an event the issue shall be put to a National Referendum. A good example is the recently ended National Constitutional Conference in which the delegates referred to the National Referendum some Articles that failed both the consensus and the requisite threshold when put to the vote.

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66 Section 3(2), Local Government Elections Act, Chapter 282 of the Laws of Zambia
67 Section 3(3), Local Government Elections Act, Chapter 282 of the Laws of Zambia
68 Section 3(4), Local Government Elections Act, Chapter 282 of the Laws of Zambia
CHAPTER 3 - A LOOK AT SOME INDEPENDENT ELECTORAL MANAGEMENT BODIES (IEMB)

In order to make an informed understanding of the legal framework that runs the electoral machinery in Zambia, I decided to conduct a comparative case study of three countries in order to compare and contrast their legal frameworks. I selected the following countries; Nigeria, India, and the United Kingdom. I selected Nigeria as the first case study because it is a good comparison to Zambia’s case in that the two African states have faced similar challenges concerning the question of autonomy and independence of their national electoral bodies. As such I have gone a bit deeper in the case study on Nigeria than I have with the other two. The second case study is India which has had a successful electoral system and national body from which Zambia can draw some good legal framework in order to improve the Zambian situation. The Election Commission of India (ECI) is widely regarded as a model of an independent EMB. It may be even more appropriate to describe it as a ‘fiercely independent’ EMB. The United Kingdom’s political and legal legacy upon Zambia has influenced much of what Zambia’s political setup is and also its legal system. Besides the United Kingdom’s overseer role upon its former colonies and protectorates makes it necessary to compare and contrast the U.K. electoral system and electoral body with that of its former colony, Zambia.

3.1 NIGERIA

Nigeria achieved independence from British colonial rule in October 1960. The first post-independence national election was held in 1964 and the resulting government lasted until January 1966. Between 1966 and 1998 there were seven military regimes and two democratic administrations. There were a series of electoral commissions after independence. The National Electoral Commission was replaced in the early 1990s by the National Electoral Commission of

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Nigeria, which was in turn replaced in 1998 by the Independent National Electoral Commission (INEC).\textsuperscript{73}

Nigeria's chequered history of democratic elections reveals that the problem associated with the conduct and management of elections are a central factor in the breakdown of democratic regimes in the country.\textsuperscript{74} The failure, since independence in 1960, of the country’s successive electoral commissions to guarantee the integrity of elections and, by extension, the sustenance of governments formed thereof has been widely acknowledged.\textsuperscript{75} Indeed, the different changes in the name of Nigeria’s electoral body since independence are a clear evidence of this claim.\textsuperscript{76} In setting up newer electoral bodies, the governments in power had often claimed that they intended not only to erase the fixated “public antipathy and distrust” associated with an abolished electoral body, but also to correct the structural and operational impediments that constrained its effectiveness and efficiency, particularly the desire to guarantee its institutional autonomy, constitutionally, legally, operationally and financially.\textsuperscript{77} This seeming desire to institutionalize the process reached its climax with the decision by the Babangida regime, through Decree No. 23 of 1987 and as amended by Decree No. 8 of 1989, to make the National Electoral Commission (NEC) an all-Nigerian intergovernmental agency by abolishing state electoral commissions and structuring electoral commissioners at the state level to serve under NEC.\textsuperscript{78} The key issues of institutional autonomy and design that arise in the Nigerian case are as follows: i.) The President appoints all the national commissioners, including the chairperson and the resident state electoral commissioners. This means that the President who is a party leader and sometimes a candidate appoints those who conduct the elections; ii.) The Electoral Commission cannot access funds directly from the consolidated federal revenue. This means that the President also determines the level and timing of funds to the Commission and can thus manipulate the body through pecuniary measures; iii) Civil society, opposition parties, and the

\textsuperscript{73} Wail et al (ed.). Electoral Management Design: The International Idea Handbook, p. 253
\textsuperscript{74} Governance and Institution Building in Africa: A Study of the Independent National Electoral Commission of Nigeria (2010), p. 27
\textsuperscript{75} Governance and Institution Building in Africa: A Study of the Independent National Electoral Commission of Nigeria (2010), p. 27
\textsuperscript{76} Governance and Institution Building in Africa: A Study of the Independent National Electoral Commission of Nigeria (2010), p. 27
\textsuperscript{78} Governance and Institution Building in Africa: A Study of the Independent National Electoral Commission of Nigeria (2010), p. 27
judiciary have no representation in the Commission; iv.) The Constitution virtually stipulates that only party members can be INEC commissioners; so the ground is laid for the President to appoint ruling party cronies to the Commission.

INEC is responsible for all elections except local government elections. It consists of the chairperson, who is the chief electoral commissioner, and 12 other members 80. Comparatively, Zambia has only got five commissioners inclusive of the Chairperson. The chairperson and members of INEC are appointed by the president, who must consult the Council of State, and the appointments are subject to confirmation of the Senate. Although Zambia’s ECZ consists of only five members of the Commission, the modus operandi of appointments of the members is almost similar to that of Nigeria’s INEC and it is not surprising that they face literally the same problems and rejection of the electoral bodies by the citizenry. In Nigeria, as in many parts of the world, the powers of the electoral body are rooted in the constitution and the Act of the National Assembly 81. Even though the country has had electoral management bodies since 1959 when the elections that heralded independence were held, the paradox is that it has not been fortunate to enjoy a credible electoral democracy 82.

In terms of operational mechanisms, there have been several attempts to assess the constitutional and legal autonomy of INEC with particular respect to the pressures they are subjected to from incumbents, the power elite and political parties 83. Much of these attempts have been prompted by and centered on the poor ratings of the Commission 84. Nigeria has engaged in electoral processes the outcome of which were distorted, sometimes beyond recognition, by the very electorate that was supposed to speak through polls, (arguing that) the only way to extricate the hostage society from the grips of these anti-democratic influences is to tackle the very roots of their crooked power through an integrated agenda of reforms 85. Zambia shares similar challenges

of constitutional and legal autonomy of the ECZ with particular respect to the manipulations and influence of the Executive arm of government in the face of a rubber stamp legislative organ. The main issues identified as compromising the institutional autonomy of INEC are\(^{86}\): The mode of appointment of INEC’s Chairman and members of the Commission (Section 154(1) of the Constitution); The equation of the qualification for appointment as an INEC official with membership of a political party (Section 156 of the Constitution); and the funding of the Commission (Sections 3 – 5 of the Electoral Act 2006).

The Citizens’ Forum for Constitutional Reforms (CFCR), Nigeria’s largest coalition of civil society associations and groups, in a submitted memorandum, took on these points and argued that Section 153(f) of the 1999 constitution contradicts the very essence of the institutional autonomy intended for INEC because it recognizes the electoral body as a “Federal Executive body.”\(^{87}\) This, according to the Forum, has its own implications, especially against the backdrop of the fact that only the Executive arm of government is empowered to direct, appoint and disburse funds to INEC\(^{88}\). Comparatively, Zambia shares a similar challenge. The placement of the Article that establishes the ECZ under the Legislature, in Part V of the Constitution is a big contradiction when in fact the Executive arm of government, like Nigeria, directs, appoints and disburses funds to the ECZ with little or no effective oversight role by the other two organs of the State.

The argument is that, apart from the likelihood that these individuals so appointed by the President would be at his (and, by extension his party’s) beck and call, there is also the natural tendency of office holders to act in favour of those who appointed them to secure their re-appointment.\(^{89}\) This argument has a lot of merit in it when one looks back at Zambia’s ECZ. The former Chairperson of the ECZ (before the one who has recently resigned her position) was a serving Supreme Court Judge at the time of her appointment as ECZ Chairperson. After she

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conducted the 2006 Presidential and Parliamentary elections, she was promoted back to the Judiciary in the position of Deputy Chief Justice, the second highest position in the Judiciary. In the given circumstances, the tendency would be for every new President to appoint persons into such positions that would serve his party’s interests. This is a fundamental stumbling block to the Commission’s quest to grow and develop the necessary resilience and institutional autonomy it requires. This challenge is at the core of the lack of legitimacy and therefore respect and trust in the ECZ. Nigeria has been hard hit by this in that none of those who have served in the office of the country’s electoral body has been privileged to have his position re-confirmed for another term\(^90\).

The credibility of any election is not only dependent on the extent to which the officials of electoral commissions discharge their duties without fear or favour, but also on the extent to which the public attests to the integrity of the officials and the transparency of the process that brought them on board\(^91\). The popular perception is that because they are appointed by the President (who himself is a party member), INEC top-ranks “pander to the wishes and do the bidding of the government in power”\(^92\). In Zambia’s case, whereby the President’s ruling party has a majority representation in the National Assembly of more than 50% and a weak and divided opposition, confirmation of presidential appointments is a mere rubberstamp ceremony. As such the arguments in the Nigerian situation observed above are also true to Zambia’s scenario.

In order to strengthen the ECZ’s operational mechanism the following suggestions have been proffered by various stakeholders, thus: i) the removal of the powers of appointment of the Chairperson and other key officials of ECZ from the hands of the President and entrusting it on the Chief Justice and/or the National Assembly; ii) reconstituting ECZ with a spectrum of stakeholders such as political parties and interest groups (such as civil society, labour, professional organizations, religious bodies, academic bodies) as part time commissioners; iii)


advertising the key positions in the organization for open competition, and 'careering' the positions as is applicable in Ghana where the head of the Commission and the commissioners have the status of appeal court judges who cannot be removed easily before they reach their retirement age. What is clear is that they all seek to demand for a constitutional instrument whose provisions are capable of guaranteeing the people an open and transparent mechanism for regulating the appointment, tenure and conditions for the removal of key officials of ECZ in such a manner that public trust in the institution can be regained.

3.2 INDIA

In 1948-9, the founding fathers of the Indian Constitution, while debating the position of the election commission in the Constituent Assembly, ensured that the body responsible for conducting elections in independent India should be a distinct one, separate from the government of the day, and that it should have ample financial and administrative autonomy to conduct its affairs. A combination of the well thought-out, broadly worded provisions contained in Article 324 of the Indian Constitution, a supportive judiciary, active media and Indian public opinion, coupled with the statute and independent attitude of some of the individuals who have headed the election commission, has resulted in the independence and reputation that the ECI enjoys today.

The Election Commission of India is an autonomous, quasi-judiciary constitutional body of India. Its mission is to conduct free and fair elections in India. It was established on 25 January 1950 under Article 324 of the Constitution of India. The commission presently consists of a Chief Election Commissioner and two Election Commissioners, appointed by the president. In terms of institutional structure, until October 1989, there was just one Chief

95 http://eci.nic.in/electoral commission of india, p. 1
96 http://eci.nic.in/electoral commission of india, p. 1
97 http://eci.nic.in/electoral commission of india, p. 1
Election Commissioner\textsuperscript{98}. However, the size, complexity and responsibility of the task led to the introduction briefly in 1989 and then from 1993 onwards of a three-member ECI\textsuperscript{99}. This law was renamed in 1993 as the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Act 1993.

The Chief Election Commissioner may be removed from his office only through impeachment by Parliament. Impeachment can take place on two grounds only – proven misbehavior or incapacity – and requires an elaborate procedure which is also prescribed for the removal of judges of the Supreme Court\textsuperscript{100}. This provision can be contrasted with the ECZ in that the removal of the chairperson of the electoral commission is by the prerogative of the president on the two grounds of insanity or unsound mind or the member being declared bankrupt\textsuperscript{101}. The Election Commission of India shall consist of a chief Election Commissioner and such other Commissioners as the President may, from time to time, fix. For a vast country such as India and a population in hundreds of millions, they have only three commissioners. Yet Zambia with five commissioners has a myriad of problems. And yet India has been a great success with only three commissioners. In India, other Election Commissioners may be removed by the President on the recommendation of the Chief Election Commissioner\textsuperscript{102}. In Zambia only the president has the powers to remove commissioners\textsuperscript{103}. Salary of chief election commissioner is same as justice of the Supreme Court of India. All three commissioners have same right of taking a decision. Tenure of commissioners is 6 years or up to age of 65, whichever is earlier\textsuperscript{104}. In Zambia all the commissioners of the ECZ enjoy the same tenure of 7 years subject to renewal and ratification by the National Assembly\textsuperscript{105}.

The Election Commission shall have the power of superintendence, direction and control of all elections to parliament and the state legislatures and of elections to the office of the President

\textsuperscript{100} Wall et al (ed.), *Electoral Management Design: The International Idea Handbook*, p. 193
\textsuperscript{101} Section 5(3) of the Electoral Commission Act, No. 24 of 1996
\textsuperscript{103} Section 5(3) of the Electoral Commission Act, No. 24 of 1996
\textsuperscript{105} Section 5(1) of the Electoral Commission Act, No. 24 of 1996
and Vice-President. The Election Commission enjoys complete autonomy and is insulated from any kind of executive interference. The body also functions as a quasi-judiciary body in matters of electoral disputes and other matters involving the conduct of elections. Its recommendations and opinions are binding on the President of India. However, the decisions of the body are liable for independent judiciary reviews by courts acting on electoral petitions.

The Election Commission is responsible for planning and executing a whole amount of complex operations that go into the conduct of elections. During the elections, the entire Central (Federal) and State government machinery including para-military forces and the Police is deemed to be on deputation to the Election Commission which takes effective control of personnel, movable and immovable Government Properties it deems necessary for successful completion of the electoral process. Zambia can learn something from the above observation. It is a very effective and positive way of giving powers to the Electoral Commission to supervise the elections. Such powers would avoid complaints about the perceived police harassments, intimidation, and non-protection of opposition political parties during campaigns and on the actual elections day. However, I hasten to say that in today's Zambia the practicability of deputation of the necessary government machinery including the para-military and police to the ECZ during elections maybe very difficult to achieve. However, it is highly recommended as a necessary measure towards achieving transparency and fair play during elections as this will result in the ECZ's image going up.

Once the election machinery is set in motion, the electoral process is subject to the administrative supervision of the ECI, and no court of law can stop the process. Only after an election is concluded can an election petition be presented to the High Court. The ECI itself enquires
into any allegations of procedural irregularity or violations of the electoral law. This procedure has ensured that the electoral process can be completed on schedule, without getting bogged down in judicial hearings. This point here is very valid and good for Zambia. The ECZ needs powers to deal with elections malpractices on the spot without waiting for the aggrieved party to go for litigation. The ECI performs routine functions, such as voter registration, deploying and training election officials, printing ballot papers, conducting the actual voting, counting the ballot papers, and declaring the election results. In addition, it allocates free time on the state-owned electronic media to the different national and state parties during the campaign period. The cost of time on the state-owned media is borne by the government as the parties are given this time free. The ECZ again can learn something from India's ECI in this respect concerning the sharing of free airtime on all state-owned electronic media.

The ECI is not responsible for the delimitation of electoral boundaries. The ECI is the watchdog of election expenditure. It appoints financial observers through whom it very closely monitors the expenditure of the candidates during the election campaign period. This has successfully reduced illegal expenditure at election time in India. Again Zambia could do well to adopt this watchdog mechanism in order to forestall vote buying which is very rampant during election campaigns and even on elections day. The ECI has the power to order a re-poll at polling stations where irregularities have been observed – or indeed in a whole electoral district – if the situation so demands. It may also adjourn any poll for a few days. Zambia's ECZ can again benefit more from this practice.

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It is a mark of the ECI’s independence that it has not faced any major funding problems\textsuperscript{123}. It is funded by the government budget through the Consolidated Fund\textsuperscript{124}. This pays for staff, technical operations and various office expenses, including the cost of acquiring electronic voting machines (EVMs)\textsuperscript{125}. The cost of time on the state-owned media is borne by the government as the parties are given this time free. The broad powers given to the ECI by the constitution have been liberally and boldly interpreted to make the government pay for any necessary expenses\textsuperscript{126}. The ECI’s accounts are subject to audit by the Comptroller and Auditor General and its report is tabled in the Parliament. This ensures the financial accountability of the ECI, and has worked smoothly\textsuperscript{127}.

In concluding India’s case study I would like to recommend India’s ECI’s financial independence to be replicated in Zambia at the ECZ. The funding of the ECZ is another major challenge which impedes on the autonomy of the institution. A lot can be borrowed from the Indian setup. The ECZ needs financial independence if it is to be cut off from the negative influence of the Executive arm of government. In its paper on ‘practical and best practices in electoral management and administration’, the ECZ lamented thus; ‘The Ministry of Finance and National Planning is the ECZ’s main institutional link as it provides the funds for the Commission’s operations. The Commission is subjected to the Finance Ministry’s requirements and these include submission of monthly expenditure returns, annual financial statements and management reports. Although the ECZ has the legal mandate to decide its financial policies and practices, currently it cannot delink itself from the Finance Ministry and assert its autonomous status due to the Ministry’s financial regulations. This state of affairs has often resulted in conflicting situations between the Ministry and the Commission, as on the one hand the Commission would want to exercise its autonomy, while on the other hand the Ministry will refer to its regulations, which will be in conflict with those of the Commission’.

\textsuperscript{123} Wall et al (ed.), Electoral Management Design: The International Idea Handbook, p. 194  
3.3 UNITED KINGDOM

Elections in the United Kingdom (UK) have historically been managed through the Governmental Model, by returning officers appointed by local authorities\textsuperscript{128}. Although a UK-wide Electoral Commission was established in 2000, it has not taken on responsibility for the management of elections\textsuperscript{129}. This practice in the U.K. can be compared with the practice in Zambia whereby the ECZ engages local council principal officers (i.e. the town clerks and council secretaries) as returning officers. It is most likely that Zambia adopted a similar practice from its colonial master’s practice. It is however, important to note that this practice of the ECZ using ad-hoc staff from the civil service to conduct elections on its behalf has been one of the stumbling blocks of the ECZ’s independence and lack of effective supervision. The problem being that of the ECZ effectively its administrative authority on a group of people employed by another institution; in this sense the Ministry of Local Government and Housing. This may be working well in the U.K. but it has definitely not done so in Zambia where the long arm of the Executive is always at play.

Although this commission therefore does not fall within the definition of an EMB (at least for elections), its role as an electoral ‘watchdog’ has provided much-needed impetus to reform and modernization of the electoral legislation and arrangement within the UK\textsuperscript{130}. The Electoral Commission was established under the Political Parties, Elections and Referendums Act 2000 (PPERA)\textsuperscript{131}. The Act outlines the structure of the commission and empowers it to undertake its key statutory functions\textsuperscript{132}. The Electoral commission has five commissioners and four deputy commissioners\textsuperscript{133}. The commission chairperson serves full-time, other commissioners part-time\textsuperscript{134}. Zambia may need to reconsider its current practice of having all the five commissioners full time and yet there exists another full time body of professional staff at the institution to carry out the day to day operations of the Commission. Conflicts in administration may result such as

the recent one where the ECZ Chairperson and the Director of the Commission were at cross purpose culminating in the embarrassing and unceremonious resignation of the Chairperson from her position.

In the U.K. the commissioners are responsible for taking strategic decisions about the direction of the commission\textsuperscript{135}. In operational terms, the commission is managed by the chief executive, supported by a team of senior managers and over 100 staff\textsuperscript{136}. The commission is funded directly by Parliament\textsuperscript{137}. It is required to submit to the Speaker’s Committee (a committee of nine MPs chaired by the Speaker of the House of Commons) an annual budget which the committee may modify, before the final request for funding is put to the House of Commons for approval\textsuperscript{138}. Funds are released to the commission from the Treasury on a monthly basis in accordance with the commission’s monthly cash forecasting\textsuperscript{139}. The commission is subject to the same accounting controls as other public departments and bodies and is audited by the National Audit Office\textsuperscript{140}. The commission is directly accountable to Parliament and not to the government\textsuperscript{141}. It submits a draft corporate plan each year to the Speaker’s Committee\textsuperscript{142}. The commission’s annual report must also be approved for publication by the Speaker’s Committee\textsuperscript{143}.

The above paragraph should summarize the further steps that the ECZ needs to take in order to improve its public image in terms of its autonomy and independence.
CHAPTER 4 - ELEMENTS OR CHARACTERISTICS OF AN AUTONOMOUS AND INDEPENDENT ELECTORAL MANAGEMENT BODY

4.0 OVERVIEW

A truly independent and non-partisan electoral management body is one of the very basic political structures that are a precondition for any democratic system\textsuperscript{144}. Independent EMBs are found under both the Independent and the Mixed Models and are guided by a 'board' of EMB members\textsuperscript{145}. There is no optimal number of members of an EMB, and no general principle to indicate that full-time or part-time EMB membership is preferable\textsuperscript{146}. The size of the country and its population, economic and geopolitical issues, the EMB's powers and functions, the strength of the EMB's secretariat, and whether electoral management follows the Independent or the Mixed Model may determine the size and work schedule of the EMB membership\textsuperscript{147}.

The Independent Model of electoral management exists in those countries where elections are organized and managed by an EMB which is institutionally independent and autonomous from the executive branch of government, and which has and manages its own budget under the Independent Model. An independent EMB is not accountable to a government ministry or department\textsuperscript{148}. It may be accountable to the legislature, the judiciary, or the head of state\textsuperscript{149}. EMBs under the Independent Model may enjoy varying degrees of financial autonomy and accountability, as well as varying levels of performance accountability\textsuperscript{150}. They are composed of members who are outside the executive while in EMB office\textsuperscript{151}. Many new and emerging democracies have chosen the Independent Model of electoral management\textsuperscript{152}. Zambia is among the emerging democracies that have chosen the independent model of electoral management\textsuperscript{153}.

\textsuperscript{145} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 104
\textsuperscript{146} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 104
\textsuperscript{147} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 104
\textsuperscript{153} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 322
In terms of membership, EMB members need to have sufficient status to entitle them to respect from their counterparts in other sectors of society, and constitutional or legal guarantees of their conditions of service and security of tenure sufficient to enable them to act without fear or favour. Independent EMBs under the Independent and Mixed Models may have a membership that is multiparty — nominated by political parties qualified to do so, or expert — politically non-aligned members appointed on the basis of their professional skills, or combined — a mixture of political and professional appointees. The type of membership that is suitable for a particular country will depend on its political environment and stage of democratic development. Fixed and secure terms of office for EMB members allow for institutional confidence and renewal. Staggering EMB members' terms of office minimizes disruption and assists in retaining an EMB's institutional memory.

A quality EMB membership selection process can be achieved by open advertising for candidates and ranking all applicants according to a transparently applied 'fit and proper' test. The most widely accepted procedure for EMB appointment is for one branch of government to nominate and another to confirm. This process could start with the executive or judiciary and end with the legislature or vice versa. In Zambia, the President has the sole role of appointing all the members of the commission. Electoral law usually specifies the qualifications to be an EMB member, which generally include citizenship, good repute, ability to act impartially, and professional qualifications or knowledge. They may include other factors such as age, health, holding or not holding specified positions, and residence.

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EMB meetings can be either closed or open to the public. Open meetings may promote greater trust in the EMB and its activities, while closed meetings may better allow open discussion on sensitive matters. A good working relationship between EMB members and its secretariat is critical for the effective functioning of the EMB.

4.1 FACTORS WHICH MAY INHIBIT EMB PROFESSIONALISM

There are numerous problems which an EMB may have to overcome to achieve an acceptable level of independence. Some may be within the EMB itself, such as behavioral, planning or resource prioritization issues. Others may be the product of factors in the EMB’s external environment, including: i) the political climate within which elections take place largely determines the credibility and legitimacy of elections. In environments of political fear, intimidation and violence, and in societies with no respect for rule of law, or where governments have no transparency or accountability, it is difficult to manage credible elections. Nevertheless, a professionally oriented EMB can still work hard under such circumstances to demonstrate a commitment to ethical principles and by so doing contribute to efforts to build confidence in the electoral process; ii) A sound electoral legal framework is essential for the successful planning and conduct of electoral events and also for the professionalization of the EMB. Where the legal framework falls short of the acceptable norms, the EMB may encounter difficulties in delivering electoral events that are acceptable to all stakeholders, and may thus appear to be unprofessional.

In order to avoid political disruptions and other uncertainties that may undermine the electoral process, it is preferable that changes to the legal framework be finalized long before the date of an electoral event. This allows the EMB sufficient time to educate the stakeholders about the changes, make the necessary modifications to its procedures, and train its staff. It also allows the parties and candidates time to adjust their plans if necessary.

4.2 SOME GUIDING PRINCIPLES FOR ALL EMBS

No matter which model is used, every EMB should be certain that it can ensure the legitimacy and credibility of the processes for which it is responsible. This can be done if electoral

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management is founded on fundamental guiding principles. Some guiding principles for EMBs include: independence; impartiality; integrity; transparency; efficiency; professionalism; and service-mindedness. These guiding principles form the basis of electoral administration and are essential to ensure both the actual and the perceived integrity of the electoral process.

4.3 INDEPENDENCE

EMB independence is one of the most hotly debated issues in election administration, yet there is still no clear, accepted view on what EMB independence really means. Partly this is because the term 'independent' embraces two different concepts - that of structural independence from the government (the 'Independent Model' of electoral management); and that of the 'fearless independence' expected of all EMBs, no matter which model is used, in that they do not bend to governmental, political or other partisan influences on their decisions. The two are separate issues, one being formal and the other normative; nonetheless, they are seen as being linked in that the Independent Model of electoral management is regarded in many parts of the world as the model most likely to ensure an EMB's independence of decision and action.

In order for the body which is responsible for the governance and control of an electoral system to play its rightful role in nurturing the integrity of the election process, it must not only be independent of government control, it must be perceived to be so by the general public and the political parties. While the formal legal framework is a necessity and should be firmly in place at all times, the persons appointed to positions on that body must be respected for their impartiality and competence. When this is achieved, the foundation is laid for the management body to play a healthy role in the protection of the integrity of the election process.

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174 Dundas, Dimensions of a free and fair elections, p. 18
175 Dundas, Dimensions of a free and fair elections, p. 18
4.3.1 CONSTITUTIONAL AND LEGAL INDEPENDENCE

Institutional or 'structural' independence can only be found in the constitution or the law. The simplest way to promote independence of decision and action in an EMB is to create a legal framework that embeds EMB independence, as provided in the constitutions and principal EMB laws of many countries. This is always feasible with the Independent Model of electoral management.

For the Independent Model electoral management, both a culture of independence and the commitment of EMB members to independent decision making are more important than the formal 'structural' independence. A strong leadership is important for maintaining an EMB's independence of action. For example, a senior member of the judiciary may fill the position of chairperson of an independent EMB within the Independent Model. This is apparently the practice in Zambia. Such a link to the judiciary may make undue interference by the government or opposition parties in EMB operations less likely. However, it would not be appropriate where the judiciary is not regarded as impartial or free of corruption, or does not have enough members for it to be possible to avoid conflicts of interest in election-related court cases. Countries which use judges or former judges as EMB chairpersons include Australia, Brazil, Costa Rica and Zambia. It is important though to note that Zambia's judiciary at the moment is not regarded as impartial and free from corruption. And this picture has not helped matters in raising the image of the ECZ upward in the eyes of stakeholders.

4.3.2 APPOINTMENTS, PROCEDURES AND TENURE OF MEMBERS

Controversies have arisen with respect to the appointment procedures and tenure of members of the EMB, which undermines the legitimacy and credibility of the electoral process. The appointment and dismissal procedures should be clearly articulated and the process undertaken in

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176 Dundas, Dimensions of a free and fair election, p. 18
177 Dundas, Dimensions of a free and fair elections, p. 18
178 Dundas, Dimensions of a free and fair elections, p. 18
a manner that is impartial, accountable and transparent\textsuperscript{184}. These procedures should also take into consideration the need to ensure institutional continuity\textsuperscript{185}.

The process for appointing members of any EMB is generally defined in an electoral law, and the recruitment and selection method may also be defined in the electoral legal framework\textsuperscript{186}. In Zambia unfortunately the process for appointing members of the ECZ is not well defined. Section 4(3) of the Electoral Commission Act\textsuperscript{187} simply provides for the members that they shall be appointed by the President, subject to ratification by the National Assembly. However, the National Assembly Bill No. 60 of 2010 which is to be tabled before parliament this February 2011 to amend the current Constitution does provide for the procedure of appointing ECZ commissioners\textsuperscript{188}. The proposed process of selecting members of the ECZ is as follows: i) the President shall constitute an ad-hoc selection committee for purposes of recruiting and selecting persons for appointment as members of the Electoral Commission\textsuperscript{189}; ii) the National Assembly shall ratify the names of those to be appointed to the selection committee\textsuperscript{190}; iii) Parliament shall enact legislation prescribing the rules and procedures for advertising the names of short-listed candidates and selecting members for appointment to the Electoral Commission\textsuperscript{191}.

\subsection*{4.3.3 OPERATIONAL INDEPENDENCE}

Operational independence of the EMB requires inter alia impartiality, integrity, and transparency. Every EMB is expected to manage elections impartially. To establish the integrity and credibility of electoral processes and promote the widespread acceptance of election results, it is critical that an EMB not only conducts electoral events in a fearlessly independent manner, but that it is impartial in its actions\textsuperscript{192}. Without impartiality of electoral management and independence of action, the integrity of the election is likely to fail, and it can be difficult to instil widespread belief in the credibility of electoral processes, especially among the losers\textsuperscript{193}.

\begin{thebibliography}{199}
\bibitem{184} Principles for Election Management, Monitoring and Observation in the SADC Region, p.12
\bibitem{185} Principles for Election Management, Monitoring and Observation in the SADC Region, p.12
\bibitem{186} Principles for Election Management, Monitoring and Observation in the SADC Region, p.94
\bibitem{187} No. 24 of 1996
\bibitem{188} Constitution of Zambia (Amendment), Cap. 1, Article 193
\bibitem{189} Constitution of Zambia (Amendment), Cap. 1, Article 193(1)
\bibitem{190} Constitution of Zambia (Amendment), Cap. 1, Article 193(2)
\bibitem{191} Constitution of Zambia (Amendment), Cap. 1, Article 193(3)
\bibitem{192} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 25
\bibitem{193} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 23
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Irrespective of the model under which the EMB exists, its source of accountability, management control or funding, it should treat all election participants equally, fairly and even-handedly, without giving advantage to any political tendency or interest group. In theory, an independent EMB made up of non-aligned 'expert' appointees might be best able to achieve this. Other independent EMBs, for example where nominees of the contesting political parties are appointed to the EMB, may have a more difficult time establishing their credentials with the public as completely impartial bodies. In Zambia the ECZ is 'expert' based and that the idea of co-opting politicians to be members of the ECZ has been rejected by many stakeholders except the politicians themselves.

Impartiality may be imposed by the legal framework or EMB structure, but it has to be put into practice through the EMB’s behaviour and attitudes to its stakeholders. Impartiality is a state of mind more than a statement in law, although this state of mind can be encouraged by effective external review of EMB decisions and an EMB code of conduct with strong sanctions. When it comes to integrity, the EMB is the primary guarantor of the integrity and purity of the electoral process and EMB members have the direct responsibility for ensuring this. Integrity may be easier to maintain if the EMB has both full independence of action and full control of all essential electoral processes. Where other bodies have electoral functions, EMBs need to be empowered to monitor their activities closely to ensure that they meet the highest integrity standards.

Transparency in operational and financial management lays out for public scrutiny the decisions and reasoning of the EMB. Transparency is a basic good practice for all EMB activities. It can assist an EMB to combat perceptions of and identify actual financial or electoral fraud, lack of competence or favoritism towards particular political tendencies, and can enhance the EMB's...
credibility. In Zambia, the ECZ has introduced rapport with political parties by establishing a standing committee known as the ‘Political Parties/ECZ Liaison Committee’ through which it disseminates all its activities to the political parties. This was in line with the recommendation of a consultancy team on the Zambian electoral process which recommended that the ECZ should establish and maintain liaison and cooperation with the parties and civic society organizations.

This committee is represented by heads of the national secretariats of the political parties on the one hand, while on the other hand the ECZ is represented by its senior management team and its chaired by the Director of ECZ. The ECZ also invites representatives of political parties to witness such crucial activities as the printing of elections ballot papers. It is encouraging to note that the ECZ has tried very hard to be transparent in its operations. This fact was observed by one Non Governmental Organization (NGO) the Southern African Centre for Constructive Resolution of Disputes (SACCORD) in its 2006 report when it stated that the 2006 tripartite elections could be said to have been much more credible mainly due to the transparency with which the preparations were handled by the ECZ.

The absence of transparency in electoral processes invariably leads to the suspicion that fraudulent activities are taking place. For example, where observers and the public are unable to access progressive vote count and aggregation data, and there are significant delays in announcing and validating election results then the credibility of the election suffers.

4.3.4 FINANCIAL INDEPENDENCE

The funding of elections may appear to be costly, and has to compete with vital national services such as defense, health and education, which may yield greater immediate political returns. Inadequate or untimely funding of electoral processes may occur because governments are not able

205 SACCORD, Zambian 2006 Presidential, Parliamentary and Local Government Elections Report, p. 31
206 SACCORD, Zambian 2006 Presidential, Parliamentary and Local Government Elections Report, p. 31
to appropriate sufficient funds or to ensure the timely disbursement of approved funds\textsuperscript{208}. EMB funding needs are dependent on the electoral cycle and will vary hugely between election and non-election years\textsuperscript{209}. Electoral costs need to be financed. Basically these are broken into three categories\textsuperscript{210}: i) core costs (or direct costs) — those costs that are routinely associated with implementing an electoral process in a stable electoral environment; ii) diffuse costs (or indirect costs) — those costs for electoral-related services that cannot be disentangled from the general budgets of agencies that assist with the implementation of an electoral process; and iii) Integrity costs — those costs, over and above the core costs, that are necessary to provide safety, integrity, political neutrality, and a level playing field for an electoral process.

Integrity costs are often largely sponsored outside EMBs, mainly by the donor community\textsuperscript{211}. Such additional costs may not be included in analyses of EMB budgets, although they relate to functions within EMB mandates\textsuperscript{212}. Core costs are proportionally highest in stable democracies, as progress towards democratic consolidation tends to lead to a decrease in integrity costs and an increase in core costs\textsuperscript{213}. The increase in the core costs results from demands for increased participation to be fostered through more widely accessible electoral operations, and from the use of high technology to expedite voter registration, voting and the transmission of election results\textsuperscript{214}.

Who finances EMBs and how? Is it State or Public Funding? Electoral events are a core function of a democratic state. The state remains the primary source of funding for the core costs of most EMBs\textsuperscript{215}. The electoral budget forms part of the consolidated national budget on an annual cycle\textsuperscript{216}. Funding for many EMBs under the Independent Model, for example; in Costa Rica, Ghana and Namibia, is a separate line item in the national budget, released directly to the EMB

\textsuperscript{208} Wall et al (ed.), \textit{Electoral Management Design: The International IDEA Handbook}, p. 175
\textsuperscript{210} Wall et al (ed.), \textit{Electoral Management Design: The International IDEA Handbook}, p. 175
\textsuperscript{211} Wall et al (ed.), \textit{Electoral Management Design: The International IDEA Handbook}, p. 175
\textsuperscript{212} Wall et al (ed.), \textit{Electoral Management Design: The International IDEA Handbook}, p. 175
\textsuperscript{213} Wall et al (ed.), \textit{Electoral Management Design: The International IDEA Handbook}, p. 175
\textsuperscript{216} Wall et al (ed.), \textit{Electoral Management Design: The International IDEA Handbook}, p. 178
by the Treasury\textsuperscript{217}. For others, the EMB budget is released through a government ministry, for example, the Ministry of Home Affairs in South Africa and the Ministry of Laws in India\textsuperscript{218}. In Zambia, the ECZ budget is released through the Ministry of Finance and Planning.

It is common for EMBs to submit their budget proposals to the Treasury for preliminary approval, although some submit their budget proposals directly to the legislature or a committee of the legislature\textsuperscript{219}. In some countries, such as Costa Rica, the legislature has no power to alter or reject any part of the proposed budget of the EMB\textsuperscript{220}. In others, as in Nigeria and the Seychelles, specified parts of the EMB's proposed budget dealing with EMB members' salaries and allowances cannot be altered by the executive or its agencies\textsuperscript{221}. In Canada, the budget of the EMB has two parts — the recurrent budget, which covers costs such as permanent staff and related material support; and the elections budget, which covers additional expenses directly related to an election or referendum\textsuperscript{222}. The recurrent budget may be altered by the government, while the elections budget may not\textsuperscript{223}. The EMB provides an annual estimate of its elections budget to the government, but is allowed to spend more than this estimate\textsuperscript{224}. Following the elections the EMB accounts for these expenditures to a committee of the legislature\textsuperscript{225}.

The practice in many countries is for the Treasury to release the funds to the EMB in a lump sum after legislative approval has been secured\textsuperscript{226}. This applies\textsuperscript{5} where the EMB has autonomy over its finances, and often its own banking account, as in Gambia and Macedonia\textsuperscript{227}. In some cases, EMB funds are kept and managed by the Ministry of Finance, with the EMB making

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requisitions for the ministry to pay its creditors and staff, mainly by cheque\textsuperscript{228}. EMBs in this category include those of Botswana and Namibia\textsuperscript{229}. The budget of the EMB is charged directly to the Consolidated Fund in some countries\textsuperscript{230}.

Emerging democracies often fail to fund major election processes in an adequate and timely manner\textsuperscript{231}. Where EMB expenditure processes and cash flow are controlled by a government ministry and subject to government rules and procedures, there may be delays in the disbursement of critical funds\textsuperscript{232}. Delayed disbursement of funds to an EMB can create major problems in electoral administration\textsuperscript{233}. It can mean that vital decisions are delayed, or that insufficient time is left for the EMB to use high-probity tender processes or organize the supply of acceptable quality goods for electoral purposes\textsuperscript{234}. Late payment to suppliers can cause disruptions to supply in the time-critical election environment\textsuperscript{235}. Late payments to staff, as has happened in Cameroon, threaten electoral processes\textsuperscript{236}. It may be to the advantage of both EMB and government to conclude a memorandum of understanding governing the funding disbursement arrangements\textsuperscript{237}. Having a ministry control EMB payments may raise perceptions that the EMBs activities are being controlled by the government, which can threaten the EMB's credibility\textsuperscript{238}. Even where an EMB is constitutionally independent of the government, linking it to the government financial payments system can limit its autonomy\textsuperscript{239}.

\section*{4.4 ECZ CONSTRAINTS, OPPORTUNITIES AND THREATS}

A critical analysis of the ECZ shows a mixture of constraints, opportunities and threats. One of the key weaknesses that the ECZ faces is to do with funding. The electoral statutes do not

\textsuperscript{228} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{229} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{231} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{233} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{234} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{235} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{236} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{237} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{238} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
\textsuperscript{239} Wall et al (ed.), Electoral Management Design: The International IDEA Handbook, p. 184
specify categorically how the Commission and the running of elections should be funded. This has resulted in the Commission being funded directly by the Ministry of Finance, like any other ministry or department. This mode of funding renders severe difficulties for the Commission to execute its functions properly and timely. It also compromises the Commission when it comes to its independence and autonomy, as the Commission's operations are dependent on the Finance Ministry's funding schedule. The ideal situation would be for the Commission to be funded by way of grants directly by Parliament. The Zamchiya Consultancy Team also alluded to this issue in its report by observing that the manner in which the Commission funds are obtained and disbursed is clearly an impediment on the independent functioning of the Commission.

The second weakness is that the legal framework in Zambia does not provide adequately for the recognition and acceptance of the ECZ as an independent body because of the mode of appointment of the Commission members by the Executive. Dr. Neo Simutanyi, a Lecturer at the University of Zambia and Consultant, has also noted the challenges that face the ECZ in his paper presented to the Zambia Centre for Inter Party Dialogue (ZCID) and the United States Embassy Workshop for Political Parties by stating that there still was little optimism that the electoral system will undergo fundamental reform because attempts to address some of the flaws in the electoral system through the Electoral Technical Committee (ERTC), the Mung'oomba Constitution Review Commission and the National Constitutional Conference are still being awaited. However, an opportunity still exists as the nation awaits the outcome of the Constitution of Zambia (Amendment) Bill No. 60 of 2010 which is to be tabled to the National Assembly soon.

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241 Practical and Best Practices in Electoral Management and Administration, p. 3
242 Practical and Best Practices in Electoral Management and Administration, p. 3
243 Practical and Best Practices in Electoral Management and Administration, p. 3
244 Practical and Best Practices in Electoral Management and Administration, p. 3
245 Zamchiya, 'Observations and Recommendations made by the Zamchiya Consultancy Team on the Zambian Electoral Process and 2001 Tripartite Elections', p. 3
The big question to be answered again is whether the ECZ should have full-time Commissioners or not? The Zamchiya Consultancy Team from EISA report observed that a lack of clarity in the respective powers and responsibilities of the Commissioners and Management existed. Being full-time, the Commissioners were inevitably involved in the day to day operations of the Commission and this could confuse the lines of responsibility and authority. There was need therefore to articulate more clearly, the specific functions and responsibilities of the Commissioners and the activities they were expected to perform.

In concluding this chapter, it can be summarized that Zambia's ECZ is an 'independent' model, with a commission membership of 5, whose tenure of office is not more than 7 years. All the members are appointed by the President including the Chairperson. The ECZ is 'expert' based as opposed to the 'party' based model.

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247 Zamchiya, Observations and Recommendations made by the Zamchiya Consultancy Team on the Zambian Electoral Process and 2001 Tripartite Elections, p. 4
248 Zamchiya, Observations and Recommendations made by the Zamchiya Consultancy Team on the Zambian Electoral Process and 2001 Tripartite Elections, p. 4
249 Zamchiya, Observations and Recommendations made by the Zamchiya Consultancy Team on the Zambian Electoral Process and 2001 Tripartite Elections, p. 4
CHAPTER 5 - RECOMMENDATIONS AND CONCLUSION

5.1 RECOMMENDATIONS

Various stakeholders in the electoral process were interviewed on the best way forward for a truly independent and autonomous ECZ. It was generally observed by most stakeholders that the ECZ needed to be strengthened in its organic structure and operations set up. The major concern of the stakeholders was the powerlessness of the ECZ and therefore its dependence on the government to carry out its duties. Some notable areas of concern were centered around the following issues: 1) what form should the ECZ be in order to carry with it the people's confidence; 2) whether the ECZ should be full-time or part-time; 3) to whom should the ECZ be directly responsible and accountable; 4) the composition of the ECZ; 5) what the role of the ECZ Chairperson is; 6) qualifications for appointment of ECZ commissioners to be clearly defined; 7) mechanisms for selection and appointment that are transparent; 8) How the ECZ should be funded. The stakeholders interviewed came up with a number of recommendations which form part of this final chapter of the essay.

Most of the stakeholders recommended an expert based electoral commission as opposed to a multiparty based one. The Acting Director of ECZ, Mrs. Priscilla Isaac, probably summarized this option when she pointed out that 'What is important is a professional and effective administration which is responsible for operations'\(^{253}\). And a part-time ECZ was recommended instead of the current full-time commission. 'Commissioners are policy makers and need not be employed full time' the director opined\(^{254}\). This recommendation was supported by other stakeholders, such as the Executive Director of the Zambia Centre for Inter-Party Dialogue (ZCID) who added that clear job descriptions for the commissioners should be spelt out so that they are not in conflict with professional staff\(^{255}\).

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\(^{253}\) INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011

\(^{254}\) INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011

\(^{255}\) INTERVIEW: Chomba Chellah, Executive Director, Zambia Centre for Inter-Party Dialogue (ZCID), 15/03/2011
Most stakeholders were in favour of the ECZ reporting to the legislature and not the executive branch of government. The current practice where the ECZ submit their reports to the President who in turn is required to table the ECZ report before the legislature was rejected because it was perceived to be some form of doctoring the report and as such making the ECZ not independent in its operations.

One of the major criticisms of the commission is its composition. Members of the opposition and civil society feel that it is not representative, as all appointees are presidential appointees. Political parties have argued that as major stakeholders they need to be directly involved in the affairs of the electoral process by way of representation on the commission. The opposition political parties have argued that the fact that the commissioners are appointed by the Republican President who is an active politician himself and a player in the elections, there is need to correct this imbalance by having other political parties to be appointed to the commission. It is further argued that this will promote the concept of inclusivity and transparency in the ECZ and help build up legitimacy and less suspicions against the party in power every time there is an election. However, the Director of the ECZ is quite happy with the current composition of commissioners at 5 members and emphasizes that these should not include politicians. ‘5 members are adequate for the policy making and overseeing the electoral process’. The quorum is 3 for a meeting and decision making. The General Secretary for the United Liberal Party (ULP) recommends a larger body of 10 members which is representative of stakeholders.

Most stakeholders did not particularly give elaborate detail in respect of what the role of the ECZ Chairperson is, and the status of the commissioners in general. However, it is important to mention here that the status of EMB members and the special role that the EMB Chairperson

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256 Electoral Commission Act, No. 24 of 1996, Section 16
257 INTERVIEW: Langtone Sichone, General Secretary, United Liberal Party (ULP), 15/03/2011
258 INTERVIEW: Langtone Sichone, General Secretary, United Liberal Party (ULP), 15/03/2011
259 INTERVIEW: Langtone Sichone, General Secretary, United Liberal Party (ULP), 15/03/2011
261 INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011
262 INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011
263 INTERVIEW: Langtone Sichone, General Secretary, United Liberal Party (ULP), 15/03/2011
plays in the electoral process are cardinal characteristics of a successful independent EMB. For an EMB to operate effectively, its members need to have status that entitles them to respect from and a relationship of equality with government, the legislature and society.\textsuperscript{264} In India, the three EMB members have the status of judges of the Supreme Court\textsuperscript{265}. The head of an EMB especially needs a status that affords her or him access to the highest levels of government and ensures adherence to the EMB’s decisions\textsuperscript{266}. In some countries, such as in Pakistan, the Chairperson of the EMB has the same conditions of service as the Chief Justice\textsuperscript{267}. In the Democratic Republic of the Congo and Romania, the Chairperson of the EMB has the rank of minister, guaranteeing access to the legislature and the government\textsuperscript{268}. It is clearly noticeable in Zambia that the ECZ and the Chairperson have been subordinated to the judiciary because the practice of appointing judges to chair the commission has also brought to light that those appointed to chair the commission are judges below the rank of a deputy chief justice. This means that rank wise the ECZ chairperson is equivalent to a Supreme Court Judge. It is because of this status of the ECZ chairperson that explains why the Chairperson of ECZ is not the returning officer for presidential elections and as such cannot receive nominations of presidential candidates and announce the presidential elections results, but must instead report the results to the Chief Justice (who is the returning officer and therefore receives presidential nominations) who eventually then must make the official results known to the nation. Anti-Voter Apathy Project witnessed the announcement of the 2006 Presidential Elections Results and they reported as follows\textsuperscript{269} ‘the announcement of the 2006 Presidential Election results was done by Chief Justice Sakala during the evening of October, 2\textsuperscript{nd} 2006 at Mulungushi International Conference Centre’.

It is then not strange that someone can take up the heavy responsibility of announcing the elections results which he/she never supervised in the first place. This example is a clear manifestation of misplacement of administrative powers and responsibility in the sense that the

\textsuperscript{266} Wall et al (ed.), Electoral Management Design: The International Idea Handbook, p. 86
Chairperson of the ECZ is vested with the responsibilities fit for a Chief Justice but with the powers of a subordinate rank. It is important that this anomaly in status is also corrected.

Mechanisms for selection and appointment of commissioners must be transparent. As to the appointment of commissioners, the Director of ECZ recommends that the provision in the Draft Constitution for an ad-hoc select committee to be responsible for recruiting and selecting persons for appointment as members of the Electoral Commission is the right path to follow. This will instill more confidence in the selection process, she concludes. Additionally a requirement of relevant professional qualifications for appointment of ECZ commissioners needed to be clearly defined. The Executive Director of ZCID, on the other hand, recommended that open recruitment through press advertisements and the necessary recruitment procedure before appointments is important to instill legitimacy and eradicate suspicions of impartiality. As positions are advertised, clear job descriptions of commissioners should be stated. And finally the short listed names should undergo parliamentary scrutiny before the appointments are done by the Head of State. The Director of ECZ is also in agreement that the appointment of commissioners should stipulate qualifications for all members of the commission.

On the question of funding the ECZ, the Director of ECZ recommends that the commission should be funded through the treasury, but that the budget should be met in full and that the funding should be timely and on schedule as requested. The Executive Director of ZCID, on the other hand, recommended that it should be funded directly from the National Assembly but that administratively the Minister of Finance and Planning would include their budget in the

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270 Article 89, Final Draft Constitution of the Republic of Zambia
271 INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011
272 INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011
273 INTERVIEW: Chomba Chellah, (ZCID), 15/03/2011
274 INTERVIEW: Chomba Chellah, (ZCID), 15/03/2011
275 INTERVIEW: Chomba Chellah, (ZCID), 15/03/2011
276 INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011
277 INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2011
5.2 CONCLUSION

I will conclude my study by examining the relevant provisions pertaining to the ECZ as provided for in the Constitution of Zambia (Amendment) Bill\textsuperscript{280} which was recently tabled for debate in the National Assembly but unfortunately was defeated at the second reading\textsuperscript{281}. This Bill was a culmination of the Mung’omba Constitution Review Commission Report and Draft Constitution of 25\textsuperscript{th} December 2005 which later led to the National Constitutional Conference (NCC) which sat for nearly three years from 13\textsuperscript{th} December 2007 to 31st August 2010. The NCC came up with a report and final Draft Constitution which is today N.A.B. No. 60 of 2010. In spite of the obvious set back which has befallen the defeat of the Bill, Republican President Rupiah B. Banda has insisted on re-tabling the said Bill after six months from the date of the Bill’s defeat\textsuperscript{282}.

The current Constitution\textsuperscript{283} only has two provisions concerning the ECZ, Articles 76 and 77. The former establishes the ECZ and provides for its constitutional functions. The latter gives powers to the ECZ to delimit constituencies in the Republic. By contrast, the NCC Draft Constitution which is a schedule to the Constitution of Zambia (Amendment) Bill\textsuperscript{284} has a total of nine articles dealing with the ECZ, Articles 88 to 96 inclusive\textsuperscript{285}. Article 88 establishes the ECZ and provides for the composition of commissioners. The number of commissioners has been increased to 7 from the current 5. All the commissioners are full-time. The increase in the numbers was done to accommodate the concept of inclusivity. However, the author of this paper is apprehensive about maintaining a full-time commission of 7 members because this will just add more to the already

\textsuperscript{278} INTERVIEW Chomba Chellah, (ZCID), 15/03/2011
\textsuperscript{279} INTERVIEW: Langstone Sichone, (ULP), 15/03/2011
\textsuperscript{280} National Assembly Bill (N.A.B.) No. 60 of 2010
\textsuperscript{281} Yes votes were 93, No votes 1 and 20 abstentions from the UPND MPs, Wednesday, 30\textsuperscript{th} March 2011
\textsuperscript{282} Zambia Daily Mail, Friday 1\textsuperscript{st} April 2011, p. 1
\textsuperscript{283} Constitution of the Republic of Zambia, Cap. 1
\textsuperscript{284} N.A.B. No. 60 of 2010
\textsuperscript{285} NCC Draft Constitution, 27\textsuperscript{th} August 2010
fragile situation at the institution where job descriptions are not well pronounced between the commissioners and the professional staff members. The author supports the stakeholders who are in favour of only three of the seven commissioners to be full-time and the rest part-time. The author proposes an organic structure similar to that of Ghana. The Chairperson and two Deputy Chairpersons should be professionals. The other four commissioners representing the interests of political parties, civil society and the rest of the public should be part-time.

Article 89 provides for an Ad-Hoc select Committee which will be responsible for interviewing and short-listing of applicants to serve as commissioners. The select committee consists of 5 members nominated from the Supreme and Constitutional Court, Public Service Commission, Judicial Service Commission, Church Mother bodies and the Investigator-General. This provision is very welcome and should at least bring some confidence in the selection process of the commissioners. Notable in this article is the fact that the executive arm of government is kept at bay. This provision should bring to rest the everyday complaint about the President’s sole authority of appointing commissioners. Article 90 gives the President the powers to finally appoint the commissioners subject to ratification by the National Assembly. I must hasten to point out here that this power given to the President should not be misunderstood to mean interference but should be looked at from the perspective of the need for the commissioners to have status that entitles them to respect from and a relationship of equality with government, the legislature and society. Article 92 gives the ECZ constitutional independence and tabulates its functions. It is worth noting that this article explicitly declares the ECZ ‘autonomous and impartial’ and that it ‘shall not in the performance of its duties be subject to the direction or control of any person or authority.’ This article can only work well if the funding of the ECZ is also independent of the executive arm of government. Article 93 provides for the funding of the ECZ from the ‘monies appropriated by Parliament for the purposes of the Commission’. The article declares the Commission to be a self-accounting institution and that it shall deal directly with the Ministry responsible for finance on matters related to finances. It is

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287 ECZ Electoral Observer Mission, Report on the Ghana Presidential and Parliamentary Election held on 7th December and the Presidential Run Off held on 28th December 2008, p. 10
288 NCC Draft Constitution, 27th August 2010
289 NCC Draft Constitution, 27th August 2010
still doubtful if this provision is going to work well for the ECZ. Most stakeholders would have preferred the ECZ to be financed directly by the National Assembly\textsuperscript{290}.

Finally, it is my submission that while a few remedial measures have been taken towards the legal framework of the ECZ a lot more needs to be done. The problems of independence and autonomy at the ECZ are not peculiarly internal but much of it is external. The political players themselves have much to learn about democratic ideals and good governance. Zambia is coming from a historical background of a traditional and cultural dictatorship in the chiefdoms where elections are a strange phenomenon. Except for a brief period of roughly less than 10 years, Zambia spent a full seventeen years under the One–Party United National Independence Party (UNIP) dictatorship. The return to multi-party politics in 1991 to date therefore faces a lot of challenges in as far as the political process and transfer of political power is concerned. Political Parties and politicians must adapt to the norms of democracy by accepting defeat honourably without blame, and in reciprocal those holding political power must respect the rule of law by not perpetrating their stay in power by manipulating the very institution that is supposed to be the custodian of the legal instruments for the transfer of political power legally. Civil society should also help out by being effective impartial arbitrators in the entire electoral process. The media on the other hand seems not to understand what their role is in the electoral process. Instead of the media disseminating the necessary information to the public such as civic education and ideals of good governance, they seem to be appendages of either the ruling party or one of the parties in opposition. The security forces are also not helping matters.\textsuperscript{2} The sector of the public service is expected to be completely impartial and maintain law and order in the electoral process but the happenings on the ground are that they are partisan and this works negatively to the institution tasked with the heavy responsibility of handling such a sensitive and emotional event such an election where political power changes hands through the ballot box.

Coming to internal factors, I submit that an effective ECZ should have adopted a 3 member full-time expert commissioners and the other four part-time to provide for inclusivity of the political

\textsuperscript{290} FODEF, Electoral Reform Strategy: Past, Present and Future Activities, Lusaka, 2002, p. 41
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