

SPR
LLB
2012
2012
2012

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

LLB OBLIGATORY ESSAY

TITLE OF OBLIGATORY ESSAY: THE INDEPENDENCE OF THE ELECTORAL COMMISSION OF ZAMBIA AND THE APPOINTMENT OF THE ELECTION DATE BY THE PRESIDENT

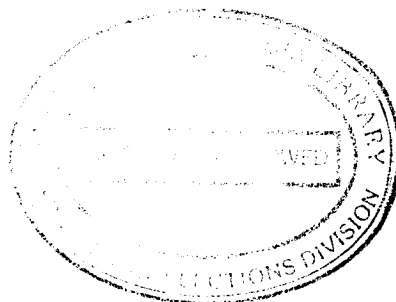
BY

KANYANGA MUCHANGANI

COMPUTER NO. 27005852

AN OBLIGATORY ESSAY SUBMITTED TO THE UNIVERSITY OF ZAMBIA, SCHOOL OF LAW, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS, LLB.

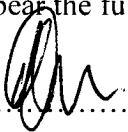
2012



COPYRIGHT DECLARATION

I, Kanyanga Muchangani, identity No. 27005852, do hereby declare that the author of this obligatory essay entitled “THE INDEPENDENCE OF THE ELECTORAL COMMISSION OF ZAMBIA AND THE APPOINTMENT OF ELECTION DATE BY THE PRESIDENT”. I, further declare that this essay represents my own original work and that due acknowledgement have been made where other people’s work has been used, and that i believe that this essay has not previously been submitted for a degree at the university of Zambia or another University.

I therefore bear the full responsibility for the content, errors, defects and any omissions therein.

Sign..........Date.....14th May, 2012.....

KANYANGA MUCHANGANI

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

EXAMINERS APPROVAL PAGE

I recommend that this OBLIGATORY ESSAY prepared under my supervision

By

KANYANGA MUCHANGANI

Entitled

THE INDEPENDENCE OF THE ELECTORAL COMMISSION OF ZAMBIA AND THE
APPOINTMENT OF THE ELECTION DATE BY THE PRESIDENT

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the
requirements pertaining to format as laid down in the regulations governing obligatory essays.

COURSE SUPERVISOR:.....DATE.....

MR J.P. SANGWA

DEDICATIONS

I dedicate this work to my late mother, Bessy Mwanga; my late dad, Mr. John Chonya Kanyanga and my late sister, Elizabeth Kanyanga and my hardworking supervisor Mr. J.P. Sangwa for the intellect and guidance he gave during my research, not forgetting friends and relatives.

ABSTRACT

The Electoral Commission of Zambia (ECZ) is a constitutionally established body pursuant to Article 76(1) of the constitution with the mandate to conduct presidential and parliamentary elections in the Republic of Zambia. The ECZ is primarily consists of five full time commissioners and the chairperson being one of them. They are all together appointed by the president.

There has been a lot of concern leveled against the ECZ since 1996 specifically on the ground of being in favour of the party in power. However, the concerns have to various reasons. The ECZ is believed not to be independent and autonomous as per demands of the constitution. One of the major issues is the interference on ECZ by the executive arm of the government through many ways. One of the criticisms has been the constitutionality of section 25(1) of the Electoral Act, funding of the ECZ and the appointment of the members of the ECZ by the president when he himself is a political player. These are the grounds upon which stakeholders have argued that the ECZ is not free to carry out its mandate as per constitution established.

This research evaluates the legal framework of the law governing the ECZ with the view to ascertain and thereafter propose a proper governing structure by having in place good legal framework concerning elections in Zambia. Mainly, the objective of this essay, is to carry out an overview of the legal framework that governs the ECZ and carry out a comparative study of other few countries. The purpose of this study is to critically establish the constitutionality of the subsidiary law governing the elections in Zambia and also look at laws whether or not they are adequate enough to deal with the independent delivery of services by ECZ and if not this study

shall determine in its quest the mechanism of restoring dignity and credibility through the law by ensuring that the ECZ is not interfered with by externalities such as the government as a matter of recommendation to this study.

However, for comparative sake as already emphasized above, the study shall be conducted in two countries. These are Nigeria and India. There are many other countries that have been left out. That does not mean that they are not better. But the preference to these jurisdictions is that there is a lot that Zambia can learn from and that their legal structures governing the EMBs are similar to Zambia.

Over and above, the guiding principles identified for successful ECZ include; non determination of an election date by the president (constitutional and legal independence); operational independence; financial independence; appointment and dismissal procedures; tenure of members and the constitutionality of the Electoral laws.

Finally, the study draws recommendations established through conducted interviews of some key stakeholders and also from research literature. The conclusion drawn is that the problem of independence and autonomy of ECZ are not perculiarly internal but that much of it is externally perpetuated and that the existence section 25(1) of the Electoral Act attacks the constitutional legacy of the supreme law of the land and must deemed a nullity following Article 1(3) of the constitution. The same discriminates other political players based on political opinion.

ACKNOWLEDGEMENTS

I would like to express my sincere thanks to my supervisor, Mr. J.P Sangwa for his comments and serious guidance during my research.

I also sincerely thank Mrs. P. Isaac, Mr. Chomba Chella and Mr. L. Sichone for providing me with the information during my undertaking.

Special thanks also go to Professor M.M. Munalula, Dean School of Law, for ensuring that work is coordinated

Am very thankful and therefore call upon GOD's guidance to the above

CONTENTS	page
Title page	i
Copyright declaration	ii
Approval page	iii
Dedication	iv
Abstract	v
Acknowledgements	vi
Table of contents	vii
Acronyms and abbreviations used in the text	viii
Chapter 1-Introduction.....	1-4
1.1 Overview.....	1
Chapter 2- Supremacy of the constitution.....	4-12
2.1 Introduction.....	4
2.2 Article 1(3) and 1(4) of the constitution.....	4
2.3 Constitutionality of section 25(1) of the Electoral Act.....	7
2.4 Discrimination of section 25(1) of the Electoral Act.....	7
2.5 Presidential appointments to the commission.....	8
2.6 By-elections against general elections.....	9
2.7 Conclusion.....	12
Chapter 3-The Mungomba Draft Constitution	13-24
3.1 Introduction.....	13
3.2 Critical Analysis of the Mungomba Draft Constitution.....	13

3.3 Public Procurement Act and the ECZ..... 19

3.4 Funding and the independence of ECZ..... 21

3.5 Conclusion..... 24

Chapter 4- Comparison with other foreign jurisdictions.....26-34

4.1 Introduction..... 26

4.2 Nigeria..... 26

4.3 India..... 30

4.5 Conclusion..... 34

Chapter 5- Recommendations and Conclusion.....35-40

5.1 Introduction35

5.2 Recommendation..... 35

5.3 Conclusion..... 3

ACRONYMS AND ABBREVIATIONS

ECI	Electoral Commission of India
ECZ	Electoral Commission Zambia
EISA	Electoral Institute of Southern Africa
EMB	Electoral Management Body
FODEP	Foundation for Democratic Process.
IDEA	Institute of Democracy and Electoral Assistance.
IEMB	Independent Electoral Management Body
INEC	Independent National Electoral Commission.
NAB	National Assembly Bill
NCC	National Constitution Conference
SACCORD	Southern African Centre for Constructive Dispute Resolution.
ULP	United Liberal Party
ZCID	Zambia Centre for Inter-party Dialogue

CHAPTER 1-INDEPENDENCE AND AUTONOMY OF ELECTORAL COMMISSION OF ZAMBIA

1.1 INTRODUCTION

To be successful and meaningful, any election must be owned by the people, it therefore involves a more emotional rather than a rational period, when people are mobilized to express their political will and choice.¹ The conduct of legitimate elections that are accepted as free and fair by stakeholders, namely the electorates, political parties, civil societies 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.² However, the honesty and the 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 the 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 and also that the laws that governs them are in conformity with the constitution.

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).³ 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 presidential and

¹ Gerhard K.H. Totemeyer, Arnold Wehmhomer and Heribert Weiland (ed.), *Elections in Namibia* (Windhoek: Gamsberg Macmillan Publishers Ltd. 1996), 1

²Gerhard K.H. Totemeyer, *The state and Functioning of the Electoral Commissions of Southern Africa* (Harare: Longman publishers, 1996), 3

³ Wall et al (ed.), *Electoral Management Design: The International IDEA Handbook*, (Stockholm: Institute for Democracy and Electoral Assistance,2006), 7

parliamentary elections and the Local Government elections under the office of the Vice president⁴. The constitution therefore established the ECZ and provides for the promulgation of legislation to determine the composition and operations of the ECZ according to the Electoral Commission Act. The commission consists of a chairperson and not more than four members appointed by the president, subject to ratification by the National Assembly⁵ for a term not exceeding seven years. Article 76(1) 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 into the National Assembly.⁶ The Electoral Commission Act sets out the circumstances under which the president may remove a member of the commission.⁷

Since the inception of 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 commissioners remains contentious.

The ECZ has come under severe attack at each and every election held in Zambia for being a tool for the party in power. This attack so often is related to the appointment of the commission chairperson and the 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 assertion being that the ECZ is not independent in the conduct of its mandate. The stakeholders' perception of the ECZ cannot be ignored because if the stakeholders have no confidence in the electoral body then, no

⁴ Neo Simutanyi, *The Zambian Electoral System: Issues and Challenges*, (Lusaka: Centre for Policy and Dialogue, 2010), 10

⁵ Section 4(3) of the Electoral Commission Act, No. 24 of 1996

⁶ The constitution of the Republic of Zambia

⁷ Section 5(3) of Electoral Commission Act No. 24 of 1996

matter how well the ECZ performs, it will still not be deemed to be credible manager of the electoral process⁸.

The purpose of this study is to critically analyse 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 elections. The study will make recommendations on how the lacuna and weaknesses in the electoral legislation can be addressed to ensure the independence of ECZ in the exercise of this mandate. Further, the study will address the following critical areas: 1) whether or not the ECZ is an autonomous public institution and independent of political interference; 2) to highlight the ECZ's structure, functions and mandate and establish whether these have contributed to the perceived lack of independence and autonomy; 3) to critically establish the role played by the executive arm of government in the functions of the ECZ and establish whether there is indeed interference or not; 4) to propose the relevant legislative and administrative framework changes to be made in order to achieve independence and autonomy of the ECZ.

Besides, the significance of this study is that it provides a practical solution as to how best the ECZ can be run independently. This study will equally undertake to determine the constitutionality of electoral laws and alongside ascertain whether the determination of general elections' date by the president discriminate on other candidates when he himself take part in the same elections whose date he determines. At the same time the study will help to find out whether government funding to the institution compromises the independent delivery of services by the commission.

⁸ Simutanyi, *The Zambian Electoral System: Issues and Challenges*, 10

Furthermore, this study questions the constitutionality of section 25(1) of the Electoral Act for allowing the Head of state to determine election date in complete ignorance of the constitutional provisions, Articles 76 and 23. This is as though Zambia does practice supremacy of the constitution. Why should the same elections be determined by different institutions when the constitution is clear and it does not even need someone to interpret as to who should determine an election date. If the president can determine an election date for general elections why cant the same extend to by-elections? But what we find is that by-elections are determined by ECZ and general elections by the president when the constitution only recognizes ECZ to do so without impunity. Powers of the president in Zambia must be curtailed. And there is no justification really, amongst all presidential candidates, only one of them supersedes the others to fix an election date. That is discrimination. The Zambian constitution does not tolerate discrimination in Article 23. Therefore, this essay in its discussion will consider viable options that can be instituted to ensure that ECZ remains independent and autonomous.

Finally, this study will critically analyse the electoral reforms that have taken place so far and identify whether they address the problem of the independence of the Electoral Commission of Zambia were the commission is able to work without any due fear or favour. If it is found that the reforms do not adequately address the problems as highlighted above, this study shall make recommendations to that effect.

CONCLUSION

It has been seen from the foregoing chapter that Zambia by constitution following the independent model of Electoral Management it has shown that there is direct interference of the executive arm of government on the Electoral Commission of Zambia vis-à-vis, determination of general and parliamentary elections by the president, appointment of the

members of the Electoral Commission by the president and many other ways as will be seen in the preceding chapters. In chapter 2, this paper will be looking at the constitutionality of section 25(1) of the Electoral Act and the difference between general and parliamentary elections, and by-elections.

CHAPTER 2- SUPREMACY OF THE CONSTITUTION

2.1 INTRODUCTION

The constitution is the supreme law of the land. Meaning that, it is the reference point of every other piece of legislation. Every law draws its validity from the constitution such that if that law the moment it subverts the constitution, it is forthwith declared null and void. Therefore, this essay shall determine the constitutionality of various pieces of legislation that governs elections in Zambia.

2.2 ARTICLE 1(3) AND 1(4) OF THE CONSTITUTION

According to Besa,⁹ he defines the constitution as the document that contains the most fundamental laws of the country. It is a document that establishes the three institutions of the government. It regulates the relationship between the three organs of government and the relationship of private citizens and between the government and the governed. Therefore, this can further be argued that the constitution is the supreme law of the land and no other law can be compared to it. The Public Order Act¹⁰ was declared null and void by the Supreme Court in the case of *Christine Mulundika and 7others v. The People*¹¹ because it contravened Articles 20 and 21 of the Republican constitution,¹² in pursuance of Article 1(3) of the constitution. This was further upheld in the case of *LAZ v. Attorney General*¹³ that the constitution is the supreme law of the land in accordance with Article 1(3) that if any law contravenes it, is null and void to its inconsistency. Further it was held that Article 1(4) provides that the constitution shall bind all persons in Zambia; the legislature, the executive, and judicial organs of the state at all levels; meaning that no institution or public officer is above the constitution. This can be seen

⁹ Mulenga Besa, *Constitution, Governance and Democracy* (Ndola: Mission Press, 2011), 2

¹⁰ Section 5(4) of the Public Order Act

¹¹ (1995) SCZ 25

¹² The constitution of Zambia

¹³ (2008) SCZ No.3

in Article 1(4) of the constitution. Therefore, Article 76(1) of the constitution of Zambia establishes an autonomous Electoral Commission. 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.

2.3 THE CONSTITUTIONALITY OF SECTION 25(1) OF THE ELECTORAL ACT

Section 25(1) of the Electoral Act No.12 Of 2006, to which it purports to confer power on the president to determine the polling day, when parliament is dissolved in line with the provision of Article 88 of the constitution, violates and continues to violate Articles 23, 44, and 76(1) of the constitution and hence null and void. It was contended in the *LAZ* case that the problem with Article 76(1) is interpretation. Article 76(2) empowers the president to appoint the Electoral Commission and provide for the composition and operations by an Act of parliament.¹⁴ 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 the 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 the legislature. As such it ought to sit independently in the constitution in line with its objective as an independent and autonomous body. For instance, the Human Right Commission which is also an autonomous body¹⁵ 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. However, over and above, suffice to state that even Article 76(2) empowers the president to appoint the Electoral

¹⁴ Constitution of The Republic of Zambia

¹⁵ Ibid., Article 125

Commission and operations of the commission by an Act of parliament, it does not mean that because of the Act of parliament which gives him the liberty arising from the powers and mandate it draws from Article 76(2) that is not certain. The fact is that Act of parliament would not be absolute it would still be subject to the supremacy clause (Article 1(3)) of the constitution. Further, Article 76(2) must be examined. Therefore, section 25(1) of the Electoral Act of 2006 arising from Article 76(2) of the constitution it can be said that it contravenes Article 76(1) of the constitution and is therefore null and void to its inconsistency. In other words, in view of article 76(1) of the constitution, section 25(1) should not have been passed to allow the president to determine the general and parliamentary election date.

2.4 DISCRIMINATION OF SECTION 25(1) OF THE ELECTORAL ACT

Section 25(1) of the Electoral Act not only is it unconstitutional pursuant to Article 76(1) but also discriminatory according to the discrimination clause in the constitution, Article 23(3) based on political opinion. Orsborne Legal Dictionary¹⁶ defines discrimination as the practice of treating somebody or a particular group in society less fairly than others. Therefore, discrimination in this case according to the constitution, is discrimination based on political opinion because there no way the Electoral Act could have allowed in the democratic dispensation such as Zambia only one individual amongst all would be left to determine the election date. This is the worst case scenario and it is equally unprecedented in the democratic jurisdiction to which Zambia subscribes. It is highly otiose amongst many to allow only one person to make a decision that would affect others. And the peculiarity in this case is that the president decides that would affect his fellow opponents or contenders. This is what is referred to as discrimination based on political opinion in accordance with Article 23(3) of the constitution. This is the only problem with our Zambian legislature there is lack of seriousness. Surely, where were they? A competent and dignified parliament cannot put up such a law on

¹⁶ Orsborne Legal Dictionary, 2nd ed. (London: Butterworth)

the statute books. Parliament, even from moral view point, it is still anachronistic to justify such. They could have thought through if anything. This just demonstrates incompetence and laziness on the part of law makers. It had to take Law Association of Zambia (LAZ) to see this irregularity in the law. We saw this trend evidently during the then 4th Republican president Dr. Levy Patrick Mwanawasa SC and Mr. Rupiah B. Banda where these two leaders discriminated their opponents by fixing an election date for them and well known to themselves far in advance but unknown to others. This is unfair. This is why it is argued that it discriminatory and unconstitutional because it contravenes Article 23. What this normally does is that it imposes undue vested interest on the president in power. The president should have declared interest or recuse himself. This is why credit must be given to the drafters of the 1996 constitution by putting in the constitution Article 76 because them they were ahead in thinking. Because they thought it wise that for avoidance of any doubt, Zambia needed an Electoral Commission that was independent and impartial. But in the current event, this objective is seemingly unrealistic and even hinges on discrimination. Just the way it happened in the case *Edith Zewelani Nawakwi v. Attorney General*¹⁷ the petitioner was denied travelling documents for children by the passport officer because she was not accompanied by her husband. She petitioned in the High Court by Article 28 arguing that she was discriminated against based on sex. She invoked the discrimination clause of the constitution, the same Article 23(3). The court upheld her submission both oral and written arguments. Therefore, in this case, since it what is in contention is not a decision but a subsidiary legislation, pursuant to Article 1(3) of the constitution which states that if any law subverts the supreme law of the land must be declared null and void. Therefore, with regard to the *Mulundika* case, section 25(1) of the Electoral Act No. 12 of 2006, must be declared null and void because it contravenes Article 76(1) of the constitution.

¹⁷ (1990-1992) Z.R. 112 (H.C.)

2.5 PRESIDENTIAL APPOINTMENT TO THE COMMISSION

Sometimes in Zambia, and mostly the cause of the dichotomy and malfunction in public institutions, is not about decisions they make but the law to which they subscribe and this has brought about a big problem in the legal jurisdiction in Zambia as the whole. Therefore, to overcome all these problems there must be a complete overhaul of laws in every sector. For instance, electoral reforms in terms of elections are inevitable. What we find is that one section of the law says this and the other one will say the exact opposite and another problem is that our law makers lack jurisprudential skills to cogently factor out what law making process should take into account; factors such as ethics and compromises which end up affecting the delivery of service in institutions especially when it comes to certain presidential appointments. The powers envisaged in the president are too enormous. There is need to relegate them as such. Because it has been found that it is extremely difficult to rule against the appointing authority because it is from whom allegiance is owed.

As already stated above, Article 76(2) empowers the president to appoint the Electoral Commission and provide the composition of the commission by an Act of parliament. The contradiction arises from the fact that the ECZ and therefore not direct functionary of neither the executive nor the legislature. The Act of parliament envisaged in Article 76(2) is the Electoral Commission Act No. 24 of 1996 which sets out the agenda. The Act provides for the composition of the Electoral Commission and its operation. The commission consists of a chairperson and not more than four members appointed by the president, subject to ratification by the National Assembly[section4(2)(3)], for a term not exceeding seven years, subject to renewals and ratification by National Assembly. In addition, it set out the circumstances under which the president may remove a member of the commission. It is undesirable to have such laws as it just compromises professionalism in the civil service as it makes public officers especially appointees to succumb to political pressure. This is what is currently happening to

the Electoral Commission of Zambia. These are some of the factors that have jeopardized its independence. That is why it has been argued above that the wisdom and the intellect of Article 76 (1) has not been espoused in subsidiary legislation by the Zambian parliament. The drafters of Article 76(1) took care of such encumbrances as the one above by ensuring that the Electoral Commission is not direct functionary to externalities such as the executive. Noteworthy here is the fact the Act provides the qualifications of the chairperson of the commission¹⁸; however, on the other hand the statute does not specify the qualification for one to be a member of the commission. The composition of the commission and the actual qualification of the members besides the manner of appointment are a source of challenge of the autonomy and independence of the commission.

2.6 BY- ELECTIONS AGAINST GENERAL AND PARLIAMENTARY ELECTIONS

In accordance with section 25 of the Electoral Act it confers powers on the president to determine an election date despite the constitution having stated in Article 76(1) otherwise. It is actually difficult to appreciate the rationality in our laws as regretted above. Article 76 (1) is very clear. It outlines in clear terms what is expected of our Electoral Commission. It is supposed to supervise the registration of the voters and review the voter's register/Roll; to conduct the presidential and National Assembly Elections; 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.

¹⁸ Section 4(3) of the Electoral Commission Act No.24 of 1996

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 Act¹⁹. Therefore, from what has been discussed above, from the constitution point of view, there is no where were it is stated that the president should be involved in the operation and management of elections when it comes to general and parliamentary elections. There is a serious contradiction in the management of elections in Zambia especially when we attempt to evaluate the laws governing elections in Zambia in their current state.

Arising from section 25 of the Electoral Act, it of course allows the president to participate in elections by determining election date. But what is strange about this section is that it imposes a serious contradiction between powers vested in the president and the Electoral Commission of Zambia. And another thing to consider is that between the statute and the constitution, the constitution takes precedence. Therefore, if the president can determine an election date for general and parliamentary elections, why doesn't he determine for by-election? What is certain is that Article 76 of the constitution does not distinguish general and parliamentary elections from by-elections. Therefore, this should as well mean that the president must set the election date for parliamentary by- elections. We do not know what the next generation will learn from these mistakes our legal system in Zambia. It is quite chaotic for certainty sake. There is clear misdirection on the part of the ECZ. There is no need of duality in election management this is why the people of Zambia collectively and unanimously agreed through the constitution that let there be the Electoral Commission of Zambia as an independent entity to manage the affairs of elections in the Republic. Therefore, the same goes, by constitution, nothing whatsoever stops the Electoral Commission to go ahead and determine the election date for general and parliamentary elections because that is why that institution was created. If we can see from Article 76 there is no mention or inclusion of the president in the operations of elections in

¹⁹ Section 3(1) of the Electoral Act No. 12 of 2006

Zambia. Therefore, from the supremacy point of anything that falls short of what the constitution stipulates is a nullity to its inconsistency (section 25 of the Electoral Act).

2.7 CONCLUSION

The previous chapter has attempted to demonstrate that the constitution is more supreme than any other law. All other laws draw their legitimacy from it. In other words it is a reference point of all other laws. And it has also been observed that, the only institution that is mandated by law established to manage elections on behalf of Zambians is the Electoral Commission of Zambia and this cannot even be contested. The reason as to why the ECZ was established was to preside on all sorts of elections not only by- election but even general and parliamentary elections inclusive of election date determination. Therefore chapter 3 is basically looking at for example of late there has been a lot reforms in the electoral sector and to address the problems which the previous chapter has brought out and the way forward. The chapter will look specifically at the Mungomba Draft Constitution. It will as well endeavor to look at how best the Public Procurement Act No. 12 of 2008 can add value to the autonomy and efficiency of the Electoral Commission of Zambia.

CHAPTER 3: THE MUNGOMBA DRAFT CONSTITUTION

3.1 INTRODUCTION

In every jurisdiction, the objective of either amending, repealing or enacting the law is to bring into existence what the previous legislation did not have or to get rid of what was not needed. Therefore, this essay will establish whether or not the objectives set in the introduction have been addressed in these reforms which have so far taken place.

3.2 A CRITICAL ANALYSIS OF MUNGOMBA DRAFT CONSTITUTION

Zambia is among the emerging democracies that have taken the independent model of electoral management.²⁰ In terms of membership, Electoral Management Bodies (EMB) members need to have sufficient status to entitle them to respect 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 favour²¹

A quality EMB membership selection process can be achieved by openly advertising for candidates and ranking all applicants according to a transparently applied *fit and proper* test. The mostly 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 the judiciary and end with the legislature or vice versa. In Zambia, it is the president sole role of appointing all the members of the commission. Electoral law usually specifies the qualification to be an EMB member, which generally includes citizenship, good reputation, 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.²² Much as it is appreciated that the accepted procedure of nominating EMB members is by allowing one branch of government

²⁰ Wall, *Electoral Management Design: The international IDEA Handbook*, 322

²¹ Ibid., 85

²² Ibid., 104

and another to confirm, is not enough. It still leaves some doubts and leaves room for manipulation as will be seen below.

Controversies have arisen with respect to the appointment, procedures and tenure of members of EMB which undermines the legitimacy and credibility of the electoral process. The appointment and dismissal procedures be clearly articulated and the process undertaken in a manner that is impartial, accountable and transparent. These procedures should be taken into consideration the need to ensure institutional continuity.²³

The process for appointing members of any EMB is defined in an electoral law, and the recruitment and the selection method may also be defined in the Electoral Legal Framework²⁴. In Zambia, unfortunately, the process for appointing members of the ECZ is not well defined. Section 4(3) of the Electoral Commission Act ²⁵ 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 2011 which was tabled before parliament in February 2011 to amend the current constitution does provide the procedure for appointing ECZ commissioners.²⁶ 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 Commission²⁷; ii) the National Assembly shall ratify the names of those to be appointed to the selection committee²⁸; iii) parliament shall enact legislation prescribing the rules and procedure by advertising the names

²³ Electoral Institute of Southern African and the Electoral Commissions Forum (EISAECOF), *Principles for Election Management: Monitoring and Observation in the SADC Region*, (Johannesburg: The Electoral Institute of Southern Africa, 2004), 12.

²⁴ EISAECOF, *Principles of Election Management: Monitoring and Observation in SADC Region*, 94

²⁵ No. 24 of 1996

²⁶ Article 193(1) of the Constitution of Zambia (Amendment)

²⁷ Ibid., Article 193(1)

²⁸ Ibid., Article 193(2)

of shortlisted candidates and selecting members for appointment to the Electoral Commission.²⁹

For as long as there is the involvement of the president in the appointment of the members of the Electoral Commission as stated above, there shall never be a complete independence of the Electoral Commission. Therefore, the Mungomba Draft Constitution attempts to realize this aspiration. It is the jurisdiction of this chapter to critically analyse the draft constitution whether it is on firm grounds (*terra firma*) towards a having an independent Electoral Commission rather how best it could have been made more plausible to avoid any external functionary from the executive and to avoid serving at the pleasure of the appointing authority.

One of the solutions that the Draft Constitution tries to offer is by enshrining election date into the constitution which is a morally and legally acceptable. Article 83(1) of the Mungomba Draft Constitution states that:

subject to clause (2) and other provisions of this constitution, a general election shall be held every five years on the last Wednesday of September after the last general election

(2) the Electoral Commission may vary the dates for a general election by not more than fourteen days, of the day specified by clause (1), when prevailing circumstances justify a variation of the date.³⁰

It is good to note that this particular Article takes care of the unconstitutionality of section 25(1) of the Electoral Act. Putting such a clause in the constitution should be welcomed by all well meaning Zambians so that political players could know well in advance as to when elections could be held to help them plan effectively unlike what has been happening over the years especially during the two past administrations. Never the less, even if this provision was not expressly provided for in the constitution, by just and strict adherence to Article 76(1) of the constitution it would still have the same effect. What ECZ could have been doing is to

²⁹ Ibid., Article 193(3)

³⁰ Ibid., Article 83(2)

ensure that it announces well in advance to all stakeholders that elections will be held on such and such date unlike the way it has been where election date was a preserve of the ruling party. But above all, there is merit in putting the election date in the constitution. The factor is that in Zambia the president is vested with enormous powers. What the Draft Constitution is trying to achieve is to take away some of the powers from him and take it back into the constitution which gives him all the powers that one can talk about. For example, Article 44 of the Republican constitution. In Zambia what we lack most is not about laws. Sometimes we have good laws in place but the problem is lack of enforcement mechanism. For instance, the same Article 76 of the constitution. If it was clearly construed there would have been no need of parliament wasting tax payers' money to enact the Electoral Act particularly section 25 which is highly undesirable, undemocratic and unconstitutional.

The Draft Constitution also takes cognizance of the fact that the by- elections be expressly provided for in the constitution. It states that,

where a vacancy occurs in a constituency- based seat or ward based seat, a by- election shall be held within 90 days of the occurrence of that vacancy.

(3) The Electoral Commission shall prescribe the date and time when a by- election shall be held.³¹

There is a marginable improvement in the Draft Constitution because if we can see in the current constitution of 1996 it does not provide in its entirety for the composition of the members of the commission. Instead it is expressly provided for in section 4(3) of the Electoral Commission Act. When something is expressly provided for in the constitution it is attached with great importance unlike in the subsidiary legislation. Article 87 of the Draft Constitution establishes the Electoral Commission of Commission. The Electoral Commission shall consist of the following members who shall serve on a full time basis:

³¹ Article 83(3) of the Mungomba Draft Constitution

- (a) Other members. A chairperson and Vice Chairperson who shall be persons qualified to be appointed as judges of a superior court; and
- (b) Five other members³²

Further, the Draft Constitution has expressly provided for a committee that would help out the president come up with a credible team of men and women to serve as commissioners and chairperson. It states as follows:

The president shall constitute an ad-hoc selection committee as provided under clause (2), for purposes of recruiting and selecting persons for appointment as members of the Electoral Commission.

(2) The selection committee, constituted under clause (1), shall consist of the following members who shall be appointed by the president subject to be ratified by the National Assembly:

- (a) One member of the Supreme and Constitutional Court, nominated by the chief justice;
- (b) A member of the public service commission nominated by the chairperson of the commission;
- (c) A member of the judicial service commission, nominated by the chairperson of the commission;
- (d) A representative from the church bodies nominated by the church mother bodies;
- (e) The Investigator-General.

Furthermore, clause (3) states that, shall enact legislation prescribing the rules and procedures for advertising Parliament the names of short listed candidates and selecting members for appointment for appointment to the Electoral Commission.

Articles 89 and 90 of the Draft Constitution, further and respectively states that, the president shall appoint a Chairperson, Vice Chairperson and members of the Electoral Commission from the names submitted by the section committee under clause (2) of article 88, subject to the ratification by the National Assembly.

90. (1) states that, a member of the Electoral Commission shall hold office for a term of five years and shall be eligible for re-appointment for only one further term.

(2) A member of the Electoral Commission may be removed from office on the same grounds and same procedure as applies to a judge of a superior court³³

³² Ibid., Article 87(2)

³³ Ibid., Article 89 and 90

It is evident, however, from the stated provision of the Draft Constitution that the main intention of the drafters was to see to it that there is sanity in the way elections are managed in Zambia. There is need to have a complete independent and dignified Electoral Commission. If we took a quick review we would discover that the current constitution does not even provide for a tenure of office. This makes the members of the Electoral Commission to work extremely under difficult conditions because there is no room to make independent decision as they would always want to please their appointing authority and eventually circumscribe to political akrasia as stated in the case of *Harry Mwanga Nkumbula v. Attorney General*³⁴. It is not easy to uphold integrity and legitimacy in an institution where allegiance is owed to the appointing authority. This was the same even in the judiciary for example in the case of *Derrick Chitala v. The Attorney General*³⁵ in which the judge found it difficult to exercise his mind even when the law was in favor of the applicant/appellant but the contrary was decided. Therefore it imperative that tenure of office is safeguarded in the constitution it enhances professionalism and efficient delivery of service because it takes care of the fear that might be there of ruling against the appointing authority.

Over and above, the Draft Constitution is justified, except only in certain parameters such as Article 89 which has already been stated above. Whilst it is legitimate that the president constitutes an ad-hoc selection committee pursuant Article 88(1), the dilemma comes in, in Article 89. After the selection committee by using procedures to be stipulated by parliament though not clearly outlined, it submits to the president for appointment names of the successful candidates. This particular Article is anachronistic and frivolous it does not seem to realize the objectives under which it was changing the existing law. One of it was to ensure that we have an eminent and independent Electoral Commission

³⁴ (1972) Z.R.204
³⁵ (1995/1997) Z.R 91

What this constitution could have done for us to have a complete independent electoral body was to ensure that there is no interaction between the president and candidates arising from the selection committee constituted by the president. Even the Draft Constitution has tenure of office for serving members of the commission, the fact that the president has to appoint, that compromises the independent operation of the members of the commission as other members will not be looking at whether they have tenure of office or not but they will be working to appease the appointing authority for other incentives. Therefore, the same selection committee could have been the same appointing authority.

On the other hand, the Electoral Commission is a holistic institution it serves public function. As such it should be neutral in its approach. There is no way by which the president could be an appointing authority because in an election the same president is political player just like the opposition. Therefore, it becomes difficult to maintain neutrality on all candidates without bias towards the appointing hand.³⁶

3.3 PUBLIC PROCUREMENT ACT AND THE ELECTORAL COMMISSION

As it has already been argued above that the appointment and dismissal procedures should be clearly articulated and the process undertaken in a manner that is impartial accountable and transparent.³⁷ For us to fully realize the independence of our Electoral Commission, is to have everything to do with the executive arm of government done away with. It is these very fusions and interferences, though appear inconsequential but have a long standing effect on the deliberations of the commission. Amidst poverty in most African states people working in positions of influence would always want to affiliate themselves with the party in power for political favors and rewards.³⁸ Therefore, the drafters of the Draft Constitution could have

³⁶ Wall, *Electoral Management Design: The International IDEA Handbook*, 22
³⁷ EISAECOF, *Principles of Election Management: Monitoring and Observation in SADC Region*, 12
³⁸ Wall, *Electoral Management Design: The International IDEA Handbook*, 34

thought of that. Even if the president does not participate in the selection process that does not solve anything it is just aimed at blinding (disguise) people to see as if there is transparency when in the actual sense it is not. Everything begins the moment the president appoints a selection committee. It is possible that the president retains an invisible hand in the selection process through *inside-dealings* to endorse to certain members/ candidates he would want to work with. Therefore, we need to have proper modicum to come up with an impartial and credible team to serve on the commission, this is because it is difficult to know the analogue of what goes on inside as that is not our preserve. Even if Article 88(3) of the Draft Constitution reaffirms the fact that parliament shall enact legislation prescribing the rule and procedures for advertising for advertising the names of short listed candidates and selecting members for appointment to the Electoral Commission, there is no guarantee that whatever the process would be, it could not be free from political manipulation because of the involvement of the Head of State. Take for instance, the Electoral Commission Act and the Electoral Act have not provided the true reflection of an Electoral Commission that Zambians have always wanted which is dimensionally free from any links with the president.

It does need to take the Head of state to constitute an ad-hoc selection committee for that sole purpose. And we need not to put that in the constitution. Government structures have the capacity to come up with the selection committee. This should not even be the responsibility of the president. After the selection has done its work, the chairperson of the committee should be given the mandate to take the names of successful candidates to National Assembly for ratification. After the National Assembly has indorsed the candidates successfully, by law established they are supposed to parade before the Head of State at State House for a swearing in ceremony. All this, is unnecessary. Parliament can come up with deliberate law to allow the swearing in ceremony to be done before a non partisan- political institution for members subject to serve on the commission in a quest to achieve a visionary and independent Electoral

Body. State House is politically motivated and the person who administers the oath is a politician. For example the Chief Justice or the Speaker of the National Assembly can administer oath.

Alternatively, for avoidance of duplication of and to avoid spending unnecessarily, there is already an established government agency or authority called the Public Procurement Authority (PPA) established pursuant to an Act of parliament, Public Procurement Act No. 12 of 2008. Public Procurement Authority is a regulatory authority whose objective is to see to it that whatever goods and services that are provided to any public institution adhere to the laid down procedure. Suffice to stating that there is a misconception amongst people as to what PPA does. People think that it only deals with regulating tender for goods only. It deals with formal regulation of goods and services in public institution even the award of contracts to provide services and supply goods to public institutions. Therefore, there are four elements for the supplier of goods or services must manifest in order to give the PPA locus. There must be:

- a) The supplier (individual(s) or institution(s))
- b) There must be goods or services to be offered
- c) The mode of dealing must be contractual
- d) Goods and services must be for public function

Therefore it is true to assert that PPA has the mandate and the competence to take up the responsibility of selection committee constituted by the president. All the four elements of the PPA are in consonance with the jurisdiction of the selection committee. To begin with, members of the Electoral Commission to be selected by the selection committee possess some skill (qualifications) to offer to the public institution such as the ECZ for public good. PPA deals with contractual situations. Even member to serve on the Electoral Commission are

purely there on contract. It is just a matter of strengthening PPA or empowering it. Otherwise it can do a good job in comparison with the selection committee cost effectively.

3.4 FUNDING AND THE INDEPENDENCE OF THE ELECTORAL COMMISSION

Article 92(2) of the Draft Constitution states that;

the Electoral Commission shall be a self accounting institution and shall deal directly with the Ministry responsible for finance or matters relating to its finances.

(3) The Electoral Commission shall be adequately funded, in any financial year, in order for it to effectively carry out its mandate.(4)The expenses of the Electoral Commission including the emolument payable to or in respect of persons serving with the commission, shall be a charge on the National Treasury Account.

Two questions can be asked. The questions are; who finances EMBs and how? Is it the 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. The electoral budget forms part of the consolidated national budget on an annual cycle. 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 EMBs by the Treasury. For others, the EMBs budget is released through a government ministry, for example, the ministry of Home Affairs in South Africa and the ministry of Laws in India.³⁹ In Zambia, the ECZ budget is released through the ministry of Finance and National 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. In some countries such as Costa Rica, the legislature has no power to alter or reject any part of the proposed budget of the EMBs. In others, as in Nigeria and Seychelles, specified some of the

³⁹ Ibid., 184

EMB's proposed budget dealing with EMB member' salaries and allowances can be altered by the executive or its agencies. In Canada, the budget of the EMB has two parts – the current 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 referendum. The recurrent budget may be altered by the government, while the elections budget may not.⁴⁰

The EMB provides an annual estimate of its election budget to the government, but it allows spending more than this estimate. Following the elections the EMB accounts for these expenditures to a committee of the legislature.⁴¹

The practice in many countries is for the Treasury to release the funds to the EMB in a lump sum after a legislative approval has been secured. This applies where the EMB autonomy over its finances, and often its own banking account, as in Gambia, and Macedonia. In some cases, EMB funds are kept and managed by the Ministry of Finance, with the EMB making requisitions for the ministry to pay its creditors and staff, mainly by cheque. EMBs of this category include those of Botswana and Namibia. The budget of EMB is charged directly to the consolidated fund in some countries.⁴²

Emerging democracies often fail to fund major election processes in an adequate and timely manner. Where EMB expenditure processes and cash flow are controlled by a government ministry subject to government rules and procedures, there may be delays in the disbursement of critical funds. Delayed disbursement of funds to an EMB can create a major problem in an election administration. It can mean that vital decisions are delayed, or that insufficient time is left to the EMB to use high- probity tender processes or organize the supply of acceptable quality good for electoral purposes. Late payment in suppliers can cause disruption to supply in

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

time critical election environment. Late payment to staff, as has happened to Cameroon, threaten electoral processes.⁴³

It may be to the advantage of both EMB and government to conclude a memorandum of understanding governing the funding disbursement arrangements. Having a ministry control EMB payment may raise perceptions that the EMBs activities are being controlled by the government, which can threaten the EMB's credibility. Even where an EMB is constitutionally independent of the government, linking it to the government financial payments system can limit its autonomy and independence and can fall prey of their sponsors and ascribe to their dictates and compromise the principles and values under which the EMB was established.⁴⁴

As has observed from other jurisdictions it has been noted that direct funding from the government affect the independent operation of the Electoral Commission. Zambia is not an exception to what is going on in the international scene. Just like many other countries stated above ECZ as well receives funding from the government. In this case, the ministry responsible for finances. This is not recommended if we were to allow the ECZ to operate independently without any compromises from the funders. It is undeniable that no government institution can thrive without funding. But what is in dispute here is the mode of funding and not the funding itself. For instance, there is no way by which ECZ could raise its funds on its own. Otherwise it cannot sustain itself. Therefore, instead of receiving money direct from the government ministry which forms part of the executive, it is better that government funding comes through the National Assembly which is more neutral and credible than a government ministry.

⁴³ Ibid

⁴⁴ Ibid

3.5 CONCLUSION

The rationale behind repealing or amending either an Act of parliament or the constitution, is to ensure that the new piece of law does not contain the very things which could have prompted either an amendment or a repeal. If we looked carefully at our Draft Constitution, as already pointed out above, when it comes to the Electoral Commission, the reason for an amendment was to see to it that the institution proffers independence in its operation. But if we look from the Draft Constitution looking at how members of the ECZ come on board and how it is funded, it is a fallacy to suggest that our Electoral Commission shall ever be independent. This quest can only be realized by ensuring that not at any point should the president come into the picture in the process of securing a deserving and competent team to serve on the Electoral Commission. Funding is needed as we have seen from other foreign jurisdictions; but it has the capacity to affect the independent operation of the Electoral body in a given country. Hence the suggestion to let independent and impartial institutions such as parliament to be the ones responsible for the disbursement of government funds to the Electoral Commission. The next chapter will generally be looking at foreign jurisdictions such as Nigeria or India whether or they have managed to come up with their independent EMBs operating independently from the executive branch of government and whether or not it is worthwhile for Zambia learn from these countries.

CHAPTER 4: COMPARISON WITH OTHER JURISDICTIONS

4.1 INTRODUCTION

In order to determine whether we are on the right course in terms of the Electoral legal regime, this study will conduct a compare and contrast analogy with two countries below.

4.2 NIGERIA

Nigeria achieved independence from British colonial rule in 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 Nigeria which was in turn replaced in 1998 by the independent National Electoral Commission.⁴⁵

Nigeria conquered 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. 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.⁴⁶ Indeed, the different changes in the name of Nigeria's electoral body since independence as a clear evidence of this claim. 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 authority

⁴⁵ Ibid., 253
⁴⁶ James Wadu, *Governance and Institution Building in Africa: A study of the independent National Electoral Commission of Nigeria*, (Lagos: Chimie Publishers Ltd.2009), 27

constitutionally, legally, operationally and financially. 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) all-Nigeria intergovernmental agency by abolishing state electoral Commission and structuring electoral at the state level to serve under NEC. The key issues of institutional autonomy and design that arise in the Nigerian case are as follows: ⁴⁷1) 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. 2) 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; 3) Civil society, opposition parties and the judiciary have no operation in the commission; 4) 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.⁴⁸ Comparatively, Zambia has only got five inclusive of the chairperson. The chairperson and the members of the 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 NEC and it is not only surprising that they face literally the same problems and rejection of the electoral bodies by citizenry . In Nigeria, like in many parts

⁴⁷Wadu, *Governance and Institution Building in Africa: A Study of Independent National Electoral Commission of Nigeria*, 27

⁴⁸ Wall, *Electoral Management design: The International IDEA Handbook*, 253

of the World the powers of the electoral body are rooted in the constitution and the Act of the National Assembly. 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.⁴⁹

In terms of operational mechanisms, there have been several attempts to assess the constitutional and legal autonomy of INEC with particular respect to pressures they are subjected to from incumbent, the power elite and political parties. Much of these attempts have been prompted by and centered on the poor ratings of the commission. Nigeria has engaged in electoral process 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 tack the very roots of their crooked power through an integrated agenda of reforms. Zambia shares similar challenges of constitutional and legal autonomy of the ECZ with particular respect to manipulation 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:⁵⁰ the mode of appointment of INEC’s chairperson and the 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 (section 3-5 of the Electoral Act 2006).

The citizen’s Forum Reforms (CFCR), Nigeria’s largest coalition of civil society association 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

⁴⁹ Ibid., 28

⁵⁰ Ibid., 31

INEC because it recognizes the electoral body as a Federal Executive body.⁵¹ This according 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.⁵²Comparatively, 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 roe by the other 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 the office holders to act in favour of those who appointed them too secure their re-appointment. 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 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 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 the core of the lack of legitimacy and therefore respect and trust in 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.⁵³

⁵¹ Ibid
⁵² Ibid
⁵³Wadu, *Governance and Institution Building in Africa: A study of the Independent Electoral Commission of Nigeria*, 33

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. 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 to the bidding of the government in power.”⁵⁴ 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 argument in Nigerian Institution situation observed above is 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 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 commissioners and the commissioners have the same 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 constitutional instruments whose provisions are capable of guaranteeing the people an open and transparent mechanism for regulating the appointment, tenure and conditions for removal of key officials of ECZ in such a manner that public trust in the institution can be realized.

⁵⁴ Ibid., 33

4.3 INDIA

In 1948 – 1949, the founding fathers of the Indian Constitution, while debating the position of election commission in the constituent assembly ensured that, the body responsible for conducting election in the independent India should be a distinct one separate from the government of the day and that it should ample financial and administrative autonomy to conduct its affairs.⁵⁵ A combination of the well thought out, broadly worded provision contained in the Article 324 of the Indian Constitution, a supportive judiciary, active media and Indian Public opinion, coupled with 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.⁵⁶

The Electoral Commission of India is an autonomous, quasi-judicial constitution body of India. Its mission is to conduct free and fair elections in India. It was established in January 1950 under Article 324 of the Constitution of India. The commission presently consists of a chief election commissioner and 2 election commissioners, appointed by the president.⁵⁷ In terms of the institutional structure, until October 1989, there was just one chief election commissioner. 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.⁵⁸ This law was amended in 1993 as the Chief Election Commissioner and other election Commissioners (Conditions of Service) Amendment Act.

The Chief Election Commissioner may be removed from his office by Parliament. Impeachment can take place on 2 grounds only- proven misbehavior or incapacity—and

⁵⁵ Wall, *Electoral Management Design: The International IDEA Handbook*, 192

⁵⁶ Ibid

⁵⁷ William Smith, *Electoral Commission of India*. [Http://eci.nic.in/electoralcommissionofindia](http://eci.nic.in/electoralcommissionofindia) (accessed on 20th March 2012, 1

⁵⁸ Wall, *Electoral Management Design: The International IDEA Handbook*, 193

requires an elaborate procedure which is also prescribed for the removal of judges of the Supreme Court.⁵⁹ 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 is declared bankrupt.⁶⁰ The Election Commission of India shall consist of Chief Election Commissioner and such other commissioners as the president may, from time to time, fix. For a vast country such as India, with a population in hundreds of millions, they have only three commissioners. Yet Zambia with five commissioners has myriad problems and yet India has a great success with only 3 Commissioners. In India, other Election Commissioners may be removed by the president on the recommendation of the Chief Election Commissioner. In Zambia, only the president has the power to remove the Commissioners. Salary of Chief Election Commissioner is same as Justice of the Supreme Court of India. All three Commissioners have same right to taking a decision. Tenure of Commissioners is 6 years or up to the age of 65 whichever is earlier. In Zambia, all the Commissioners of the ECZ enjoy the same tenure of 7 years subject to removal and ratification by the National Assembly.⁶¹

The Election Commission shall have the powers of supretendance, direction and control of all elections to parliament and the state, legislatures and of elections to the office of the president 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 judicial 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.⁶²

⁵⁹ Ibid., 193

⁶⁰ Section 5(3) of Electoral Commission Act, No.24 of 1996

⁶¹ Ibid., section 5(1)

⁶² William Smith, The Electoral Commission of India, 2

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 paramilitary forces and the police is deemed to be on deputation to the election commission which takes effective control of personnel, movable and immovable government property it deems necessary for successful completion of electoral processes.⁶³ Zambia can learn something from above observation. It is a very effective and positive way of giving powers to the electoral commission to supervise the elections. Such powers could avoid complaints about perceived police harassments, intimidation and non protection of opposition political parties during campaigns and on the actual Election Day.

Once the election machinery is set in motion the electoral process is subject to 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 electoral law. This procedure has ensured that the electoral can be completed on schedule without getting bogged down judicial hearing. This point is good and valid for Zambia. The ECZ needs powers to deal with election 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, conduct 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 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.⁶⁴ The ECZ again can learn

⁶³ Wall, *Electoral Management Design: The International IDEA Handbook*, 192

⁶⁴ *Ibid.*, 195

something from India’s ECI in this respect concerning the sharing of free air time on all state owned electronic media.

It is the mark of ECI’s independence that it has not faced any major funding problems. It is funded by the government budget through the consolidated fund. This pays for staff, technical operations and various office expenses, including the cost of acquiring electronic machine.⁶⁵

The ECI’s accounts are subject to audit by the comptroller and Auditor General and its report is tabled in Parliament. This ensures the financial accountability of ECI, and has worked smoothly.⁶⁶

3.4 CONCLUSION

In concluding India’s case, it is recommended that India’s ECI’s financial independence be replicated in Zambia at ECZ. The funding of the ECZ is another challenge which impedes on the autonomy of the institution. A lot can be borrowed from the Indias’ 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 practice in election management and administration”, the ECZ lamented thus; “the Ministry of Finance and National Planning is the ECZ’s main institutional link as it provides for 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 Ministry of Finance and asset 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 one hand the commission would want to exercise its

⁶⁵Ibid., 193

⁶⁶Ibid

autonomy while on the on the other hand the Ministry will refer to its regulations, which will be in conflict with those of those of the Electoral Commission of Zambia.’

CHAPTER 5 – RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

This chapter looks at whether the set objectives in the introduction have been realized and it will also propose the best approach to overcome such challenges.

5.2 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 ECZ; 5) what is the role of the ECZ chairperson?; 6) qualifications for appointment of ECZ commissioners to be clearly defined; 7) mechanisms for selection and appointments 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 multi-party based one. The acting director of the ECZ, Mrs. Priscilla Isaac, summarized this option when she pointed out that, 'what is important is a professional and effective administration which is responsible for operations.'⁶⁷ And a part-time ECZ was recommended instead of the current full-time commission. 'Commissioners are policy makers and need not to

⁶⁷ INTERVIEW: Pricilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2012

be employed full-time' the director opined.⁶⁸ This recommendation was supported by other stakeholders, such as the Executive Director of the Zambia Center for Inter-party Dialogue (ZCID) who added that clear job description for the commissioners should be spelt out so that they are not in conflict with professional staff.⁶⁹

Most stakeholders were in favor of the ECZ reporting to the legislature and not to the executive branch of government. The current practice where the ECZ submit their reports to the President⁷⁰ 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.⁷¹

One of the major criticisms of the commission is in 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 a major stakeholder, they need to be directly involved in the affairs of the electoral process by way of representation on the commission.⁷² The opposition political parties have argued that the fact that the commissioners are appointed by the republican president who is an active politician and a player in the elections, there is need to correct this imbalance by having other political parties to be appointed to the commission⁷³. 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 on power every time there is an election.⁷⁴ However, the director of ECZ is quite happy with the composition of the commissioners at five members and emphasizes that these should not include politicians. 'Five

⁶⁸ Ibid., 11/03/2012

⁶⁹ INTERVIEW: Executive Director, Zambia Centre for Inter-party Dialogue (ZCID), 20/03/2012

⁷⁰ Section 6 of the Electoral Commission Act, No 24 of 1996

⁷¹ INTERVIEW: Langtone Sichone, General Secretary, United Liberal Party (ULP) 17/03/2012

⁷² INTERVIEW: General Secretary, (ULP) 17/03/2012

⁷³ Ibid., 17/03/2012

⁷⁴ FODEP, *Electoral Reform Strategy: Past, Present and Future activities*, (Lusaka: FODEP Secretariat, 2002), 41

members are adequate for policy making and overseeing the electoral processes.⁷⁵ The quorum is three for a meeting and decision making.⁷⁶ The general secretary for United Liberal Party (ULP) recommended a larger body of ten members which is representative of stakeholders.⁷⁷

Mechanisms for selection and appointment of commissioners must be transparent. As to the appointment of commissioners, the director of ECZ recommends that the provision of the Draft Constitution⁷⁸ for an adhoc selection committee to be responsible for recruiting and selecting persons for appointment as members of the ECZ is the right path to follow.⁷⁹ ‘This will instill more confidence in the selection process,’ she said.⁸⁰ Additionally, a requirement of relevant professional qualifications for appointment of ECZ commissioners needed to be clearly defined. The director of ZCID, on the other hand, recommended that open recruitment through press advertisements and the necessary procedure before appointments is important to instill legitimacy and eradicate suspicions of impartiality.⁸¹ As positions are advertised, clear job descriptions of commissioners should be stated.⁸² Finally the shortlisted names should undergo parliamentary scrutiny before the appointments are done by the Head of State.⁸³ The director of ECZ is also in agreement that the appointment of commissioners should stipulate qualification for all members of the commission.⁸⁴

On the question of funding the ECZ, the director of the ECZ recommends that the commission should be funded through the treasury, but the budget should be met in full and that the funding

⁷⁵ INTERVIEW: Director of Elections, ECZ, 11/03/2012

⁷⁶ Ibid., 11/03/2012

⁷⁷ INTERVIEW: General Secretary, (ULP) 17/03/2012

⁷⁸ Article 89 of The Final Draft Constitution of the Republic of Zambia.

⁷⁹ INTERVIEW: Director of Elections, ECZ, 11/03/2012

⁸⁰ Ibid., 11/03/2012

⁸¹ INTERVIEW: Executive Director, (ZCID), 20/03/2012

⁸² Ibid

⁸³ Ibid

⁸⁴ INTERVIEW: Director of Elections, ECZ, 11/03/2012

should be timely and on schedule as requested.⁸⁵ The Executive Director of ZCID recommended that it should be funded directly from the National Assembly and that administratively the minister of Finance and National Planning would include their budget in the national budget.⁸⁶ The General Secretary of ULP also recommended funding directly through parliamentary allocation.⁸⁷

The Draft Constitution still retains room for the Head of State or the Executive to manipulate the ECZ vis-à-vis through appointment of members of the ECZ and through funding. This paper has elaborately provided the mechanism on how that could be resolved. That the Electoral Act of 2006 section 25 that gives the President power to appoint an election date for general elections is unconstitutional contrary to Article 76 (1) and discriminatory to other political players contrary to Article 23 (3) of the constitution. Pursuant to Article 76 all election matters in Zambia are a responsibility of the ECZ. Therefore, Section 4 (3) of the Electoral Commission Act of 1996 must be amended. It gives the President powers to appoint members of the Electoral Commission which in the end would compromise the independence of the commission in its operations.

5.3 CONCLUSION

It would be concluded by examining the relevant provisions pertaining to the ECZ as provided for in the constitution of Zambia (Amendment) Bill⁸⁸ which was recently tabled for debate in the National Assembly but unfortunately was defeated at the second reading.⁸⁹ This Bill was a culmination of the Mungomba Constitution Review Report and Draft Constitution of 25th December, 2005 which later led to the National Constitutional Conference. The NCC came up with a report and final draft constitution which is today N.A.B No. 60 of 2010.

⁸⁵ Ibid

⁸⁶ INTERVIEW: Executive Director, (ZCID), 20/03/2012

⁸⁷ INTERVIEW: Langtone Sichone, (ULP) 17/03/2012

⁸⁸ National Assembly Bill (N.A.B) No. 60 of 2010

⁸⁹ Yes Votes were 93, No votes 1 and 20 abstentions from the UPND MP's, Wednesday, 30th March, 2011

The Constitution⁹⁰ only has one provision concerning the ECZ, Article 76. The former establishes the ECZ and provides for its constitutional functions. Article 88 establishes the ECZ and provides for the composition of the commission. The number of commissioners has increased to seven from five. All the commissioners are full-time.

Article 89⁹¹ provides for an adhoc select committee which will be responsible for the interviewing and short-listing of applicants to serve as commissioners. The selection 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 the Government is kept at bay. This provision should bring to rest the everyday complaint about the Presidents sole authority of appointing commissioners. Article 90⁹² gives the President the powers to finally appoint the commissioners subject to ratification by the National Assembly. Article 92 gives the ECZ constitutional independence and tabulates its functions.

It is worth noting that this Article explicitly declares the ECZ autonomous and impartiality 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 work well if the funding of the ECZ is also independent of the Executive arm of the 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 on matters related to finances. It is still doubtful if this provision is going

⁹⁰ The Constitution of The Republic of Zambia.

⁹¹ NCC Draft Constitution, 27th August 2010

⁹² Ibid

to work well for the ECZ. Most stakeholders would have preferred the ECZ to be financed directly by the National Assembly.⁹³

Political power must respect the rule of law by not manipulating the very institution that is supposed to be the custodians of the legal instruments for the transfer of political power legally. Coming to the internal factors it would be submitted that an effective ECZ should have adopted three-member full time expert commissioners and the other four part-time to provide for inclusivity of the political players and the public. Such a commission should have been cost-effective, expert oriented and to carry with it the people’s confidence through the other four part-time commissioners. Therefore, a high breed full-time/part-time commission would work well in this nascent democratic dispensation. The ECZ should be directly responsible and accountable to the legislature, and that it must submit its report at the same time to the Speaker of the National Assembly.

⁹³ FODEP, *Electoral Reform Strategy: Past, Present and Future Activities*, 41

BIBLIOGRAPHY

BOOKS

Besa, Mulenga. *Constitution, Governance and Democracy*, Ndola: Mission Press, 2011

Wall et al (ed.), *Electoral Management Design: The International IDEA Handbook*, Stockholm: Institute for Democracy and Electoral Assistance, 2006

Totemeyer, K.H. Gerhard, et al (ed.), *Elections in Namibia*, Windhoek: Gamsberg Macmillan Publishers Ltd. 1996

Totemeyer, K.H. Gerhard, et al (ed.), *The State and Functioning of the Electoral Commissions of Southern Africa*, Harare: Longman Publishers, 1996

Simutanyi, Neo. *The Zambian Electoral System: Issues and Challenges*, Lusaka: Centre for Policy and Dialogue, 2010

REPORTS

FODEP, *Electoral Reforms Stratage: Past, present and future Activities*, Lusaka: FODEP National Secretary, 2002

PUBLICATIONS AND JOURNALS

Electoral Institute of Southern African and the Electoral Commissions Forum, *Principles for Election Management, Monitoring and Observation in the SADC Region*, Johannesburg: The Electoral Institute of Southern Africa, 2004

The Mungomba Draft Constitution of 2010

Wadu, James, *Governance and Institution Building in Africa: A study of the independence National Electoral Commission of Nigeria*, Lagos: Chimie Publishers, 2010

National Assembly Bill (N.A.B) No. 60 of 2010

NCC Draft Constitution, 27th August 2010

PRINT AND ELECTRONIC MEDIA

The Post Newspaper

Smith, Williams, [Http://eci.nic.in/electoralcommissionofindia](http://eci.nic.in/electoralcommissionofindia), 20/03/12

INTERVIEWS

INTERVIEW: Priscilla M. Isaac (Mrs.) Ag. Director of Elections, ECZ, 11/03/2012

INTERVIEW: Executive Director, Zambia Centre for Inter-party Dialogue (ZCID),
20/03/2012

INTERVIEW: Langtone Sichone, General Secretary, United Liberal Party (ULP) 17/03/2012

CITED ACTS

The Electoral Act No. 12 of 2006

Public Order Act, Cap. 104 of the laws of Zambia

The constitution of Zambia, Cap 1 of the Laws of Zambia

The Electoral Commission Act No. 24 of 1996

The Public Procurement Act No. 12 of 2008

REFERRED CASES

Christine Mulundika and 7 others v. The people [1995] SCZ 3

Edith Zewelani Nawakwi v. Attorney General, [1990-1992] Z.R. 112 (H.C.)

Harry Mwangi Nkumbula v. Attorney General [1972] Z.R.204

Derrick Chitala v. Attorney General [1995/1997] Z.R 91