



**THE RECONSTITUTION OF
ZIMBABWE'S ELECTORAL
COMMISSION: FROM BAD TO
WORSE?***

May 2016

Introduction

A trend in contemporary constitution making is to provide for the establishment of various institutions to guard democracy in a country's governing Charter. South Africa's post-apartheid Constitution created various "Chapter Nine" institutions for this purpose and Zimbabwe followed suit by including in the 2013 Constitution five "Independent Commissions Supporting Democracy". These are:

- a) the Zimbabwe Electoral Commission (ZEC);
- b) the Zimbabwe Human Rights Commission;
- c) the Zimbabwe Gender Commission;
- d) the Zimbabwe Media Commission; and
- e) the National Peace and Reconciliation Commission.¹

These Independent Commissions are intended to guard democracy by providing a check against abuse of governmental powers, enhancing accountability and strengthening constitutionalism.² This is mainly achieved through the Commissions falling outside the three arms of government, the executive, the legislature and the judiciary.³ The intention is then that these "hybrid"⁴ bodies will carry out functions which democracy demands should be free from bias or even merely perceived bias. Zimbabwe has made a significant democratic advance by moving from the position where elections were conducted from start to finish by a "Registrar-General of Elections" appointed by an executive with a clear interest in electoral process, to that where they are now conducted by one of the Independent Commissions supporting democracy, ZEC.

However, for the benefits of this democratic advance to be realised, it is essential that ZEC is in fact independent and carries out its functions without fear or favour. This then brings to the fore a difficult, and possibly intractable, problem of contemporary democracy. While it is obviously salutary to remove the control of elections from the purview of a single person appointed by an interested party (for example by a president, who is also a candidate in the elections) to that of an independent body, the question arises as to how those that comprise such independent body should be selected. For if the appointing authority is partisan or has an interest in the functions of the nominally independent body, the problem of bias is merely displaced by one step rather than

* Prepared by Derek Matyszak, Senior Researcher, 31 May 2016

¹ Section 232 of the Constitution.

² Fombad, C. (ed) *Separation of Powers in African Constitutionalism* Oxford University Press March, 2016.

³ Such organisations are not without controversy. Since they carry out executive functions they may be regarded as violating the principle of separation of powers and since their members are invariably appointed rather than elected, as inherently undemocratic. See generally Part IV Independent Constitutional Institutions in *Separation of Powers in African Constitutionalism* for discussion of this point.

⁴ They are referred to as "hybrid" as they frequently incorporate both judicial and executive functions.

removed. This problem was all too evident during the recent⁵ process of replacing six of ZEC's nine members, whose terms of office expired on 31st March, 2016.

The Procedure

The European Court of Human Rights has established various principles, which ought to be considered when determining whether a body is independent. According to the Court, regard must be had to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence.⁶ In Zimbabwe, section 237(1) of the Constitution sets out procedures that must be followed when appointing Commissioners to ZEC. The section requires the Committee on Standing Rules and Orders to:

- (a) advertise the position;
- (b) invite the public to make nominations;
- (c) conduct public interviews of prospective candidates;
- (d) prepare a list of twelve nominees for appointment; and
- (e) submit the list to the President, from which he is to appoint eight.

A ninth Commissioner is appointed to Chair the Commission by the State President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders. This process immediately strikes one as unsatisfactory, as it retains, in an attenuated form, presidential power to select the members of a body in whose functions he or she has an interest.⁷

Of even more importance is the composition of the Committee on Standing Rules and Orders that compiles the list of 12. The Committee on Standing Rules and Orders presently⁸ comprises 23 members⁹ – 8 elected on a pro rata basis, 4 appointees and 11 who hold office *ex officio*, that is, who are automatically members by virtue of their other positions.¹⁰ These *ex officio* members are: the Speaker and Deputy Speaker of the National Assembly (both elected by that House¹¹);

⁵ The date of writing is 23.05.16. On 14.02.16 Parliament invited the public to submit nominations by 27.02.16 with the interviews taking place on the 09.05.16.

⁶ *Findlay v. the United Kingdom*, (25 February 1997) 24 EHRR 221 § 73.

⁷ The process was developed and legislated probably to demonstrate compliance with the 2004 SADC principles and Guideline Governing Democratic Elections introduced six months before the 2005 polls. It was an improvement on the procedure where the President had the sole power to appoint the entire Commission (section 61 of the then Constitution). The changed process was not, as many mistakenly believe, introduced by the 2013 Constitution.

⁸ The exact tally depends upon the number of political parties in both Houses.

⁹ Section 151(2) of the Constitution and 14(1) of the Standing Orders *Parliament of Zimbabwe* 2015.

¹⁰ 14(2) of the Standing Orders.

¹¹ Section 127 of the Constitution.

the President and Deputy of the Senate (also both elected by that House¹²); the Minister of Finance; the Leader of Government Business in the House; President of the National Council of Chiefs; the Chief Whips of the political parties in the National Assembly and Senate; and the Leader of the Opposition. It is clear that all but three of these will be members of the ruling (ZANU PF) party, who hold the majority in the Houses. Of the four appointees, two are elected by the State president, one by the Speaker and one by the President of the Senate, meaning that all four will be members of the ruling party. The eight members elected, are divided evenly between the Houses, and it is only here that the requirement that the Committee reflect the composition of the Houses in regard to gender and party representation is applied. In practice it has meant that only two are opposition members. Thus of the 23 member Committee only five are not ruling party (ZANU PF) affiliated.

With the Committee thus composed, although Members of Parliament should represent all their constituents, it is stretching credulity somewhat to believe that the process of shortlisting, interviewing, scoring and selecting candidates for the list to be sent to the President will not be biased on a party political basis. The procedure thus appears to be inherently flawed. Fairness and impartiality suggest that the processes ought to be conducted on the basis of consensus and compromise, with equal representation between political parties, no matter how small a party might be.

The only safeguard against bias by the Committee is that the interviews of shortlisted nominees are held in public. This affords interested observers an opportunity to at least protest when obviously outstanding candidates are side-lined or abysmal candidates listed. The “fourth estate” likewise obviously has a clear duty in this regard. It is on the former basis that I dutifully headed to Parliament to observe the interview process on the 9th May, 2016. And this is my protest.

Candidates and question formulation.

More in hope than expectation, I looked forward to witnessing opposition members of the interview panel putting some prickly questions to nominees who were seeking reappointment as Commissioners. When an interviewee is applying for a position identical or similar to one he or she has held before, it is obvious that questions ought to be directed to the candidate’s past successes or failures in such a post. I had assumed that the outgoing Commissioners who also wished to be considered as incoming¹³ would thus be questioned on the manner in which previous elections had been conducted by ZEC.

One such candidate was Joyce Kazembe. As a member of ZEC for the last two general elections, Ms. Kazembe has been signatory to two patently disingenuous and statutorily belated¹⁴ Election Reports. For example, the ZEC Election Report concerning the 2008 Presidential run-off

¹² Section 123 of the Constitution.

¹³ Dr Petty Makoni, Mrs Bessie Nhandara, Joyce Kazembe and Daniel Chigaru.

¹⁴ The Reports must be tabled in parliament “as soon as possible” and in any event no later than six months (Section 13(1) of the Electoral Act). ZEC’s Report on the March & June 2008 polls was presented in May 2009 and that for the 2013 poll was presented to Parliament in September 2014.

election, to which she subscribed, suggests that the Commission was alone in its ignorance of the rampant violence that engulfed the country ahead of the vote.¹⁵ The Report on the 2013 poll¹⁶ which also carried her endorsement, deals with the blatant bias in favour of ZANU PF in the State media (which ZEC is now obliged to monitor¹⁷) and which was noted even by usually uncritical observers such as SADC and the AU, by the subterfuge of claiming that *both* ZANU PF and MDC-T claimed the “lions share” of the media coverage.¹⁸ That such coverage was invariably negative when the MDC was mentioned and positive in relation to ZANU PF,¹⁹ and that ZANU PF received the lion’s share of the lion’s share as it were, is thus swept under the carpet, though not without leaving an obvious lump. There is also the awkward fact that the Constitution prohibits ZEC members from being in office for a period that amounts to more than 12 years, whether continuous or not.²⁰ If Ms Kazembe is not already disqualified on this account by virtue of having been a member of the erstwhile Electoral Supervisory Committee from 2001 to 2005, she will be disqualified as a member after May 2018.²¹ This would require a replacement being sought for her after only two years and probably before the next elections, making her selection somewhat pointless and inconvenient to all concerned. Perhaps she had an explanation for standing. I looked forward to hearing what it was.

Included in the group of unsuitable candidates was Joseph Matema, formerly Officer Commanding of the Zimbabwe Republic Police’s notorious Law and Order Section, where presumably his admirable performance of duties eventually led to promotion as Zimbabwe’s Officer Commanding (Serious Fraud and Crime Management) of the Criminal Investigation Department and as a Senior Assistant Commissioner. Highlights of his curriculum vitae in this regard include being tasked as the investigating team leader, with the help of fraudster Ari Ben Menashe, to find evidence, through entrapment if necessary, of treason committed by presidential aspirant Morgan Tsvangirai a few months ahead of the 2002 presidential poll.²² They also include the arrest, in the company of one of his successors at the Law and Order Section, Chief Superintendent Crispen Makedenge, well-known to MDC activists, of the then opposition Secretary-General and Finance Minister, Tendai Biti. The arrest was based on spurious treason charges laid shortly before the 2008 presidential run-off poll. The abominable conditions in

¹⁵ For a detailed critique see *Hear No Evil, See No Evil, Speak No Evil RAU 2008* available at www.researchandadvocacyunit.org.

¹⁶ The performance of ZEC, and thus indirectly this Report, is analysed in *The Zimbabwe Electoral Commission and the 2013 Poll: An Appraisal RAU February 2015*.

¹⁷ Section 160K of the Electoral Act.

¹⁸ *The State v Morgan Tsvangirai* HH 169 2004 at p 28 and 66.

¹⁹ Election Watch 2013-20 MMPZ July 2013.

²⁰ Section 238(5) of the new Constitution.

²¹ Ms Kazembe was first appointed to ZEC on 17th May, 2006 – see Zimbabwe Election Commission Report on the 2008 Elections paragraph 1.1.

²² See *State v Morgan Tsvangirai* HH 164-2004 at p67.

which Biti was held by the duo resulted in a court application against them by Biti.²³ While Mr. Matema was an Officer Commanding at CID for the country, there is little evidence that any investigation of the endemic political violence around the June 2008 polls, including the murder of 200 MDC activists, ever took place. It is, as will be seen, also of relevance that as an Officer Commanding Mr. Matema's duties probably would have included supervising the postal votes for police officers – a system subsequently shown to be replete with electoral malpractices.²⁴

In this company of the eminently unsuitable was also Professor²⁵ Charity Manyeruke, Dean of the Faculty of Social Studies and Professor of Political Science at the University of Zimbabwe, who is familiar to the Zimbabwean public through her numerous television appearances on political talk programmes and the quotation of her opinions in the *Herald* newspaper, not as an academic, but as a spin doctor and apologist advancing ZANU PF's cause. She is also the Deputy Chairperson of ZANU PF's Woman's League for Harare Province.

The Interview Process

The interview process began two hours and twenty minutes after the advertised time. The public was informed that the delay was due to that fact that the Committee was finalising administrative arrangements for the interview process. It later emerged that the delay was on account of the manner in which the questions for the candidates were to be formulated. It had been determined (by whom, precisely, is obscure) that in order to ensure “even-handedness” in the questioning, that the Parliamentarians would not construct the questions for the candidates. This was to be done by an “expert panel” engaged to assist the Committee. The panel comprised Lloyd Mhishi, Ms Vimbai Nyemba, and Stanley Kanyembe. Lloyd Mhishi had been in the public eye previously in a matter relating to public office.²⁶ He had been selected by the President to be one of three²⁷ to sit on a Tribunal to determine whether the then Attorney-General, Mr. Gula-Ndebele, who controversially had been arrested for “criminal abuse of office”,²⁸ should be removed from his post, as was clearly the desire of the ZANU PF hierarchy. The Tribunal

²³ Zim Finance Minister Drags Notorious Police Officers to Court *RadioVop* 12.10.10.

²⁴ Chihuri Orders All Police Officers to Vote Mugabe in Run-Off *SWRadio* 07.05.08. Evidence of Police officers being compelled to vote for ZANU PF was subsequently captured by hidden cameras - see Exclusive: Secret Film Reveals How Mugabe Stole an Election <http://www.guardian.co.uk/world/2008/jul/04/zimbabwe1>.

²⁵ The award of the professorship to Dr. Manyeruke was controversial, with claims that her publications record was insufficient for the promotion – see Manyeruke Professorship Raises Stench *The Zimbabwe Independent* 10.04.15.

²⁶ He is also a former president of the Law Society

²⁷ Together with Justices Bhunu and Kudya.

²⁸ In November 2007, in terms of section 174 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

decided the issue affirmatively,²⁹ paving the way for Mr. Johannes Tomana to assume the post.³⁰ Ms Vimbai Nyemba is President of the Law Society, while Stanley Kanyembe's presence on the panel of experts was "explained" on account of the fact the he "is an educationist of long standing."³¹

There was also the small difficulty of determining how many interviewees should be selected to be on the list for the President. As noted above, the Constitution provides that when ZEC is first established, a list of twelve is compiled from which the President is to choose eight. The Constitution, however, is silent as to what is to happen when six and not eight Commissioners are to be appointed. Should the list still contain twelve names once more, or, on a pro rata basis, only nine? The Committee had not determined the issue before the questioning of applicants commenced. It clearly had no idea how many candidates would be chosen to be on the list. One Chairperson informed the public that the list would contain a "suitable" number, the other an "appropriate" number.

The questioning procedure was as follows. Candidates had been informed of the time that they would be interviewed, set at 20 minutes apart from each other. Only shortly before the candidates entered the Chamber, were the interviewing members of the Committee handed the question sheet, in order, we were informed, to ensure the security of the questions.³² Five questions were then put, one by each Member, with the questioning lasting 15 minutes. Before the questioning began, each candidate was asked to tell the Committee,³³ in one or two minutes, a little about themselves. I was later informed by a Member of Parliament present that the idea was that there was a list of about seven questions, so that when the end of the question sheet was reached, the questioning would start from the top once more, thus ensuring that the questions would not be the same for each candidate, but not it should be noted, that one would be unable to work out in advance which candidate would be asked which question – as the candidates attended strictly in the order they had been listed, save that Teresa Mugadza, candidate number 15 (of 23), did not arrive for the interview.

²⁹ In May 2008, during the violent pre-presidential election run-off period.

³⁰ Mr. Gula-Ndebele is perceived as aligned to Joice Mujuru, the former Vice-President later purged by ZANU PF and accused of plotting to take over from President Mugabe. Gula-Ndebele's charge of abuse of office related to a failure to arrest then banker James Mushore, believed to be a nephew of Mujuru ([wiki]leaked US Embassy cable 08HARARE162). Both James Mushore and Johannes Tomana have recently been in the news, again due to issues relating to public office, with the Minister of Local Government refusing to allow the appointment of the former as City of Harare Town Clerk and Johannes Tomana set to go the way of his predecessor, again on account of "criminal abuse of office" charges believed related to ZANU PF's internal factional politics.

³¹ Unless I have misspelled his name, Google delivers no hits on Mr. Kanyembe and the reason why he was thought to have the skills to be on the panel of experts is obscure.

³² Previously, interviewees or colleagues have sat in the public gallery and listened to others being questioned, using the information gathered to allow candidates to be forearmed. None appeared to use this ruse on this occasion – those who did so previously have obviously requested anonymity. There did not appear to be any enforced safeguards against this.

³³ This, presumably was more for the benefit of the public, as the Committee surely had this information when the candidates submitted their curricula vitae as part of their applications.

With this procedure, there was little point in five members being asked to put the questions to the candidates. The questions were not those of the Members. The Members were simply reading them out. If the procedure had been followed, there was no reason why the questions could not simply have been put by one of the chairpersons³⁴ or any other single member present. The process, however, created the illusion that Members were being given the opportunity to ask questions of their choice. Once the candidate had answered, no follow up questions were allowed.

If the information I had been given as to the procedure was correct, it was not followed. Most questions were of an open ended nature such as: “What do you understand by a free and fair election?”; “Why is it necessary to have free and fair elections?”; “What do you understand by the term ‘independent’? etc. However, the third question put to most candidates was invariably by Hon. Daniel Shumba, and was invariably of a highly technical nature. Thus the hapless Bishop Gandiya was asked: “What are the contents of a preliminary delimitation report?” and Stembile Mporu was asked: “What is the procedure when constituency candidates receive an equal number of votes?” Technical questions of this nature seemed to turn the proceeding more into an oral examination of candidates’ knowledge of the Electoral Act, than testing a candidate’s suitability as a Commissioner. You may be confident for example, that the current Chairperson of ZEC, would not have been able to answer more than one or two of the technical questions before assuming her post, despite being a Supreme Court Judge. Certainly, knowledge of the Electoral Act should be counted as an advantage, but so long as Commissioners know that elections ought to be run in terms of its provisions and that they are capable of finding and following these provisions, there does not seem to be any necessity for candidates to learn the Act by heart before appearing for the interview. Instead, the inability to answer these technical questions appears to have been treated as fatal. When Bishop Gandiya and Ms Mporu “passed” on these questions the ensuing silence from the Committee seemed to indicate that the prospects of success for these candidates had been reduced to zero. This line of questioning obviously had the effect of favouring the Commissioners seeking reappointment. Having been involved in the electoral process already, they may well have encountered the technical issues asked of them.

This line of questioning ought then also to have tripped up candidates whose background suggests an affinity with ZANU PF, but who were not Commissioners seeking reappointment - retired Senior Assistant Commissioner Matema for example, who had been so assiduous in Tsvangirai’s 2001 treason trial. The technical question asked of the former police officer was: “What is the procedure for postal voting?” As a former Officer Commanding, Mr. Matema, very probably would have been involved in supervising postal votes for his subordinates. The question immediately arises whether it was merely coincidence that this candidate was asked this particular question. Dr. Charity Manyeruke, and only Dr. Charity Manyeruke, was asked: “What is an accredited observer?” The ZANU PF functionary and academic, without a second’s hesitation, answered that such an observer was one accredited by the Accreditation Committee, but then surprisingly faultlessly rattled off the composition of the entire eight member

³⁴ The meeting was co-chaired by Hon Nelson Chamisa (MDC-T) and the Deputy Speaker of the National Assembly, Hon. Mabel Chinmona.

Committee. There are two possible explanations as to how she was able to achieve this impressive feat: i) she is a brilliant academic who had memorised or closely studied all 193 Sections and Eight Schedules of the Electoral Act ii) she had been prepared for the question (the passive voice is used advisedly). In a similar vein another candidate who when asked: “What are the functions of ZEC?” with an equal immediacy of response, replied: “There are eleven functions set out in the Constitution and four in the Electoral Act” and proceeded to detail these. The candidate had clearly been prepared for the question. My conspiratorial side began to wonder if the delay in starting the interviews was innocuous.

The failure to customise questions to take into account concerns about particular applicants, as would have been normal in a commercial interview process, for example, made it impossible to properly assess candidates’ suitability as independent Commissioners. Mr Matema for example, when asked about the criteria for a free and fair election dutifully trotted out that elections must be free from violence and intimidation and allow for freedom of expression and movement. When exactly, after being a member of a singularly supine police force during the electoral violence of 2008 and the pre-election arrests of Tsvangirai and Biti on 2002 and 2008 respectively, did the former Assistant Commissioner of Police have this damascene realisation as to the nature free and fair elections? There is an obvious gap between knowledge of what is required, and a willingness to implement what is required – which is where the need for customised questions arises.

For a Commission to be regarded as independent Commissioners must not only be able to act impartially but must be perceived to be able to do so. Of institutions such as ZEC, the South African Constitutional court had this to say: “*they perform sensitive functions which require their independence and impartiality to be beyond question*”³⁵ On what basis did Dr. Charity Manyeruke believe she was thus suitable as a Commissioner taking into account this and the requirement to be perceived by the public to be independent? Dr. Manyeruke, given her roles in and for ZANU PF, it appears, should not have been shortlisted at all.

In the result, however, those candidates who might be perceived to be ZANU PF leaning shone, those who were not so inclined, stumbled. There was one very notable exception, Barbra Nyangairi. Ms Nyangairi had been one of the Zimbabwe Elections Support Network’s brightest and energetic staffers for many years. Her experience at this NGO meant that she was well versed in all aspects of the electoral cycle, including technical issues pertaining to the Electoral Act. She answered all questions with aplomb and confidence. Ms Nyangairi and Dr Manyeruke were easily identifiable by those in the public gallery as the best two candidates. But Ms Nyangairi, was very unlikely to have been scored as highly as her learned counterpart by the ZANU PF MPs. She had been a member of an NGO critical of the conduct of past elections. While the probable low scores allocated to her by ZANU PF MPs might have been moderated by the panel of experts, one can have little confidence that Ms Nyangairi attained an equivalent

³⁵ *Ex Parte The Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Republic of South Africa* 1996(4)SA 744 (CC) cited in *Separation of Powers in African Constitutionalism* (above) p 336.

number of points as Dr. Manyeruke or the most points, as she ought, of any candidate. That honour in all probability went to Dr. Manyeruke.

Conclusion.

It is very likely that the list of nominees for the Zimbabwe Electoral Commission will consist of Dr. Charity Manyeruke at the top of the list, followed by former³⁶ Deputy Chairperson of the Commission, Joyce Kazembe,³⁷ and then the other Commissioners seeking reappointment. The first six on the list will be completed by the inclusion of Mr. Matema. The final three to make the nine, should it be this number on this list, will probably contain Barbra Nyangairi to provide a veneer of impartiality, knowing that President Mugabe will simply exclude her when selecting the final six.

The predictable nature of the choice of Commissioners which can be deduced from either loyalty to ZANU PF or, at the very least, an unwillingness to challenge the kind of electoral improprieties which redounded to the ruling party's advantage in 2013, indicates that the process for selecting Commissioners to Zimbabwe's Independent Commissions is fatally flawed. The procedure has been used for other Commissions, in addition to that of ZEC, albeit without the highly technical questions which caused many to stumble.³⁸ The Committee on Standing Rules and Orders is itself often charged with carrying out tasks which require that it too act as an impartial body. Yet the composition of this body as determined by the Zimbabwe's Constitution does not meet the standards of international best practice for the occasions when it does so. Furthermore, the manner in which the Committee carries out interviews, replete with opportunities for bias and lack of fairness, does not appear to comply with the constitutional provisions relating to administrative justice where those with legitimate expectations have a right to administrative conduct which is substantially and procedurally fair.³⁹ The question of the functioning and appointments to Zimbabwe's Commissions and tribunals is becoming a matter of concern in other areas apart from that of the Electoral Commission. In keeping with some other jurisdictions (such as the United Kingdom) and Zimbabwe's own Constitution, there is an urgent need for specific legislation to provide for the establishment of Commissions and tribunals generally and to set out in closer detail than the Constitution, the manner in which appointments are to be made to these bodies, in order that the public might have confidence in their independence.

³⁶ Joyce Kazembe cannot resume this position due to the constitutional requirement that a chairperson and deputy be of different genders. This provision was not yet effective when Rita Makarau was appointed chairperson during Ms Kazembe's tenure. Justice Makarau's appointment was nonetheless unconstitutional on other grounds, Matyszak, D. *ZEC's Unconstitutionally Appointed Commissioners* *RAU* Harare, September, 2015.

³⁷ There was reportedly some debate about Ms. Kazembe's eligibility, not because of the 12 year rule referred to above, but that, being over 65 she was over the age at which, were she a government official, she would face compulsory retirement.

³⁸ Interview with a former interviewee for the Zimbabwe Media Commission, 19.05.16.

³⁹ Section 68.

* Please note that this piece was written by Derek Matyszak by May 20, 2016 - ten days after the interview process.