Zambia has held three multiparty elections since the restoration of multiparty democracy in 1991. This peaceful transition raised expectations of a smooth process towards democratic consolidation. But the Zambian democratic process has remained stuck in a transitional zone between actual democracy and authoritarian systems. This article argues that Zambian elections fall short of the expectations of a democratic process due to the institutional uncertainty surrounding elections, absence of a democratic constitution guaranteeing and safeguarding electoral democracy, as well as limitations of important institutions like the Electoral Commission of Zambia. The continued uncertainty around the rules and regulations guiding elections and electoral administration has been a source of conflict within the Zambian political framework with no end in sight, thus maintaining the same party in power over the past three consecutive elections.

Prof MO Hinz, UNESCO Chair for Human Rights and Democracy, Faculty of Law, University of Namibia once noted that:

Democracy cannot be decreed; democracy is a continuous process that embraces the entire society. In other words, as much as democracy is the goal of elections, the societal acceptance of certain democratic rules and values is the precondition of elections at the same time. The cardinal question though is that, how can this pre-condition be secured, at least to the extent necessary to build
a successful electoral process on it that deserves to be called democratic?

This is the dilemma that African realities pose notwithstanding the quest for democratic dispensation within the continent. Whilst it is imperative that stronger democracies should be advocated in Africa, the concept itself should be subjected to critical contextualisation, as a relative ideology. In Africa, academics have concluded that democracy should be defined with social, cultural and historical relevance, and should thus be placed within the distinct boundaries relative to the character and interests of specific groups at a given point in history. A greater challenge obtains in the Zambian scenario where 74 different cultures are manifested in languages (though the most commonly used are seven). If, for argument's sake, the languages constitute social boundaries, how does an electoral democracy satisfy such diversity? It can be argued (with the assistance of further research) that the lack of consensus in the constitutional review initiatives could be used as a barometer for such diversity. At the heart of these democratic initiatives was the need to solve the political power transfer dynamic which has been problematic since the last years of Dr Kenneth Kaunda's era. Obviously the conduct of democratic, free and fair elections became an important component of the discussions.

Any credible electoral process is dependent upon a sound political and constitutional dispensation that nurtures the electoral regime and its supporting institutions. Thus constitutional and legal frameworks are the cardinal documents that inform the context within which elections are conducted. Quite positively, this fundamental realisation has been evident in the Zambian scenario, at least in theory. But the operationalisation of these important principles has been a bone of contention. Where then is the missing link? Is it that people do not believe in constitutions or that constitutions in themselves are a rare phenomenon in the African cultural framework to the extent that their relevance in the day to day lives of the ordinary people is not easily understood?

Interestingly, contrary to a widely accepted viewpoint, constitutions, both written and unwritten, have always existed in Africa as the foundation for social organisation. Yet the notion that the constitutions in Africa should reflect the diversity of their nationals cannot be overemphasised. This, however, is the whole idea behind the concept of constitutionalism which Professor Julius Ihonvbere refers to:

... essentially the focus of what we mean by Constitutionalism is on two issues; first, the process of constitution-making and the extent to which it is popular and democratic; and second, the available openings, institutions, and processes of making the Constitution a living document by taking it to the people so that they are in a position not just to have access to it, but that they understand it, claim ownership and deploy it in the defence of their individual and collective rights and the democratic enterprise.

Thus the advancement of the citizenry's civil and political rights, which of course underpin their effective and unhindered participation in an electoral process, should find home in the spirit of the constitution and constitutionalism. It is against this background that the Zambian electoral reform debate will be analysed in terms of whether or not there is or has been a deliberate move to encompass the same. What attempts have been made to engage the Zambian populace in an attempt to democratisethe electoral process? What are the constitutional guarantees for the conduct of democratic, free, fair, transparent and credible elections? Are the electoral management bodies like the Electoral Commission of Zambia (ECZ) and the electoral dispute mechanisms democratic both in the manner in which they are constituted and in their overall function?

There is growing international consensus that the principle of free and fair elections is a core value of electoral democracy. In fact, this principle is contained in key international instruments and regional protocols which deal with issues of human rights, democracy, and good governance. In many countries in Africa, Zambia included, attempts have been made to incorporate the principle, albeit with different expressions, in national constitutions and other domestic laws incidental or connected to the running of elections. However, this principle does not operate in a vacuum. On the contrary, research has shown that the principle can only find practical expression through a series of interrelated principles, institutions, guarantees, and rules provided for in the legal order. These include constitutionalism and the rule of law; universal, free, and secret ballot; separation of powers; representative and participatory democracy; judicial independence and impartiality; freedom of information and a free press; political pluralism; and transparent and accountable governance, all of which represent values without which free and fair elections would not be possible. The cardinal question therefore is: is this principle immediately apparent in the Zambian case?

The Zambian Electoral Reform Technical Committee (ERTC) in its preamble concurred with the principle that an efficient electoral process is a necessary condition and cornerstone for effective democracy and good governance. However, in Africa, elections have yet to serve as
reliable barometers for enhanced democracy and good governance in reality. The elections are, in most cases, characterised by conflict and or controversy, which often results in electoral petitions filed by the parties that may be aggrieved by the outcome of the elections.

**Constitutional Crisis**

There have been successive attempts to engage the population in constitution making in Zambia. The Mvungi Commission, the Mwanakatwe Commission and of late the Mung’omba Commission all aimed at people-driven constitutional reform, albeit under the Inquiries Act. One of the most controversial provisions in this legislation is that the President determines the terms of reference, and appoints the Commission, and the Commission reports to the President. The method of review and adoption of the Constitution under this Act allows the government to override the wishes of the people. Consequently, this has been a source of contention, particularly following the constitutional review undertaken by the Mwanakatwe Commission. For instance, the proposal by the Mwanakatwe Commission to adopt the Constitution via a Constituent Assembly was rejected by government for technical reasons, which seem to affect the Mung’omba Commission as well. Quite recently, the opposition parties attempted to move a motion in Parliament for the establishment of a Constituent Assembly without success.

In 1996 an attempt by the Mwanakatwe Commission to amend the Constitution failed as people’s submissions were ignored. Subsequently, the political parties contesting the elections in 2001 advocated for an immediate review of the Constitution after the 27 December 2001 plebiscite. It was against this background that President Levy Patrick Mwanawasa appointed a Commission chaired by Mr Wila Mung’omba in April 2003. The Mung’omba Constitution Review Commission (CRC) in its report of December 2005 noted with concern that the current Constitution as amended does not explicitly deal with the subject of democratic governance though there are a number of statutes dealing with the electoral process. Moreover, principles of democracy, such as separation of powers and regular, free elections are indirectly addressed under other chapters of the Constitution. Meanwhile, the Constitution of Zambia Bill of 2005, meant to repeal the Constitution of Zambia Act of 1991, which invariably contained public submissions to the Constitution Review Commission exercise, has

![Protesters demand a new constitution in Lusaka, Zambia.](salam_henry Reuters / The Big Picture)
not been debated by Parliament. The bone of contention was the adoption process of the Constitution Review Commission’s report, which upon the inception of the Commission was supposed to be adopted by a Constituent Assembly. Its shifting to the legislative process elicited resistance from major stakeholders. A similar predicament also befell the Mwanakatwe Constitution Review Commission process. The net effect is that the 2006 elections might be conducted under the old constitutional framework. Ironically, the management of electoral conflicts rest squarely on a Constitution that encompasses the spirit of constitutionalism. That is, the constitutional principles should create an environment of political predictability and thus contribute substantially to confidence building, indispensable in situations of heightened conflict.

**Electoral Reform Process**

In the quest for a democratic electoral process, the Electoral Reform Technical Committee (ERTC) was appointed to review the country’s electoral process and make recommendations aimed at ensuring the conduct of free and fair elections. The ERTC drafted its report after wide consultation and submitted its report on 11 August 2004. The Minister of Justice and Attorney General, George Kunda, then ordered the ERTC to subject the report to further public scrutiny. The final report was submitted to the Minister on 18 July 2005.

Prior to the ERTC, the Mvunga Commission of 1991 in its report had recommended that a fresh electoral regulatory regime be enacted to enhance the conduct and supervision of elections in line with the new democratic dispensation. The Commission also recommended that the electoral system with respect to the determination of a winning candidate should be reviewed to tackle the problem of a simple majority winner who could, in fact, have received a minority of votes in relation to the total number of valid votes cast. The ERTC borrowed this provision when it recommended that a mixed member majority system be adopted for forthcoming elections. This was buttressed by the recommendations of the Constitution Review Commission (CRC). The provision was deemed to be fundamental as it would promote fair representation of political parties, women, minorities and interest groups.

The question of the electoral system to adopt in the forthcoming elections has remained a contentious issue in Zambia notwithstanding the recommendations from the ERTC and the CRC. The current debate is centred on the absolute majority concept (50% plus one vote) in the determination of presidential poll results. This concept, despite being recommended by the Mvunga and Mwanakatwe Commissions, has since not been adopted for use in the 2006 elections. This issue has elicited debate and conflict in Zambia in the last few months to the extent that it might have an impact on the acceptability of election results. Again this raises the question of the Constitution as an instrument for resolving conflicts that arise out of the electoral process.

The electoral reform bill of 2006, which seeks to provide a framework for the conduct of elections, has since been criticised by among others the Law Association of Zambia and Non-Governmental Organisation Coordinating Council for not incorporating people’s views submitted to the ERTC as well as retaining the status quo wherein the power to determine the date of the elections lies with the President. The President of the Law Association, Mr William Mweemba, has noted that the government should have passed the Constitution Amendment Bill, which would have settled matters including electoral reform. He further observed that the passing of the Bill would cause more confusion after the 2006 elections because the Bill does not address the contentious issues that were replete in the electoral process in Zambia. The issue of the absolute majority concept (50% plus one vote) in the determination of presidential elections, the transitional period for the incoming president, repeal of the Public Order Act, parental clause, independence of the media, the matter of the Chief Justice being the returning officer for presidential elections when he also sits to hear the cases of election petitions, and others were contentious issues that required further deliberation.

Therefore, appropriate mechanisms have to be built into the electoral law that allow for the proper handling of electoral conflicts. The Electoral Commission is the most adequate entry point, but it should also have the power to take up potential conflicts pro-actively. Though there is general agreement about the importance of the Electoral Commission of Zambia (ECZ) in its role as the primary
instrument for overseeing the electoral process, there has been a public outcry over its autonomy, lack of legal mandate to register and regulate the conduct of political parties, observers and monitors or even to enforce its own electoral code, and its impartiality and independence. Debate has been raging over the creation of an independent institution detached from the Executive. The CRC in its report recommended that the Constitution establishes an independent and autonomous electoral commission under which the Electoral Office should operate. It also stated that the Chairperson and the Vice-Chairperson of the Electoral Commission should be Zambian citizens qualified to be Judges of the High Court. Unfortunately in the absence of a new Constitution, these recommendations will be of no value.

The electoral system governing the elections deserves constitutional recognition. Part of the constitutional foundation should be on how elections would be organised, supervised and certified. In other words, what has become accepted practice in Southern Africa, namely the establishment of a widely mandated Electoral Commission, should form part of the pre-electoral constitutional arrangement. Having the Electoral Commission as a constitutional body will empower such a commission. Independence and organisational efficiency are the most important characteristics of an Electoral Commission. The geography and ethnic composition of a given country should assist in determining the needed number of commissioners. The nomination of commissioners should be the result of consultations with all possible stakeholders and not directly by the Executive as is currently the case in Zambia. This will ensure that electoral conflicts are covered under the same constitutional recognition.

So how should electoral conflict be managed in Zambia? The answer is twofold: First, government and non-government stakeholders need to be in (constitutional or quasiconstitutional) agreement about the principles of the electoral process as well as the principles governing the political order envisaged before or after elections. Secondly, the process to reach these agreements must be governed by a decision to achieve the widest possible consensus. A very important element is to have a broadly accepted vision regarding the socio-political order after the elections. Support for nation building, an effort to reconstruct society for the benefit of all, reconciliation with the past, mutual tolerance, safeguarding of existing material achievements, human rights for all and protection of minority positions are key concepts, which such a vision might entail.

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### Endnotes


2 Hinz, M.O. 2003. ‘The constitutional framework, the electoral law and other related regulations vis-a-vis electoral conflicts in the SADC region’, Faculty of Law, University of Namibia Windhoek, 14 November 2003.


8 These include the Oasis Forum, the Non-Governmental Organisation Coordinating Council (NGOCC), Citizens’ Forum, women’s organisations, the Church and opposition parties.

9 The ERTC comprised 25 representatives from institutions involved or associated with the management of the electoral process and, according to its report dated July 2005, the terms of reference were: to analyse and make recommendations regarding the legal framework of the electoral process; to examine legislation that impacts on the electoral system such as the Public Order Act and media laws in relation to elections; and to assess the electoral system in Zambia and make recommendations regarding desirable or necessary modifications to ensure the democratic conduct of general or local government elections.

10 The Final Report of the Constitution Review Commission, December 2005 noted: “In its consideration of the subject, the Commission noted the recommendations of the Electoral Reform Technical Committee (ERTC), that Zambia should adopt MMR which combines the FPTP and the PR system, with 200 Members of Parliament excluding the Speaker. The Commission further notes the recommendation by the Electoral Reform Technical Committee on the specification of the PR seats consisting of 35 women; three persons living with disabilities and two youths aged 21 to 30.” The proposal that the forty PR seats should replace the eight nominated seats was equally noted.


12 Ibid.