

**ELECTION MANAGEMENT BODIES IN EASTERN AND SOUTHERN AFRICA:  
SOME REFLECTIONS ON THEIR LEGAL FRAMEWORK**

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## **Abstract**

It is generally recognised that election management bodies (EMBs) constitute one of the most important institutions needed to sustain Africa's fledgling transition to democratic and constitutional governance. They are needed to ensure that all political actors adhere to the rules of the electoral contest and that the outcome of elections are not predetermined and are based on free and fair processes that reflect the genuine will of the people. However, frequent incidents of post-election violence in which citizens question the role played by the EMBs in the last few years have raised many questions about their role which has not been systematically and thoroughly investigated.

This paper aims to take a critical look at the legal framework relating to the setting up and regulation of EMBs in a selected number of countries in the Eastern and Southern African region to see whether there is any possible connection between the manner in which they are structured and the effectiveness of their operations. Does the legal framework of an EMB have anything to do with the acceptance or non-acceptance of the electoral results of elections organised by the EMB? Are there any lessons that can be learnt by comparing the legal framework of the EMBs of countries where election results are generally accepted with that of countries where the announcement of election results have often provoked violence? The establishment of an EMB is supposed to be a clear sign of a firm commitment by a country to constitutionalism and constitutional democracy. This does not always turn out to be so. From the comparative analysis of the experiences of the selected countries, this study will highlight some of the major lessons that can be drawn in designing EMBs in order to enhance their performance and credibility.

## **1. INTRODUCTION**

Although elections lie at the very heart of democracy, the surge in the frequency and number of elections in Africa in the last two decades has shown that they also pose the greatest threat to the democratic project. As a result of poor management, many African governments have used elections merely to create a semblance of democratic legitimacy whilst using opaque and manipulated electoral processes to perpetuate their stranglehold on power. Increasing pressure both within and outside Africa for free and fair elections have made electoral competitions in the last decade very intense and the results very close. This has also made the issue of electoral administration and management critical. In this respect, it is now generally accepted that credible election management bodies (EMBs) provide the best prospects for promoting electoral justice, not only in terms of ensuring a fair and just outcome but also in acting as an effective institution to prevent, mitigate and resolve disputes that may arise from the electoral processes. However, the reports by many independent election observers on controversial election results that have led to serious post-election violence such as the highly contentious presidential elections in Kenya (2007), Nigeria (2007) Zimbabwe (2008) and Côte d'Ivoire (2010) show that the EMBs were complicit in the irregularities. It is therefore no surprise that a recent United Nations Economic Commission for Africa report has described the overall performance of EMBs in Africa as uneven (Jinadu 2014, 11). EMBs are certainly one of the most important institutions that are critical to bringing Africa's fledgling transition to democratic and constitutional governance back on track. The major argument in this paper is the integrity and acceptance of election results depends to a large extent on the legal framework within which the elections were organised and managed. The challenge is usually to develop a legal framework which prevents the EMB which organises and manages

the electoral process from being captured, controlled and manipulated by governments whilst allowing it to operate in a manner that it is able to gain public confidence in electoral justice, electoral democracy and constitutional governance.

The establishment of an EMB is supposed to be a clear sign of a firm commitment by a country to constitutionalism and constitutional democracy. But the nature of this commitment will depend on the type of EMB created. The discussion will proceed with section 2 which provides a brief overview of the different models of EMBs that exist and some of the main factors that are used to assess their potential effectiveness. Section 3 provides a comparative assessment of some critical aspects that influence the effectiveness of the legal framework of an EMB. It however focuses on four countries; Botswana, Kenya, South Africa and Zimbabwe, each of which provide contrasting approaches and experiences to the administration and management of elections. The section examines, from a comparative perspective, four main aspects of their EMBs viz, the general legal framework, its bearing on the ability of the EMBs to operate independently and conduct credible, free and fair elections, the ability of the EMBs to deal with illegal practices and the framework for resolving disputes. Section 4 considers the lessons that can be drawn from the experiences of the four countries. In concluding, it is contended that because of the possible connection between electoral fraud and election-related violence, an EMB that is designed in a manner that makes it truly independent of all political actors will certainly contribute to make electoral outcomes more credible and widely acceptable.

## **2. AN OVERVIEW OF EMBs**

The generic term “election management body” has been coined to refer to any organisation, institution or body that has “the sole purpose of, and is legally responsible for, managing some or all of the elements that are essential for the conduct of elections and direct democracy instruments – such as referendums, citizens’ initiatives and recall votes – if those are part of the legal framework” (Catt *et al* 2014, 5). The actual title of the EMB, its shape and size as well as its precise functions varies from one country to another. The numerous functions that these bodies may be required to perform may be dispersed and shared amongst more than one body operating independently or operating within a larger body that exercises supervisory control over the others.

One of the most contentious issues is that of determining exactly what form an EMB should take. Is there any standard or perfect model of EMB which can ensure that elections are successfully managed without any hitch? This raises two important issues: one concerning the different models of EMBs and the other, the factors that could determine which model should be adopted.

### **2.1 The main models of EMBs**

There are a very wide variety of EMBs around the world. Hardly any two EMBs in different countries are exactly the same. The particular institutional design adopted by a country is usually dictated by several factors, such as its history, its political system, its geographical structure, the complexities of the composition of its population and political developments within the country. Although there are wide design variations, EMBs have generally been classified into three broad categories; the independent, governmental and mixed or hybrid models.<sup>1</sup>

The independent model operates in countries where the EMB is institutionally independent and autonomous from the three branches of government. Although it may be accountable to the executive or the legislature, it usually enjoys a reasonable degree of financial autonomy. The defining feature of this model is its institutional independence and the possibility of it exercising full responsibility for managing the electoral process.

The governmental model by contrast operates in countries where elections are organised and managed by the executive branch. This is often done by the ministry of interior and at local level by local authorities. There is little or no independence, especially from the executive branch because the actual work is usually carried out by civil servants under the supervision of a minister who answers to cabinet.

The mixed or hybrid model, of which there are a much wider variety than the other two discussed above, generally consists of two component EMBs. One component is usually relatively independent of the executive branch and focuses on policy, monitoring and supervisory work. The other component is usually located within the government and/or local government and is responsible for implementation. Generally, the scope of powers, functions and strength of the independent EMB component in relation to the governmental component of the EMB varies considerably from country to country. This is not often clearly defined in legislation and as a result may be a potential source of conflicts. This model was previously common in Francophone African countries where the Constitutional Council acted as the independent component of the EMB when it was given the powers to tabulate and declare the results of elections, especially presidential elections.<sup>2</sup>

The above generalisation of the main models of EMBs needs to be understood as subject to two important qualifications. First, there are a number of features which cut across the distinction between independent, governmental and mixed EMBs, even if not always to the same extent. One of these is that a country may decide to create only a temporary EMB to be set up during an electoral period or a permanent one that will operate continuously. In doing so, the issue of institutional memory, expense and inconveniences of setting up a new body at each election has to be balanced against the cost of maintaining a permanent body. Another feature of an EMB that does not depend on the model chosen is the decision whether it will be centralised or decentralised. This is often dictated by the system of government; unitary systems tend to be centralised whereas federal systems tend to be decentralised or even have separate EMBs at state or provincial levels. The membership of the EMB may vary from being only ordinary civil servants, independent experts, representatives or persons appointed on a partisan basis or a mix of civil servants, independent experts and representatives or persons appointed on a partisan basis. There are often differences in the way judicial, quasi-judicial and non-judicial dispute settlement bodies are involved. Some designs may involve only one, two or all three of these or even specialised electoral courts.

Second, the threefold classification must not be taken at face value. There is no perfect model. Whilst each model has its advantages and disadvantages,<sup>3</sup> the fact that one is classified as an “independent model” and another as a “governmental model” does not necessarily mean that the former is more independent than the latter. For example, the latest world survey of EMBs suggests that of the 53 African countries surveyed, a majority (42 or 79%) have adopted the independent model, 8 (15%) the mixed model and 3 (5%) the governmental model (Catt *et al.* 2014, 374-395). If the performance and effectiveness of an EMB cannot be judged by the label, then what are the factors that need to be taken into account to determine which model is appropriate for any particular country?

## **2.2 Main factors in assessing the effectiveness of an EMB**

Although the electoral management model that a country adopts is important, the critical issue however is the ability of the EMB to perform its functions through a process that is seen as legitimate and credible by voters. A number of guiding principles are generally considered to be essential to ensure the integrity and broad acceptance of the outcome of the electoral process. The main guiding principles for EMBs are; independence, impartiality, integrity, transparency, efficiency, and professionalism (Catt *et al.* 2014, 21-25).

Although most African EMBs can be described as falling under the independent model, the concept of independence goes beyond the label. In very broad terms, independence involves two distinct concepts; formal institutional or structural independence from the government, which is usually specified in the constitution or other legislation regulating the EMB and functional independence, which is supposed to enable the body operate without interference from any external forces. Impartiality requires that the EMB discharges its functions in a fearlessly independent manner and treat all parties equally, fairly and in an even-handed manner. Integrity and credibility will be earned by the EMB if it is seen to be in full control of the electoral process and acts in an independent and impartial manner throughout. Transparency on the other hand requires that all the actions of the EMB are open, transparent and effectively publicised and communicated to all. EMBs are usually only given limited resources and to succeed in their mission, they must use these resources rationally with competence and efficiency. Staff of EMBs whether permanent or temporary, need to be well trained to ensure that they act with the highest professional standards. This is particularly important because of the delicate and sensitive nature of their responsibilities.

Although these principles apply to all models of EMBs, it is clear that they are likely to be more fully achieved under the independent model than any of the other two. In other words, one cannot reasonably expect a governmental model EMB to operate with as much independence as an independent or mixed EMB. Even then, the existence of these principles on their own are not decisive in the way an EMB operates. What is often pivotal over and beyond the model of EMB chosen and the principles which should apply is the legal framework. Whilst the legal framework is not the sole factor that determines how effectively an EMB can operate, it is without doubt a critical one. What this raises is whether there is any standard legal framework for designing an EMB in accordance with the guiding principles discussed above to ensure that it effectively and satisfactorily accomplishes its objective of delivering an election process that satisfies, ideally, all or at worse most of the stakeholders. To address this from a practical perspective, we shall now examine a number of EMBs in a selected number of countries in the Eastern and Southern African region.

## **3. COMPARATIVE REVIEW OF SOME CRITICAL ASPECTS OF THE LEGAL FRAMEWORK OF EMBs IN SELECTED COUNTRIES**

The legal framework of EMBs covers all the constitutional and legislative provisions which govern the conduct of elections generally, especially those which define its core features viz its composition, powers, functions, and financial autonomy. Generally, the legal framework usually consists of the constitution and any relevant international or regional treaties that have been expressly or implicitly incorporated by the constitution as well as all legislative enactments made by parliament or under the authority of parliament such as regulations, orders and directives. The overriding objective of the legal framework is to provide a process

where the EMB can organise and manage free and fair elections under a climate which allows citizens to exercise their democratic rights to freely choose their rulers.

The analysis of the legal framework will focus on the EMBs in four countries in Eastern and Southern Africa, namely Botswana, Kenya, South Africa and Zimbabwe. Although all four countries have adopted the independent EMB model, the similarity almost ends there. Botswana is one of only two countries (the other being Mauritius), that has weathered the fever of constitutional change and has retained its old 1966 Constitution which provided for an independent EMB which is probably as dated as the Constitution itself. Nevertheless, Botswana is also one of the few African countries that have since independence in 1966 maintained a liberal multiparty democracy marked by regular free, fair, peaceful and competitive elections (The Economist 2004; Holm and Mulutsi 1990). Has the legal framework of its EMB contributed to this? Like Botswana, but dating only to 1994 when apartheid ended, South Africa provides another example of a country that has turned from an international pariah state into a full-fledged democracy with regular, free, fair and peaceful elections (Misra-Dexter and February 2010). By way of contrast, Kenya and Zimbabwe in 2013 successfully held elections which all international election observers could only pass as free and peaceful but deliberately avoided using the word “fair”.<sup>4</sup> This is was in marked contrast to the previous elections held in 2007 and 2008 respectively, which were generally condemned as deeply flawed and resulted in post-election violence in which many people lost their lives and a lot of property was destroyed (Thiankolu 2013, 58-94).<sup>5</sup> Could the new 2010 Constitution in Kenya and 2013 Constitution in Zimbabwe hold the secret to the peaceful and more acceptable outcome of the 2013 elections in both countries?

The analysis will focus on four main factors. First, it will compare the general legal framework, and then consider certain factors bearing on the independence and ability of the EMBs in these countries to conduct credible, free and fair elections. This is followed by an examination of the framework for resolving electoral disputes and ends with a brief discussion of the ability of the EMBs to deal with illegal electoral practices.

### **3.1 The General Legal Framework**

The laws that govern the electoral process in most, if not all African countries, have in one way or another been influenced by international, regional and sub-regional treaties. These international treaties provide the basic framework of norms against which each country’s electoral laws, especially those dealing with EMBs can properly be assessed. Some of these treaties create binding and others, non-binding obligations and the nature and extent of their incorporation into national laws differs considerably. In assessing the legal framework of EMBs it is necessary to preface this by looking at the international treaties and the extent to which they may have influenced the national legal framework.

#### **3.1.1 The international, regional and sub-regional framework**

There are many international, regional and sub-regional treaties which deal with electoral matters. Although the focus here is on those dealing specifically with EMBs, it is nevertheless important to mention those which contain general rules of international law recognising the right of people to participate in a fair electoral process.

At the international level, one of the most important instruments is the Universal Declaration of Human Rights (UDHR) of 1948. Although only a declaration and in principle, not binding,

it is generally recognised to have acquired the status of customary international law due to the fact that it has consistently been applied by states and has considerably influenced the development of international human rights law as well as numerous international legally binding conventions.<sup>6</sup> It contains many provisions touching directly on the electoral process.<sup>7</sup> Many of the rights recognised in the UDHR are further developed in other instruments. For example, article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR), recognises, *inter alia* the right to vote as well as be voted in genuine periodic elections. Under article 5 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, state parties undertake to prohibit all forms of discrimination in *inter alia*, the electoral process. The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in article 7 requires state parties to avail women the opportunity to participate in the electoral and political processes on an equal footing with men.

Although none of these instruments expressly provide for an independent EMB, it can be said that the emphasis on periodic elections, universal suffrage, equality of vote, secret ballot and the free will of the voter creates an obligation on states to provide a genuine electoral process that attains these objectives. The Human Rights Committee was more forthright in CCPR General Comment No. 25, paragraph 20 which expressly states: “An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.”<sup>8</sup> From this, it can therefore be concluded that the duty to establish an EMB is one which states parties to these instruments must fulfil if they are to fully comply with their obligations under these instruments.

At the regional level, there are several instrument adopted by the African Union (AU) and its predecessor, the Organisation of African Unity (OAU). In this respect, one of the earliest was the African Charter on Human and Peoples’ Rights of 1981 which in article 13 imposes a duty on member states to adopt legislative measures to promote the right of citizens to participate freely in the government of their country. The 2000 Constitutive Act of the AU lists amongst its objectives in article 3(g), “the promotion of democratic principles and institutions, popular participation and good governance.” These objectives are developed in other instruments, such as the 2000 Declaration on Unconstitutional Changes of Government, the 2002 Declaration on the Principles Governing Democratic Elections in Africa, and the 2004 Guidelines for Electoral Observation Missions. Article 9 of the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa recognises the right of women to participate without discrimination in the political and decision-making process and specifically requires contracting states to ensure that women are represented equally at all levels with men in all electoral processes. Perhaps the most significant instrument, insofar as EMBs are concerned is the 2007 African Charter on Democracy, Elections and Governance (or African Charter on Democracy, for short). Article 17 states as follows:

“State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union’s Declaration on the Principles Governing Democratic Elections.

To this end, State Parties shall:

1. *Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.*
2. *Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.*

3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.
4. Ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through (sic) exclusively legal channels.”(emphasis added).

If the AU instruments have gone further than the international instruments, at least insofar as EMBs are concerned, the sub-regional instruments have gone even further. An excellent example of this are the instruments adopted within the framework of the Southern African Development Community (SADC). The SADC summit in Mauritius in August 2004 adopted the SADC Principles and Guidelines Governing Democratic Elections. Two further instruments are worth noting; the SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region and the Electoral Institute of Southern Africa (EISA) Principles for Election Management, Monitoring and Observation in the SADC Region agreed upon in November 2003. It is however the “Principles and Guidelines on the Independence of the Election Management bodies (EMBS) in the SADC Region,” adopted by the Electoral Commissions’ Forum of SADC countries that is the most developed. It contains detail rules which define the characteristics of an EMB, its powers and duties, its financial independence, its accountability and the strategy for implementing the principles and guidelines.

It is clear from the foregoing that international, regional and sub-regional treaty law strongly favour not only the establishment of EMBs but also the independent model EMBs. Two important observations can be made at this stage about the possible impact of these international legal instruments on the national legal framework. First, it is to be noted that some of these instruments whether signed and ratified or not, are not binding. A typical example of this is and incidentally the most elaborate of all, is the document containing “The Principles and Guidelines of the Independence of Election Management Bodies (EMBs) in the SADC Region.” Nevertheless, many states in the region have revised their national legislation in order to establish EMBs that conform to the standards laid down in these instruments. For example, Zimbabwe in 2004 re-structured its electoral management system and established the Zimbabwe Electoral Commission (ZEC) as an independent body in line with the recommendations contained in the SADC Principles and Guidelines Governing Democratic Elections.<sup>9</sup> Indirect pressure is usually brought to bear on states by election monitoring bodies who in their reports often comment on the extent to which a country’s EMB conforms to regional and in general, international standards. Second, most African countries do not hesitate to sign international instruments and will often ratify them but are usually slow to domesticate them. This is the case with some of the instruments discussed above.<sup>10</sup> For example, Botswana has neither signed nor ratified either the African Charter on Democracy nor the Protocol to the African Charter on Human or Peoples’ Rights on the Rights of Women in Africa.<sup>11</sup> Considering the importance of some of these documents, especially the African Democracy Charter, the unwillingness of some states to be parties to it raises serious doubts about their commitment to democratic governance. Nevertheless, whilst no domestic legal obligations can arise when an international instrument has neither been signed nor ratified, the same is not necessarily true when it has been signed but not ratified or signed and ratified but not domesticated the instrument. Two important decisions, one by the highest court in Botswana and the other, the highest court in South Africa clearly point in this



direction. In the South African case of *Glenister v President of the Republic of South Africa*,<sup>12</sup> the Constitutional Court after referring to section 39(1)(b) of the Constitution which required the Court in interpreting the bill of rights to consider international law and section 231 which states that all international agreements approved by Parliament are binding, concluded that the establishment of a corruption-fighting unit ignoring binding international instruments which required such a unit to be independent was not a reasonable constitutional measure. On the basis of this, it declared the relevant provision unconstitutional. In this indirect manner, the court declared legislation unconstitutional for violating international law which became relevant because it was based on an instrument that had been signed and ratified by the South African government although there was no evidence that this had been expressly domesticated. A similar approach was adopted in the famous Botswana case of *Attorney-General v Dow*<sup>13</sup> where the Court of Appeal, whilst recognising that courts cannot compel governments to domesticate international treaties and conventions, however pointed out they could nevertheless compel them not to act in breach of their international commitments. In also dealing with the position where a treaty had been signed but had not been domesticated, Amisshah JP in *Attorney-General v Dow*, cited with approval the following passage from the judge *a quo* in the same case:

“I bear in mind that signing the Convention [the OAU Convention] does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be preferable to a ‘narrow construction’ which results in a finding that section 15 of the Constitution permits discrimination on the basis of sex.”<sup>14</sup>

In doing so, the Court basically followed the well-established presumption in statutory interpretation that courts will strive to interpret legislation in such manner that it will not conflict with international law. The judge went further to explain this thus:

“...Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act...”<sup>15</sup>

Ultimately, the standards and guidance usually crafted in international and regional instruments are meaningful only when they are incorporated or help to influence and shape national law. The rest of this section will be devoted to examining the national legal framework.

### **3.1.2 The constitutional and legislative framework**

The full legal framework regulating EMBs is usually contained in the constitution and other pieces of legislation. Because the organisation and administration of elections is such a complex matter, it requires a carefully designed and comprehensive legal framework to gain the confidence of voters. The legal framework usually deals with the most important aspects of an EMB such as, its status, its composition and appointment of members, the tenure of members, conditions for removal of members, its main powers and duties, provisions to protect its independence, its financial independence and its accountability. A substantial amount of detail is crucial to enable voters assess whether the EMB can operate independently, impartially and efficiently. Confidence in the legal framework and the trust that this can provide will depend on the level of regulation: what aspects of the EMB are

covered and in what? Are these constitutionally entrenched or enacted in ordinary legislation, whether primary or secondary?

The approach adopted by the four countries in this study show remarkable differences and similarities in some aspects. The level of detail specified at different levels of the legal framework show some significant differences. The table below provides a brief overview of the extent to which these countries have constitutionally entrenched some of the core aspects of an independent EMB.

**Table 1 Comparison of scope of constitutionalisation of EMBs**

	<b>Botswana (sections)</b>	<b>Kenya (articles)</b>	<b>South Africa (sections)</b>	<b>Zimbabwe (sections)</b>
<b>1)General guiding principles and values of governance of institutions</b>				
i) Independence, impartiality, integrity, transparency, efficiency, and professionalism	65A(12)(c)	10;20;21	1;2;195(1);237	3;7;8;9;10;11;17;18;46(1)(b);155-156;233;194;
ii) leadership and integrity in public office		73-77		196
iii) Political rights	13	38;81	18;19	58;67
<b>2)Recognition of International and regional treaties</b>		2(5)-(6);21(4)	39(1);233	12(1);34;46(1)(c) and (e);327
<b>3) Recognition of ENB's independence</b>				
i) general principles on ENB independence		81(e)(iii);82(2)(b);249(2);88(1)-(3);249(10)-(2);250(9)	181(2)	235;236;321(1);320(6)-(7)
ii) Financial autonomy		249(3);250(7)-(8);249(3);250(7)-(8)		305(3)(a);320(7);322
iii) Appointment of staff		252(1)(c)		
iv) Accountability	65A(13)	254	181(5)	241;323
<b>4)Powers and Functions</b>				
i) Boundary delimitation		88(4);89		160-162;239(f)
ii) Conduct and supervision of elections and referenda	65A(12)	86;88(4)	190(1)(a)	239(a)-(b)
iii) Voter registration	66(3)(a)	88(4)		239
iv) Voter education and information		88(4)		239(h)
v) Promotion of democracy and equity		86		7
vi) Adoption of rules and codes of conduct		84;88(4)		157(4)
vii) Electoral dispute resolution		88(4)		239(K)

Viii Conciliation mediation and negotiation		252(1)(b)		
ix) Funding of political parties		88(4)		
x) Accreditation of election monitors		88(4)		239(i)
<b>5)Composition of ENB</b>				
i) Membership	65A	250	191	327;17;18;320(4)
ii) Qualification for appointments	65A;66	88;250(3)-(4)	193(1)-(2)	194(1)(k);194(2);240;328
iii) Appointment process	66	250	193(4)-(6)	327(1);328
iv) Full time or part time members		250		
v)Term of office of members	65A(5)	250(6)(1)		238(5)
vi) Removal from office	66(8)-(11)	250(9);251	194	237(2)
<b>5)Funding</b>				
State or public funding		249(3)		9(2);305(3);322
<b>6) Other avenues of dispute resolution</b>				
i) Fair administrative action		47	33	68
ii) Access to justice		48;	34	
iii) Enforcement of electoral rights under bill of rights	18	22-23	38	85
iv) conciliation and mediation				

This table is based on the Botswana Constitution of 1966, Kenyan Constitution of 2010, South African Constitution of 1996 and the Zimbabwean Constitution of 2013 and takes account of all the latest amendments.

For obvious reasons, one cannot expect a constitution to be cluttered with every little detail of an EMB. Nevertheless, there are very important reasons for entrenching the core aspects of an EMB which are critical to its ability to operate efficiently with little risk of political interference and manipulation, especially by incumbent regimes. There are three main advantages to constitutional entrenchment of the core elements that define the powers, functions and other important aspects of an EMB.

First, because most constitution-making processes try to be as inclusive as possible, constitutional provisions are more likely to reflect the sovereign will of the people than an ordinary law passed by a partisan majority in parliament. As the supreme law of the land, all other laws derive their validity from it and will be declared invalid to the extent to which they are inconsistent with the constitution. Also, because of its special status, the procedure for amending constitutions is usually more elaborate and complicated to protect them from careless, casual or arbitrary amendments by transient majorities or opportunistic leaders trying to promote a selfish political agenda.<sup>16</sup> From this perspective, the advantage of constitutional entrenchment is that it provides a greater sense of durability, certainty and predictability than is the case with ordinary legislation.

Second, as we saw in the *Glennister* case, where an EMB is guided by clearly stipulated constitutional values and principles, they impose obligations on both the legislature and

executive in a manner that will limit their scope of action or inaction. The obligation to implement constitutional obligations, which at least insofar as Africa is concerned, first appeared in the South African Constitution,<sup>17</sup> has now been adopted in the Constitutions of Kenya<sup>18</sup> and Zimbabwe.<sup>19</sup> This opens the way for an action for violation of the constitution where the alleged “violation” consists of a failure to fulfil a constitutional obligation in the manner specified in the constitution. This may therefore result in a declaration of unconstitutionality for the omission to carry out a constitutional obligation.<sup>20</sup> In this way, pressure can be brought to bear on both the legislature and executive, to take effective action to ensure that the EMB created conforms to the principles laid out in the constitution. As a result, it will no longer lie within the exclusive and absolute discretion of the executive and legislature to decide either when to act or how to act. The courts will have the power to invalidate any legislation which fails to conform to the standards imposed by the constitution. Sham EMBs which can easily be controlled and manipulated at will are often the result of bad faith and lack of political will. It can be argued that once there is a legally enforceable constitutional obligation on the government to establish a genuinely independent and credible EMB, governments will have no alternative but to comply with this.

A third advantage of constitutional entrenchment of core aspects of the legal framework is that the nature of the action to be taken will no longer depend on the whims and caprices of opportunistic majorities who may want to arbitrarily change the law at any stage to suit their political agenda. The courts have the powers to invalidate any legislation that goes against the constitution. In this way, the scope for self-serving legislation by dominant parties or transient majorities can be avoided. The Zimbabwean Constitution recognises this risk and tries to pre-empt this when it states in section 167(5) that “after an election has been called, no change to the Electoral Law or to any other law relating to elections has effect for the purpose of that election.” Commendable as this might be, a wily incumbent will easily evade this by changing the law well ahead of announcing the elections.

Ultimately, the significance of constitutional entrenchment will depend, on amongst other factors, the model of EMB chosen and the exact nature of its institutional setup as well as the functions conferred on it. Where these are couched in clear language and in a manner that imposes a legal obligation, this is likely to be more effective than where the constitution merely provides a broad framework that empowers the legislature to enact detailed legislation to address many of the core issues concerning the structure and powers of the EMB. Because of the importance of the constitutionalisation of EMBs, the focus here is on the extent to which provisions in the constitution deal with the core aspects of their management of elections.

From the perspective of constitutional entrenchment, it is clear from the table 1 above that the Zimbabwean Constitution, followed by that of Kenya and South Africa have gone furthest in entrenching most of the key features of an independent and effective EMB. It is not surprising that Botswana, which is still operating under its 1966 independence constitution ranks last. Is this reflected in the way these institutions are operating in these four countries? This is a matter to which we will return to in the next section. Nevertheless, it is important to point out that the non-constitutionalisation of any of the items highlighted in the table above does not necessarily mean that the EMB does not possess such powers. This may well be regulated by way of ordinary legislation, but as pointed out above, the disadvantage of such an approach is that the legislation can easily be amended at any time by a party with a slim parliamentary majority in order to enact legislation that will facilitate its retaining power.

Now turning to the second aspect of the legal framework; in all four countries, with the exception of those instances where the constitution expressly provides otherwise, the EMBs have been conferred, through ordinary legislation with the core responsibilities usually associated with EMBs.<sup>21</sup> The scope of legislation directly related to the management and administration of elections by EMBs varies from country to country. In Botswana, the constitutional framework has been supplemented with a number of statutes, the main ones being the 1968 Electoral Act (as amended), and the Local Government-District Councils Act. It is in general a weak legal framework particularly because the Botswana IEC does not have any regulatory powers and as a result it falls far short of international standards, such as the SADC Principles and Guidelines Governing Democratic Elections and the Electoral Commissions Forum of SADC Principles and Guidelines on the Independence of Election Management Bodies in the SADC. Its IEC has so far succeeded largely because it has undertaken many tasks such as civic and voter education and the adoption of a code of conduct for political parties, without having been expressly or implicitly given the powers to do so.<sup>22</sup> By way of contrast, in Kenya there is a plethora of legislation regulating most aspects of its EMB, the Independent Electoral and Boundaries Commission (IEBC). The main ones are the Elections Act of 2011, the Political Parties Act of 2011 and the Independent Electoral and Boundaries Commission Act of 2011 and Elections (General) Regulations of 2012.<sup>23</sup> Perhaps the most significant aspect of the Kenyan approach is articles 84 and 88(4) of the Constitution which gives the IEBC powers to adopt regulations and codes of conduct. The constitutional provisions in the South African Constitution dealing with its EMB have also been strengthened and the powers and functions of its Independent Electoral Commission (IEC) expanded and refined by the Electoral Act of 1998, the Electoral Commission Act of 1996 and the Public Funding of Represented Political Parties Act. The 2013 Constitution of Zimbabwe restructured the Zimbabwe Electoral Commission (ZEC) which has now replaced the three separate bodies that previously discharged these functions. The main pieces of legislation which complement the constitutional provisions are the Electoral Act (consolidated in 2014) and the Electoral regulations (consolidated in 2014).

Regardless of how elaborate the legal framework may be, it will only be meaningful if it can ensure that the EMB is able to successfully conduct elections which are accepted by the voters as free, fair, transparent and credible. Whilst the best legal framework can never guarantee this, it can nevertheless enhance the prospects for such an outcome. Three important factors can help gauge the extent to which the legal framework provided in the four countries examined in this study can ensure a legitimate and credible electoral process viz, the ability of the EMB to operate independently without interference from any of the stakeholders, its ability to timeously and satisfactorily resolve the disputes that are inevitable in any competitive elections and its ability to deal with the illegal practices that have been the bane of most elections in Africa. These three factors will form the basis of the comparative analysis in the rest of this section.

### **3.2 The ability of the EMBs to operate independently**

The issue of the independence of the EMB is one of the most contested and controversial concerns in electoral processes. EMB independence can at best only be relative rather than absolute. It is impossible for it to operate in total isolation without the involvement of any of the stakeholders, especially the government when it comes to appointments. Be that as it may, what it entails is the ability of the body to have full independence of action and full control of all the essential electoral processes without any perceived or actual undue influence or interference by the government, opposition parties or any external persons or

institutions. In critically assessing whether or not the legal framework in Botswana, Kenya, South Africa and Zimbabwe sufficiently insulates their EMBs from any undue interference, four main issues will be looked at viz, the method of appointment of members of the EMB, their security of tenure, the security of funding and the general principles that protect the body from external manipulation.

### **3.2.1 The method of appointment**

The four countries have adopted fairly different approaches in constituting the membership of their EMBs. The Botswana IEC is made up of 7 members with a chairperson who must be a judge of the High Court and another member who must be a legal practitioner and are appointed by the Judicial Service Commission (JSC). The remaining five members are appointed by the JSC from a list of names recommended by the All Party Conference. The Commissioners are part-time and meet when necessary to supervise and direct the Secretary, who is the head of the IEC and is appointed by the President. The other staff members of the IEC are seconded from the public service. Although the five members who constitute the majority of the commissioners are appointed by the JSC, it needs to be noted that because the majority of those who make up the JSC are presidential appointees,<sup>24</sup> the legal framework therefore makes it quite possible for the President, who already appoints the secretary (who is the only permanent member and heads the IEC), to have considerable influence over who gets appointed as Commissioner. The relevant legislation does not adequately provide a framework which will ensure either that the appointed commissioners are competent or that on their appointment they will be required to act free from any external interference.

As regards Kenya, article 250 of the Constitution envisages that any constitutional commission, such as the IEBC, shall consist of at least three, but not more than nine, members. The Chairperson and each member of IEBC, is to be: identified and recommended for appointment in a manner prescribed by national legislation; approved by the National Assembly; and appointed by the President. Appointments are to reflect the regional and ethnic diversity of the people of Kenya. The remuneration and benefits to a commissioner are to be a charge on the Consolidated Fund. Furthermore, article 250(8) expressly provides that the remuneration and benefits payable to a commissioner is not to be varied to the disadvantage of that person during their respective terms of office. Other clauses in article 250 provide for the members of the commission to elect a vice-chairperson from among themselves, subject to the caveat that the chairperson and the vice-chairperson shall not be of the same gender. The Commission appoints a Secretary to the Commission who acts as the chief executive officer of the commission. The detailed regime on appointment of commissioners is contained in the IEBC Act. Section 5(1) of this Act provides that the Commission shall consist of a chairperson and eight other members. Section 7(2) of the Act provides for full-time commissioners who are prohibited from holding any other office or employment. Section 6 of the Act provides that the chairperson of the commission shall be a person who is qualified to hold the office of a judge of the Supreme Court of Kenya. For one to be qualified for appointment as a member of the commission, such a person must be a citizen of Kenya, hold a degree from a recognised university and must have experience in any of the following fields: electoral matters, management, finance, governance, public administration or law and must be a person of integrity. The First Schedule of the Act provides detailed regulations on the appointment of the Commissioners. The Schedule envisages that the President appoints a Selection Panel with the approval of the National Assembly comprising of two persons nominated by the President; one person nominated by the JSC; one person nominated by the Kenyan Anti-Corruption Advisory Board; and one

person nominated by the Association of Professional Societies of East Africa. The nominating bodies are to send two names of both genders to the National Assembly for the latter to select one. The Selection Panel is to invite applications from qualified persons and publish the names of all applicants in the Gazette, through newspapers of nationwide circulation and the Public Service Commission's website. After carrying out interviews, the Selection Panel selects three persons qualified to be appointed Chairperson and thirteen persons qualified to be appointed as members of the Commission and forward these names to the President for nomination of one person for appointment as the chairperson and eight persons for appointment as members. The President forwards the list of nominees to the National Assembly for vetting and approval. The National Assembly considers all nominees and may reject or approve any or all the nominees. The President then appoints the chairperson and members of the Commission from the list approved and forwarded to him by the National Assembly. The process is elaborate and although a President with a parliamentary majority can still influence who gets appointed, there are nevertheless safeguards in the transparent nature of the process. Two other aspects reinforce the prospects for the IEBC's independence; the stringent qualifications spelt out for membership<sup>25</sup> and the measures to exclude persons who might act in a partisan manner.<sup>26</sup>

Now turning to South Africa, its 1996 Constitution was, in many respects and insofar as Africa is concerned, the harbinger of independent constitutional institutions such as independent EMBs. South Africa's IEC is composed of 5 members, one of whom must be a judge. The qualifications for appointment as well as the process for appointment are specified in both sections 191 and 193 of the Constitution as well as section 6 of the Electoral Commission Act. Members of the IEC are appointed by the President on the recommendation of the National Assembly, following nominations by a National Assembly inter-party committee which is proportionally composed of members of all parties represented in the National Assembly. The inter-party committee examines a list of at least 8 nominations submitted by a panel consisting of the President of the Constitutional Court, as chair and representatives of the Human Rights Commission, the Commission on Gender Equality and the Public Prosecutor. The final appointments are not only made by the President but he alone designates the chairperson and vice chairperson from among the members of the commission. The main qualification for appointment, besides the requirement that one of the members must be a judge is that under section 193(1)(b) which requires the appointee to be a "fit and proper person[] to hold the particular office." And furthermore, according to section 6(2)(b) of the Electoral Commission Act, it must not be a person who "at that stage [has] a high party-political profile." Although all indications since the first post-apartheid elections were held till date show that the South African IEC has performed exceedingly well with little evidence of political interference, the legal framework for the appointment of truly independent members is weak. First, the ruling African National Congress (ANC) because of its dominant majority will always easily recommend only its preferred persons for appointment. The fact that they only act on nominations made by a Panel does not prevent this because all of the members of that Panel are persons whose appointment is largely dependent on the discretion of the President and often influenced by partisan considerations.<sup>27</sup> Second, the requirement that the appointee should not at that stage have a high party-political profile is so obscure as to be meaningless. For example, after the recent resignation of the chairperson of the IEC, Pansy Tlakula, under a cloud of financial impropriety, President Zuma easily accepted and implemented the recommendations of the ANC dominated National Assembly that Vuma Mashinini should replace her as commissioner, although the latter had at some stage acted as a special and personal adviser to

the President.<sup>28</sup> With “cadre deployment” as an official credo of the ANC, the chances of the IEC remaining genuinely independent do not look good.<sup>29</sup>

Until 2004, elections in Zimbabwe were managed by 4 bodies which lacked independence from the state and the ruling Zimbabwe Peoples’ National Union-Patriotic Front (ZANU-PF) party. ZEC which came into existence in 2005 progressively took over these functions and these were consolidated in sections 232-241 of the 2013 Constitution. Of all the 4 countries, the Zimbabwean legal framework for the appointment of members of its EMB is the most elaborate. The ZEC is composed of 9 members. The chairperson is appointed by the President after consultation with the JSC and the Committee on Standing Rules and Orders.<sup>30</sup> The chairperson must be a judge or former judge or a person qualified for such appointment. The other eight members are also appointed by the President from a list of not fewer than twelve nominees submitted by the Parliamentary Committee on Standing Rules and Orders. The Constitution in section 237(1) lays out an elaborate process involving the advertisement, shortlisting and public interviews before the list of nominees for the 8 positions is prepared for submission to the President. Whilst section 236 of the Constitution does not exclude the appointment of persons who are members of a political party or an organisation, they are required to relinquish their political or other positions within thirty days in favour of membership of ZEC. The Constitution goes further state that members of the ZEC should not allow partisan considerations to influence their work in any way.<sup>31</sup> It is also stated that members of the ZEC must be chosen for their “integrity and experience and for their competence in the conduct of affairs in the public or private sector.” It is a legal framework that goes to some length to exclude the possibility of partisan members.

A number of observations can be made from comparing the approaches used in the four countries. Generally, politically appointed members of EMBs are not necessarily a threat to its independence. In fact, there are some EMBs which are made mainly or exclusively of the representatives of political parties but such bodies usually have a more difficult time establishing their credentials with voters as completely impartial bodies (Catt *et al* 2014, 22). This also carries other risks.<sup>32</sup> Whilst the use of part-time commissioners in Botswana is quite understandable, given the small size of the voters,<sup>33</sup> which may not warrant the expenditure incurred in employing permanent commissioners and the staff that go with this, the fact that the only permanent senior official, the secretary to the IEC, is appointed by the President alone may raise doubts about his ability to act impartially. Another point which deserves comment is the trend towards appointing judges, especially as chairpersons. The selection of members of the judiciary reflects an instinctive desire to seek persons whose independence and impartiality in handling matters of public concern is widely recognised and accepted. Where the EMB discharges its responsibilities with honour and dignity and the results are widely accepted by voters, there will be no problem. There is however risks where this does not happen and the judge become publicly identified with a discredited body in a manner that may put the reputation and prestige of the judiciary in jeopardy. There is also a risk that some judges’ performance of these duties may be influenced by the expectation of some reward in the form of elevation to a higher judicial office. Furthermore, there is also a risk that a judge who was appointed to chair or participate in an EMB, may upon the resumption of his regular duties, and if disputes relating to the conduct of the elections by the EMB come before the courts, adopt a position that will try to justify or defend the position he took when acting in the body. Be that as it may, judges are certainly better placed than most ordinary citizens to help in the management of EMBs but it may well be desirable to use only retired judges who will have little to gain in acting partially and where there is little chance of putting their reputation for independence and impartiality at risk. Be that as it may, the issue of



appointment is only one, albeit an important indicator of the ability of the EMBs to act independently. We will now turn to the others.

### **3.2.2 Security of tenure**

Members of EMBs will be better placed to carry out their duties impartially and make bold even unpopular decisions if they know that they cannot be removed from office arbitrarily and without due process. This usually requires that their tenure should be clearly spelt out and the conditions for dismissal also indicated in advance.

In Botswana, the commissioners serve for two successive terms of parliament, which is 10 years whilst the secretary whose position is permanent serves until retirement at 65 years. In Kenya, they serve for 6 years and are not re-eligible for re-appointment. In South Africa, the commissioners serve for 7 years and may be re-appointed for only one further term. And in Zimbabwe, they can serve for 6 years with the possibility of re-appointment for one further term.

In all four countries (including Botswana only insofar as the secretary to the IEC is concerned), the conditions on which commissioners may be dismissed are clearly spelt out as well as the detailed procedure to be followed.<sup>34</sup> Commissioners can only be removed from office for a cause, such as serious violation of the constitution, gross misbehaviour, physical or mental incapacity, incompetence or bankruptcy. This involves an elaborate process which in some cases requires an investigation to be conducted by a tribunal or by a resolution by parliament but with the final decision resting with the president. The only exception to this is the silence of Botswana's laws with respect to its part-time commissioners. The security of tenure, like the next issue, security of funding is a necessary factor in gauging the independence of an EMB.

### **3.2.3 Security of funding**

Without guaranteed adequate and predictable funding insulated from political interference by the government, the EMB will not be able to operate effectively and efficiently. The regulatory framework should therefore endeavour to ensure that this matter is dealt with.

In both Botswana and South Africa, the constitutions are silent on the issue of financing the EMBs. However, whilst in Botswana, the IEC is funded through allocations made to the Ministry of Presidential Affairs and Public Administration, in South Africa, section 13 of the Electoral Commission Act provides that, the expenditure of the IEC is defrayed out of money appropriated by Parliament for that purpose. The legislation also allows it to receive money from other sources, such as foreign donors. The Botswana and South African approaches are not the best way to fund an EMB because it makes them dependent on the goodwill of government. Such good will may not come easily where the EMB tries to assert its independence. Both Kenya and Zimbabwe have made funding the EMBs a constitutional duty imposed on the government. Under article 249(3) of the Kenyan Constitution, the budget allocation of the IEBC is to be treated as a separate vote by Parliament. Under the Zimbabwean Constitution, several provisions deal with the issue of funding the ZEC but the most important of this is section 322 which states that, "Parliament must ensure that sufficient funds are appropriated to the Commissions to enable them to exercise their functions effectively." Be that as it may, it is the extent to which the courts can intervene to

compel third parties, especially the government to respect that independence of the EMBs which matters and to which we must now turn.

### **3.2.4 General guiding principles that legally protect EMBs against external manipulation**

Appointing competent independent-minded persons with secure tenure to work for an adequately resourced EMB as commissioners is no guarantee that parties with vested interest, especially incumbent governments who are always interested in retaining power will not seek to influence and manipulate it to work in a manner that will favour them. The South African Constitution in its 1996 Constitution in what it refers to in its section 181 as “establishment and governing principles,” provided what can be considered as four fundamental guiding principles designed to ensure that institutions such as EMBs are insulated from partisan manipulation.

In protecting the IEC, section 191 states as follows:

- “i) These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- ii) Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- iii) No person or organ of state may interfere with the functioning of these institutions.
- iv) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”

There is no better way to protect the EMB than this. Section 235 of the Zimbabwean Constitution protects the independence, impartiality and integrity of the ZEC in similar language whilst a number of provisions in the Kenyan Constitution to a limited extent try to achieve the same purpose.<sup>35</sup> There is no provision in the Botswana legal framework that deals directly with this.

It is clear from this that it is not the label “independent” before an EMB that makes it independent but a number of important features in the legal framework which are crucial to making it functionally possible to efficiently run an electoral process that produces legitimate, credible and acceptable results. Another critical element to such an outcome to which we must now turn is the dispute settlement system.

### **3.3 The framework for resolving disputes**

The efficacy of the mechanism for resolving electoral disputes is as important for free and fair election as it is for assessing the robustness of the legal framework regulating the EMB. The design of the dispute resolution mechanism has become particularly important because elections have become more and more competitive and the outcomes fairly close and unpredictable, as they should ideally be. For example, the presidential elections in the following countries were very close and the announced results controversial: Cote d’Ivoire in

2010, Ghana in 2008 and 2012, Kenya in 2008 and 2013, Senegal in 2013, Sierra Leone in 2007 and Zimbabwe in 2008. An effective and credible dispute resolution mechanism in such circumstances is critical to mitigating any pre- or post- election violence. However, distrust of the judicial system and of the ability of courts in many African jurisdictions to adjudicate electoral disputes in an impartial and fair manner runs deep. Thus, after the 2007 Kenyan presidential elections, in spite of the considerable evidence indicating that there had been blatant electoral fraud, the loser, Raila Odinga, refused to go to courts because of the notoriety that Kenyan courts had gained for corruption and incompetence (Van de Vijver 2006, 50-51). The recourse of violence led to heavy loss of life and destruction of property (Ongoya 2013, 152). Therefore in assessing the effectiveness of the legal framework regulating the EMBs in these four countries, it is essential to see how the issue of electoral disputes has been addressed. An overview of the general framework is provided in table 2 below.

**Table 2 Bodies competent to deal with electoral disputes**

BODY	BOTSWANA	KENYA	SOUTH AFRICA	ZIMBABWE
EMB		Section 88(4)(e) Constitution; and article 4e IEBC Act		
Electoral Court			Section 18-20 Electoral Commission Act Sections 56, 95-96 Electoral Act	Section 161-165 Electoral Act
High Court	Section 18 Constitution; and Section 116-140 Constitution	Sections 89(10)-(11) and 105 Constitution; sections 74 and 75(1) Elections Act; and Regulations 99 Elections (General) Regulations		
Supreme Court		Section 140 Constitution		
Constitutional Court				Section 167(2)(b)
Alternative Election Dispute Resolution (AEDR)		Section 12 IEBC Act ( Dispute Resolution Commission)	Section 103A Electoral Act	Section 160A-160D Electoral Act

As table 2 above shows, the approaches vary considerably. In Botswana, the Electoral Act outlines the procedures for filing election petitions. These must be submitted to the High Court within 30 days of the pronouncement of the results and the Court is required to address the petition within 90 days of its presentation. In Kenya, a distinction is made between disputes before the declaration of election results and those after the declaration of results. The IEBC is competent to deal with electoral disputes relating to or arising from nominations prior to the declaration of election results. And these have to be resolved within 7 days of the receipt of the petition. On the other hand, petitions challenging the validity of parliamentary or county elections are determined by the High Court and must be brought within 28 days of the declaration of results. By contrast, petitions challenging presidential elections are dealt with by the Supreme Court and must be brought within 7 days after the declaration of results. The High Court must decide the matter within 6 months whereas the Supreme Court is given 14 days from the filing of the petition to give its decision. As regards South Africa, the Electoral Court, which has the same status as the Supreme Court of Appeal, was established and acts as a final court of appeal in the review of any decisions taken by the IEC. The IEC established a conflict management programme as an AEDR mechanism in 1999 and this has

proved effective in reducing the number of challenges going before the courts and as a result led to a gradual decline in disputes.<sup>36</sup> Zimbabwe, like South Africa has an Election Court which deals with ordinary election disputes but only the Constitutional Court has jurisdiction to deal with disputes concerning presidential elections. To help it deal with electoral disputes, ZEC has set up Multiparty Liaison Committees at national, provincial and constituency level. The use of AEDRs besides complementing the formal dispute settlement methods will in some cases save time and money and may be particularly suitable for resolving intra-party disputes which are hardly subject to the formal dispute settlement mechanisms.

This brief overview shows that some thought was given to the issue of election disputes in developing the legal framework for dealing with elections. There are often so many disputes that arise before, during and after an election that these usually put any election dispute resolution system under extreme stress.<sup>37</sup> An examination of the outcome of these disputes in the light of the legal framework for dealing with disputes raises a number of serious issues (Thiankolu 2013, 57-94; Elisha 2012). First, the strict timelines for bringing petitions after the announcement of results and the timelines within which the courts must decide the matter and render a decision are often problematic. For reasons of administrative and political certainty, there is obviously a need for these matters to be resolved within the shortest possible time. However, with such short timelines, the parties usually do not have enough time to collect the evidence they need or if they do, the courts may not have the time to carefully review the evidence before rendering their decisions. As a result of time constraints, many disputes have been withdrawn because there was no time to collect the evidence or raise the money necessary to pay the deposit or obtain the necessary witnesses.<sup>38</sup> Second, since some of the necessary evidence might be with the EMB, its non-cooperation is usually fatal. Such non-cooperation led to the withdrawal of the petition brought by Morgan Tsvangirai against Robert Mugabe after the 2013 harmonised elections in Zimbabwe. He withdrew the matter alleging that ZEC had refused to release some of the information at its disposal which he needed as evidence.<sup>39</sup> Third, there appears to be a desire to disperse the resolution of electoral disputes to different bodies, probably to reduce the risk of overwhelming the ordinary courts, which at the best of times are struggling to cope with a backlog of ordinary cases. However, it is not certain if this is entirely successful. This is because most of these constitutions expressly recognise, guarantee and protect political rights<sup>40</sup> as part of the bill of rights and the High Court in all these jurisdictions is given the right to deal with disputes concerning the enforcement of fundamental rights. This appears to suggest that a disgruntled petitioner could avoid the tight timelines usually spelt out for election petitions and frame his matter as an issue involving the enforcement of human rights and more specifically, a violation of the right to free and fair elections, and bring it before the High Court instead of before any of the other courts envisaged for dealing with election disputes. Such a petitioner nevertheless is subject to the usual court process prone to delays and the petition will compete for hearing time with other disputes which usually clog the court's schedule. This is an issue which needs to be carefully reviewed by constitution-makers. Finally, in spite of the strict time limits, some court decisions cancelling some elections have come long after the elections and sometimes matters drag on until the next elections.<sup>41</sup> There is need to recognise that this could occur and may even be a deliberate ploy to frustrate the petitioner. This is where the time lines find strong justification but in many such instances, they are not consistently applied to all persons. But a closely related matter that has proven notoriously problematic has been the issue of electoral fraud and other electoral malpractices. We will now proceed to see how these are dealt.

### 3.4 The ability to deal with electoral malpractices

Preventing and sanctioning some of the factors that can be considered to be one of the most serious threats to Africa's fragile transition to genuine multiparty democracy namely electoral malpractices and electoral violence is critical to any effective legal framework regulating EMBs and elections. Adequately dealing with electoral malpractices and electoral violence is also an essential factor in promoting a platform for free, fair and credible elections. An electoral framework that does not adequately address this will clearly be defective.

In Botswana,<sup>42</sup> Kenya<sup>43</sup> and Zimbabwe,<sup>44</sup> as compared to South Africa,<sup>45</sup> an elaborate set of provisions list a wide range of acts which are sanctioned as election offences. These range from offences relating to registration such as multiple registration to personation, treating and undue influence. A variety of sanctions ranging from fines, imprisonment and even a ban from voting or standing for elections for a number of years is usually provided for those who commit these offences.

The progressive criminalisation of electoral malpractices as has been done in the four countries covered in this study has at least two important benefits. First, the risk of a person or even a party being banned from participating in elections could act as a strong deterrent to indulging in illegal electoral practices. Second, the fact that members of staff as well as the EMB itself can be sued for electoral malpractices also ensures that it doesn't yield to pressure to give an undue advantage to any political party or individual. There is probably need to go further and provide severe penalties for those who try to improperly influence the EMB as well as those who yield to such external pressure. This will not apply to Botswana's IEC, which unlike the others, has no separate legal personality and therefore cannot sue or be sued.

The question that one might ask at this stage is whether the steady enhancement of the legal framework of EMBs, marked particularly by the constitutionalisation of certain core aspects of their operation has or is making any difference. We will now proceed to see what lessons can be drawn from what has been happening in these four countries.

## 4. LESSONS, CONSTRAINTS AND FUTURE PROSPECTS

Just as there is no ideal or perfect model of an EMB, there is also no ideal or perfect legal framework. A country's history, geography, ethnic dynamics and other peculiar factors influence and shape its approach to regulating the conduct and administration of elections. Be that as it may be, it is clear from our analysis above, that the legal framework of the Botswana IEC is the weakest and by contrast, that of Kenya and Zimbabwe appear to offer the best prospects, even vis-à-vis that of South Africa. However, mindful of the wide gap that often exists between what is stated in the legal framework and what obtains in real life it is necessary to consider to what extent these observations are borne out in real practice?

Of all four countries, Botswana can rightly boast of being one of the two oldest liberal democracies in Africa (the other being Mauritius) having successfully since independence in 1966 to date regularly held open, transparent, free and fair multi-party elections and for decades also earned international recognition as probably the best governed country on the continent.<sup>46</sup> The Freedom House survey of the state of freedom with respect to elections, political rights and civil liberties has consistently placed Botswana and South Africa as the top performers.<sup>47</sup> This is also borne out by the reports of independent election observers who have also consistently rated elections in Botswana as free, fair and credible.<sup>48</sup> But how can

this be reconciled with an EMB whose design is flawed. As we have seen, it is hardly independent and does not have exclusive power to conduct all elections because the Chief Justice, a presidential appointee has exclusive powers to conduct presidential elections and his decision on the matter cannot be challenged before any court.<sup>49</sup> The IEC is funded through the Ministry of Presidential Affairs and Public Administration and therefore vulnerable to political manipulation. It is accountable, not directly to Parliament but rather to a Minister who then has to submit the report to Parliament. Even then, such reports are only required to be submitted at the end of an election. What is even more, Botswana, as compared to the other countries has not, as was pointed out earlier, signed and ratified many important treaties which could have helped to complement the gaps in its weak legal framework. With such a defective legal framework, what can explain the successful administration and management of elections in Botswana?

A critical analysis of elections and political developments in Botswana will suggest two possible explanations. First, the well-deserved praises and admiration that the country has earned for its successful multiparty democracy, clean and relatively transparent and accountable government cannot be attributed to its clearly outdated 1966 Constitution. It can be argued that this success has been largely due to the quality of the leaders it has had since independence, starting with the first leader, Sir Seretse Khama who died in office and the two who came after him, Sir Ketumile Masire and Festus Mogae,<sup>50</sup> both of whom served two terms and retired graceful and with dignity. These three were an exceptional breed of competent, honest and patriotic leaders who appear to have put the interest of the country first. They were hardly saints but whilst other African leaders recklessly mismanaged their countries, looted and plundered their countries' wealth and murderously suppressed dissent, the Botswana economy for the most part since the late 1970s grew in leaps and bounds in an atmosphere of peace and serenity under their competent leadership. It can be argued that because of the good will and benevolence of the political leadership elections have been held in a relatively transparent manner without too much political interference and manipulation. A possible second factor may be that because of the charisma of these leaders, the opposition parties in country have given the Botswana no reasons to want to change their incumbents. In many respects, the opposition parties in Botswana have been their own worst enemies. Fractious and divided, many of them spend their time squabbling and in most cases provide more competition for each other, especially when elections are called, than for the ruling party. As a result, the IEC's task has always been made easier by the lack of any serious electoral competition that could give rise to controversy. In very many respects, this is the story of opposition politics in all African countries. Whilst under President Ian Khama, the days of exemplary leadership and non-interference with the IEC are appear to be gone, the opposition is still locked in its internecine battles. Nevertheless, looking at the future, it is submitted here that the legal framework and the scope for political interference with the IEC is such that should there be a threat of an actual electoral victory by an opposition party in Botswana, the IEC could easily be manipulated into distorting the outcome. In other words, the roots of democracy and democratic processes in Botswana are too shallow to withstand an electoral upset that could remove the ruling party that has been in power since independence from power. This is exacerbated by the fact that the frequent references to Botswana as a shining example of democracy in Africa has led to a misconceived conceit, self-contentment and good governance complacency. In refusing to sign many international and regional human rights and good governance treaties the impression given is that they don't need them (Fombad and Sebudubudu 2007, 125).<sup>51</sup> A combination of a weak legal framework and unwillingness to conform to international standards on election administration at a time when there are ominous signs of creeping authoritarianism does not augur well for political

certainty and stability in the country(Cook and Sarkin 2010; Poteete 2014; Poteete and Holm 2014).

A similar combination of factors, although to a lesser degree, can be said of the South African legal framework. When it was crafted in 1996, there was Nelson Mandela and a lot of good will. As we have seen, there are very strong constitutional principles to protect the commissioners but the manner of appointing them does not sufficiently ensure that credible-independent minded commissioners are appointed. It can well be argued that members of EMBs do not necessarily have to be apolitical. Whilst partisan appointments may be normal, unlike under the Kenyan and Zimbabwean Constitutions, the South African legal framework does not provide adequate safeguards to ensure that the appointee does not act in a partisan manner. In many respects, the controversy surrounding the former chairperson of the IEC, Pansy Tlakula, showed that the institution was strong enough to withstand the indiscretions of its chairperson. Nevertheless, the prospects for the future do not look particularly good. In fact, Freedom House in its election analysis of 2015 for Sub-Saharan Africa, rightly points out that “recent years have seen backsliding among both the top performers, such as South Africa, and the more repressive countries...”<sup>52</sup> As the South African elections become more competitive and the position of the dominant ANC is threatened, the question is whether it will maintain the “hands off the IEC” approach it has adopted so far. This does not seem likely. The recent appointment of President Zuma’s confidante, Vuma Mashilini to replace Pansy Tlakula as chairman of the IEC raises serious questions as to whether he can manage the organisation without being perceived, rightly or wrongly, that he is acting on the instructions of the ANC.<sup>53</sup> It might well be in accordance with the law but there is indeed an arguable case that this may not be consistent with many of the fundamental founding principles and values of the Constitution<sup>54</sup> as well as the practice in the past twenty years of appointing to such sensitive positions persons with broad support amongst all the main political actors.

As table 1 above shows, it is perhaps the elaborate constitutional values and guiding principles that underpin the Kenyan and Zimbabwean EMBs that gives them such an enormous potential for the future. In both countries, the 2007 elections did not only end in conflict and violence but the EMBs in both countries substantially contributed to this outcome. For Kenya, the 2007 elections were the most closely contested in the country’s history up to that point and the polling was peaceful. The ruling party lost its parliamentary majority and pre-election and exit polls predicted a victory for the opposition presidential candidate. After an unusual delay, the Electoral Commission of Kenya (ECK) declared the incumbent winner but acknowledged “cooking” and “witch doctoring” of the results in some constituencies. Whilst the chairperson admitted his personal embarrassment over the results, five commissioners called for an investigation.<sup>55</sup> Similarly, many of the election monitors pointed out several acts of blatant partisanship of the Zimbabwe Electoral Commission (ZEC) which in many respects led to a rejection of the results it announced and the violence that ensued in 2007.<sup>56</sup> By contrast, the reports on the performance of the EMBs established after the 2010 and 2013 constitutional reforms in Kenya and Zimbabwe respectively clearly indicate radical improvements. Although most of the observers still found many shortcomings with several aspects of the way the IEBC conducted the elections, they nevertheless concluded that the process was credible and met many of the benchmarks to which Kenya was committed.<sup>57</sup> In *Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others*,<sup>58</sup> the Kenyan Supreme Court was asked to determine whether the 2013 presidential elections were conducted in a manner that was free, fair and transparent and verifiable in terms of the constitutional standards set out in articles 81 and 86

of the Constitution. The Court whilst holding that the conduct of the elections could by no means be said to be perfect concluded that the petitioners had failed to clearly and decisively show that it was so devoid of merits and so distorted that it could not possibly reflect the people's electoral intent. In upholding the results, the Court said that the evidence adduced did not disclose any profound irregularity in the management of the process nor did it gravely impeach the electoral process.<sup>59</sup> With respect to the Zimbabwean 2013 elections, most of the observers noted that the performance of the ZEC was much better than in 2008 and whilst they considered the election as generally credible, they were not, on the question of fairness prepared to say that the outcome was fair.<sup>60</sup> As noted earlier, after the MDC-T party's petition at the Electoral Court seeking to compel the ZEC to release electoral materials used during the election was rejected, it withdrew the case it had brought before the Constitutional Court challenging the results of the presidential elections. The Constitutional Court on the rather spurious grounds that a petition challenging a presidential election was unique and could not under section 93 of the Constitution be withdrawn, proceeded to examine the petition and declared Robert Mugabe the winner of the elections. One of the main problems that led many election observers to express reservations about the standards of the Zimbabwean 2013 elections was the fact that several aspects of the legal framework were not implemented.<sup>61</sup> This was compounded by the numerous technical obstacles alluded to earlier, which made a review of some of these issues by the courts impossible.

Whilst a solid legal framework is crucial, but since no legal framework is self-implementing, it will depend on its proper implementation. Proper implementation entails two factors: knowledge of the legal framework and the willingness to ensure that it is properly implemented. The legal principles for ensuring that future elections in at least three of the four countries, namely Kenya, South Africa and Zimbabwe are free, are firmly constitutionally entrenched. Nevertheless, the effectiveness of this will depend on the awareness by citizens of the nature and extent of the rights and duties it imposes, especially those it imposes on the EMBs and their willingness to see that these principles are fully implemented. Only the Zimbabwean Constitution is section 7 imposes a legal duty on the state to promote public awareness of the constitution. Once there is such an awareness, voters will realise that the duty to organise free and fair elections imposed on EMBs is one whose breach either through action or inaction entitles them to bring a legal action. With the broad expansion of public interest action under the Kenyan, South African and Zimbabwean Constitutions,<sup>62</sup> it is now easier for NGOs and other CSOs to take up any violations that may occur.

Only the Kenyan Constitution in its Sixth Schedule establishes a Commission for the Implementation of the Constitution and a Parliamentary Implementation Oversight Committee to oversee and coordinate the implementation of the Constitution. These commissions have made considerable progress in promoting the implementation of the Constitution but both commissions have admitted that effective implementation requires that a majority of the population is sensitised on their rights and obligations and how these can be enforced.<sup>63</sup> Designing a legal framework for enhancing the prospects of free and fair elections must therefore include an in-built implementation strategy.

## 5. CONCLUSION

Although unlike before the 1990s, elections have become more or less routine, they were, until fairly recently in Africa in general, and in the eastern and southern African region in particular, a source of conflict and political instability instead of a vehicle for building and



consolidating democracy. Kenya and Zimbabwe, which in 2007/2008 displayed the worst extremes of failed electoral processes in which the EMBs were fully complicit have since the adoption of new constitutions developed new legal frameworks for administering and managing elections which certainly contributed to the relatively peaceful and fairly successful elections that were conducted in 2013. Of the other two countries covered in the study, Botswana is only one of two African countries that have since independence regularly held free, fair and credible elections. South Africa joined the exclusive honourable coterie of countries that have been holding free and fair elections after the end of apartheid in 1994. It has been the main contention of this paper that the legal framework that defines the nature and structure of an EMB has an impact not only on its performance but also on the credibility and integrity of the electoral process. The ingenuity and capriciousness of those who want to hang on to power by undermining the integrity of elections must never be underestimated. Three main points can be noted from this comparative analysis.

First, whilst it is clear that the EMB model and the legal framework within which it operates is of crucial importance, it will be simplistic to assume that this on its own is the sole and decisive factor. Otherwise, how can we explain the consistently good record of free and fair elections in Botswana against a rather weak legal framework? The element of good political leadership, political good will and the political commitment to allow an EMB to act freely and impartially is important. However, the ability of an EMB to conduct free and fair election requires a well-crafted and comprehensive legal framework and should not depend almost entirely on the good will of the political leadership, as it presently does in Botswana.

A second point to note is that the extensive nature and scope of the legal framework for free and fair elections in Kenya and Zimbabwe, combined with the constitutional entrenchment of many core aspects of the independence and effective operation of their EMBs provide a solid legal foundation to build on for the future. It is no surprise that the 2013 elections in both countries were far better organised and managed than the 2007/2008 elections and were therefore, in spite of several shortcomings more acceptable to the voters. Three aspects of this framework are worth noting. The first is that the obligation on both the executive and the legislature to design a genuinely independent EMB is one that is legally enforceable at the instance of ordinary citizens and CSOs. The second is that the EMB's independence is not only legally protected but all persons and institutions are obliged to respect this as well as do all in their powers to help it achieve its objectives. Because of the underlying constitutional values and principles, action can be brought against EMBs if they fail to act in an impartial and fair manner. Finally, the effectiveness of the legal framework depends on knowledge on the part of citizens and their willingness to ensure that it is fully enforced. This is where CSOs and where necessary, the international donor community can come in. Regular campaigns to educate people about the legal framework and the rights and duties that it imposes will go a long way to help in ensuring that all participants in the electoral process act in a manner that will ensure a credible and legitimate outcome.

A third point to note is the importance of international and regional legal standards in the legal framework. As a result of the fairly strong language used in incorporating international, regional and sub-regional law in the Kenyan and Zimbabwean Constitution and to a limited extent, under the South African Constitution, it is now possible to approach courts to insist that the EMB design as well as practices should be made to conform to certain minimum international electoral standards of election management and administration. On the basis of this, it can therefore be argued that a government does not have an absolute discretion in the design of an EMB or all of its features, such as its powers and the manner of funding. Where it

does no more than create a sham EMB which it can easily control and manipulate, then this could be challenged in court.

Generally, although each country has to tailor the legal framework for regulating electoral matters according to its needs and the particular model chosen and its detail structure will reflect its political system, its geography, ethnic mix and dynamics and a host of other peculiar factors, the ultimate goals are the same for each country; to come up with a system that will ensure free, fair and credible elections that are accepted by the electorate. As elections are increasingly becoming more and more competitive, with a risk of violence where there is a perception of fraud, the need to design credible and legitimate electoral processes managed by competent EMBs has become an imperative for political stability and the deepening of constitutionalism. The evidence from the four countries covered in this study show not only a strong commitment to promoting fair multiparty competition but also that, unlike in the past, regional organisations like the AU and sub-regional organisations like the SADC are investing a lot to monitor elections and provide fairly objective and frank reports. This combined with the standards that they have set will increasingly put pressure on African governments to comply with good internationally recognised and agreed practices. This will also certainly reduce the opportunities for electoral malpractices by lowering the risks of irregularities and enhance citizens' participation and eventually their acceptance of the outcome of the process.

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<sup>1</sup> For an elaborate discussion of these models, see generally, Catt, *et al.* 2014. *Electoral management design. Revised edition*, Stockholm: International IDEA: 6-31; and Ace Project, n.d *Electoral management*. Retrieved April 15, 2015, from <http://aceproject.org/ace-en/topics/em/the-legal-framework-the-context-for-the-emb2019s/default>.

<sup>2</sup> See for example, article 48(1) of the Cameroon Constitution of 1996 which states that "The Constitutional Council shall ensure the regularity of presidential, parliamentary elections and referendum operations. It shall proclaim the results thereof."

<sup>3</sup> For a full discussion of this, see Catt, *et al.* 2014. *Electoral management design. Revised edition*. Stockholm: International IDEA: 6-31.

<sup>4</sup> See the following reports: New Zimbabwe, 2013. Zimbabwe election: SADC observer mission's summary statement. Retrieved on March 25, 2015 from <http://www.newzimbabwe.com/news-12240-SADC+observer+team+summary+statement/news.aspx> and SADC Parliamentary Forum, 2013. Election observation mission to the 31<sup>st</sup> July, 2013 Zimbabwe harmonised general elections. Retrieved on 20 March 2015 from [http://www.sadcpf.org/index.php?option=com\\_content&view=article&id=131%3Aelection-observation-mission-to-the-31st-july-2013-zimbabwe-harmonised-general-elections&catid=125%3Anews-events&Itemid=146](http://www.sadcpf.org/index.php?option=com_content&view=article&id=131%3Aelection-observation-mission-to-the-31st-july-2013-zimbabwe-harmonised-general-elections&catid=125%3Anews-events&Itemid=146); African Union, 2013. Report of the African Union election observation mission to the July 31, 2013, harmonised elections. Retrieved on March 19, 2015 from <http://pa.au.int/en/sites/default/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf>; and Electoral Commissions Forum of SADC Countries, 2013. Election observation mission report, Zimbabwe harmonised elections July 2013. Retrieved on March 18, 2015 from <http://eisa.org.za/PDF/zim2013ecf.pdf>

<sup>5</sup> Also see, Pan African Parliament, 2008. Report of the Pan African Parliament election observer mission presidential run-off election and House of Assembly by-elections Republic of Zimbabwe, June 27, 2008 PAP/S/RPT/76/08; and Zimbabwe Election Support Network, 2008. Report on the Zimbabwe 29 March 2008 harmonised elections and 27 June presidential run-off. Retrieved on April 15, 2015 from [http://www.zesn.org.zw/publications/publication\\_275.pdf](http://www.zesn.org.zw/publications/publication_275.pdf).

<sup>6</sup> For example, the 1966 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>7</sup> For example, article 21 provides that everyone has the right to take part in the government of his country; that the will of the people shall be the basis of the authority of government and that this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage, held by secret vote or equivalent free voting procedures.

<sup>8</sup> See, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service Adopted at the Fifty-seventh Session of the Human Rights Committee, on 12 July 1996,

CCPR/C/21/Rev.1/Add.7, General Comment No. 25.

<sup>9</sup> See, African Democracy Encyclopaedia Project, 2013. Zimbabwe Electoral Commission. Retrieved April 29, 2015 from <http://www.content.eisa.org.za/sites/eisa.org.za/files/imports/import-data/WEP/zimzec.htm>.

<sup>10</sup> See for example, Report on the status of OAU/AU Treaties (as at 11 July 2012). Retrieved April 16, 2015 from <http://www.peaceau.org/uploads/ex-cl-728-xxi-e.pdf>.

<sup>11</sup> Zimbabwe too has neither signed nor ratified the African Charter on Democracy, Elections and Governance. Kenya has only signed but not ratified it.

<sup>12</sup> 2011(3) SA 347 (CC).

<sup>13</sup> [1992] BLR 119.

<sup>14</sup> *Ibid.* at p. 154.

<sup>15</sup> *Ibid.*

<sup>16</sup> See further, Fombad, C.M. 2013. Some perspectives on durability and change under modern African constitutions, *International Journal of Constitutional Law*. 11(2) 382-413.

<sup>17</sup> It states in section 2 “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and *the obligations imposed by it must be fulfilled.*” This is reiterated in section 237 which states, “*All constitutional obligations must be performed diligently and without delay.*” (emphasis added).

<sup>18</sup> Article 21(4) of the Kenyan Constitution states; “The State *shall enact and implement legislation* to fulfil its international obligations in respect of human and fundamental rights.” (emphasis added).

<sup>19</sup> Section 2(2) states; “The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, *and must be fulfilled by them.*” (emphasis added).

<sup>20</sup> For a discussion of this interesting issue, see, Mendes, (n.d) Constitutional jurisdiction in Brazil: The problem of unconstitutional legislative omission. Retrieved on April 20, 2015 from

[http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfDiscurso\\_en\\_US/anexo/Omisao\\_Legislativ\\_a\\_v\\_Ing.pdf](http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfDiscurso_en_US/anexo/Omisao_Legislativ_a_v_Ing.pdf) ; and also, Paczolay, (n.d) Experience of the execution of Constitutional Court’s decisions

declaring legislative omission in Hungary. Retrieved on April 20, 2015 from

[http://www.venice.coe.int/docs/2008/CDL-JU\(2008\)019prog-e.asp](http://www.venice.coe.int/docs/2008/CDL-JU(2008)019prog-e.asp).

<sup>21</sup> An example of where the constitution provides otherwise, is the Botswana Constitution, which in section 64 establishes separate and independent delimitation commission to deal with issues of constituency demarcation.

<sup>22</sup> See further, Commonwealth Secretariat, 2014. Botswana General Elections, 24 October 2014. Retrieved on April 23, 2015 from <http://www.oecd-ilibrary.org/content/book/9781848599246-en>.

<sup>23</sup> Also worth mentioning are the Campaign Finance Act 2013, the Leadership, Ethics and Integrity Act 2012 and the Public Procurement Act 2011.

<sup>24</sup> This is because under section 103 of the 1966 Botswana Constitution, at least 5 of the 7 members of the JSC are directly or indirectly appointed by the President.

<sup>25</sup> The stringent qualifications are spelt out in paper 6, which spells out detail guidelines on assessing “leadership and integrity,” and article 250(1)(4) of the Constitution and further details with respect to professional competence and qualifications in sections 6(2) and 10(2) of the IEBC Act.

<sup>26</sup> In dealing with this, article 88(2) states: “A person is not eligible for appointment as a member of the Commission if the person –

- a) A person who has at any time within the preceding five years held office or stood for election as-
  - i) a member of Parliament or of a county assembly; or
  - ii) a member of the governing body of a political party; or
- b) holds any State office.”

Clause 3 adds that ; “A member of the Commission shall not hold another public office.”

<sup>27</sup> For example, under section 174(3) of the Constitution, the President, unlike in the case of other judges, appoints both the Chief Justice and the Deputy Chief Justice with only a bare and often symbolic obligation to consult the JSC and the leaders of parties represented in the National Assembly. Again, under section 193 (4) of the Constitution, the President also appoints the head of the other institutions on the recommendation of the National Assembly guided by vague criteria which makes it easy for partisan considerations to prevail.

<sup>28</sup> See, City Press ( 2014, March 4), EFF rejects ‘ANC deployee’ to head IEC. Retrieved on March 20, 2014 from <http://www.citypress.co.za/politics/eff-rejects-anc-deployee-head-iec/>.

<sup>29</sup> For an analysis of this policy, see Twala, C. 2014. The African National Congress (ANC) and the cadre deployment policy in the post-apartheid South Africa: A product of democratic centralisation or a recipe for a constitutional crisis? *Journal of Social Science*. 41(2) 159-165.

<sup>30</sup> Although section 238 (3) states that if the President after consulting with the JSC makes an appointment which is inconsistent with their recommendations, he “must cause the Committee on Standing Rules and Orders to be informed as soon as practicable.” This is doubly confusing. First, because section 238(1)(a) makes it

imperative for him to consult both the JSC and this Committee! Second, section 339(2) makes it clear that the obligation to consult these two bodies doesn't mean that he is "obliged to follow any recommendations made by" them.

<sup>31</sup> In this regard, section 236(1) states: "Members of the independent Commissions must not, in the exercise of their functions –

- (a) act in a partisan manner;
- (b) further the interests of any political party or cause; or
- (c) violate the fundamental rights or freedom of any person."

<sup>32</sup> For example, the resignation of two MDC-T nominated commissioners from the ZEC in 2013, at a time when the former had petitioned against the elections raised fears that this might denigrate the credibility of the process and could cause supporters of the party to once again resort to violence. Although it did not happen, the resignation of commissioners appointed by losing parties for partisan reasons could always discredit the electoral processes and provoke violence. See details of this in the African Union, 2013. Report of the African Union election observation mission to the July 31, 2013, harmonised elections.

Retrieved on March 19, 2015 from

<http://pa.au.int/en/sites/default/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf>.

<sup>33</sup> With an estimated population of just over 2million, the registered voting population in the 2014 elections was 824, 073. See further, Mosikare, O. 2014. Tough Elections for Botswana. Retrieved on May 20, 2015 from <http://www.osisa.org/hrdb/botswana/tough-elections-botswana>.

<sup>34</sup> See section 66(8)-(10) of the Botswana Constitution, article 251 of the Kenyan Constitution, section 194 of the South African Constitution and section 237(2) of the Zimbabwean Constitution.

<sup>35</sup> See for example, articles 10, 20, 21 and 73-77 of the Kenyan Constitution and section 26 of the Independent Electoral Commission and Boundaries Act.

<sup>36</sup> The electoral disputes dropped from 1113 in the 1999 elections to 314 in the 2000 elections to 252 in the 2004 elections. See further, Ayoub, A. and Ellis, A. 2010. *Electoral Justice: The International IDEA handbook*. Sweden: International IDEA, 184-185.

<sup>37</sup> For an indication of the number of disputes that came before the Kenyan IEBC in 2013, see Hassan, A. I. 2013. IEBC Chairperson's opening remarks at the forum on handling of election disputes in Kenya. Experts' meeting at Intercontinental hotel, Nairobi on 29 November, 2013. Retrieved on April 19, 2015 from <http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/downloads/item/iebc-chairperson-s-opening-remarks-at-the-forum-on-handling-of-election-disputes-in-kenya-29112013>.

<sup>38</sup> For a detail report and discussion of the numerous cases that have come before the dispute resolution bodies of some of the four countries covered in this study. For the cases in Zimbabwe, see, Zimbabwe situation, 2013. Court Watch 6/2014 of 24<sup>th</sup> of April [Electoral Court & Election Petitions: Part 1: Withdrawn Petitions] . Retrieved on April 20, 2015, from <http://www.zimbabwesituation.com/news/court-watch-72014-28th-april-electoral-court-election-petitions-part-ii-petitions-dismissed-electoral-court/>.

<sup>39</sup> See further, African Union, 2013. Report of the African Union election observation mission to the July 31, 2013, harmonised elections. Retrieved on March 19, 2015 from <http://pa.au.int/en/sites/default/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf>.

<sup>40</sup> See for example, article 38 of the Kenyan Constitution, section 19 of the South African Constitution , and section 67 of the Zimbabwean Constitution.

<sup>41</sup> See the Kenyan case of, *Kanyingi v Nyonga & 2 Others* [2008] 3KLR (EP) 713.

<sup>42</sup> See sections 90-115 of the Electoral Act.

<sup>43</sup> See sections 56-63 and 106-107 of the Elections Act.

<sup>44</sup> Sections 84-92, 133A-133E and 134-160 of the Electoral Act.

<sup>45</sup> Sections 87-94,95-98, and 110-113 of the Electoral Act.

<sup>46</sup> See Samatar, A.I. (1999). *An African miracle: State and class leadership and colonial legacy in Botswana development*. Portsmouth: Heinemann.

<sup>47</sup> See, Freedom House, 2015. *Freedom in the World 2015*. Retrieved May 20, 2015 from

[https://freedomhouse.org/report/freedom-world/freedom-world-2015?gclid=CjwKEAjw9uypBRD5pMDYtsKxvXcSJACcb9AYuph6iacntAGsEnABZ1H44sCsIBM\\_ZihKMvuXN2VDVhoCzjvw\\_wcB#.VTtX4NKqqkr](https://freedomhouse.org/report/freedom-world/freedom-world-2015?gclid=CjwKEAjw9uypBRD5pMDYtsKxvXcSJACcb9AYuph6iacntAGsEnABZ1H44sCsIBM_ZihKMvuXN2VDVhoCzjvw_wcB#.VTtX4NKqqkr) .

<sup>48</sup> See for example, Report of the Commonwealth Expert Team, 2014. *Commonwealth Elections Reports, Botswana General Elections, 24 October 2014*, London: Commonwealth Secretariat, and African Union. African Union Election Observation Mission (AUEOM) to the 24 October 2014 General Elections in the Republic of Botswana. Retrieved May 15, 2015 at

<http://pa.au.int/en/sites/default/files/AUEOM%20Report%20to%20the%202014%20General%20Elections%20in%20Botswana%20Final.pdf> .

<sup>49</sup> See, section 38 of the Constitution.

<sup>50</sup> It was no surprise that shortly after he retired, Festus Mogae was awarded the Ibrahim Prize for Achievement in African Leadership in 2008. A prize that is supposed to be awarded annually to deserving African leaders but often there aren't many who qualify to receive this prestigious award. The only other winners have been Presidents Pohomba of Namibia in 2014, Rodriguez Pires of Cape Verde in 2011 and Joaquim Chissano of Mozambique in 2007. For more information on this, see, (2015), The Ibrahim Prize for Achievement in African Leadership. Retrieved on April 20, 2015 from <http://www.moibrahimfoundation.org/ibrahim-prize/>.

<sup>51</sup> Most of the election observer reports on Botswana have regularly recommended that the country needs to review its constitutional and legal framework for elections as well as sign and ratify regional and international treaties. See African Union. African Union Election Observation Mission (AUEOM) to the 24 October 2014 General Elections in the Republic of Botswana. Retrieved May 15, 2015 at <http://pa.au.int/en/sites/default/files/AUEOM%20Report%20to%20the%202014%20General%20Elections%20in%20Botswana%20Final.pdf>, pp.7-8, and 19; and Commonwealth Secretariat, 2014. Botswana General Elections, 24 October 2014. Retrieved on April 23, 2015 from <http://www.oecd-ilibrary.org/content/book/9781848599246-en>, at p. 17.

<sup>52</sup> See, Freedom House, 2015. Sub-Saharan Africa. Retrieved on April 20, 2015 from <https://freedomhouse.org/regions/sub-saharan-africa#.VTtw5NKqqko>.

<sup>53</sup> See, Capazorio, B. and Mabuza, K. (2015, April 24). Zuma man grabs top IEC job *The Times*, pp1-2.

<sup>54</sup> See for example, sections 1(d), 181(2) and 193(1) of the Constitution.

<sup>55</sup> See, Toulou, L. (n.d). A brief analysis of recent events in Kenya: 2007 post election violence. Retrieved on 20 April 2015 from <http://www.content.eisa.org.za/node/36>; and for more elaborate commentaries, see Abuya, E. 2010. Can African states conduct free and fair presidential elections? *Northwestern Journal of International Human Rights Law*. 8(2) 122-149 and the same author in, 2009. Consequences of a flawed presidential election. *Legal Studies* 29(1) 127-158.

<sup>56</sup> See for example, Pan African Parliament, 2008. Report of the Pan African Parliament election observer mission presidential run-off election and House of Assembly by-elections Republic of Zimbabwe, June 27, 2008 PAP/S/RPT/76/08; Zimbabwe Election Support Network, 2008. Report on the Zimbabwe 29 March 2008 harmonised elections and 27 June presidential run-off. Retrieved on April 15, 2015 from [http://www.zesn.org.zw/publications/publication\\_275.pdf](http://www.zesn.org.zw/publications/publication_275.pdf); and also Badza, S. (n.d.). Zimbabwe's 2008 harmonized elections regional and international reaction. Retrieved on April 23, 2015 from [http://www.kas.de/upload/dokumente/2010/05/Defying\\_9.pdf](http://www.kas.de/upload/dokumente/2010/05/Defying_9.pdf).

<sup>57</sup> See generally, African Union Commission, 2013. Report of African Union elections observation mission to the 4 March 2013 general elections in Kenya. Retrieved on April 21, 2015 from [http://pa.au.int/en/sites/default/files/African%20Union%20Election%20Observation%20Report%20Kenya%202013\\_0.pdf](http://pa.au.int/en/sites/default/files/African%20Union%20Election%20Observation%20Report%20Kenya%202013_0.pdf); European election observation mission to Kenya, general elections 2013, 2013. Final report. Retrieved on 18 April 2015 from [http://www.eods.eu/library/eu-eom-kenya-2013-final-report\\_en.pdf](http://www.eods.eu/library/eu-eom-kenya-2013-final-report_en.pdf); Commonwealth Secretariat, 2013. Report of the Commonwealth observer group: Kenya general elections 4 March 2013. Retrieved on April 19, 2015, from <http://thecommonwealth.org/sites/default/files/news-items/documents/130411.pdf>; Carter Center, 2013. Observing Kenya's March 2013 national elections: Final report. Retrieved on April 19, 2015 at [http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/kenya-final-101613.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf).

<sup>58</sup> Petition Number 5, 3 & 4 of 2013.

<sup>59</sup> For a critique of this judgment as being too deferential to the IEBC, see: Musila, G. and Sihanya B. *et al.*, 2013. *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence*. Law Society of Kenya, Nairobi; and African Centre for Elections Governance, 2013. Africog-KPTJ Elections 2013 Compendium. Retrieved on April 20, 2015 at <http://africog.org/reports/AfriCOG-KPTJ%23Elections2013%20Compendium.pdf>.

<sup>60</sup> See in particular, New Zimbabwe, 2013. Zimbabwe election: SADC observer mission's summary statement. Retrieved on March 25, 2015 from <http://www.newzimbabwe.com/news-12240-SADC+observer+team+summary+statement/news.aspx> and SADC Parliamentary Forum, 2013. Election observation mission to the 31<sup>st</sup> July, 2013 Zimbabwe harmonised general elections. Retrieved on 20 March 2015 from [http://www.sadcpf.org/index.php?option=com\\_content&view=article&id=131%3Aelection-observation-mission-to-the-31st-july-2013-zimbabwe-harmonised-general-elections&catid=125%3Anews-a-events&Itemid=146](http://www.sadcpf.org/index.php?option=com_content&view=article&id=131%3Aelection-observation-mission-to-the-31st-july-2013-zimbabwe-harmonised-general-elections&catid=125%3Anews-a-events&Itemid=146); African Union, 2013. Report of the African Union election observation mission to the July 31, 2013, harmonised elections. Retrieved on March 19, 2015 from <http://pa.au.int/en/sites/default/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf>; and Electoral Commissions Forum of SADC Countries, 2013. Election observation mission report, Zimbabwe harmonised elections July 2013. Retrieved on March 18, 2015 from <http://eisa.org.za/PDF/zim2013ecf.pdf>.

<sup>61</sup> For an elaborate discussion of this, see Matyszak, D. 2015. An examination of the performance of the Zimbabwe Electoral Commission (ZEC) in managing the 2013 elections in Zimbabwe. Retrieved on April 23,

2015 from <http://www.davidcoltart.com/2015/01/%EF%BF%BCan-examination-performance-zimbabwe-electoral-commission-zec-managing-2013-elections-zimbabwe/> .

<sup>62</sup> For the provisions expanding the scope for *locus standi*, see articles 22(1) of the Kenyan Constitution, section 38 of the South African Constitution and section 85 of the Zimbabwean Constitution.

<sup>63</sup> See for example, African Centre for Open Governance, (n.d). Taking stock: Challenges and prospects of implementing the Constitution of Kenya, 2010. Retrieved on March 20, 2015 from [http://www.africog.org/reports/taking\\_stock](http://www.africog.org/reports/taking_stock); Sihanya, B. (n.d). Constitutional commissions in Kenya: Experiences, challenges and lessons. Retrieved on March 20, 2015 from <http://www.fes-kenya.org/media/publications/Constitutional%20Commissions%20-%20Prof.%20Ben%20Sihanya.pdf> ; Sihanya, B. (n.d). Constitutional implementation in Kenya, 2010-2015: Challenges and prospects. Retrieved on March 20, 2015 from <http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/38845/full%20text%20.pdf?sequence=1>.

## REFERENCES

Abuya, E., 2009. Consequences of a flawed presidential election. *Legal Studies* 29(1) 127-158.

Abuya, E. 2010. Can African states conduct free and fair presidential elections? *Northwestern Journal of International Human Rights Law*. 8(2) 122-149.

Ace Project, n.d *Electoral management*. Retrieved April 15, 2015, from <http://aceproject.org/ace-en/topics/em/the-legal-framework-the-context-for-the-emb2019s/default>.

African Centre for Elections Governance, 2013. Africog-KPTJ Elections 2013 Compendium. Retrieved on April 20, 2015 at [http://africog.org/reports/AfriCOG-KPTJ\\_%23Elections2013%20Compendium.pdf](http://africog.org/reports/AfriCOG-KPTJ_%23Elections2013%20Compendium.pdf).

African Centre for Open Governance, (n.d). Taking stock: Challenges and prospects of implementing the Constitution of Kenya, 2010. Retrieved on March 20, 2015 from [http://www.africog.org/reports/taking\\_stock](http://www.africog.org/reports/taking_stock).

African Democracy Encyclopaedia Project, 2013. Zimbabwe Electoral Commission. Retrieved April 29, 2015 from <http://www.content.eisa.org.za/sites/eisa.org.za/files/imports/import-data/WEP/zimzec.htm> .

African Union. African Union Election Observation Mission (AUEOM) to the 24 October 2014 General Elections in the Republic of Botswana. Retrieved May 15, 2015 at <http://pa.au.int/en/sites/default/files/AUEOM%20Report%20to%20the%202014%20General%20Elections%20in%20Botswana%20Final.pdf> .

African Union, 2013. Report of the African Union election observation mission to the July 31, 2013, harmonised elections. Retrieved on March 19, 2015 from <http://pa.au.int/en/sites/default/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf>.

African Union Commission, 2013. Report of African Union elections observation mission to the 4 March 2013 general elections in Kenya. Retrieved on April 21, 2015 from [http://pa.au.int/en/sites/default/files/African%20Union%20Election%20Observation%20Report%20Kenya%202013\\_0.pdf](http://pa.au.int/en/sites/default/files/African%20Union%20Election%20Observation%20Report%20Kenya%202013_0.pdf).

---

Ayoub, A. and Ellis, A. 2010. *Electoral Justice: The International IDEA handbook*. Sweden: International IDEA.

Capazorio , B. and Mabuza, K.( 2015, April 24). Zuma man grabs top IEC job. *The Times*, pp1-2.

Carter Center, 2013. Observing Kenya's March 2013 national elections: Final report. Retrieved on April 19, 2015 at [http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/kenya-final-101613.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf).

Catt, *et al.* 2014. *Electoral Management Design. Revised Edition* Stockholm: International IDEA: 6-31; and Ace Project n.d *Electoral Management* Retrieved April 15, 2015, from <http://aceproject.org/ace-en/topics/em/the-legal-framework-the-context-for-the-emb2019s/default>.

City Press ( 2014, March 4), EFF rejects 'ANC deployee' to head IEC. Retrieved on March 20, 2014 from <http://www.citypress.co.za/politics/eff-rejects-anc-deployee-head-iec/>.

Commonwealth Secretariat , 2013. Report of the Commonwealth observer group: Kenya general elections 4 March 2013. Retrieved on April 19, 2015, from <http://thecommonwealth.org/sites/default/files/news-items/documents/130411.pdf>.

Commonwealth Secretariat, 2014. Botswana General Elections, 24 October 2014. Retrieved on April 23, 2015 from <http://www.oecd-ilibrary.org/content/book/9781848599246-en>

Cook, A and Sarkin, J. 2010. Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development. *Transnational Law & Contemporary Problems* 19: 453-489.

Electoral Commissions Forum of SADC Countries, 2013. Election observation mission report, Zimbabwe harmonised elections July 2013. Retrieved on March 18, 2015 from <http://eisa.org.za/PDF/zim2013ecf.pdf> .

Elisha, O.Z. and Otieno, W. S., 2012. *Handbook on Kenya's electoral laws and system*. Nairobi: Electoral Institute for Sustainable Democracy in Africa (EISA).

European election observation mission to Kenya, general elections 2013, 2013. Final report. Retrieved on 18 April 2015 from [http://www.eods.eu/library/eu-eom-kenya-2013-final-report\\_en.pdf](http://www.eods.eu/library/eu-eom-kenya-2013-final-report_en.pdf);

Fombad, C.M. 2013. Some perspectives on durability and change under modern African constitutions, *International Journal of Constitutional Law*. 11(2) 382-413.

Fombad, C.M. and Sebudubudu, D. 2007. The framework for curbing corruption, enhancing accountability and promoting good governance in Botswana. In *Essays on the law of Botswana*. Edited by Fombad, C.M. 82-126.Cape Town: Juta & Co.

---

Freedom House, 2015. Freedom in the world 2015. Retrieved May 20, 2015 from [https://freedomhouse.org/report/freedom-world/freedom-world-2015?gclid=CjwKEAju9uypBRD5pMDYtsKxvXcSJACcb9AYuph6iacntAGsEnABZ1H44sCsIBM\\_ZihKMvuXN2VDVhoCzjvw\\_wcB#.VTtX4NKqqkr](https://freedomhouse.org/report/freedom-world/freedom-world-2015?gclid=CjwKEAju9uypBRD5pMDYtsKxvXcSJACcb9AYuph6iacntAGsEnABZ1H44sCsIBM_ZihKMvuXN2VDVhoCzjvw_wcB#.VTtX4NKqqkr) .

Freedom House, 2015. Sub-Saharan Africa. Retrieved on April 20, 2015 from <https://freedomhouse.org/regions/sub-saharan-africa#.VTtw5NKqqko>.

Hassan, A. I. 2013. IEBC Chairperson's opening remarks at the forum on handling of election disputes in Kenya. Experts' meeting at Intercontinental hotel, Nairobi on 29 November, 2013. Retrieved on April 19, 2015 from <http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/downloads/item/iebc-chairperson-s-opening-remarks-at-the-forum-on-handling-of-election-disputes-in-kenya-29112013>.

Holm, J. and Mulutsi, P. 1990. *Democracy in Botswana*. Gaborone, Macmillan Botswana.

Jinadu, A. 2014. Lessons from electoral management and processes in West Africa. South African Institute of International Affairs, Occasional Paper 194.

Matyszak, D. 2015. An examination of the performance of the Zimbabwe Electoral Commission (ZEC) in managing the 2013 elections in Zimbabwe. Retrieved on April 23, 2015 from <http://www.davidcoltart.com/2015/01/%EF%BF%BCan-examination-performance-zimbabwe-electoral-commission-zec-managing-2013-elections-zimbabwe/> .

Mendes, (n.d) Constitutional jurisdiction in Brazil: The problem of unconstitutional legislative omission. Retrieved on April 20, 2015 from [http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfDiscurso\\_en\\_US/anexo/Omisao\\_Legislativa\\_v\\_Ing.pdf](http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfDiscurso_en_US/anexo/Omisao_Legislativa_v_Ing.pdf) .

Misra-Dexter, N. and February, J. 2010. Testing democracy : which way is South Africa going? Cape Town, IDASA.

Mosikare, O. 2014. Tough elections for Botswana. Retrieved on May 20, 2015 from <http://www.osisa.org/hrdb/botswana/tough-elections-botswana>.

Musila, G. and Sihanya B. *et al.*, 2013. *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence*. Law Society of Kenya, Nairobi

New Zimbabwe, 2013. Zimbabwe election: SADC observer mission's summary statement. Retrieved on March 25, 2015 from <http://www.newzimbabwe.com/news-12240-SADC+observer+team+summary+statement/news.aspx>.

Pan African Parliament, 2008. Report of the Pan African Parliament election observer mission presidential run-off election and House of Assembly by-elections Republic of Zimbabwe, June 27, 2008 PAP/S/RPT/76/08.

Paczolay, (n.d) Experience of the execution of Constitutional Court's decisions declaring legislative omission in Hungary. Retrieved on April 20, 2015 from [http://www.venice.coe.int/docs/2008/CDL-JU\(2008\)019prog-e.asp](http://www.venice.coe.int/docs/2008/CDL-JU(2008)019prog-e.asp) .



---

Poteete, A. 2014. Botswana: Democracy derailed? Botswana's fading halo. Retrieved May 25, 2015 from <http://allafrica.com/stories/201410211490.html>

Poteete, A. and Holm, J. 2014. Botswana Democracy: On Course or Derailing? Retrieved May 28, 2015 from <https://africaplus.wordpress.com/2014/11/03/botswana-democracy-on-course-or-derailing/>

The Economist, 2004 Botswana: Africa's Prize Democracy, Retrieved May 20, 2015, from <http://www.economist.com/node/3364739>

The Ibrahim prize for achievement in African leadership. Retrieved on April 20, 2015 from <http://www.moibrahimfoundation.org/ibrahim-prize/> .

Thiankolu, M. 2013. Resolution of electoral disputes in Kenya: An audit of past court decisions. In *Handbook on election disputes in Kenya. Context, legal framework, institutions and jurisprudence*, edited by Musila, G., Sihanya, B. *et al* , 57-94. Kenya: Law Society of Kenya.

Toulou, L. (n.d). A brief analysis of recent events in Kenya: 2007 post election violence. Retrieved on 20 April 2015 from <http://www.content.eisa.org.za/node/36>

Twala, C. 2014. The African National Congress (ANC) and the cadre deployment policy in the post-apartheid South Africa: A product of democratic centralisation or a recipe for a constitutional crisis? *Journal of Social Science*. 41(2) 159-165.

Samatar, A.I. (1999). *An African miracle: State and class leadership and colonial legacy in Botswana development*. Portsmouth: Heinemann.

Sihanya, B. (n.d). Constitutional commissions in Kenya: Experiences, challenges and lessons. Retrieved on March 20, 2015 from <http://www.fes-kenya.org/media/publications/Constitutional%20Commissions%20-%20Prof.%20Ben%20Sihanya.pdf> .

Sihanya, B. (n.d). Constitutional implementation in Kenya, 2010-2015: Challenges and prospects. Retrieved on March 20, 2015 from <http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/38845/full%20text%20.pdf?sequence=1>.

Van de Vijver, L. 2006. *The judicial institution in southern Africa. A comparative study of common law jurisdictions*. Cape Town: Siber Ink CC.

Zimbabwe Election Support Network, 2008. Report on the Zimbabwe 29 March 2008 harmonised elections and 27 June presidential run-off. Retrieved on April 15, 2015 from [http://www.zesn.org.zw/publications/publication\\_275.pdf](http://www.zesn.org.zw/publications/publication_275.pdf).

Zimbabwe situation, 2013. Court Watch 6/2014 of 24<sup>th</sup> of April [Electoral Court & Election Petitions: Part 1: Withdrawn Petitions] . Retrieved on April 20, 2015, from

---

<http://www.zimbabwesituation.com/news/court-watch-72014-28th-april-electoral-court-election-petitions-part-ii-petitions-dismissed-electoral-court/>.

## **TABLE OF CASES**

*Attorney-General v Dow* [1992] BLR 119.

*Glenister v President of the Republic of South Africa* 2011(3) SA 347 (CC).

*Kanyingi v Nyonga & 2 Others* [2008] 3KLR (EP) 713.