
ZIMBABWE LAW REVIEW

Volume 16

1999



Issue Editors

M. Gwisai, K. Hodzi, L. Madhuku, D. Matyszak, Prof. W. Ncube

THE ZIMBABWE LAW REVIEW

1999 VOLUME 16

CONTENTS

ARTICLES

- Freedoms of Association and of Assembly: Some International and Comparative Perspectives 1
LOVEMORE MADHUKU
- Anton Piller Orders in Nigeria 22
E.S. NWAUCHE
- The Land Question in Zimbabwe : Can Indian Jurisprudence Provide the Answers? 30
WEBSTER CHINAMORA
- Capital Punishment, the Death Row Phenomenon and the Supreme Court of Nigeria: *Onuoha Kalu V The State* [1998] 12 S.C.N.J. 1 45
A. A. OBA
- The Roads to Nowhere: Fighting Corruption in Zimbabwe 61
KUMBIRAI HODZI
- Electoral Process in Botswana: A Synopsis 70
OAGILE KEY DINGAKE
- A Survey of Constitutional Amendments in Post-independence Zimbabwe (1980-1999) 82
LOVEMORE MADHUKU

NOTES AND COMMENTS

- Review of Cases on Local Government Law Between 1980 and 1999 108
ARTHUR MANASE
- A Review of the Law Governing Termination of Employment of Junior Employees in Local Authorities 111
ARTHUR MANASE

ELECTORAL PROCESS IN BOTSWANA: A SYNOPSIS

Oagile Key Dingake

Lecturer in Law, University of Botswana

INTRODUCTION

The purpose of this article is to provide an overview of Botswana's electoral process. It outlines the functional demands of elections, identifies the contentious issues in the electoral process, and where appropriate, suggests the way forward. Botswana's electoral system has yielded unsatisfactory results which have tended to distort the support of political parties on the ground.¹ To this extent, the article discusses, albeit briefly, the political consequences of the first past the post electoral systems and other electoral systems. Botswana is a multi-party state with nine duly registered parties.²

The two leading political parties are the Botswana Democratic Party (BDP) and the Botswana National Front. The administration of elections is the responsibility of the Independent Electoral Commission.³

POLITICAL BACKGROUND

Botswana gained its independence from Britain in 1966 and inherited a liberal democratic system of government. The constitution that was adopted mandated the holding of elections once every five years. Since then (1965) the country has held seven (7) local and parliamentary elections.⁴

In March 1965 Botswana held its first elections which led to self-rule and full independence. The 1965 general elections were administered by the colonial administration. The first four elections after the 1965 elections have been administered by the Botswana Civil Service under the Permanent Secretary to the Office of the President, as supervisor of elections.⁵ After a series of complaints that the Permanent Secretary is not an impartial figure to administer elections, the government in 1988 responded by removing the office of the supervisor of elections from the Office of the President into an "independent office". This move did not succeed to allay fears of partiality as opposition parties continued to call for an independent electoral commission.

Botswana is a multi-party state which has never postponed elections which were constitutionally due. This track record of absolute fidelity to elections is unparalleled in Africa. A caveat need to be added, however, that the holding of elections does not

-
1. Botswana follows the first past the post electoral system which it inherited from Britain in 1966.
 2. Report to the Minister of Presidential Affairs and Public Administration on the General Election (1994).
 3. S. 67 of the Constitution of Botswana, as amended in 1997.
 4. The 1994 elections were the seventh since 1965.
 5. Bojosi *et al* (eds), "Consolidating Democracy; The Electoral Process Under Scrutiny" (Report of the Workshop on Electoral Law and Administration of Elections of Botswana Held on 19-20 February, 1993, Chapter 5.

automatically mean a country is democratic.⁶ Elections are but, a significant ingredient of a democratic order.

FUNCTIONAL DEMANDS OF THE ELECTORAL PROCESS

Elections are an essential aspect of a democratic dispensation. The primary purpose of elections are to allow people to select or choose a government of their choice. It therefore follows that the wishes of the people as expressed through the ballot should be respected. As it is often said — there is no point in consulting them if no notice is to be taken of their answer.

The above purpose, which one may call the fundamental purpose of elections is crisply captured in article 21 (3), of the Universal Declaration of Human Rights which provides:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by a secret ballot or by equivalent free voting procedures.

Although conventional wisdom has it that the Universal Declaration of Human Rights is not binding, it being a declaration, the tide and heightened commitment to democracy leads one to a submission, that free and fair elections held at regular intervals is now a binding rule of international law. Voting rights lie at the root of parliamentary democracy. Indeed, many regard them as a basic human right. Nevertheless, they are not like the air we breath. They do not just happen. They have to be conferred, or at least defined and the categories of citizen, who enjoy them have also to be defined.⁷

However fair and regular the election may be, their political consequences are governed on the main by the electoral system that is operative. Electoral systems determine the way in which votes are cast and ultimately how seats are allocated, while the electoral law deals with the procedure of conducting elections.⁸

An electoral system has to fulfil the following needs: create a legislature that is representative, accountable and should not emasculate the effectiveness of the ruling party to govern.⁹ Constitutional engineers have also been concerned with ensuring that in any electoral system that is chosen there should be a link between the voters and their elected representative so as to avoid representatives representing only their views and thereby undermining democracy.

Democratic elections must meet certain basic requirements, which are:

- (i) All adults regardless of race or religion, should enjoy the right to vote.
- (ii) The ballot should be cast freely and secretly.
- (iii) Elections should be held regularly within prescribed time-limits.
- (iv) All sections of the community should be free to put forward candidates, to form political parties and campaign openly.

6. *Ibid.*, Chapter 2-6.

7. Per John Donaldson UR in *Hipperson v Newsburg Electoral Registration Officer* 1985 Q.B. 1060. 1067.

8. Kader Asmal *et al* "An Electoral System for South Africa". In *Free and Fair Elections* (1994), pp. 1-23.

9. *Ibid.*

- (v) Campaign period should be of sufficient length.
- (vi) An honest, competent, non-partisan administrative body with an impartial body being able to adjudicate over election disputes.
- (vii) All parties should accept the results and facilitate smooth transfer of power.

The above constitutes the minimum requirements of free and fair elections. Over time democratic governments have changed or adapted their electoral systems and/or laws to meet the above criteria.

AN OVERVIEW OF THE CONTENTIOUS ISSUES IN THE ELECTORAL PROCESS

Botswana's opposition parties have consistently complained of exclusion in the running of elections.¹⁰ Complaints have been made consistently that election administration is not impartial and transparent. Lack of transparency has led to charges by some political parties of election rigging. Growing discontent with the electoral process has in the past led opposition parties to consider boycotting the elections. There have been election petitions complaining of undue election of certain candidates in virtually every election by the ruling party or the opposition parties. Some of these petitions have been successful.¹¹

The state media has also been accused of lack of impartiality in its coverage of election campaigns.¹² The state media is composed of the daily newspaper and the radio. Radio Botswana reaches a majority of people, more than any other media in Botswana and consequently has a significant bearing on election campaigns and results. There is to date no law that regulates equitable coverage of political parties campaigns. Equitable coverage of all parties is one of the essential ingredients of fair and democratic elections. A vibrant, vigilant press committed to equitable coverage lies at the root of democracy, for without a free press committed to the equitable coverage of political players, public education that brings about informed choice will not be possible.

The above concerns demonstrate that Botswana's electoral process is not beyond reproach and its credibility is at best suspect. It is not possible to dismiss these concerns as frivolous and vexatious. A catalogue of these concerns alone justifies a rigorous academic study, so that if all or some of these concerns are found to be true, remedial measures may be taken. Indeed, an electoral process must not only be fair and democratic, but must be seen to be so.

Although the impartiality of the delimitation commission has not been seriously and consistently taken up as an issue, concerns have been expressed in the past by academics and other sections of civil society that there is quite often malapportionment of electoral districts (constituencies). In 1981 the disparity in wards in terms of registered voters varied from as high as 17 to 1 in Lobatse and 12 to 1 in Ghanzi to a low 2.5 to 1 in Gaborone.¹³ The establishment of electoral boundaries is a critical part of the electoral process because it

10. Bojosi (note 5) Chapter 5.

11. *Ibid.*, Chapter 3.

12. Bojosi (note 5) Chapter 5.

13. John Holm, "Elections and Democracy in Botswana". In *Democracy in Botswana* (1989), p. 191.

has a direct bearing on the results of the elections. It is important that the law should provide for a fair, transparent and all inclusive procedure of delimiting electoral boundaries. Malapportionment or gerrymandering as it is called in electoral discourse, also leads to inequality of voters. In a situation where a constituency is twice as big as another, for instance, it effectively means that a voter of the bigger constituency has less influence in selecting a candidate than another voter in a smaller constituency.¹⁴

Some of Botswana's electoral laws are unnecessarily inhibitive to candidates, voters, political parties and ultimately undermine democracy. The electoral laws place age, residence and financial limitations on voters, candidates and political parties respectively. Currently voting age is 18 years.¹⁵ Candidates are required to pay some deposits. Batswana outside the country will vote for the first time in the 1999 elections.¹⁶ Political parties are not subsidised. After elections the law empowers parliament and in some cases a minister to appoint MPs and Counsellors respectively. Complaints have been raised in the past that the system of special nominations is undemocratic especially when it is used to reward party members and to overturn victory of another party, as has happened on several occasions in Botswana.

There is no law that governs a situation where chosen representatives defect from their political parties to join other political parties before the expiry of their terms of office. The current position is that elected representatives can defect to other parties and maintain their seats, notwithstanding that they were elected on a different party ticket.¹⁷ The role of the police during elections is not clearly defined and concerns have been expressed that in some rural constituencies their presence may be intimidatory.

The judiciary has often adopted a rather rigid approach in dealing with disputes.¹⁸ It has tended to give undue weight to technicalities rather than the merits of the petitions. It is important to find a more flexible way of dealing with electoral disputes that take into consideration the particular circumstances of Botswana and the need to ensure that acquisition of power is legitimate. Undue concern with delays in bringing petitions instead of the merits of the case may not be in the interests of democracy.

The requirement of security as a condition *sine qua non* for filing an election petition which is mandatory in terms of the Electoral Act is also an area of concern which makes the court inaccessible to election petitioners. Botswana's first past the post electoral system has been in operation since 1966 to date. Since then Botswana's elections have not led to a change of government. For 30 years only one political party has dominated Botswana's politics, winning most elections with a landslide majority. This trend made Botswana effectively a *de facto* one-party state.¹⁹ The highest number of seats won by the combined opposition before the 1994 elections is five (5) in a thirty-two member parliament. An interesting trend however, of the elections was that the opposition popular vote has steadily increased over

14. *Ibid.*, pp. 191-4.

15. Reduction of voting age from 21 years to 18 was only done in 1997.

16. See the Constitution Amendment Act, 1997.

17. John Holm (note 13) p. 198.

18. Bojosi (note) Chapter 5.

19. Patrick Molutsi, "Botswana's Democratic Institutions: Strength and Weakness", In *Democracy in the 21st Century*, p. 28.

the years while that of the ruling party plummeted steadily. This trend was however, not reflected in the number of seats gained by opposition parties.

Botswana's electoral system has been criticised by commentators and opposition parties as unfair and antiquated because it does not reflect the true strength of contestants for power on the ground.

The results of the 1994 Botswana's parliamentary elections have necessitated the need to re-examine the suitability of the first past the post electoral system in contemporary Botswana. We need to examine whether other electoral systems can serve the country better in terms of enhancing the participation of the voters and accountability of people's representatives.

Nine (9) political parties contested the 1994 elections.²⁰ The results of the elections showed that the two major political parties in Botswana, the Botswana Democratic Party and Botswana National Front, ranked very close to each other in terms of popular vote, but when votes were translated into seats the strength of the two main parties was seriously distorted. The ruling Botswana Democratic Party polled 151 011 votes nationally. The main opposition Botswana National Front polled 102 362. The Botswana People's Party, the third largest party in the country, polled 11 496. The aforementioned votes were translated into seats as follows:

Table 1: Results of the 1994 Botswana Parliamentary Elections

Political Parties	Votes Polled	% Of Total Votes Polled	Seats Gained
1. BDP	151 011	55	26
2. BNF	102 362	37	13
3. BPP	11 496	4	—
4. IFP	7 806	3	—
5. BPU	3 016	1	—
6. UDF	783	—	—
T USP	265	—	—
8. LLB	235	—	—
9. BLP	23	—	—
Total	276 997	100	39

A comparison of the percentage polled by the individual parties from the 1979 to the 1994 election shows progressive decline for the BDP, a steady increase for the BNF and a constant performance by smaller opposition parties, such as the BPP and BIP (EFP).

In 1979 when there were 32 seats in Parliament, the national poll was 58.4% out of which the BDP gained 29 seats and registered 75.2%, the BNF 2 seats and 13%, BPP 1 seat and 7.4%, and, BIP 0 seats and 4.2%. In 1984 there were 34 seats in Parliament, the national poll was 77.6% out of which the BDP gained 29 seats and 68%, BNF 4 seats and 20.4%, BPP 1 seat and 6.6%, and, BIP 0 seats and 3.2%. In 1989 there were again 34 seats in Parliament,

20. Election Report (note 2), p. 9.

the national poll was 68,23%, out of which the BDP gained 31 seats and 64,78%, BNF 3 seats and 26,95%, BPP 0 seats and 4,34%, and, the BIP 0 seats and 2.4%. During the recent 1994 elections there were 40 seats in Parliament and the national poll was 76,60%, out of which the BDP gained 27 seats and 54,43%, BNF 13 seats and 36,07%, the BPP 0 seats 4,18%, whilst the IFP gained 0 seats and registered 2,76% (Thamaga Constituency excluded).

The number of seats gained by individual parties though decisive for the purpose of victory, is not indicative of the strength the parties command nationally. The percentages polled nationally, are a better indication of the strength and popularity each party has at a national level. As earlier indicated, the BDP strength and popularity have declined whilst those of the BNF have increased during the past four general elections between 1979 and 1994. Whilst the number of BDP seats between 1979 and 1989 appear constant at 29, 29, 31, the strength and popularity of the party have been decreasing. Thus 75,2%; 68% and 64,78%. It is only in 1994 that the BDP seems to have experienced a rude awakening at 27 seats, and 54,43%, excluding the Tharnaga Constituency, where there was a by-election later.

Table 2: Election Results 1979-1994

Year	% of voters	% vote polled	BNF	BPP	BIP/ IFP	BDP seats won	BNF	BPP	BIP/ IFP	No. of seats to be won	Majority in seats
1979	58.4	75.2	13	7.4	3.2	29	2	1	0	32	29
1984	76.6	68	20.4	6.6	3.2	29	4	1	0	32	29
1989	68.23	64.78	26.95	4.34	2.4	31	3	0	0	34	31
1994	76.60	54.43	36.07	4.18	2.76	27	13	0	0	40	27

The winner takes all system is inherently unfair as can be gleaned from the 1994 elections, in terms of which the BNF, the main opposition party polled 36% of the total votes cast and won 13 seats in a 40 seats parliament. If the proportional representation system was used the BNF could have secured 17 seats which would have been a fair proportion of the votes cast.

One clear feature of Botswana's politics is that the opposition parties are strong in urban areas and the ruling party in the rural areas. Botswana's demographic pattern shows that the rate of rural urban migration is high and continues to rise as people continue to search for non-existent jobs in towns and cities. This demographic pattern may lead to anomalous results where a government may be elected by a minority of voters but is able to obtain a majority in terms of seats if the present electoral system is followed.

ELECTORAL SYSTEMS: AN OVERVIEW

A wide variety of electoral systems exists in the world. For purposes of this article electoral systems are classified into three groups. These are the plurality; mixed proportional systems and proportional representation systems, hereinafter referred as PR. In the debate on election methods, two arguments predominate. The proponents of the plurality system argue that its great advantage is that it produces firm government or in any case, that it is much more likely to do so than PR. Their line of reasoning is that the plurality method, by discriminating

against small parties, encourages a two party system, which in turn makes stable one party government possible.²¹

The main argument of the advocates of proportional representation is that a democratic legislature should be representative of all interests and viewpoints of the electorates.

There is an abundance of literature that shows that the protagonists of the two system broadly agree that proportional representation methods substantially lead to fair distribution of seats relative to the votes cast and that the plurality system leads to relatively more stable governments. The proportional representation protagonists argue that a strong stable government founded on disproportionate representation is undemocratic and does not inspire confidence among the voters and may suffer from a legitimacy crisis. There are those who argue that proportional representation may be fair but that does not mean it is democratic.²²

Some people are prepared to retain the simple plurality system because they attach great importance to stability of governments. It is said the plurality system promotes a member of parliament's contact with his geographical constituency and further that the method of voting is simple. PR supporters point out that PR promotes representation of minorities such as ethnic and cultural communities. In fact in an era where women's lack of representation in political structures is a major concern, PR may offer the solution to equitable representation of women.²³

The bottom line however, is that these electoral systems both have advantages and disadvantages. The choice of which electoral system to follow is a political one, often dictated by the interests of the dominant political force which is in government or hopes to be in government. Consequently, the choice of an electoral system can be quite opportunistic.²⁴

It has also been argued that like all political instruments, electoral systems inevitably have a class bias and that in some situations, depending on the development of social formation, the class dimension may be subordinated to other factors like ethnicity or tribalism.²⁵

Since elections are an aspect of democracy the choice of an electoral system may reflect the dominant political force conception of democracy and further, since democracy is a contested concept an electoral system is not and cannot be static, because whether or not it changes depends on the struggle that is waged on the ground by contestants for power. Those who formulate an electoral system hope that the system of their choice will keep in power forces who share their political and value perspective.²⁶

Plurality Systems

In terms of this system voting is based on a single constituency and the candidate who obtains the largest number of votes is declared the winner, notwithstanding that the winner

21. Grofinan *et al* *Electoral Laws and Their Political Consequence* (1986), pp. 124-38.

22. Peter Haine, *Proportional (Bias) Representation: The Case against PR in Britain* (1986) Chapters 1-2.

23. *Legal Forum* Vol. 6. No. 3, September 1994 Legal Resources Foundation, Zimbabwe.

24. Kader Asmal *et al* (note 8), pp. 1-23.

25. M. Ncube and Collins Parker, *Comparative Electoral Systems and Political Consequences: Options for Namibia* (United Nations Institute for Namibia) (1988), pp. 1-10.

26. *Ibid.*

may actually have been elected by 25% of the voters — as long as he has been elected by a larger percentage of voters.

In Britain where the system originated it was understood then that members of parliament represented geographical entities with discernible boundaries. MPs represented not opinions or ideological tendencies nor political parties but constituencies.²⁷

The plurality system is the oldest electoral system in the world and still commands considerable support. The emergence of the party-system led to the questioning of the efficacy of the system, especially because the system was originally predicated on the theory of territorial representation before the proliferation of political parties. With the proliferation of political parties and their occupation of the centre stage in electoral processes, the theory of territorial representation was questioned as failing to meet the imperatives of democratic representation. In the context of Britain those who are unhappy with the system have said the following about the first past the post electoral system.

First past the post electoral system can unquestionably result in all sorts of anomalies. Labour lost power in 1951 despite having 1% less votes than the Tories . . . Mrs Thatcher gained a landslide victory in 1983 by winning 58 more seats than in the 1979 general election even though the Tory vote actually declined by 1.5%.²⁸

Discontent with first past the post electoral system, especially relating to the ability of the system to produce a government with an overall majority on the basis of a minority of the popular vote has led to some adaptations to ensure that a member of parliament is elected by the majority of the voters, hence majoritarian systems. Majoritarian systems have two major variants: absolute majority or alternative or preferential vote.

Absolute majority voting requires a candidate to obtain one more vote of half the votes cast. If no candidate is elected by the majority a second ballot is held. In this system a simple majority is sufficient in the second round of voting.

With respect to the preferential system voters vote for a single candidate but indicate in a declining order their preferences for others. If none of the candidates receives absolute majority in the first count, the least popular candidate is eliminated and his second preference redistributed. The operation is repeated until one candidate obtains absolute majority.

Proportional Representation

Proportional representation has two major variations; List PR and the single transferable vote. This tends to make it extremely complex. It is perhaps owing to its complexity that it probably boasts of the largest number of books and articles dedicated to its analysis.²⁹ It was first tried in Belgium in 1885 and today a considerable number of countries practise it.

27. Kader Asmal (note 8), pp. 1-23.

28. Peter Haine (note 22), 1.

29. *Electoral Systems: A Worldwide Comparative Study*, Inter Parliamentary Union (1994).

The main aim of proportional representation is proportionality: The allocation of seats must be proportional to the votes cast. This system is said to be fair because minority parties are included in governance.³⁰

Proportionality therefore is the major virtue of the system; this ensures that no political force or part of public opinion enjoys monopoly of governance.

Those who are opposed to it charge that while PR may be fairer it is actually less democratic because it involves the creation of monster constituencies where Members of Parliament have no link with the voters. It is also criticised for centralising power in party bureaucracies, thereby diminishing the power of individual voters. It also has a tendency to lead to the fragmentation of political forces which may lead to instability.³¹

There are basically two basic models of proportional representation: Full proportional representation and limited proportional representation. Full proportional representation is involved where the country as a whole is one constituency, as in Israel, Namibia and Holland.³² In limited proportional representation elections are carried out in various constituencies and distribution of seats takes place at this level.

Semi-Proportional System or Mixed Systems

Some electoral systems have the characteristics of both the plurality system and proportional representation system and are often called mixed systems.³³ This system is used in multi-member constituencies. It is often classified as semi-proportional. The voter may only choose a single candidate. The system permits minority representation and this is what distinguishes it from the plurality system.³⁴

ELECTORAL REFORMS

As a result of the concerns discussed earlier, the constitution was amended in the course of 1997 to establish an independent management body, reduce voting age from 21 years to 18 and to introduce an absentee ballot system.

Prior to the 1997 Constitutional Amendment Act, the conduct and supervision of the elections was the responsibility of the supervisor of elections. The supervisor of elections was obliged by law "... to enforce on the part of all election officers, fairness, impartiality and compliance with the provisions of the Act"³⁵

The office of the supervisor of elections was staffed by 15 permanent members. Its staff was technically part of the civil service. Recruitment of staff was done by the Directorate of Public Service Management.³⁶ The office of supervisor of elections relied heavily on District

30. Kader Asmal (note 8), pp. 1-23.

31. *Electoral Systems: A Worldwide Comparative Study* (note 29), p. 8.

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*

35. S 3, *Electoral Act: Cap 02:07*.

36. Ayeni V. and Somblekae, G. "Promoting the Credibility and Effectiveness of Electoral Administration Agencies: The Case of Botswana", paper presented at a seminar on The Strengthening of Electoral Administration in Africa, Ghana, April 1993, p. 14.

Commissioners who were used as returning or presiding officers during elections. This heavy reliance on the civil service tended to blur the distinction between his office and government departments. The supervisor of elections was to be independent and not "subject to the direction or control of any other person or authority".³⁷ To further enhance the independence of the supervisor of elections, his tenure of office was secured, like those of judges. He could only be removed from office for inability to perform the functions of his office or for misbehaviour.

Whilst the provisions of the constitution and the Electoral Act sought to entrench the independence and impartiality of the office, one single provision, which gave the president the sole power to appoint the supervisor of elections, was a source of serious discontent. The opposition parties alleged that the supervisor of elections was a member of the ruling party and therefore biased against the opposition. The net result was an opposition highly skeptical of the fairness of the office. In the end, the credibility of the office of supervisor of elections was highly suspect.

A national referendum was held to determine whether Botswana agree to the proposal to amend the Constitution to provide for the appointment of an independent electoral commission to conduct and supervise both parliamentary and local authority elections instead of the supervisor of elections. The people voted in favour of the independent electoral commission.³⁸

Composition and Appointment of the Independent Electoral Commission

The Constitutional (Amendment) Act, 1997 makes provision for the appointment of the independent electoral commission to "supervise the conduct of elections".³⁹ The independent electoral commission is appointed by the judicial service commission and has a secretary appointed by the president alone. According to the Act, the commission shall consist of a High Court Judge as chairman, and five other members, and a legal practitioner. The five other members shall be appointed by the judicial service commission from a list of persons recommended by the all-party conference.

The Constitution provides that the chairman and the rest of the members of the commission shall hold office for the period of two successive lives of parliament. A person shall not be qualified to be a member of the independent electoral commission if he/she has been declared insolvent or bankrupt; or has been convicted of an offence involving dishonesty.

Functions of the Commission

The functions of the commission are the following: (i) the conduct and supervision of elections of the elected members of the national assembly and members of the local authority; and conduct of a referendum;⁴⁰ (ii) give instructions and directions to the secretary

37. S 66 (7) of the Constitution of Botswana.

38. Report to the Honourable Minister of Presidential Affairs and Public Administration on the conduct of the 1997 Hationgi Referendum, p. 18.

39. Constitution Amendment Act, 1997.

40. S 2 (12), note 39.

of the commission;⁴¹ (iii) ensuring that elections are conducted efficiently, properly, freely and fairly;⁴² and (iv) performing such other functions as may be prescribed by an Act of parliament.⁴³

The commission is required on completion of any election conducted by it to submit a report on the exercise of its functions to the minister for the time being in charge of the elections. The substantive functions in regard to the running of the elections are the responsibility of the secretary to the commission. The secretary's functions, "are to exercise general supervision over the registration of voters for elections of the elected members of the national assembly, and the members of any local authority".⁴⁴

A person shall not be qualified to be appointed as secretary to the independent electoral commission if (i) he is not a citizen of Botswana; (ii) he has been declared insolvent or bankrupt; (iii) he has been convicted of any offence involving dishonesty in any country.

The constitution stipulates that members of the commission shall hold office for a period of two successive lives of parliament. It does not set out grounds upon which membership of the commission may be terminated such as expulsion or resignation.

The circumstances under which the secretary of the commission may vacate office are however, set out quite clearly in the Act. A person holding the office of the secretary shall vacate office on attaining the age of 65 years or such other age as may be prescribed by an Act of parliament. A holder of the office of the secretary may be removed from office for inability to perform the functions of his office (whether arising from the infirmity of body or mind or from any other cause) or for misbehaviour.

The secretary can only be removed in accordance with the procedure set out in the Constitution, which requires that wherever the president considers that there is reason to remove the secretary, he shall appoint a tribunal which shall consist of a chairman and not less than two members who hold or have held high judicial office. The tribunal shall inquire into and report on its findings to the president and advise the president on whether the secretary ought to be removed. Once the president has been advised to remove the secretary by the tribunal, he has no discretion but to remove him because the empowering provision is peremptory and uses the word shall. The president is also empowered to suspend the secretary from office pending the submission of the report by the tribunal.

The issue of removing the secretary is problematic in that whilst it is desirable to remove the secretary or even other members of the commission, who are abusing their office, by promoting the interests of the other party, care must be taken not to take any measures that may be construed as improper or meant to compromise the independence of the secretary or any other member.

The other difficulty with respect to the grounds of removal of the secretary is that what amounts to 'misbehaviour' and even 'incapacity' may be controversial. It is suggested that removal on the basis of misconduct must be a decision of a five member panel of serving

41. S 2 (12) (b), note 39.

42. S 2 (12) (c), note 39.

43. S 2 (12) (d), note 39.

44. S 3, note 39.

judges. A decision that calls for the removal of the secretary or any other member on the basis of 'misbehaviour' must be carried by a two-thirds majority of the panel.

With respect to incapacity, it is suggested that the constitution should clearly provide that the secretary or any other member may be removed on the grounds of incapacity, if it is certified by one or more duly qualified medical practitioners that he/she is substantially incapacitated or incapable by reason of any infirmity of mind or body of carrying out the functions of the secretary or commissioner. As a matter of fair procedure, it is further suggested that the secretary or commissioner who is removed on the ground of incapacity should be given the opportunity to make representations in writing that he/she may wish to make in response to the proposal to remove him or her.

The powers of the commission are cast in broad terms to include supervision. It will be helpful to specify the powers, duties and functions of the commission more comprehensively. The Act must specify clearly the commission's responsibilities in relation to administration, organisation, conduct and supervision of elections.

CONCLUSION

It is self-evident from the synopsis that some aspects of Botswana's electoral process need fine tuning. In particular the country's first past the post electoral system appears to yield very undemocratic results which distorts popular support of other political parties. The recent electoral reforms, in particular the establishment of the independent electoral commission, the reduction of voting age from 21 years to 18 and the introduction of the absentee ballot system, will go a long way in enhancing the fairness of the electoral process in Botswana.



This work is licensed under a
Creative Commons
Attribution – NonCommercial - NoDerivs 3.0 License.

To view a copy of the license please see:
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

This is a download from the BLDS Digital Library on OpenDocs
<http://opendocs.ids.ac.uk/opendocs/>