

# REVISION AND REFORM OF AN ELECTORAL ACT IN A DEMOCRATIC ENVIRONMENT

## *The Namibian Case*

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### ABSTRACT

*Namibia is revising and reforming its Electoral Act (Act No 24 of 1992). In this undertaking stakeholders were consulted and public meetings were held throughout the country. In the subsequent report (2012) there were 59 recommendations of ways in which the Electoral Act could be improved. Electoral revision implies re-examining the Electoral Act within the context of democracy. The aim is to discover and rectify errors and shortcomings. Since electoral revision achieves reform, the two concepts are intertwined, with the intention of both being to strengthen the qualities of an Electoral Act. In this process, apart from efficiency, public desires and expectations must be attended to. In addition to the administrative and managerial task of running elections attention must be paid to the normative character of an electoral process, which is substantially determined by electoral justice. A number of principles are identified in relation to the character of electoral justice. These principles should be pursued both by stakeholders in the electoral process and the electoral bodies responsible for conducting elections in a democratic environment.*

### REVISION AND REFORM

Electoral revision implies a re-examination of the Electoral Act with the aim of discovering, rectifying and amending shortcomings that have been discovered, while applying the rules and obligations contained in the Act. Two interrelated concepts are at stake – revision and reform.

Electoral reform relates to revision. The intention is to set new rules for improving the entire electoral process, while strengthening the good qualities contained in the Act. Electoral reform also intends, among other things, to improve the responsiveness of electoral processes to public desires and expectations, to

rectify shortcomings discovered during the application of the Act and to improve its efficiency. Each election is a learning experience which can give reason to improve the electoral law.

Reform and revision should never be a once-off undertaking. An electoral management body (EMB) should constantly be engaged in reviewing its administrative strategies, policies, procedures and practices. If it does do so, its effectiveness and credibility may be affected, if not diminished.

According to Wall, Ellis, Ayoub, Dundas, Rukambe & Staino (2006, pp 295-296), three distinct areas of electoral reform can be identified:

- Legal reform, involving, possibly, the amendment of the constitution and definitely the electoral law(s) and/or related regulations and rules, to enhance the integrity, relevance and adequacy of the legal framework within which the electoral management body delivers its services. This can include institutional reform of the EMB itself.
- Administrative reform: the introduction within an EMB of new strategies, structures, policies, processes, procedures and technical innovations which enable it to deliver its services most efficiently.
- Political reform, involving changes that take place in the political environment in which the EMB is obliged to operate. It could imply more autonomy and authority, improving and guaranteeing the independence of the EMB and/or creating a more effective and transparent framework for its functioning and accountability.

## ELECTIONS AND DEMOCRACY

Considering the relationship between elections and democracy Namibia is compelled to comply with approved international norms such as those laid down in the African Union's (AU) *Declaration on Elections, Democracy and Governance* and the Southern Africa Development Community's (SADC) *Principles and Guidelines Governing Democratic Elections*.

Both of these documents emphasise the obligation to pursue democracy, which is considered essential and a precondition for stable, social, cultural and economic developments in African states. Emphasis is put on representative democracy in a multiparty state, 'which is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework of constitutional order' (s 1, arts 1.1.-1.3 of the AU *Declaration on Elections, Democracy and Governance*).

Article 1.4 of the AU declaration states that:

[e]ssential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free and fair elections based on secret balloting and universal suffrage as an expression of sovereignty of the people, a pluralistic system of political parties and organisations and the separation of powers and independence of the branches of government [the legislative, judicial and executive powers].

The *SADC Principles and Guidelines Governing Democratic Elections*, which were adopted in 2004 and are not legally binding on member states, are presently being revised by the SADC Electoral Advisory Council. They undertake, among other things, to:

2.1.3 Promote the holding of regular free and fair, transparent, credible, and peaceful democratic elections to institutionalise legitimate authority of representative government in addition to democratic change in government;

2.1.4 Enhance the integrity of election processes by providing a basis for comprehensive, accurate and impartial assessments of national elections and sharing of experience and information among member states about democratic development;

2.1.5 Promote electoral justice and best practices in the management of elections and mitigation of election-related conflict.

SADC Third Draft Revision April, 2013, p 3

Both declarations emphasise that elections are fundamental to any competitive democracy and are part of an important exercise in pluralism. Elections imply the reflection of democracy in action. They are about people who vote and express their opinions unhindered and whose rights are legally determined and guaranteed.

Elections contribute to a self-identification process and empower voters to play an important role in securing democratic governance. The vote is an instrument that confers power and legitimises rulers to act in the name and on behalf of those who voted them into power. They thus provide the principal link between the rulers and the ruled.

A working democracy is related to quality governance. It is a dialectic relationship. If quality governance is the goal, elections must be credible instruments for the attainment of that goal. In this process, values, norms and principles must be translated into a functioning operational framework.

Electoral management bodies have the task of ensuring that elections serve as instruments for securing quality governance within democratic parameters and conditions.

The electoral process itself can only be meaningful, functional and valuable if voters understand the essence and consequence of democracy and their role in attaining it. Voter education and information must, therefore, form an essential part of an electoral process, whether on its own or as an integral part of civic education. Voters need to be taught constantly the relevance of regular and periodic elections and what the electoral process entails.

The building of democracy includes not only the pursuit of political values and political attitudes that uphold democracy but must also attend to fundamental issues. These include the efficient organisation of democratic elections, the guarantee of sound voter registration, the overseeing of an orderly electoral campaign and the application of the best-possible voting system.

Electoral bodies are entrusted with a supervisory and disciplinary role. They are obliged to act and intervene when the credibility and fairness of democratic elections are threatened. Threatening issues such as corruption, bribery, favouritism, political violence, intolerance, and intimidation must, consequently, be dealt with immediately. In a democratic environment within which elections are conducted, the values of electoral justice must be respected.

The AU and the SADC statements consider legality and legitimacy to be equally important in a democratic electoral process. It has become evident that legitimacy, thus the ethics and morality of elections, is often not assigned the same relevance, value and status as legality. Both legality and legitimacy are integral elements of electoral justice.

### ELECTORAL JUSTICE

There may be different interpretations of the concept of electoral justice and its relevance in the electoral process. Electoral justice is, in the first instance, related to free and fair elections. It is argued that the two qualities 'free and fair' do not fully cover the comprehensive character of elections.

The SADC Electoral Advisory Council (SEAC) has deliberated on some additional concepts that would give a more comprehensive character to elections. In addition to free and fair, elections should be *credible* (in the sense of trustworthy / genuine), *peaceful* (non-violent) and *transparent*.

The question arises whether elections are only a purely technical and material exercise? This assumption is arguable, as equal importance must be paid to normative aspects. For example, on what premise and value system are elections based? What are the morality and ethics behind elections? How much attention is paid to normative electoral justice?

Electoral justice relates to both the operative legal framework and the legitimate execution of rules and regulations. In an electoral process the concepts of legality and legitimacy are intertwined. Each is, however, entitled to its own right.

A functional electoral law is a critical factor for the orderly and responsible running of an election. Equally important is the way it is applied. It is at this point that issues such as humility, empathy, ethics and moral responsibility come strongly to the fore. To apply only a positivistic attitude to the electoral process is insufficient.

Electoral management bodies should not, like judicial bodies, concentrate predominantly on positivism, operating on the assumption that truth is completely represented by observable phenomena and scientifically verifiable facts.

The intention of electoral justice is to go beyond the letter of the law and add a human element to legal prescriptions, procedures and processes. In other words, it should humanise electoral laws and practices. The focal point is the integrity of the total electoral process, including normative aspects, not merely its technical and administrative aspects.

In 2011 an international 'Election Integrity Group' gathered in Ghana and devised the *Accra Guiding Principles for Elections*. These are of particular value and relevance to an electoral process and can serve as a directive and a norm for elections in SADC countries.

The emphasis in the Ghana declaration is on applied electoral justice, which not only protects fundamental human rights, such as political rights and the entitlement to vote and to stand for election, gender rights, freedom of association and affiliation, the right to express personal opinions, access to security, and the democratic right to participate actively in public affairs, but also guarantees and safeguards normative rights such as freedom of opinion, freedom of speech, the right of unhindered assembly, no discrimination and intimidation, the right to freely communicate and inform and the right to seek justice. Together they form important and principal objectives in an election.

The intention of electoral justice is thus to go beyond the letter of the law. It addresses inclusively the integrity and legitimacy of the total electoral process. The Ghana group identified specific principles which underlie electoral justice and should be adhered to in an electoral process. To these, some others can be added.

The principles related to electoral justice include lawfulness (the rule of law), integrity (eg, honesty, accountability), voter participation (eg, voter registration and voting), impartiality (eg, equal treatment of all voters), fairness (related to credibility), professionalism (eg, of electoral bodies), independence (eg, structural independence of electoral bodies), neutrality (of electoral bodies), transparency (openness of and accessibility to electoral officials), timeliness (eg, punctuality in the performance of electoral tasks), non-violence (peace and no intimidation of

voters), regularity of elections (periodic elections), acceptance of voting results (as part of a voting culture), efficiency of electoral officials (quality assurance) and service mindedness (quality and adequate performance).

#### MATTERS RELATED TO THE REVISION AND REFORM OF THE NAMIBIAN ELECTORAL ACT (ACT NO 24 OF 1992)

Revision and reform often relate to the failure of EMBs to deliver expected goods and services. Wall, Ellis, Ayoub, Dundas, Rukambe & Staino (2006, p 297) identify a number of possible failures:

- Absence of stakeholder confidence in the EMB;
- Government and/or political influence on EMB decisions;
- A partisan approach by the EMB;
- A lack of professionalism in the EMB; and
- EMB incompetence and/or financial impropriety.

A compelling reason for revising and reforming the Namibian Electoral Law was a statement by the Namibian High Court on 14 February 2011 expressing dissatisfaction with the present state of the law. High Court judges J P Damaseb and Dr J Parker stated, among other things, that the law

... is very scattered. We had ourselves to wade through a myriad of amendments to ascertain what the applicable provisions are. That is an unsatisfactory state of affairs and something must be done as a matter of urgency and before the next round of elections, to consolidate the electoral law of Namibia.

*Rally for Democracy and Process and Progress & Others vs Electoral Commission of Namibia & 5 Others*, paras 325 and 326, p 160

The reform and revision of the Namibian Electoral Act are guided by the democratic norms, values and practices to which the Namibian state is legally and morally bound. They are reflected in the Namibian Constitution. In addition to revision and reform, the Namibian Electoral Act was guided by the spirit, norms, practices and rules applied in other SADC countries.

#### *The Revision and Reform Report on the Namibian Electoral Act*

The final version of the report, which was compiled in 2012, reflects, among other things, the outcome of consultations with those who have a direct stake in the Namibian electoral process. Public meetings were held in all 13 regions of Namibia.

It soon became evident that distrust and scepticism prevailed on a number of electoral issues. Little confidence was expressed in the EMB, which comprises the Electoral Commission (EC) and its executive agency, the Directorate of Elections, particularly in the way they conduct the electoral process before, during and after elections. The EMB was accused of not performing its role efficiently, professionally, diligently, trustworthily, responsibly and effectively. Its competence and capacity as well its impartiality were questioned.

The EMB was not considered to be a neutral, autonomous and independent body.

Other matters the research team addressed were whether Namibia's political environment is conducive to free, fair, transparent, trusted, responsible and credible democratic elections and whether the EMB, as the guarantor of democratic elections, performs its task free of any pressure or coercion from outside, thus not being exposed to external interference and intervention.

The enquiry also had to assess whether the principles of electoral justice, integrity, lawfulness, impartiality, professionalism, transparency and voter friendliness are adhered to, considering that they must be applied in a dominant/hegemonic one-party state. Also, whether democratic norms and values form an integral part of the electoral process and are adhered to.

A multitude of elections since Namibia gained its independence in 1990 have given a clear indication of issues that must be addressed to improve the electoral process. They are not only related to the technical processes of how elections are best run but also to the institutional framework.

During the public meetings concern was repeatedly expressed about the independence and credibility of the Electoral Commission and the Directorate of Elections. There were complaints about the selection process of the commissioners and the way in which they are appointed. The composition of the selection committee was questioned, as was the selection procedures it follows. The public feels that it is not sufficiently consulted and is underrepresented in the selection process.

There was a general feeling that the members of the EMB should not be appointed by the president. The criticism was not directed as much against the office of the president per se as it was related to concerns that the president's choice could be influenced by his position as both the head of state and president of the ruling party.

In the late Nineties the responsibility for the EMB was transferred from the office of the prime minister to the office of the speaker, which was considered a more neutral entity. It became the responsibility of the speaker to submit the annual report of the Electoral Commission to the National Assembly, but, when it came to introducing the annual vote on the EMB in the National Assembly, the speaker's



limited knowledge of its activities became evident. A definite shortcoming is that because of his independent status the speaker may not introduce a new Bill or amendments to an Act.

The report therefore recommends that the Ministry of Justice take care of all legal issues pertaining to electoral matters and the Ministry of Finance should present and defend the annual budget of the EMB in the National Assembly.

The report recommends a clear separation between the tasks and responsibilities of the Electoral Commission and the Directorate of Elections. It has become evident that the commission should exercise stricter control over the responsibilities and activities of the Directorate of Elections and that it must prevent the directorate from bypassing directives it issues.

The report pays attention to expanding the tasks of the EC to make it an even more responsible body. The practice in many SADC countries of dividing the EMB into sub-divisions, each taking on particular responsibilities and forming an active link with the director of elections, is recommended for Namibia.

Other policy issues addressed in the report are whether the present electoral system complies with the expectations and quality of elections at all levels of governance. Does it serve the purpose expected of it?

The report makes recommendations on improving electoral mechanisms such as the registration of voters, the voting process and the counting procedures. Also addressed is the issue of voters who are absent on election day from the constituencies in which they are registered. The question is raised whether a postal or any other kind of absentee vote system should be introduced, as the present tendered vote system is not satisfactory.

Questions were raised about eligible voters who are abroad, the police and army on duty on election day, prisoners and the physically handicapped.

The possibility of introducing an electronic registration and voting system was hotly debated. An electronic system will be used for the 2014 national and presidential elections.

In view of the vast expanse of the country, the report recommended further decentralisation of EMB responsibilities at management and administration level. Such decentralisation might include voter registration and voter education.

A definite shortcoming in Namibia is the absence of a separate body to adjudicate electoral disputes. This has resulted in prolonged court cases after nearly every election since independence. The institution of an Electoral Court for a period before and after elections is therefore highly recommended.

Other issues addressed in the report include the relationships between the EMB, registered political parties and the public and how these can be improved. The issues of fair access to radio and television, the ruling party's use of government transport during election campaigns, and related favouritism are also mentioned.



Another concern is what legal controlling mechanisms can be introduced to oversee political party financing and auditing, and what codes of ethics should be devised for election officials, political parties, observers, the media and other entities that play a role in the electoral process and how they can be enforced to make them more credible.

Other issues raised during the consultations with the public and, in particular, with stake holders such as political parties, are the introduction of a ward system at local governance level, the way electoral officials are selected and trained and the need to define the roles and tasks of party representatives at registration points and polling stations.

Opinions were divided on the amalgamation of the Delimitation Commission (in some SADC countries called the Border Commission) with the Electoral Commission.

Another issue of concern addressed in the report was fair gender representation at all levels of governance and in the permanent appointment of electoral officials at headquarters and temporary appointment during election periods. The same gender parity should be applied when observers and party representatives are appointed at polling and counting stations.

Other matters that were addressed during the public hearings and meetings included whether voting should be restricted to one day only; the improvement of the quality and efficiency of electoral officials and the abolition of registration of voters via sworn statements. A personal identity document should be the only valid means of identification both for registration and on polling day.

## CONSEQUENCES

The public hearings and meetings with stake holders have brought to the fore the relevance of assigning to the public, political parties and community organisations a greater say in the operation of the electoral process and the functioning of electoral institutions.

The gap between the EMB and the public, including the media, needs to be narrowed and common interests should be harmonised. It is important that the electorate takes full ownership of the electoral process and identifies with it.

Elections are an important signpost in Namibia's still young democracy. For this reason communication between electoral bodies and the public at large should be improved.

The report addresses extensively, in addition to institutional aspects and the electoral process itself, how democracy in Namibia can be enhanced through quality elections. In making elections in the country technically and administratively more proficient and more qualitative, and therefore meaningful,

relevant, trustworthy, transparent and credible, there is always room for improvement. To be constructive in contributing to a better electoral system, management and process is a better option than criticising and condemning without offering other options.

— REFERENCE —

- African Union. 2003. *OAU/AU Declaration on Elections, Democracy and Governance in Africa*. Addis Ababa: OAU.
- African Union. 2007. *Declaration on the Principles governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII)*. Addis Ababa: AU
- African Union. 2009. *African Charter on Democracy, Elections and Governance*. Pretoria: Idasa.
- Electoral Integrity Group. 2011. *Towards an International Statement of the Principles of Electoral Justice (The Accra Guiding Principles)*. Nairobi: EIG.
- Republic of Namibia. 1992. *Electoral Act No 24 of 1992*. Windhoek: Government Printers.
- Southern African Development Community (SADC). 2013. *Principles and Guidelines Governing Democratic Elections. Second Draft Vision (Restricted Draft) March 2013*. Gaborone: SADC.
- Töttemeyer, G K H, A Wehmhörner & H Weiland. 1996. *Elections in Namibia*. Windhoek: Friedrich Ebert Stiftung.
- Töttemeyer, G. 2012. *Revision and Reform of the Namibian Electoral Act (Act 24 of 1992)*. Report, Namibia Institute for Democracy, Windhoek.
- Wall, A, A Ellis, A Ayoub, C W Dundas, J Rukambe, S Staino. 2006. *Electoral Management Design: The New International IDEA Handbook*. Stockholm: International Institute for Democracy and Electoral Assistance.

**Court case**

Second ruling of the High Court in *Rally for Democracy and Progress & Others vs Electoral Commission of Namibia & 5 others*. Case No A 01 / 2010 (No 2)