

Civil Society Consultative Workshop
on the
Legal Framework for Free and Fair Elections in Namibia
Windhoek, Safari Hotel Conference Centre
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Workshop Report

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Introduction

Namibia is facing a new round of presidential and parliamentary elections in November this year. Every Namibian citizen, in fact everyone, who has made Namibia his / her home, as well as every current or prospective investor in this country has a vested interest that Namibia will have a peaceful election campaign and free, fair and credible elections.

To ensure such kind of elections is the task of the national election management body, the Electoral Commission of Namibia (ECN), the political parties – especially their respective leadership, our government – especially our President and our Parliament, the justice system, the police as well as other stakeholders.

Among these stakeholders, organised civil society has an important watchdog role to play, while being objective and without taking sides. Previously civil society coalitions in Namibia had limited themselves to voter education and election observation, the latter also limited in that it was confined to polling and counting observation. These were commendable efforts. However, to play its watchdog role effectively civil society must get involved at a much earlier stage. Civil society must come out and see for itself that the organisational and legal preconditions for free, fair and credible elections exist, and if they don't yet exist, clearly identify possible shortcomings and raise its voice to ensure that ultimately conducive conditions are effectively put in place.

It is with this understanding in mind, that the NANGOF Trust Election Coalition (NTEC), with the financial and organisational support of the *Friedrich-Ebert-Stiftung (FES)*, held a two-day consultative workshop to examine the legal basis for free, fair and credible

elections in Namibia in general and the *Electoral Amendment Bill of 2008* in particular. From NTEC's perspective the workshop was meant as a three-way dialogue between the NTEC, who is one of the interested stakeholders in civil society, the ECN as well as national and regional experts, among them two former Directors of Elections, Prof. Gerhard Töttemeyer and Mr Joram Rukambe (who is now with the *International Institute for Democracy and Electoral Assistance*) as well as others, e.g. from the *Electoral Institute of Southern Africa* (EISA), the *Institute for Security Studies* (ISS), the *Law Faculty of the University of Namibia* (UNAM) as well as the *Institute for Public Policy Research* (IPPR).

As it turned out, representatives of the ECN were unfortunately only able to attend part of the workshop. Hence the recommendations listed below are only those arrived at after discussion between representatives of civil society and the invited experts present. As NTEC we want, however, to express our sincere appreciation to Mr Victor Tonchi, Chair of the ECN, for delivering the opening address in which he highlighted key proposals in the Electoral Amendment Bill, and to Mr Moses Ndjarakana, Director of Elections, for attending at least part of the workshop.

The following observations and recommendations were adopted by the workshop:

Regional and African Guidelines for Free and Fair Elections:

1. Based on a presentation by Ms Maureen Moloji (EISA) the workshop discussed existing AU and SADC norms, standards, guidelines and principles for elections and election observers. Implementation of and respect for these instruments at national level provide the basis for enhanced transparency, credibility and acceptance of elections.
2. The workshop called on NTEC to:
 - Compile – in collaboration with the ECN and based upon the benchmarks and provisions contained in the above-mentioned instruments – **guidelines for domestic election observers/monitors**;
 - Launch a public **awareness campaign** pertaining to the above-mentioned guidelines;
 - Approach the ECN about the establishment of a **civil society liaison committee** for the purpose of transparency, accessibility and timely dissemination of information;
 - Consistently lobby for increased **alignment of the Electoral Act** and other relevant legislation **to the regional & continental benchmarks**

The Independence /Autonomy of Electoral Management Bodies (EMBs)

1. The workshop discussed the **meaning of independence** in the context of EMBs, with independence being identified **as the key** to free and fair electoral management. A distinction has to be made between *structural independence* which means that the EMB operates at arm's length from the executive, with full responsibility over staff recruitment, appointment and discipline, budgeting and budget control, only accountable to the legislature and *functional independence*, denoting the EMB's ability to take decisions and actions in a way which shows integrity and impartiality and behavioral independence, i.e. **to behave and to be seen as behaving independent of external influence**. According to the presenter, Mr Joram Rukambe, *"EMB independence means the EMB must uncompromisingly subscribe to the rule of law, and consistently, even-handedly, and impartially apply and also comply with the law."*
2. With regard to the Namibian situation a number of concerns were raised during the discussion, in particular with regard to the **efficiency of election officials** and the **perceived impartiality of the ECN**, the Namibian EMB:
 - The **role of the Regional Councils and Regional Councillors** in the recruitment of election officials, voter education as well as the frequent **use of constituency offices of Councillors by the ECN** can be perceived as compromising the independence of the ECN, especially in an environment where the distinction between state, government and ruling party is often not well understood or deliberately blurred;
 - The **recruitment of** otherwise unemployed, mostly very young and often undereducated people as temporary **election officials** is undoubtedly justified from a social policy point of view. At the same time it is also problematic as it potentially undermines the efficiency and hence the credibility of the electoral process, unless a serious and concerted training effort of these officials, including training towards an understanding of the democratic process takes place. Written examinations might be considered. Even more important under these circumstances is to retain a core of experienced election officials (as returning and presiding officers);
 - To get more professional people as potential candidates as Electoral Commissioners. The current mechanism of self-nomination may have to be complemented by a legal possibility of **nomination by others**.

Management of Election-Related Conflicts

1. The workshop discussion underlined the relevance of some of the **causes of election-related conflicts**, mentioned by the presenter, Mr Takawira Musavengana (ISS). Among the causes for conflict, found the world over, were issues such as an inadequate/faulty constitutional and legal framework, an uneven playing field (i.e. incumbent has access to and uses state resources as his own cheque book), government-controlled and partisan state-funded media (especially the electronic media), an electoral process in the hands of the dominant party (due to the composition of the electoral commissioners), un-independent, partial, unprofessional, inept, weak, poorly funded, poorly staffed EMBs (incl. boundary commissions), over-bearing and inefficient state organs – public service (and security sector), an uninformed public (civic and voter education), limited participation by an ever-increasing sceptical and disaffected citizenry, shambolic voters' registers, inequitable funding for political parties.
2. As far as a conducive environment for the **prevention of election-related conflicts** is concerned, the presenter mentioned a responsive, transparent, fiercely independent, impartial, adequately funded, efficient, accountable and permanent EMB; ease of access to election-related information before, during and after elections; EMB, civil society and media partnerships; political will, tolerance and practical commitment to political pluralism and last but not least an understanding among the citizenry that governance, public policy-making, law-making and politics are too important to be left in the hands of politicians alone.
3. With regard to the situation in Namibia the workshop participants made the following recommendations:
 - The merits of establishing a **temporary Electoral Court / Tribunal** (which could operate, for instance, four months prior to and two months after the elections) should be seriously researched and considered; there was general consensus that such a mechanism could ensure prompt hearings, judgements and sentencing.
 - Creation of **multi-stakeholder Conflict Management Committees** at national and sub-national levels (like in DRC, Lesotho, Zambia or South Africa);
 - Vigorous **civic education** on the Constitution and the Code of Conduct for Political Parties;
 - **Legal provisions to enforce the Code of Conduct for Political Parties**, including effective punitive measures.

Election-related Offences: The Role of the Law / Punitive Measures

1. This section was delivered in two parts. According to the first presenter, Mr John Nakuta (*Faculty of Law, UNAM*) the Namibian Constitution does not mention any specific election-related offences, but outlines certain values to be upheld, as well as election-related rights and the issue of Administrative Justice. The Electoral Act, however, does list numerous offences or prohibited conduct during the pre-election phase (registration of voters, mutilation of election material, unlawful production of election material, nomination of candidates), polling/election day (voting procedures, polling station procedures, multiple voting, ballot box stuffing, disorderly behaviour), and the post election phase.

The Act also lists corrupt and illegal practices (impersonation, undue influence, bribery, corrupt procurement or withdrawal of candidates, treating), as well as the non-disclosure of foreign funding by political parties and improper use of foreign funding. The Act covers offences committed by political parties, individuals and the ECN and its officials, whether, permanently or temporarily employed. The Act further imposes criminal sanctions by way of fines and imprisonment.

The presenter identified a number of **gaps in the existing law**: Currently the Code of Conduct for Political Parties is not legally enforceable and therefore carries no sanctions. Unlike in some neighbouring countries (e.g. South Africa) there is no general Electoral Code of Conduct which would also be applicable to observers, election officials etc.

2. The second presenter, Prof Horn (Faculty of Law, UNAM) noted that the Electoral Act does not address election-related violence as an offence. He expressed concern about the stipulation that the court will only give the applicant *locus standi* if the applicant can prove that his/her application will substantially change the outcome of the specific election. He recommended that this should be changed to include *prima facie* cases. He based his recommendation on the premise, *that if every vote counts, every offence counts!* The Act does however provide for specific issues that can be challenged in court, even if no proof of systemic election fraud can be brought before the court, but these will not be enough to declare any election null and void. Another issue the Act is silent on, is the issue of personal liability of ECN office bearers and staff.

3. With regard to election-related offences and the law in Namibia the participants made the following recommendations:

- Government should be encouraged to **ratify the *African Charter on Democracy, Elections and Governance***.
- **Offences of Election Commissioners**, e.g. "Collusion with political parties" should be added to the list of offences in the Act.
- Provide "teeth" to the **Code of Conduct for Political Parties** by making it legally enforceable. (See also under '*Management of election-related conflicts*'))
- Appropriate and effective **punitive measures** and punishment commensurate with the gravity of an offence need to be incorporated in the law.
- **Acts of political violence and intolerance should be included** in the Act as offences. Such acts should be clearly defined.

Election Monitoring and Election Observation

1. Based on the presentation by Ms Karen Ogle (*EISA*) the conceptual difference between election observation and election monitoring was extensively debated. Unlike observers, election monitors are granted certain rights to intervene in cases where the election process or the law are violated. Monitors are therefore usually governed by much stricter rules of conduct.

2. With regard to election monitoring and election observation in Namibia participants raised some concerns and made a number of recommendations:

- Participants are concerned about the **current Electoral Act's apparent silence on election observers/ monitors**, other than political party agents. The Electoral Amendment Bill, 2008 introduces accreditation, powers and duties of observers, but the Bill has not yet been tabled in parliament.
- Some clauses in the Election Amendment Bill with regard to election observation seem to be problematic (see under "Electoral Amendment Bill")
- The Amendment Bill/Act should provide for **different categories of observers**, namely international observers, local observers and local monitors.
- The NTEC is in favour of **monitor status for domestic observers**. The case of Lesotho should be researched and considered in that regard.

Media and the Electoral Process

1. The presentation by Mr Mathew Haikali (*MISA Namibia/ NTEC-Chair*), among other things, looked at the role of the media as election watchdog, and the responsibility of the media with regard to election reporting. Electoral Management Bodies (EMBs) should be models of accessibility, transparency and information sharing. The EMB's activities and decisions should be open to the media.
2. Concerning the **media's responsibilities**, the presenter highlighted the following:
 - Reporters need to be well aware of the election rules, how the Electoral Commission of Namibia (ECN) operates and how the voting will be conducted.
 - Policy and practice of equitable or fair news reporting about the political parties. An EMB should make rules to require the news media to do this, during the election campaign period.
 - News media should provide equitable or fair amounts of free advertising or free airtime for each political party.
 - When the ECN advertises in the media to inform voters about election procedures, it should advertise in all media.
 - Reporters should not show any political preference in their news reports. Their news reports should be accurate, impartial and responsible.
3. With regard to contentious issues concerning media and elections that need to be addressed in Namibia participants made the following recommendations:
 - A more **equitable and transparent formula** has to be found and applied by the national broadcaster with regard to **free airtime allocation to party election broadcasts**.
 - The **SABA Guidelines and Principles for Broadcast Coverage of Elections** in the SADC Region, adopted by the Chief Executives of public broadcasting services in the Southern African Development Community (SADC) in 2004 should be fully applied by the national broadcaster.
 - **Access to Information legislation** is urgently needed.

Political Party Funding in Namibia

1. The presentation of Mr Graham Hopwood (*IPPR*) took a critical look at the current situation with regard to political party funding in Namibia. According to the presenter, the current Electoral Act only deals with foreign financing of parties (Article 46). It says that foreign funding cannot be received unless it is disclosed to the public. But no mechanism exists for making funding public. There seems to be a veil of secrecy over the amounts given to parties. Efforts to ensure accountability have fallen flat. No one, including the political parties, mentions the issue – a situation that seems to suit the parties receiving the funds. The total amount available in a financial year for the state funding of parties is 0.2% of the state revenue from the previous financial year (Funding introduced in 1997 on the basis of Cabinet decision; no legislation as yet). That amount is then divided among the parties in the National Assembly proportionally based on seats, obviously favouring the dominant party. Parties face no legal requirements to account for the money they receive. No party in Namibia voluntarily publishes its accounts. Parties also do not follow the Electoral Act's stipulations on foreign funding, having seen it as unworkable. Parties that argue for transparency and accountability when it comes to government expenditure are being unaccountable concerning their own use of public funds. Only civil society seems to have an interest in raising the matter.
2. On political party funding in Namibia, the participants made the following recommendations:
 - There is a **need for legislation to govern funding of political parties** – both local and foreign – to ensure transparency, fairness and accountability.
 - Proper and trustworthy **auditing of funding of and expenditure by political parties** is required.
 - The **formula for allocation of state funding** must be revisited.

Voter registration and the voters' roll

1. After a presentation by Ms Karen Ogle (EISA) which raised a number of challenges and drew a number of lessons mainly based on the South African experience, the situation in Namibia was discussed in some detail. Participants felt that the **different systems of registration** are currently **difficult to monitor/audit**. The Act provides for general voter registration every 10 years, when the existing roll is scrapped. Between general elections, supplementary registration takes place during a certain limited period prior to every election or by-election. Recently the ECN has also re-introduced the so-called continuous registration. This latter type of registration needs

improvement and clarification. The **registration of voters without identity documents** remains a challenge.

2. Participants agreed that the status quo of the voters roll was not conducive to instil trust. Participants felt that a **concerted effort for a clean-up of the voter's roll** was needed. A consistent, integrated system of voter registration linked to the national population register / the data bank of the Ministry of Home Affairs and Immigration would be a way forward.

Balloting

After a general discussion highlighting the main issues with regard to balloting, the participants to the workshop made the following observations and recommendations:

- There is an urgent need to instil confidence in the **procurement of ballot papers**;
- The introduction of **Electronic Voting Machines**, although not likely with regard to the upcoming elections may present enormous challenges. Currently not even the Electronic Voters' Roll is deployable countrywide, nor is there a system in place to network the computers which carry the electronic voters' roll.
- The **tendered ballot system** remains a huge challenge. This system requires above average competencies of administration. The 2005 High Court ruling also acknowledges this fact and warns the ECN to maintain a verifiable paper trail at all times. At the very least the system of administering the tendered vote must be clarified with a view to a more transparent and efficient administration of the tendered vote by the ECN. Scrapping the tendered vote altogether and replacing it with something else (e.g. postal or special vote) must be researched and considered. The NTEC will revisit the current legal provisions for tendered balloting for further recommendations.
- The transparency of and the accessibility to the **Central Elections Results Centre** needs substantial improvement. Election results have to be released timely.

The Electoral Amendment Bill, 2008

1. In his presentation on the Bill, Prof Töttemeyer (*former Director of Elections*) presented practical, hands-on comments & proposals. Generally speaking the present Bill is not all comprehensive. Additional matters, like all the recommendations made in the previous sections of the workshop should be addressed eventually. Also, the proposed Draft Regulations need further scrutiny and improvements.

2. Participants discussed a number of pertinent issues:

- Participants welcomed the proposed amendment, that counting would commence immediately after the closing of polls and that counting would be done at the polling station. What is missing is the provision of only one day being set aside as polling day, something even the Prime Minister mentioned recently.
- Clause 14 of the Bill to be inserted after Section 52 of the principal Act, provides for the accreditation of observers. While the provision for accreditation is a welcome addition to the legislation, Sub-section (3)(a) appears to be open to subjective interpretation. Applicants' accreditation or rejection will be based on the premise of whether their accreditation "will promote conditions conducive to free and fair elections".
- Clause 15 of the Bill as an amendment to Section 53 of the principal Act, compels observers to "make ... a declaration of secrecy". This provision needs clarification as it seems to defeat the purpose. Secrecy should be limited to secrecy of the ballot only.
- Clause 19 of the Bill to be inserted after Section 58 of the principal Act, provides for the automatic election of a presidential candidate as President of Namibia, in the event that only one candidate has been nominated for such an election. Participants argued that a presidential candidate should have proven widespread national support. It is questionable if such support could be secured without election. In addition it was not clear, why such amendment was proposed, while other amendments, which would align the Act closer to African benchmarks, are not considered.

Conclusion

In closing, the NTEC appreciates that Mr Tonchi in his opening address acknowledged the proactive role NANGOF is playing in the democratising process as well as in stakeholder participation and public participation in the forthcoming elections. It is further encouraging that he is confident that the Bill will be passed in time to be "fully operational" in November. One aspect that is, however, not quite clear, is Mr Tonchi's referral to the "total overhaul" and "comprehensive review" of the Electoral Act that apparently culminated in the current Electoral Amendment Bill. While the Bill contains additions that are welcomed and are not covered at all by the current Act, e.g. the Accreditation of Observers and the Powers and Duties of Accredited Observers, as well as the counting process that is proposed to take place at the polling stations

immediately after closing of poll, the bill also contains proposed amendments that are puzzling, while other urgent amendments are excluded. It therefore remains rather difficult to contemplate the current Bill to be the result of a “total overhaul”.

Nevertheless, NTEC remains motivated to stay involved in the law-making process of the Bill, especially by Mr Tonchi’s invitation to all members of the public “to make further input on the Bill, and to do so through the Parliamentary Committees public hearing platforms”.

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