

## A critical reflection on the 2002 presidential election in Zimbabwe

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### 1 General introduction

#### 1.1 Introduction

Zimbabwe held a crucial presidential election from 9 to 11 March 2002. This election was momentous because it was preceded by cataclysmic events in the country's post-colonial history. Because the election attracted such singular international attention, the question of sovereignty, never raised before in the context of the way in which elections are conducted, became a topical issue in Zimbabwe and other countries. Furthermore, fears regarding human rights abuses that had characterised the 2000 parliamentary elections paled into insignificance by comparison.<sup>1</sup>

This article is a critical examination of the presidential election in the light of international human rights standards guiding electoral practices. It also measures the election against democratic norms prevailing in the global environment. It is envisaged that this contribution will help scholars and political scientists studying electoral institutions to contextualise the event and appraise it against the democratic ethic that Africa is aspiring towards. Afterwards, the model of the election may either be accepted or rejected as a contribution towards the improvement of domestic or regional systems.<sup>2</sup> The limitation of this paper is the fact that during the election, the writer was merely an unaccredited observer. As

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<sup>1</sup> Allegations from different corners were made regarding human rights abuses before and after the 2000 parliamentary election. See eg Amnesty International 'Zimbabwe: Terror tactics in the run-up to the parliamentary elections' June 2000; The Law Society of Zimbabwe *Rule of law* (2000) 5 *The Law Society of Zimbabwe Magazine*; B Raftopoulos 'Politics in Zimbabwe — 2001: Confronting the crisis' (2001); paper presented at the 'Crisis in Zimbabwe Conference' in Harare, 4 August 2001 (on file with author).

<sup>2</sup> Individual aspects of the election may be dealt with likewise.

such, it was not possible to gain access to polling stations or to formally interview the main actors. Thus, much reliance was placed on information from the Zimbabwe Human Rights NGO Forum (ZHRF or the Forum), newspaper reports, the Internet and reports from international groups.<sup>3</sup>

## 1.2 The importance of elections

While the reasons for the international community's interest in the Zimbabwean election may not have been entirely selfless, many of the concerns raised by the international community were justified.<sup>4</sup>

It is now axiomatic that free and fair elections are one of the fundamental prerequisites for any democratic transition.<sup>5</sup> Indeed, some scholars go as far as to say that 'the notion of democracy, involving the two aspects of 'free and fair elections' and 'good governance' has become established as a global norm'.<sup>6</sup> It is admitted that the notion of democracy and all its collaborators, such as the rule of law and good governance, have not yet found universal acceptance, let alone interpretation.<sup>7</sup> Nonetheless, it cannot be gainsaid that 'the notion of democracy, involving the two aspects of 'free and fair elections' and good governance, has become established in the course of the 1990's'.<sup>8</sup>

Among other things, governance in the modern sense recognises that the will of the people should determine the way in which they are ruled.<sup>9</sup> The 2002 Zimbabwean election was expected to reflect the will of the majority of the people, since citizens have a right to determine their own existence and to choose who should preside over their day-to-day lives in their pursuit of fulfilment and happiness.<sup>10</sup>

<sup>3</sup> The forum comprises 12 non-governmental organisations (NGOs) working in the field of human rights.

<sup>4</sup> The ruling party, ZANU PF, and its associates argued that American and European interests, especially those of the British, were actuated not because of any concern for democracy, but because of a 'satanic conspiracy' to return white supremacy and prevent the land redistribution exercise in which prime land belonging to white commercial farmers was being acquired, reportedly for redistribution to landless blacks. See generally *Parliamentary Debates* 28, 4:4128–9 (29 January 2002) and 28, 46:4136 (29 January 2002).

<sup>5</sup> R Dahl 'Draft notes' (1990) paper presented to the AID seminar on economic growth and political democracy: Linkages and political implications' as quoted in L Diamond *Globalisation of democracy: Trends, types, causes and prospects* (1995) 17.

<sup>6</sup> International Institute for Democracy and Electoral Assistance (IDEA) (1996) *Democracy Forum: Report of the Democracy Forum* (12–14 June 1996) 2.

<sup>7</sup> JA Wiseman *The new struggle for democracy in Africa* (1996) 7–8.

<sup>8</sup> IDEA (n 6 above).

<sup>9</sup> United Nations General Assembly Resolution (UNGA) 46/137 of 17 December 1991.

<sup>10</sup> Art 21(3) Universal Declaration of Human Rights (Universal Declaration): 'The will of the people shall be the basis of the authority of government'.

### 1.3 The notion of free and fair elections

Free and fair elections are a human right.<sup>11</sup> Indeed, the elements of freedom and fairness pervade all international and regional legal instruments dealing with elections.<sup>12</sup> Elections should be free and fair so that the rights and interests of the governed are protected.<sup>13</sup>

The right of individuals to determine their own fate will remain a sham if they are not granted the necessary environment in which to exercise it freely and without unnecessary impediments. Thus, state parties (in this case Zimbabwe) are bound to hold genuine and periodic elections 'guaranteeing the free expression of the will of the electors'.<sup>14</sup> They are also bound to ensure that representatives are 'freely-chosen'.<sup>15</sup> Apart from protecting the individual, these requirements are also designed to give legitimacy to the political system and to enhance democracy. In this respect they are a motivation to contribute to the development process.<sup>16</sup>

It should also be observed that the requirement of freeness protects the voters not only at the time of voting, but also during the pre-election period.<sup>17</sup> As a consequence, the principle of free elections is closely linked to the fundamental freedoms of thought, conscience and religion, expression, association as well as assembly and freedom from discrimination.<sup>18</sup> These essential freedoms are also protected in the African Charter on Human and Peoples' Rights (African Charter).<sup>19</sup>

Finally, the idea of freedom in the electoral process contemplates a political environment that is not manipulative. It envisages a situation where there exists freedom of the media to operate without undue influence or hindrance. Feltoe sets out some of the circumstances that could negate the freeness and fairness of an election:

- Campaigning by a political party is prevented or seriously obstructed.
- Voters are intimidated or bribed.

<sup>11</sup> G Totemeyer & D Kadima *SADC observer handbook* (2000) 3.

<sup>12</sup> Among which see 'United Nations framework for strengthening the rule of law' <http://www.arts.mcgill.ca/programmes/polisc/unsco-ruleoflaw.html> (accessed 15 July 2002); also art 21 of the Universal Declaration and art 25(a) of the International Covenant on Civil and Political Rights (ICCPR).

<sup>13</sup> 'Context and objectives of UN electoral assistance' <http://www.un.org/Depts/dpa/ead/website5.htm> (accessed 13 August 2002).

<sup>14</sup> Art 25(b) ICCPR.

<sup>15</sup> Art 13 African Charter; art 23(1)(a) American Convention; art 21(1) Universal Declaration; art 25(a) ICCPR.

<sup>16</sup> Part 1 African Charter for Popular Participation in Development and Transformation (African Charter for Development).

<sup>17</sup> Generally see GS Goodwin Gill *Free and fair elections: International law and practice* (1994).

<sup>18</sup> M Nowak *CCPR Commentary* (1993) 449.

<sup>19</sup> Arts 2, 8, 9, 10, & 11.

- The electoral laws give an unfair advantage to one of the political parties contesting the election.<sup>20</sup>
- There is rigging of the election.<sup>21</sup>

It follows from the above that the notion of freedom in elections is a prerequisite for democracy and that it denotes an environment wherein voters have the freedom

to participate in elections the way they want without fearing adverse effects on their own or families' safety, welfare or general dignity, and without coercion and restrictions.<sup>22</sup>

Fairness means that the rules of the game are clearly spelled out for all contesting parties to know what is at stake. They must also be held in respect to the principles of universal and equal suffrage, paying attention to the right to equality.<sup>23</sup>

#### 1.4 The international and regional instruments governing elections

Many conventions, declarations and protocols provide for free, fair and genuine elections. The International Covenant on Civil and Political Rights (ICCPR) makes provision for open elections, just as the Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>24</sup> Zimbabwe is a party to these two conventions.<sup>25</sup> It has also ratified the African Charter.<sup>26</sup>

<sup>20</sup> Transparency establishing the legal ground rules 'in an inclusive and open manner' is necessary: The Organisation for Security and Co-operation in Europe (OSCE) *The ODIHR election observation handbook* (1999) 7.

<sup>21</sup> G Feltoe 'An unfair contest: The presidential elections in Zimbabwe' (2002) 6 *Zimbabwe Human Rights Bulletin* 81. Electoral fraud vitiates or even perverts the will of the people.

<sup>22</sup> Elklit 'Free and fair' in International Institute for Democracy and Electoral Assistance (IDEA) *Democracy Forum: Report of the Democracy Forum 12-14 June 1996* (1996) 18. Thus the requirement for the secrecy of the ballot.

<sup>23</sup> Any restriction to the right to vote should be a reasonable one, not discriminatory: See UNGA resolution 46/137 of 17 December 1991 and Preamble as well as art 25(b) of the ICCPR. Restrictions on the grounds of residency were upheld by the European Commission on Human Rights in Application 7566/76, 9 *Decisions and Reports* 121. Citizenship is another ground. In Communication 211/98, *Legal Resources Foundation v Zambia*, the African Commission on Human and Peoples' Rights held that discrimination in the exercise of these rights has caused 'violence and social and economic instability' and should therefore not be justified. Equality of suffrage means no vote should carry more weight than others; Nowak (n 18 above) 449.

<sup>24</sup> Arts 5 & 25. See also art 1 Convention on the Political Rights of Women (CPRW).

<sup>25</sup> C Heyns (ed) *Human rights law in Africa 1996* (1996) 2. In the regional sphere, the African Charter on Human and Peoples' Rights (African Charter), the American Declaration of the Rights and Duties of Man (American Declaration), the American Convention on Human Rights (American Convention) and the European Convention on Human Rights Protocol 1 (European Convention) make provision for this right: arts 13, 20, 23 & 3 respectively.

<sup>26</sup> As above, 5.

For the purposes of this paper, it suffices to say that all the instruments cited above make provision for regular (or periodic), genuine (or free and fair) elections, mostly by secret ballot. However, it is interesting to note that unlike the European and American Conventions, the African Charter is silent on the issue of secrecy of the ballot. It is also remarkable that of the regional instruments, it is only the American Convention that makes a direct reference to the question of suffrage.<sup>27</sup> The African Charter may also be compared to the American Convention, which adds a right to be elected.<sup>28</sup>

Evaluated against international and regional instruments, the African Charter 'stands out as meagre and without substantial legal content' with regard to the right to vote. Moreover, the right is to be exercised 'in accordance with the provisions of national laws'. It may be noted, however, that there is no clear check or limitation on the import or operation of national legislation, leaving wide discretion to the individual state.<sup>29</sup> This leads us to examine the extent to which sovereignty, as contested by the government of Zimbabwe, can preclude international interest in domestic elections.

### 1.5 Sovereignty and elections

A state party to the international instruments setting out the rules and standards for the conduct of elections has some modicum of discretion and latitude to conduct elections within the parameters of its own laws.<sup>30</sup> The United Nations (UN) recognised sovereignty in its resolution on 'Respect for the principles of national sovereignty and non-interference in the internal affairs of states in their electoral processes'.<sup>31</sup>

Although they are held within the limitations of domestic law and practice, elections must be held in an environment that caters for the exercise of fundamental freedoms in accordance with international law. It seems indisputable that the principle of sovereignty should give way to the principles of accountability, the observance of international norms and human rights.<sup>32</sup> Sovereignty should never become a sanctuary for dictatorship and human rights violations.

<sup>27</sup> Art 23(1)(b).

<sup>28</sup> As above.

<sup>29</sup> L Lindholt *Questioning the universality of human rights: The African Charter on Human and Peoples' rights in Botswana, Malawi and Mozambique* (1997) 156.

<sup>30</sup> The principle of sovereignty has been codified in, among others, art 2 of the UN Charter.

<sup>31</sup> UNGA Res 46/130 of 17 December 1991; see also UNGA Res 47/130 of 18 December 1992 and UNGA Res 48/124 of 20 December 1993.

<sup>32</sup> It is admitted, though, that there is a lack of consensus on what issues the international community has the right to intervene; see generally M Heinberg (ed) *Subduing sovereignty: Sovereignty and the right to intervene* (1994). See also an article in Heinberg's book by JJ Holst 'Keeping a fractured peace' 136 in which Holst observes that 'Sovereignty may in fact be waning more rapidly than widely presumed . . .'.

## 2 Political and legal background

The struggle for democracy and human dignity has its roots in the colonial period of the country. Zimbabwe was formally colonised by the British in 1890. In 1893, the Anglo-Ndebele War was fought against the local Ndebele ethnic group in the Matebeleland region. This war was actuated by the dispossession of blacks of their land and cattle. Shortly thereafter, the Shona groups from Mashonaland joined the war and by 1896, the conflagration had become so widespread that it was called the First *Chimurenga* or War of Liberation. After the arrest and execution of the *Chimurenga* leaders, further dispossession and oppression followed, the upshot of which was that dissent spread commensurately.<sup>33</sup>

As a result, the trade union movement gave birth to several opposition political parties. The Zimbabwe African Peoples Union (ZAPU) was formed in 1961 under the leadership of Joshua Nkomo. The Zimbabwe African National Union (ZANU) was formed in 1963 under the leadership of Ndabaningi Sithole.<sup>34</sup> As discontent increased with a political system premised on the notion of white supremacy, Smith announced a Unilateral Declaration of Independence (UDI) on 11 November 1965.<sup>35</sup> This move was designed to perpetuate minority rule and is largely seen as the precipitator of the bitter liberation struggle that was to follow: the Second *Chimurenga*.<sup>36</sup> The guerrilla war forced Smith to the negotiating table, culminating in the country's first majority vote in 1980. The ZANU (PF) won the elections and ushered in black majority rule.<sup>37</sup>

Although the country has never been a *de jure* one-party state, the ruling party has completely dominated Zimbabwean politics since the Unity Accord with ZAPU in 1987. However, it seems to have been shocked out of its complacency when the Movement for Democratic Change (MDC), under the leadership of Morgan Tsvangirai, won nearly half the contested seats in the June 2000 parliamentary elections. Compounded by the fact that the government had suffered defeat when Zimbabweans rejected a government-sponsored draft Constitution at a referendum earlier in the year, the tone of official government speeches became ominous as the presidential election drew near.<sup>38</sup>

<sup>33</sup> For aspects of the history of Zimbabwe, see the Zimbabwe government website at <http://www.gta.gov.zw>.

<sup>34</sup> President Mugabe, as the First Secretary of the party, subsequently led it.

<sup>35</sup> The system was segregationist and the franchise was only extended incrementally until equal and universal suffrage was obtained at independence in 1980.

<sup>36</sup> G Shumba *et al* 'Report on the presidential election in Zimbabwe' (2002) 4, paper researched under the guidance of staff members of the Centre for Human Rights, University of Pretoria.

<sup>37</sup> As above, 5. ZANU (PF) won 116 out of the 120 contested seats.

<sup>38</sup> These speeches are extensively captured by the Forum in (generally) ZHRF (2002) *Human rights and Zimbabwe's presidential election: March 2002*.

## 2.1 The legal system for the elections

In evaluating an election, recourse should be had to the domestic legal system, in particular, electoral law and the Constitution. The Constitution of Zimbabwe provides for fundamental human rights.<sup>39</sup> These include political rights, such as freedom of conscience, expression, assembly and association, movement and protection from discrimination.<sup>40</sup> Other freedoms include the right to life, the right to protection from inhumane treatment and the right to protection from arbitrary search or entry.<sup>41</sup>

The Constitution also provides for the election of the president in accordance with the electoral law.<sup>42</sup> To be elected to presidency, one must be a citizen by birth or descent and should have attained forty years of age and be ordinarily resident in Zimbabwe.<sup>43</sup> The tenure of the office of the president is limited to six years. It is, however, notable that the Constitution is silent on the duration of the term of office of the incumbent president in the event of his or her being re-elected.

Section 61 of the Constitution provides for the establishment of an Electoral Supervisory Commission (ESC). It may be observed that, although the Constitution makes provision for the registration of voters,<sup>44</sup> it does not guarantee that those entitled to be registered will actually be registered as voters. It also does not grant the right not to be prevented from casting the ballot.

The Electoral Act provides for regulations and procedures governing parliamentary and presidential elections.<sup>45</sup> It makes provision for the appointment of an Electoral Directorate (ED), the functions of which include 'giving instructions and making recommendations' for 'ensuring that elections are conducted efficiently, properly, freely and fairly'.<sup>46</sup> It also regulates the procedure and conditions of service of the Electoral Supervisory Commission and the Registrar-General of Elections (RG), as well as the registration of voters. The Act also provides for the functions of the RG, who is subject to the direction of the ED.<sup>47</sup>

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<sup>39</sup> Ch 3.

<sup>40</sup> Secs 19–23.

<sup>41</sup> Secs 12, 15 & 17.

<sup>42</sup> Ch 4.

<sup>43</sup> Sec 28(1)(a)–(c).

<sup>44</sup> Schedule 3, sec 3.

<sup>45</sup> Ch 2:01.

<sup>46</sup> Sec 4(1)(c) of the Act.

<sup>47</sup> Sec 15(2) & (3) of the Act.

## 2.2 The Election Directorate (ED)

The ED consists of a chairman, appointed by the President, the Registrar-General and not fewer than two, nor more than ten other members. The Minister of Justice, Legal and Parliamentary Affairs appoints the ten others. Any other person assigned for the administration of the Act in terms of section 3 may also assume the Minister's responsibility.<sup>48</sup> It would seem that the composition of the ED does not augur well for guaranteeing free and fair elections. Ultimately, the President appoints members in one way or another. In practice, it has often been shown that the ED's partiality in handling contentious elections is suspect.<sup>49</sup>

The ED was chaired by Mariyawanda Nzuwa (appointed by President Robert Mugabe) and the Registrar-General (Tobaiwa Mudede) *ex officio*. Who exactly comprised the ED's other members in March 2002 was not made clear. The Police Commissioner sat together with the ED Chairperson and the Registrar-General at the table from which the results were announced.<sup>50</sup>

## 2.3 The Electoral Supervisory Commission (ESC)

An Electoral Supervisory Commission (ESC) is established in terms of section 61 of the Constitution. The President, in consultation with the Judicial Service Commission, appoints a Chairperson and two other members.<sup>51</sup> Two other members are again 'appointed by the President after consultation with the Speaker'.<sup>52</sup> It should be noted that albeit the President must consult, he or she is not required to adopt recommendations. The President also decides the tenure of office of the commissioners.<sup>53</sup> Furthermore, members hold office 'on such conditions as the President may fix' and may be removed by the President.<sup>54</sup> Thus, the impartiality of the ESC remains suspect. Although the Constitution provides for its independence, practice has also generated suspicions that the ESC panders to political considerations.<sup>55</sup>

<sup>48</sup> Sec 4(2)(a)-(c).

<sup>49</sup> See generally AP Cheater 'Human rights and Zimbabwe's June 2000 election' (2001).

<sup>50</sup> As above.

<sup>51</sup> Sec 61(1)(a).

<sup>52</sup> Sec 61(1)(b).

<sup>53</sup> Sec 7(1) Electoral Act.

<sup>54</sup> Secs 7(3) & 10 Electoral Act.

<sup>55</sup> Sec 61(6). Generally, <http://www.mdczimbabwe.com> (accessed 27 July 2002). In 2000, the United Parties resolved to boycott the election until amendments were made to the Electoral Act and the Registrar-General was precluded from conducting voter registration. See A Cheater 'Human rights in Zimbabwe January-June 2000: A baseline report' in Zimbabwe Lawyers for Human Rights (ZLHR) (2000) 3 *Zimbabwe Human Rights Bulletin* 66.



Together with the Registrar-General, the ESC is responsible for conducting presidential and parliamentary elections. Neither the Electoral Act nor the Constitution specifically grants the ESC a mandate to conduct elections for presidency.

The ESC appeared to be inadequately geared to discharge its constitutional mandate as only four of the requisite five ESC members were appointed.<sup>56</sup> As Chairperson, the President appointed retired army colonel and ex-combatant lawyer, Sobusa Gula-Ndebele.<sup>57</sup> In turn, the Chairperson of the ESC appointed as Director of Elections Brigadier Douglas Nyikayaramba.<sup>58</sup> Seventy-two Zimbabwe National Army officers were reportedly seconded to the ESC. One thousand and eighty election supervisors and 22 000 election monitors were recruited from mostly the Ministries of Defence, Home Affairs and Education.<sup>59</sup> It would appear that the selection of electoral officers was not transparent and inclusive. A balance could have been attained by including people from other sectors of the national spectrum, to give the impression of independence.

#### 2.4 Changes to the electoral law

The President used his wide powers under the Electoral Act (three times)<sup>60</sup> to promulgate laws that were detrimental to the opposition.<sup>61</sup> One such law was the General Laws Amendment Act (GLAA).<sup>62</sup> The GLAA made extensive amendments to the Electoral Act. It was described by the opposition as 'undemocratic and contrary to the SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region'.<sup>63</sup> The Minister of Justice, Legal and Parliamentary Affairs, described the amendments as designed 'to kick out from our politics the influence of foreign money and foreign interests' and to prevent private organisations from conducting voter education.<sup>64</sup>

Also contentious was a provision in the GLAA which empowered the Registrar-General to change voters' registration particulars without informing them.<sup>65</sup> It was feared that it facilitated rigging the roll by moving

<sup>56</sup> Zimbabwe Human Rights NGO Forum 'Human rights and Zimbabwe's presidential elections' <http://www.hrforumzim.com> (accessed 17 June 2002).

<sup>57</sup> He took over after Peter Hatendi resigned in protest over funding and other inadequacies.

<sup>58</sup> *The Zimbabwe Independent* (14 February 2002).

<sup>59</sup> *The Financial Gazette* (31 January 2002).

<sup>60</sup> Statutory Instruments 41D, 42B & 42E of 2002.

<sup>61</sup> Sec 158 gives the President powers to make statutory instruments that he or she 'considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation . . . '.

<sup>62</sup> Act 2 of 2002.

<sup>63</sup> *Parliamentary Debates* 28, 35:3135.

<sup>64</sup> ZHRF (n 56 above).

<sup>65</sup> Sec 34(1).

voters between constituencies without their knowledge, or even throwing them off the roll altogether. After the Supreme Court nullified the GLAA,<sup>66</sup> an Electoral Amendment bill was introduced, carrying identical provisions.<sup>67</sup>

## 2.5 Evaluation

It may be observed that the electoral institutions for the election were not independent, at least not in principle. International standards of transparency, freeness and fairness can usually only be enforced when, among others, the selection of electoral officers and the setting up of institutions are seen to be unbiased. Changes to the electoral law that fly in the face of court judgments may only have one purpose — to favour the ruling party at the detriment of the opposition.<sup>68</sup> However, this should not be considered in isolation when arriving at a conclusion on the freeness of the elections.

## 3 The events before the election

### 3.1 Voter education

Unlike the 2000 parliamentary election, the government outlawed the provision of voter education by civil society and made it a preserve of the ESC. The ESC, however, could delegate its responsibility and supply material to anyone it granted the permission to carry out voter education.<sup>69</sup> The GLAA also banned foreign contributions or donations for the purposes of voter education to anyone, except to the Electoral Supervisory Commission.<sup>70</sup> This restricted the participation of civil society in voter education and deprived voters of their freedom of information. This provision was not as illogical as it may seem, considering that the ESC was short on resources. Since education is power, it may be argued that the government had a reason to want the electorate ignorant in the face of mounting economic problems and what promised to be a stiff election.

It is worth noting, however, that these provisions were largely ignored, as the Zimbabwe Election Support Network (ZESN) and others continued to distribute pamphlets.<sup>71</sup> Thus, although the GLAA had the

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<sup>66</sup> Supreme Court Judgment SC 10/02.

<sup>67</sup> Act 20 of 2002.

<sup>68</sup> In Lesotho, electoral laws were only changed to facilitate the smooth running of elections in view of the compromises made by the contestants.

<sup>69</sup> General Laws Amendment Act 2002 secs 14D(4) & (6).

<sup>70</sup> Sec 14D(5).

<sup>71</sup> Commonwealth Observer Group (COG) 'Zimbabwe presidential election: 9–11 March 2002' <http://www.thecommonwealth.org/activities/democ.html> (accessed 21 September 2002).

potential to, and indeed prejudiced voters, the effect was not fatal in terms of voter education.<sup>72</sup>

### 3.2 Voter registration

On 31 January 2002, the nomination day for the presidential election, the ESC announced that 5 479 100 people were registered on the voters' roll.<sup>73</sup> The official government newspaper, *The Herald*, announced that of those registered, 3,2 million were urban and 2,2 million rural.<sup>74</sup> (The government altered the figure later to reflect 3,2 million rural and 2,2 million urban. This is significant, because the ruling party believed its support base were the rural areas).<sup>75</sup>

It is alleged that the office of the Registrar-General declined to make public the number of voters registered in each constituency, on the grounds that the information was confidential.<sup>76</sup> Furthermore, the RG is also alleged to have refused to release the final roll used in the election.<sup>77</sup> This caused disquiet within the opposition, as it was argued that the roll could be used to manipulate the outcome of the vote. Some commentators claimed that this anomaly reflected the fact that the roll had not been updated, leaving 'a vast reservoir of fictional voters who can then be mobilised at will when the going gets tough'.<sup>78</sup> This secrecy was hardly in the spirit of transparency and has the potential to vitiate the fairness of an election, contrary to international expectations.

### 3.3 Complaints with regard to registration

The Human Rights Forum observes that the right to vote and the right to equality were compromised. It also observed that the effects of the GLAA and other subsequent laws was to disenfranchise Zimbabwean citizens of foreign descent and those previously entitled to postal votes. Moreover, procedural complexities also resulted in most people being deprived of their right to register and therefore their right to vote.

Disenfranchisement occasioned by failure to secure national identification was particularly rampant among women married under customary law and among the youth. Chiefs and headmen (under the pay of the ruling party) became a conduit for securing national identity

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<sup>72</sup> It may also be noted that the Civic Alliance for Social and Economic (CASEP) and the Legal Projects Centre (LPC) continued to educate people on their rights in spite of the GLAA.

<sup>73</sup> The Forum reports that the MDC claimed to have uncovered 524 duplications and 107 deceased voters still registered on the roll.

<sup>74</sup> *The Herald* (12 March 2002).

<sup>75</sup> *The Herald* (11 March 2002).

<sup>76</sup> *The Daily News* (10 March 2002).

<sup>77</sup> *The Herald* (7 March 2002).

<sup>78</sup> *The Daily News* (2 April 2002).

cards for the purposes of registration. Tendai Shumba, of Magunje (Hurungwe district) failed to secure a national identity card, reportedly because she did not take a letter of recommendation from ZANU-PF officials.<sup>79</sup> It is reported that numerous roadblocks were set up by ZANU (PF) supporters to dispossess people of their identity cards where they could not prove membership to the ruling party. The Forum also reports that about 1 300 national identity cards had been reportedly stolen in the districts of Mutoko, Tsholotsho, Nkayi, Bulilimangwe South, Kwekwe and Buhera North by the time of voting. Such extensive disenfranchisement impacted on the freeness and fairness of the election.

Other 'stringent' provisions that may be said to have contributed to the disenfranchisement of voters were the proof of residence requirements in the GLAA.<sup>80</sup> Many people in the urban areas (touted to be the opposition MDC stronghold) were either homeless or could not obtain proof of residence. Many expatriates intending to come to Zimbabwe to vote were likewise disenfranchised.<sup>81</sup> About 22 000 prisoners in jail could not vote, although there is no legal impediment for those on remand or those serving six months or below. In contrast, all prisoners were allowed to vote at independence.

Students were also among those to suffer disenfranchisement. Those who had been registered at tertiary institutions found that they could not vote as the Ministry of Higher Education gave instructions that the institutions remain closed during the election. Students attempting to vote at polling stations near their institutions were reportedly turned away.<sup>82</sup> Amendments that were introduced to the Citizenship Act<sup>83</sup> were also used to disenfranchise a majority of the electorate who held dual citizenship. There were also allegations of procedural irregularities such as registration after the roll had been closed or by the underaged.<sup>84</sup>

Although it is difficult (if not impossible) to verify all allegations, some of these complaints must have a basis in fact. It would seem that most were founded as the government did little to counter them. Violations and wilful manipulation of the law are difficult to dispute. Such a scenario offends against the standards for elections as contemplated in the international instruments referred to already.<sup>85</sup>

<sup>79</sup> *The Daily News* (7 March 2002).

<sup>80</sup> Secs 3(e)–(f) thereof. It is generally felt that the GLAA placed 'unreasonable' demands on the electorate.

<sup>81</sup> *The Zimbabwe Standard* (10 March 2002).

<sup>82</sup> *The Daily News* (2 March 2002), quoting the Zimbabwe National Students Union (ZINASU).

<sup>83</sup> Ch 4:01.

<sup>84</sup> See generally The Zimbabwe Human Rights Forum <http://www.hrforumzim.com/special-inhrru/Election.htm> (accessed 30 July 2002).

<sup>85</sup> See also Southern African Development Community (SADC) Parliamentary Forum (2001) *Norms and Standards for Elections in the SADC region*. Zimbabwe is a member of SADC.

## 4 The elections and fundamental freedoms

### 4.1 Freedom of expression and information

The right to freedom of expression is protected by the Zimbabwean Constitution.<sup>86</sup> As was the case in Lesotho, the state-controlled media devoted most of their coverage to the ruling party. In Zimbabwe, however, the situation was more serious. To begin with, the media was clearly polarised between the independent press and the state-controlled one.<sup>87</sup> The former seemed to favour the opposition, although most of them strove for balance. The government-controlled media was, however, glaringly partisan. For example, not a single state-controlled newspaper, radio or television ran any advertisement for the opposition when the private press would advertise the ruling party.<sup>88</sup>

The state-controlled media often invented stories to paint the opposition in a bad light.<sup>89</sup> In fact, the Zimbabwe Broadcasting Corporation (ZBC) was subsequently accused of not adhering to basic standards of journalism in their support for the ruling party.<sup>90</sup> The Media Monitoring Project issued a report of the television news bulletins between 1 December and 7 March 2002. It observed that 94% bulletins favoured ZANU (PF), while the remainder was negatively slanted against the opposition.<sup>91</sup>

Incidents of violence against media houses and personnel were not uncommon during the Zimbabwean election. Offices and printing houses of *The Daily News* were bombed several times by suspected ruling party supporters. Independent publications were 'banned' from such areas as Bindura, Karoi and Masvingo, all strongholds of the ruling party.<sup>92</sup> Vendors of these publications were invariably assaulted or tortured.

The law was also used to make it difficult for the media to freely inform the populace. Laws such as the Public Order and Security Act (POSA),<sup>93</sup> as well as the Access to Information and Protection of Privacy Bill (now

<sup>86</sup> Sec 20. See also art 19 Universal Declaration and art 19 ICCPR.

<sup>87</sup> Generally see Media Monitoring Project (MMP): (2001) *Election 2000: The media war*; MMP; MMP (2000) *A duty to inform: A report on Zimbabwe's publicly owned media — January–May 1999*: Article 19; MMP (2001) *A question of balance*: MMP, and R Saunders (1999) *A history of the media in Zimbabwe*.

<sup>88</sup> Zimbabwe Human Rights NGO Forum *Human rights and Zimbabwe's presidential election: March 2002* (2002) 15.

<sup>89</sup> Feltoe (n 21 above) 83–84. Also see the stories run by the *Sunday Mail* (24 February 2002) & (3 March 2002) as well as *The Herald* (11 February 2002).

<sup>90</sup> Commonwealth Observer Group (2002) *Zimbabwe presidential election 9–11 March 2002*: COG 33.

<sup>91</sup> Quoted in ZHRF (n 88 above) 18.

<sup>92</sup> *The Daily News* (25 January 2002).

<sup>93</sup> Ch 11:17.

an Act) were often used to arrest journalists for publishing 'false statements which are peddled internationally'.<sup>94</sup>

It may be observed that ruling party supporters deliberately violated the rights of media personnel as well as the electorate. Opposition parties were denied coverage in the state-owned media. As if that was not enough, laws were introduced to curtail the right of expression as well as its attendant right to receive information. Where the playing field is not level, elections cannot be said to be genuine, free and fair.

#### 4.2 Freedom of association and assembly

The Zimbabwean Constitution protects these two freedoms.<sup>95</sup> In *John D Ouko v Kenya* the African Commission held freedom of association sacrosanct.<sup>96</sup> The African Commission affirmed freedom of assembly as a fundamental political right in *Sir Dawda K Jawara v The Gambia*.<sup>97</sup> However, these freedoms seem to have been trampled upon during the Zimbabwean election.

The introduction of POSA heralded the acceleration of a series of violations.<sup>98</sup> Summarised, POSA made it illegal to hold political meetings without advance notice and the permission of the police. It also prohibited statements likely to cause 'ridicule' to the President. A month after POSA came into operation, 42 people had been arrested under the Act. The Forum notes that none of them were supporters of the ruling party.<sup>99</sup>

While President Mugabe addressed 50 major rallies, Tsvangirai could only address eight, as the police mostly refused to grant permission on the grounds that they feared for public security.<sup>100</sup> In White City Stadium in Bulawayo, the police fired teargas to disperse MDC supporters after clashes with ZANU (PF) sympathisers who invaded the stadium.<sup>101</sup> Subsequently, the MDC had to obtain an injunction against the police.<sup>102</sup> There were also reports that the police asked for national identity cards

<sup>94</sup> P Chinamasa, as recorded in *Parliamentary Debates* 28, 39:3547 (24 January 2002).

<sup>95</sup> Sec 21. See also art 20 Universal Declaration and arts 21 & 22 ICCPR.

<sup>96</sup> Communication 232/99, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

<sup>97</sup> Communication 149/96, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

<sup>98</sup> Ch 11:17. Violations included freedom of association, see eg South African Parliamentary Observer Mission (SAPOM) (2002) Zimbabwe Presidential Elections 9–11 March 2002 9. Although the group held (amid disagreements) that the election was 'a credible expression of the will of the people', their observations seem to controvert the conclusion.

<sup>99</sup> ZHRF (n 88 above) 23.

<sup>100</sup> As above.

<sup>101</sup> *The Daily News* (1 February 2002).

<sup>102</sup> *The Financial Gazette* (21 February 2002).

before allowing people to attend rallies addressed by MDC. Those without cards were allegedly turned away.<sup>103</sup>

### 4.3 Freedom from violence and intimidation

Political violence impedes the elector's ability to participate freely in the electoral process. Electors may either be deterred from voting or may be unduly influenced in their choice.<sup>104</sup> Violence was the most outstanding occurrence in the Zimbabwean election. It appeared to have been in most instances incited by the ruling party. Although the opposition MDC was the principal target, civil society and churches were not spared either. I must, however, mention that the opposition itself was not above perpetrating violence.<sup>105</sup> Nonetheless, the ruling party employed the full weight of the 'war veterans' in order to win the election.

Political violence at such a scale had never been experienced before the 2000 constitutional referendum and parliamentary election.<sup>106</sup> Inflammatory statements from the leadership of the ruling party worsened the violence. President Mugabe was quoted boasting that his party had several 'degrees in violence'. He also urged his supporters to wage 'a real war' on the MDC.<sup>107</sup> 'The war is going to be physical', he said.<sup>108</sup>

Following an appeal by SADC, he eventually made an appeal for an end to violence, arguing that it was drawing international attention.<sup>109</sup> After the European Union (EU) and the Commonwealth mounted the pressure, the President made further calls for an end to violence.<sup>110</sup> The governor for Manicaland is also reported to have called for a peaceful campaign.<sup>111</sup> These pleas did nothing to stop the tide as party youths trained under the national youth service, known as the 'green bombers' for their military-style uniforms, continued to set up roadblocks and terrorise people. The 'war veterans' and the 'green bombers' also set up terror 'bases' where victims would be tortured or 're-educated'.<sup>112</sup>

<sup>103</sup> *The Daily News* (4 February 2002).

<sup>104</sup> Commonwealth (n 90 above) 7.

<sup>105</sup> As above.

<sup>106</sup> Evidence of the massive violence and intimidation came to light in the cases following the disputed 2000 Parliamentary Elections. See for instance *Mutoko South Election Petition* HH 68/2001; *Hurungwe East Election Petition* and *Silas Matamisa v Phillip Chiyangwa and Registrar General of elections* HH 48/2001. See also S Moyo 'The rule of law in Zimbabwe' (2001) Paper presented to the Canadian Bar Association Annual General Meeting which is on file with the author.

<sup>107</sup> *The Financial Gazette* (10 January 2002).

<sup>108</sup> *The Daily News* (26 January 2002).

<sup>109</sup> *The Daily News* (19 January 2002).

<sup>110</sup> *The Herald & The Daily News* (30 January 2002).

<sup>111</sup> *The Zimbabwe Standard* (27 January 2002).

<sup>112</sup> *The Zimbabwe Independent* (1 March 2002).

Several deaths and disappearances were reported.<sup>113</sup> In the Midlands, a MDC supporter was allegedly beheaded with a spade. Another victim had the letters MDC carved with a knife on his back.<sup>114</sup> Gang rapes against suspected opposition supporters were not uncommon.<sup>115</sup> In stark contrast, Tsvangirai appealed for reason and resort to the law.<sup>116</sup>

Tsvangirai's faith in the rule of law was, however, misplaced, as the Zimbabwe Republic Police (ZRP) was clearly partisan in enforcing the law.<sup>117</sup> In fact, it has been said that 'sympathising with the opposition became a sure way of having normal life disrupted by the law enforcement agents'.<sup>118</sup> In the Chivi District, police fired live bullets and hurled teargas at Tsvangirai's convoy after he had stopped to greet supporters lining the roadside.<sup>119</sup> This was not the first or last time for the police to harass him or his supporters.<sup>120</sup>

## 5 Polling and post-election events

Although there were incidents of gross human rights abuses in the run-up to the election, it is encouraging that the days of the election were generally peaceful.<sup>121</sup> However, police fired teargas in Kuwadzana, Harare, to dispel voters who had become impatient with the slow pace of the process. A large number of people were unable to vote in the MDC strongholds of Harare and Chitungwiza as a result of the reduction of polling stations in urban areas. This reduction amounted to about 30% to 40%.<sup>122</sup>

Even though verification and counting were delayed, the process was conducted smoothly and according to procedure. Notwithstanding this, irregularities prior to this time had marred the whole process. For example, it is reported that the uniformed forces' voting was done in

<sup>113</sup> The ZHRF catalogues a total of 56 reported politically motivated deaths, (n 90 above) 97-100.

<sup>114</sup> Commonwealth (n 90 above).

<sup>115</sup> As above. Such mindless violence is still continuing at the time of writing.

<sup>116</sup> *The Zimbabwe Independent* (8 February 2002) & *The Daily News* (11 February 2002).

<sup>117</sup> This has been going on since the constitutional referendum in which the government's sponsored Draft Constitution was rejected. See for example *The Human Rights Observer* 'Deterioration of the rule of law in Zimbabwe'; Norwegian Election Observation Mission (2002) *Presidential Elections in Zimbabwe 2002, Preliminary Report Issued on 12 March 2002* 3 and G Feltoe 'The onslaught against the rule of law in Zimbabwe' (2001) Paper presented to the South African Institute of International Affairs, Johannesburg and is on file with the author.

<sup>118</sup> Zimbabwe Human Rights Association (ZIMRIGHTS) (2002) *Zimbabwe Presidential Elections 2002 Report* 3.

<sup>119</sup> *The Daily News* (23 February 2002).

<sup>120</sup> *The Daily News* (7 & 8 February 2002).

<sup>121</sup> This writer was an unofficial observer on behalf of the Centre for Human Rights, University of Pretoria.

<sup>122</sup> Commonwealth (n 90 above) 16.



the presence of senior officers and was therefore not secret and subject to influence.<sup>123</sup> Numerous MDC agents were kidnapped, injured or arrested or had their cars stoned or taken away, making it impossible to supervise the process.<sup>124</sup> In Kuwadzana, 'war veterans' allegedly assaulted and dispersed voters whilst wielding guns.<sup>125</sup> It is not surprising, therefore, that the outcome of the election has not been accepted by the main opposition party, which has filed suit. More importantly, the European Union and the United States have imposed targeted sanctions against senior members of the ruling party.

## 6 What went wrong?

### 6.1 The electoral system

In analysing the Zimbabwean anomaly, it is fitting to make a brief comparison with other countries. Lesotho (2002) and Ghana (2000) were remarkable for the peacefulness of their elections. In Lesotho, it has been mooted that this was because of the new electoral system that was introduced.<sup>126</sup>

Zimbabwe uses the First Past the Post (FPP) or 'winner takes all' electoral arrangement. It cannot be denied that the choice of a political model is important. Apart from the fact that this has an impact on the 'representativity, legitimacy and stability of the government born of it',<sup>127</sup> the choice of a model is also important in that it shapes the limitations and expectations of the contestants and as such steers their conduct in respect of human rights. For example, in the FPP system the stakes are high in the sense that the loser loses everything. Knowing this, parties and individuals are liable to use unethical and unlawful means to win the election. However, since elections have been held relatively peacefully (in Ghana for instance) using the FPP system, the choice of an electoral model should not be overemphasised. Even in Lesotho where a new model was introduced, it must not be forgotten that it was used on a limited scale. There are other vital considerations to be taken into account.

### 6.2 The lack of transparency in Zimbabwe

Perhaps the most serious cause of violence in Zimbabwe was the lack of openness that accompanied the electoral process. For instance, the

<sup>123</sup> ZIMRIGHTS (n 118 above) 5.

<sup>124</sup> Feltoe (n 21 above) 92.

<sup>125</sup> *The Daily News* (11 March 2002).

<sup>126</sup> The Mixed Member Proportional Representation system.

<sup>127</sup> NL Mahao 'Electoral system and legitimacy of representation' (2000) 10 *Lesotho Law Journal* 245. See also SN Ndengwa 'The relevance of the electoral system: A simulation of the 1992 Kenyan election' (1997) 2 *African Journal of Political Science* 14.

registration process reopened three times amid claims by the opposition that there was insufficient publicity of the event.<sup>128</sup> Electoral laws that had been the hallmark of past elections were often changed willy-nilly. At times the courts struck down certain laws, but nevertheless, the same provisions would be returned in the form of other laws.<sup>129</sup> In instances such as these, it is likely that both the electorate and the contestants may be forced to unlawful means out of sheer frustration or even to complement an apparently anarchical process.

The refusal to grant accreditation to both domestic and foreign observers perceived as unfriendly by the Zimbabwean government worsened the situation.<sup>130</sup> It also seemed to give credence to the idea that the process was flawed.<sup>131</sup>

Also important is the fact that in Lesotho, the 'rules of the game' were clearly defined. The opposition had been included in the negotiations surrounding the post-1998 electoral preparations. This was in sharp contrast to the 'ostracising' of the opposition in Zimbabwe. Thus, because of the inclusiveness of the developments in Lesotho, rather than the new electoral system, the election went smoothly.

### 6.3 The advent of a strong opposition in Zimbabwe

It could be contented that the Zimbabwean election was strikingly different for the reason that there had now emerged a strong official opposition. Zimbabwe's ruling party had a history of dominance and complacency that made it appear invincible. Although ZANU (PF) seems to have a history of violence against political opponents,<sup>132</sup> in 2002 the fear of loss was palpable, as evidenced in the actions of the ruling party.<sup>133</sup> This apprehension could only lead to desperate measures that would be an indictment to the whole election.

It should further be noted that Zimbabwe has a very big middle class, a student movement and civil society so strong that consciousness was high. Because of unparalleled economic woes, largely the result of

<sup>128</sup> Commonwealth (n 90 above).

<sup>129</sup> For example, the General Laws Amendment Act was struck down by the courts to be returned barely two weeks later in the form of the Electoral Amendment Bill (No 4 of 2002).

<sup>130</sup> The local Zimbabwe Election Support Network (ZESN) applied to field 12 500 observers but was only allowed 500. The 23-strong delegation of NGOs from South Africa was refused accreditation. The EU pulled out after its delegation head had also been denied observer status.

<sup>131</sup> Compared to the Lesotho 2002 and Ghana 2000 elections.

<sup>132</sup> International Human Rights Law Group Zimbabwe: *Report on the 1985 General Elections*; R Sunders *Never the same again: Zimbabwe's growth towards democracy* (2000) Edwina Spicer Productions and ZESN (2001) Bikita West 2001 Parliamentary By-Election Report 13–14 January 2001: ZESN 20–24.

<sup>133</sup> Most statements by senior personnel in the government were astonishingly unstate-manlike.

corruption and economic structural adjustment policies, students, urbanites and the middle class were the most poignant victims of the economic downturn. This could only increase strife, as demonstrations became an almost daily phenomenon. Believing it was under a siege of coup-like proportions, the ruling party increased its strong-arm tactics.

#### 6.4 The land question

Although no African state could be said to be liberated from problems regarding land issues, in Zimbabwe for various reasons the clamour took on a serious tone in the run-up to the elections. The liberation struggle (one of the most bitter in the struggle for the decolonisation of Africa) was principally premised on the land question.

The Lancaster House Constitution, which was negotiated in 1979, made it well nigh impossible for the new black government to expedite the process of redistribution.<sup>134</sup> Thus, after the government had failed to win support to solve the land issue through what many perceived to be an unrepresentative, unjust and discriminatory constitutional overhaul, it mounted what was dubbed a 'racist campaign' against white farmers. These farmers were accused of having sponsored the rejection of the draft Constitution in collaboration with the MDC, who were also called 'puppets' of Western influence and 'Rhodies'.<sup>135</sup>

This gospel of hate found its mark and spawned ruling party militants in the form of 'war veterans' and most unemployed youths who were willing to go to extremes to advance the Third *Chimurega*. Thus, although other countries have their own land crises, the demagoguery surrounding the issue in Zimbabwe contributed to violence.<sup>136</sup>

### 7 Conclusion

Following from the above, it is my submission that the 2002 Zimbabwean presidential election was neither genuine and legitimate, nor free and fair. The Zimbabwean process violated all the norms and standards, international or regional, expected in an election. It is sad, therefore, that some observers opted to see no evil, hear no evil and speak no evil.<sup>137</sup>

<sup>134</sup> J Herbst 'The dilemmas of land policy in Zimbabwe' in S Baynham *State politics in Zimbabwe* (1990) 131.

<sup>135</sup> Zimbabwe was formerly Rhodesia under colonial rule.

<sup>136</sup> South Africa, Kenya and Namibia are some of the countries where the land question has manifested itself recently.

<sup>137</sup> These include the Namibian, Kenyan and Tanzanian Government Observer Teams, the COMESA Observer Team, the OAU Observer Mission, the African Heads of (Diplomatic) Mission and the SADC Ministerial Task Force.

It is hoped that it is not a misplaced sense of brotherhood or an 'old-boy network of African strongmen' as Philip Gourevitch calls it,<sup>138</sup> that makes African leaders stick together in the face of wanton human rights violations. Now is the time to come up with clear, binding and enforceable human rights protection protocols and mechanisms. For the sake of progress and development, the continent should be courageous enough to admit, condemn and rectify its shortfalls. Where praise is due, as in the case of the election in Lesotho, it must be generously accorded. By the same token, where intervention is necessary, as was the case in Zimbabwe, the international community should not hesitate to do so.

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<sup>138</sup> P Gourevitch *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda* (1998) 254.