

# **Zimbabwe – Ready for elections?**

## **Pre-Election 2013 Report**

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This publication is dedicated to the long suffering members of Zimbabwe Lawyers for Human Rights (ZLHR). Human Rights lawyers have continued to strive to shape the jurisprudence and judicial precedents through their expertise and tools of trade under extreme pressure. To members of ZLHR, this one is for you - steadfast in litigation to foster a culture of human rights in Zimbabwe!

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## **About Zimbabwe Lawyers for Human Rights**

Zimbabwe Lawyers for Human Rights (ZLHR) is a not for profit human rights organization whose core objective is to foster a culture of human rights in Zimbabwe as well as to encourage the growth and strengthening of human rights at all levels of Zimbabwean society through observance of the rule of law. ZLHR is committed to upholding respect for the rule of law and the unimpeded administration of justice, free and fair elections, the free flow of information and the protection of constitutional rights and freedoms in Zimbabwe and the surrounding region. It keeps these values central in its programming activities.

ZLHR is a national membership organization consisting of around 170 lawyers and law students, who voluntarily associate, pay a membership fee and carry out human rights promotion and protection activities due to their interest in human rights and the rule of law. A Secretariat of 16 people, 9 of whom are lawyers, are employed full time to implement the organization's objectives and the policy decisions of a Board of 11 members elected by, and reporting to, the general membership at an Annual General Meeting. ZLHR holds Observer Status with the African Commission on Human and Peoples' Rights (ACHPR), forms the Secretariat of the Human Rights Committee of the SADC Lawyers Association, and has affiliate status with the International Commission of Jurists (ICJ).

ZLHR's aims and objectives are:

1. To strive to protect, promote, deepen and broaden the human rights provisions in the Constitution of Zimbabwe.
2. To strive for the implementation and protection in Zimbabwe of international human rights norms as contained in important sub-regional, regional and international human rights instruments.
3. To strive for the adoption of a Southern African Development Community (SADC) Charter on Human Rights and to develop and/or strengthen the implementing mechanisms.
4. To endeavour to find common ground with and to work alongside other Zimbabwean groups, organisations, activists and persons who share a broadly similar concern for and interest in human rights.
5. To liaise and work with other human rights groups wherever situated but particularly in Southern Africa, and especially those closely linked to the legal profession.
6. To do all other things necessary to promote and protect human rights, the rule of law and separation of powers in Zimbabwe and the region.

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## **Abbreviations**

ACHPR	African Charter on Human and Peoples' Rights
AG	Attorney General
AIPPA	Access to Information and Protection of Privacy Act
AU	African Union
AU Declaration	OAU/AU Declaration on the Principles Governing Democratic Elections
CIO	Central Intelligence Organisation
CSOs	Civil Society Organisations
GPA	Global Political Agreement
HRDs	Human Rights Defenders
ICCPR	International Covenant on Civil and Political Rights
IG	Inclusive Government
MDC T	Movement for Democratic Change led by Morgan Tsvangirai
MDC-N	Movement for Democratic Change led by Arthur Mutambara/ Welshman Ncube
NGOs	Non-Governmental Organisations
OAU	Organisation of African Unity
POSA	Public Order and Security Act
R-G of Voters	Registrar-General of Voters
SADC	Southern Africa Development Community
SADC Principles	SADC Principles and Guidelines Governing Democratic Elections
UN	United Nations
ZEC	Zimbabwe Electoral Commission
ZLHR	Zimbabwe Lawyers for Human Rights
ZRP	Zimbabwe Republic Police

# 1 Background

## 1.1 Introduction

The harmonised elections set for 31 July 2013 remain perhaps the most significant yet contested polls in the history of Zimbabwe. Not only has the timing of the actual poll been uncertain,<sup>1</sup> but the polls are also approaching at a time when the curtains are coming down on the embattled Inclusive Government (IG) that was akin to a love-hate relationship amongst the three main political parties represented in Parliament. Threats of disengagement, accusations and counter-accusations of maladministration and breaches of the Global Political Agreement (GPA) were common since the consummation of the IG on 9 February 2009. A new Constitution was adopted after a national referendum on 16 March 2013, ushering in a new electoral system.<sup>2</sup> Unlike in previous elections that implemented the first-past-the-post (absolute majority) system, the new Constitution introduced a mixed system of first-past-the-post, with a dose of proportional representation for the Senate and Provincial Councils, together with a women's quota.<sup>3</sup> Additional changes included representation of people with special needs.<sup>4</sup> It is within the framework of this new electoral system that the 31 July elections are set to take place.

It is widely accepted that, for conclusive credible, free and fair elections to be achieved, there is need for a clear legislative framework that creates a foundation to protect the integrity of electoral processes and minimise conflict and disputes. This framework must be supported by adequate, functional policies, laws and supporting democratic state institutions that are effective, non-partisan and instill public confidence in their operations. Over the years, Zimbabwe Lawyers for Human Rights (ZLHR) has advocated for reform of laws and institutions that impact on the conduct of elections in a manner that allows the citizenry to fully participate in the governance of the country, as is their constitutional right. A clear and respected constitutional and legal framework will allow Zimbabwe to transition to a democratic state without contestation. Such a framework must comply with norms, standards and good practices developed at the sub-regional, regional and international level. Zimbabwe is a member of the Southern Africa Development Community (SADC), African Union (AU) and United Nations (UN), and

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1 E Mushava "Poll dates uncertain: Ncube" *Newsday* (28 February 2013) p 3.

2 Constitution of Zimbabwe (Amendment No. 20) Act of 2013.

3 Section 157(1)(d) of the Constitution of Zimbabwe (Amendment No. 20)

4 Section 157(1)(e) of the Constitution of Zimbabwe (Amendment No. 20)

these institutions have over the years provided minimum guidelines on the conduct of credible, free and fair elections.

### 1.1.1 The role of the Southern Africa Development Community

The establishment of the IG was the epitome of the subversion of the peoples' will. The IG was an imposed political solution, negotiated after the sham one-man presidential election run-off of 27 June 2008, tainted with stark evidence of extra-judicial killings, enforced disappearances, widespread violence and manipulation. It was rejected by all observer missions and the national population at large.<sup>5</sup> The SADC and AU, concerned about the political crisis and the possible instability in Zimbabwe, and desirous of maintaining peace and security in the region and on the continent, played a key role in negotiating a power-sharing agreement – the GPA of September 2008. This set the foundation for a government amongst the three main political parties with presence in Parliament, being the two Movement for Democratic Change (MDC) formations led by Morgan Tsvangirai (MDC-T) and (then) Arthur Mutambara (MDC-M),<sup>6</sup> and the Zimbabwe African National Union Patriotic Front (ZANU PF). The AU and SADC also acted as guarantors of the GPA, continuing to monitor the implementation of the GPA provisions by the three principals for the purposes of facilitating a conducive electoral environment, eradication of impunity for politically-motivated violence, and reformed institutions to ensure that the will of the people would be respected in a future poll.

Since February 2009 when the IG was established, the SADC-appointed facilitators – first, President Thabo Mbeki, and subsequently President Jacob Zuma – worked to facilitate dialogue between the two MDCs and ZANU PF for the achievement of the GPA objectives. Economic stabilisation, a reduction in overt violence, and the production of a constitution accepted by national referendum were achieved during the life of the IG;<sup>7</sup> however key legislative and institutional reforms and countering of impunity for human rights violations proved elusive. A roadmap to elections was constantly ignored and violated and, on the eve of elections, many outstanding reform issues remain unresolved.

The region and continent have been seized with efforts to resolve the Zimbabwe situation since 2009, holding a record number of Summits and Troika meetings to deal with emerging disputes and infractions. Through these efforts, and the work of a strong South African facilitation team, the IG managed to hold under extreme pressure and provocation. However, following the delivery of a controversial judgment by the

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5 Voters are said to have gone to poll on 27 June 2008 in a climate of fear and dread after Morgan Tsvangirai withdrew from participating, citing violence and insecurity. See M Meredith *The State of Africa – A history of the continent since independence* (2011) p 621.

6 Mutambara was removed from presidency of the party during a disputed congress in January 2010. His removal was held to have been procedural by the court. See D Nemukuyu "Mutambara's ouster above board – High Court" *The Herald* (13 June 2012)p 1; O Gagare "I'm now principal – Ncube declares" *Newsday* (12 January 2011) p 1.

7 This constitution was adopted after about 4 years as it was stalled due to major disagreements by the political parties involved, amongst other challenges.

Constitutional Court of Zimbabwe in the case of *Mawarire v President of Zimbabwe and Others*,<sup>8</sup> the President swiftly moved to bypass both SADC and the national Parliament and used his long-disputed presidential powers to amend the Electoral Act and unilaterally set an election date of 31 July 2013, purportedly in compliance with the order of the Constitutional Court.<sup>9</sup> In this manner, key media, legislative and institutional reforms were bypassed by a presidential candidate interested in the outcome of a national poll. Security sector reform, openly opposed by the Zimbabwe Defence Forces, the Zimbabwe Republic Police,<sup>10</sup> and even the Central Intelligence Organisation<sup>11</sup> also remain outstanding.

During an Extraordinary Summit held in Maputo, Mozambique, on 15 June 2013, SADC Heads of State and Government recommended that the President return to court to seek a postponement of the elections to allow for outstanding reforms to be implemented. ZANU PF received the outcome of the Maputo Summit with open hostility and subsequent defiance. The party and its representatives in government have, since then, operated unilaterally and have essentially abandoned the GPA and its outstanding requirements. Rhetoric has become the order of the day, with threats to pull out of the regional body,<sup>12</sup> and insults and hate speech directed against any institution and person expressing concerns around the unfolding processes and current operating environment. One stark example was the attack on Ambassador Lindiwe Zulu, President Zuma's advisor on international relations, for comments about the state of Zimbabwe's preparedness for elections. She was labeled "an ordinary, stupid and idiotic street woman",<sup>13</sup> and President Zuma has also been reminded that he is the facilitator and he cannot delegate his responsibilities.<sup>14</sup>

Incontrovertible facts indicate that the political instability of the past decade or more has forced a mass exodus of Zimbabweans into neighbouring countries, with South Africa and Botswana receiving the largest numbers. The absence of sustained peace and stability in Zimbabwe will continue to contribute to regional instability and regression, something which affects SADC and its efforts towards regional integration, growth, peace and development. Whilst the time and effort invested by SADC in seeking to resolve the impasse in Zimbabwe is commendable, there is need to see the political manipulation for what it is, and take firm and uncompromising action if it is to ensure that the overall objective of the GPA (to achieve a credible, free and fair election in

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8 Constitutional Court of Zimbabwe, unreported case CCZ1/13.

9 Before this decision there was considerable speculation about when elections would be held, from as far back as 2012. See E Mashava "Poll talk a mere hoax" *Daily News* (10 January 2012) p1.

10 See "ZDF won't entertain security sector reform" *The Herald* (12 November 2011) p 2; M Kashumba "Security Sector reforms a foreign agenda, says Chihuri" *The Herald* (1 December 2011) p 2; T Farawo "I have no time for sellouts: Chiwengwa" *The Sunday Mail* (5 May 2013) p 1; V Langa et al "Furore over security sector reforms" *Newsday* (6 April 2013) p 3.

11 L Gumbo "Sekeramayi dismisses security sector reform" *The Herald* (22 April 2013).

12 See X Ncube "I'll pull out – Mugabe" *Daily News* (21 July 2013) p 1.

13 See T Maodza "President raps Lindiwe Zulu" *The Herald* (6 July 2013) p 1; D Sibanda et al "Mugabe threatens SADC pull out labels Zulu 'street woman'" *Newsday* (6 July 2013) p 1; M Mataboge "Rift between ZANU PF and SA deepens" *Mail and Guardian* (12 July 2013) p 8.

14 See T Kamhungira "Mugabe Attacks Zuma" *Daily News* (21 July 2013) p 2.

Zimbabwe whose outcome will not be disputed) is to be achieved. In this regard, it is not ZANU PF or the MDC formations whose will must be respected, but the long-suffering people who seek peace, development and a normal life free from the hardships visited upon them over the years by self-serving politicians.

### **1.1.2 Norms and standards binding Zimbabwe**

The right to participate in the government of one's country is enunciated in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), which instruments Zimbabwe has ratified. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the SADC Protocol on Gender and Development also impose obligations on the Zimbabwe government. ZLHR submits that incorporating standards encompassed in these instruments in domestic law and in electoral processes can result in full implementation of this right. Zimbabwe has not signed or ratified the African Charter on Democracy, Elections and Governance. ZLHR urges the government of Zimbabwe to ratify and fully implement this treaty as a matter of urgency.

ZLHR has published its views on the electoral legal and institutional framework in various publications over the years. The ideas reflected in this pre-2013 election report are a follow-up to publications focusing of the elections in 2002, 2005 and 2008, both pre- and post-election reports.

## 2 Electoral system and processes

### 2.1 The Electoral system

It is universally acknowledged that the electoral system of a country must ensure the realisation of the right of every individual to participate in the government of their country. Participation in free, fair and credible elections, as articulated in various local, regional and international human rights instruments, advances this fundamental right.<sup>1</sup> In 2012 and 2013, several legislative reforms to electoral laws were introduced by Parliament (through amendments to the Electoral Act and the introduction of a new constitution on 22 May 2013) and through Presidential Powers respectively, to advance political rights.<sup>2</sup>

The Presidential and local government elections of 2013 will be decided using the first-past-the-post system.<sup>3</sup> A mixed system of first-past-the-post and proportional representation for the women's quota system will ascertain those to be elected in the National Assembly.<sup>4</sup> Senatorial seats are now solely based on proportional representation, whilst provincial government is a mixed system.<sup>5</sup> The new Constitution also espouses key principles of the electoral system as peaceful, free and fair, based on adult universal suffrage, equality of votes, free from violence and other malpractices, and secrecy of the ballot.<sup>6</sup>

The effectiveness of recent electoral reforms and their implementation in practice will be measured against regional and sub-regional standards such as the OAU/AU Declaration on the Principles Governing Democratic Elections (the "AU Declaration") and the SADC Principles and Guidelines Governing Democratic Elections (the "SADC Principles"). These guidelines and standards seek to ensure that citizens in Africa and

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- 1 Article 13 of the African Charter on Human and Peoples' Rights (ACHPR); Resolution adopted by the African Commission on Human and Peoples' Rights during its 19th Session in C Heyns (ed) "Introduction to the African Commission' *Human Rights Law in Africa* (2004) p 407; Part IV (2) of the OAU Declaration on the Principles Governing Democratic Elections (OAU Declaration); Article 21 of the ACHPR; Article 25 of the International Covenant on Civil and Political Rights (ICCPR); Article 7 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).
  - 2 The new Constitution recognises political rights of every Zimbabwean to vote and be voted into office in section 67.
  - 3 Section 110(3)(f)(ii) of the Electoral Act says the candidate who has received more than half the votes is declared to be the winner.
  - 4 Section 124(1)(a&b) of the Constitution of Zimbabwe amendment (No 20).
  - 5 Section 120(1)(a-d) of the Constitution of Zimbabwe amendment (No 20).
  - 6 Section 155(1)(a-d) of the Constitution of Zimbabwe amendment (No 20).

the SADC sub-region in particular enjoy and realise their right to participate in electing their government and to input into how they are governed.

Legislation alone, however, cannot prevent malpractices; the best protections and/or remedies against them are the existence and proper functioning of an impartial, efficient, transparent and active election management body;<sup>7</sup> rigorous observation and monitoring of all stages of the electoral process;<sup>8</sup> and impartial and professional enforcement of the laws through an unbiased prosecutorial authority and judicial body.<sup>9</sup> For these electoral principles to be effective, a climate must be created before, during and after elections in which voters believe that they can vote freely and express their views on who must govern them through the ballot box, and have confidence that the elections will be conducted fairly.<sup>10</sup>

## 2.2 Gender aspects of the electoral system

Political parties have been said to be gatekeepers of women's selection for, and election to, political office.<sup>11</sup> Due to economic power imbalances between men and women, patriarchal social relations and the gendered violence that has characterised electoral periods, women have not been able to fully participate in political and electoral processes. In Zimbabwe, this has been the case, and women have remained marginalised. Representation in public office by women has been very nominal – particularly in Parliament and other key government institutions, which is disappointing – more so as Zimbabwe was part of the Beijing Platform for Action and agreed that the goal of women and men in decision-making will provide the balance needed to strengthen democracy and promote its proper functioning.<sup>12</sup> Electoral systems are flexible as they can be changed to achieve representation of women in the short term over culture or economic factors.<sup>13</sup> Amendments have been made in efforts to address this imbalance.

On the face of it, the new Constitution appears to address under-representation of women with the introduction of 60 reserved seats for women (quota system),<sup>14</sup> and the zebra formula in party lists for proportional representation allocations for Senators and

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7 Principle 7(3) of the SADC Principles and Guidelines Governing Democratic Elections (SADC Principles); Principle 1.2(e) of Guidelines for African Union Electoral Observation and Monitoring Missions (African Union Guidelines) of 2004 in Centre for Human Rights *Compendium of Key Human Rights Documents of the African Union* (2005) p 87.

8 Principle 7.5 of SADC Principles, Part III (f) of AU Declaration.

9 Principle 7.7 of the SADC Principles articulates the need to ensure that security is provided to all parties in the elections; Part III(c) of AU Declaration; Principle 1.2(c) of African Union Guidelines.

10 There must not be any repetition of the widespread violence that surrounded previous elections and the gross irregularities that occurred in the election process; Part II (4) of AU Declaration.

11 *Gender equality, striving for gender equality all over the world* p 158.

12 A Karam *et al* "Women in Parliament: Making a difference" p 187 in *Women in Parliament: Beyond numbers* (eds) J Ballington *et al* (1998).

13 As above.

14 Section 45E(2)(f) of the Electoral Act.



Councillors.<sup>15</sup> Proportional representation has been said to be “women friendly” and will ensure participation of women in politics.<sup>16</sup> However, the unintended consequences of this has been a reduction in participation of women candidates as contestants for elective seats in the National Assembly and further marginalisation by pushing them to contest the 60 reserved seats. This will continue to be problematic, and may lead to a substantial decrease over the next 10 years in which the quota system will be in place with respect to elective seats in the National Assembly. Once the quota system is removed after 10 years, there could therefore be substantially fewer women in Parliament than was the case in 2008.

## **2.3 Key reforms and progress**

The Zimbabwe Electoral Commission (ZEC) was re-constituted in terms of Constitutional Amendment No. 19. The Electoral Laws Amendment Act of 2012 incorporated the provisions of the Zimbabwe Electoral Commission Act into the Electoral Act and elaborated on the functions of the electoral management body. The re-constituted ZEC managed the conduct of a constitutional referendum leading to the adoption of a new Constitution that was published and came into force on 22 May 2013. This constitution made substantive amendments to the electoral process and required revision of several other statutes impacting on elections. However, the Constitutional Court in the *Mawarire* case compelled the President to announce an election date before these amendments and alignment of electoral laws to the new Constitution could be made. A number of applications filed for extension of the election date to accommodate these critical reforms were dismissed, with reasons not yet having been provided by the court. Consequently, the only amendments made to the Electoral Act were imposed by Presidential powers and not subject to review by Parliament. Alignment of all other related laws was not done.

## **2.4 Election Management Body**

### **2.4.1 Composition and training**

Constitutional Amendment No. 19 and the 2012 amendments to the Electoral Act effectively changed the appointment process and composition of ZEC. The legislature took a more proactive role to ensure independence and impartiality, as articulated in the SADC Principles and the AU Declaration.<sup>17</sup> In early 2010, prospective commissioners were interviewed by the Parliamentary Committee on Standing Rules and Orders.<sup>18</sup> However one problematic feature of the appointment process that remained unchanged was the fact that the President – who is a candidate and interested party in

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15 Section 124(1)(b) of the Constitution of Zimbabwe amendment (No 20); Section 45E(2)(f) of the Electoral Act.

16 See n 10 above.

17 Note 3 above; Part II (c) of OAU Declaration.

18 Section 2 of the Electoral Law, as amended.

the election – still appoints members of ZEC. Another challenge related to the involvement of the three political parties in Parliament, which effectively politicised the appointment process and subsequent composition of ZEC.

The ZEC was initially headed by Justice Mutambanengwe and comprised a total of nine commissioners. The commissioners were appointed by the President from a list of not less than 12 nominees submitted by the Committee on Standing Rules and Orders. After the resignation of the first chairperson, there was leadership gap at ZEC, although the deputy chairperson, Joyce Laetitia Kazembe assumed the chair in an acting capacity. The Constitution requires the Chairperson to be a person who qualifies to be a judge, which Kazembe is not. Several key processes were therefore presided over by a person not qualified to be the Chairperson and head the Commission and its decision-making processes. This leadership gap was subsequently challenged in the case of *National Constitutional Assembly & Anor v The President of the Republic of Zimbabwe & Anor*.<sup>19</sup> Before the matter could be heard, however, the President rushed to appoint a qualified substantive Chairperson, Justice Rita Makarau, in order to avoid an adverse decision being made through the courts a few days before the referendum was held.

Whilst new commissioners were appointed, the ZEC secretariat remains unreformed.<sup>20</sup> In the past, concerns have been raised by various stakeholders that some of the staff members were from the military and intelligence services.<sup>21</sup> In addition, they comprised the same personnel who had overseen disputed elections in the past. As such, the composition of the secretariat in the absence of meaningful reforms does not satisfy the required impartiality of national institutions prescribed in the SADC Principles<sup>22</sup> and neither does it inspire public confidence.

The Electoral Act as amended does not elaborate on the qualifications of the Chief Elections Officer despite the sweeping powers that he has with managing affairs, supervising and controlling activities relating to a national process.<sup>23</sup> The Chief Elections Officer is also the accounting officer. This position is untenable as there are no checks and balances at the senior management level to ensure that funds are not misappropriated or misallocated. Finance and programming have to be separate to ensure sound management of ZEC and instill confidence in stakeholders. In any event crowding one person with too many functions will result in pressure of implementation, as they will be inundated with work and supervision responsibilities.

The Electoral Act categorically states that Chairpersons of the public service, health service board or any other responsible authorities of any statutory body or council shall second such persons in the employment of the State to be staff members of ZEC during elections.<sup>24</sup> This pool of persons who can be seconded to ZEC continues to be the

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19 Constitutional Court of Zimbabwe unreported case SC 54/13.

20 M Matenga "ZEC secretariat must be disbanded: ACT" *Newsday* (17 January 2013) p 5.

21 See ZLHR 2008 Pre-election report.

22 See Principle 7.3 of the SADC Principles.

23 Section 9(2)(b&c) of the Electoral Act.

24 Section 10(1) of the Electoral Act.

preserve of civil servants and employees of local authorities.<sup>25</sup> It remains exclusionary although SADC Principles call for it to be inclusive.<sup>26</sup> Concerns about the impartiality which Zimbabwe has to ensure according to the OAU Guidelines<sup>27</sup> and SADC Principles<sup>28</sup> remain. As in past elections, the fact that new recruits to the public service have had to undergo training under a National Youth Service programme that is heavily politicized, remains a concern.

As at 20 July, barely 10 days before elections, it remains unclear how capacitated ZEC is in terms of numbers of polling officers recruited. On 13 June, it was reported that the Public Service Commission had approved that civil servants participate in elections.<sup>29</sup> In the past 2008 elections the ZEC publicly indicated its capacity in terms of the number of recruited and trained polling officers. This has not been done in 2013. The ZEC Chairperson has however, during consultative meetings with stakeholders including civil society, advised that at least 15 000 ZEC polling officials who will be participating in the harmonised elections had applied to cast special votes.<sup>30</sup>

There seems to be a lacuna in the electoral law as there is no provision obliging ZEC to ensure that all temporary staff members are recruited timeously to ensure that they are properly and comprehensively trained on time and able to appreciate the electoral process. Even so, it is unlikely that the ZEC officials will be adequately prepared as it may be difficult to provide adequate skills training to carry out the onerous functions required during harmonised elections where the electoral system used will be different than in the past. It is also not clear how far ZEC has complied with the obligation to provide adequate resources to ensure personnel will effectively carry out their duties in accordance with the SADC Principles and AU Guidelines.<sup>31</sup>

In 2008 ZEC, in its training manuals, provided inaccurate information to polling officers. Contradictions in the Constitution and the Electoral Act make this issue worse. For instance, in the Special Vote polling officers' manual, the number of observers allowed in a polling station is limited to four<sup>32</sup> despite the fact that the regulations stipulate that at least six observers must be in the polling station. This has the potential to cause problems, given the fact that in 2008 some temporary staff members were accused of electoral fraud all attributable to insufficient training and late recruitment on the part of ZEC then. It is hoped that the obligation to provide adequate resources that include well-trained personnel will nevertheless be fulfilled in the 31 July election.

These issues relating to questionable composition and training of ZEC personnel have already revealed themselves in ZEC's handling of the 2013 election-related processes

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25 Section 17(1) of the Electoral Act, as amended.

26 Principle 7.3 of the SADC Principles.

27 Part III(c) of the OAU Guidelines.

28 Principle 7.3 of the SADC Principles.

29 "Elections present cash deal for civil servants" *The Herald* (13 June 2013) p 1.

30 Part III(c) of the OAU Declaration.

31 See Principle 7.6 of the SADC Principles; Part III of the OAU Guidelines.

32 Paragraph 7 p 11 of the Manual for polling officers conducting Special Vote.

including voter registration and inspection, voter education, nomination and the Special Vote. In particular, ZEC's handling of the Special Vote on 14 and 15 July 2013 has come under fire. The process was highly disorganised leading to political parties and civil society doubting ZEC's preparedness to conduct a harmonised election. The main challenge of the Special Vote exercise was the late dispatching of ballot papers,<sup>33</sup> and slow pace of processing of voters. At a press briefing in Harare, the Deputy Chairperson acknowledged this.<sup>34</sup> The MDC-T also alleged that voting continued at a number of centres on 16 July in violation of the Electoral Act which stated that voting must be done 16 days before the national poll.<sup>35</sup>

Commissioners, staff and agents are prohibited from divulging any confidential information gained through the course and scope of their employment with ZEC.<sup>36</sup> This provision may be invoked by those aimed at discouraging commissioners and staff members from disclosing irregularities in electoral processes or misconduct on the part of ZEC.

#### 2.4.2 Functions of ZEC

The functions of ZEC have evolved since the 2008 elections. In 2012, additional functions and powers were introduced in electoral amendments.<sup>37</sup> These include undertaking, promoting research, developing expertise on use of technology and promoting cooperation with government, civil society and political parties.<sup>38</sup> ZEC also has to provide the public with information on registration of voters; delimitation of wards, location or boundaries; availability of voters' roll and inspection of the roll; details of political parties and candidates participating; voting and electoral processes.<sup>39</sup> ZEC also has to recommend to Parliament appropriate ways to provide public financing for political parties.<sup>40</sup>

In respect of some of its new functions, ZEC has taken full mandate and authority as provided by the law. For instance, soon after Justice Makarau was sworn in as Chairperson, there has been noticeable improvement in engagement by ZEC with stakeholders including with Civil Society Organisations (CSOs).<sup>41</sup> ZEC has also kept the public informed to some extent (although not satisfactorily) about some processes. Lists of

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33 M Tafirenyika "ZEC not ready for elections: MDC" *Daily News* (17 July 2013) p 1.

34 See Press statement by the Deputy Chairperson of the Zimbabwe Electoral Commission, Mrs Joyce Laetitia Kazembe, on Special Vote distributed on 14 July 2013 after a Press briefing at the Rainbow Towers, Harare.

35 Section 81 of the Electoral Act; "Junta takes over polls: MDC T" *Newsday* (17 July 2013) p 1.

36 Section 11(2)(g) of the Electoral Act.

37 Section 5 of the Electoral Act, this section is in Part II as substituted by Statutory Instrument 4 Act 3 of 2012.

38 Section 5(a-c) of the Electoral Act.

39 Section 5(d)(i-vii) of the Electoral Act.

40 Section 5(e) of the Electoral Act.

41 Several meetings have been called with stakeholders such as CSOs, political parties, see Press release – ZEC to hold briefing with Civil Society organisations and Faith based organisations; Programme of briefing of the local observers on special and postal votes held on 13 July 2013 at the Rainbow Towers; M Tafirenyika "Tsvangirai meets Makarau, Mudede" *Daily News* (7 June 2013) p 4.

provisional polling stations, locations of polling stations, and details of nominated candidates have been published in different print media such as the *Daily News*, *Newsday* and *The Herald*, and have also been published in the government gazette.<sup>42</sup> It has also sought to promote transparency by inviting observers to observe certain processes such as the processing of applications for the Special Vote. During voter registration, ZEC also kept the public informed about the different services that those who wanted to register could obtain.<sup>43</sup>

However fulfillment of this role may have been undermined by limitations in capacity to widely disseminate information outside the capital city, down to community level, and even to people living with different disabilities such as the blind and the deaf. There appears not to have been any translation of the material into the many vernacular languages that are used in Zimbabwe. Other issues undermining this role will be discussed in following sections.

One grave concern that remains is the practice of ZEC outsourcing some of its functions such as the registration of voters, updating, inspection and custody of the voters' roll to the Registrar-General (R-G) of Voters. The R-G has been accused of all sorts of violations in the past which cumulatively inhibited citizens from exercising their right to vote or participate in electoral processes. The R-G, Tobaiwa Tononeth Mudede, is unresponsive to calls for transparency and adherence to the law and established processes, and his officials have been blamed of exhibiting high levels of corruption. Parliament has in the past reined him in by summoning him to give evidence to the Parliamentary Committee on Defence and Home Affairs over voter registration<sup>44</sup> as well as other issues. There are extensive court orders against him relating to his failure to register voters, allow inspection of the voters' roll, amongst other issues. Electoral amendments in 2012 sought to remove him from these processes and also to remove responsibility and custody for the voters' roll. Provisions have been inserted into the Act and the Constitution to keep him away from these processes. However, transitional provisions in the new Constitution have seen him remain a key player for these specific elections, and this should raise alarm bells, particularly in light of the number of concerns that have been raised relating to a shambolic voter registration and inspection exercise carried out after the new Constitution came into effect.

#### 2.4.2.1 *Institutional and individual independence*

Independence of the ZEC stands on two pillars, namely institutional and individual independence. Individual independence relates to the ability of the individual not to be influenced by external forces and maintain a high degree of neutrality and lack of partisanship. Institutional independence reflects the broader commitment of the Commission not to be unduly influenced by arms of government in the exercise of its

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42 See lists of candidates who were nominated printed in *Newsday* on 12 July 2013, lists of polling station for Harmonized elections disseminated in *Newsday* on 10 July 2013.

43 See ZEC insert in the *Daily News* of 9 June 2013.

44 C Zvauya "Mudede summoned over voter registration" *Daily News* (7 June 2013) p 3.

functions and to be properly resourced in terms of human personnel and financial resources (financial autonomy) in order to carry out its functions effectively. The new Constitution now explicitly states that ZEC is an independent commission;<sup>45</sup> however the reality in terms of the politicisation of the appointment process, allegiance to the appointing authority, the overbearing role and influence of the Minister of Justice & Legal Affairs in their operations, and the inadequate resourcing detract from the legislative protective provisions for independence.

Most egregiously, the Minister continues to have power to veto any regulations made by ZEC, seriously compromising its independence.<sup>46</sup> This is despite the fact that the Minister is also a candidate and interested party in the elections. ZEC also lacks total financial autonomy. Any donations or grants, whether from local or foreign donors have to be approved by the Minister.<sup>47</sup> Over the last year, ZEC appears to have been the proverbial grass that suffers when two elephants fight. There have been accusations and counter-accusations from the Minister of Finance and the Minister of Justice & Legal Affairs on poll funding and actual sources. The Minister of Finance has sought to secure funds from the United Nations and various SADC countries, whilst the Minister of Justice has refused to accept such funding.<sup>48</sup> ZEC's business and resourcing should be completely transparent to ensure that the electoral process is not distorted or manipulated at any time. Ascertaining the budget of ZEC in the past has proved difficult since Commissioners are sworn to secrecy, and there is no clarity on exactly how much is needed to run an efficient election. The law remains silent on whether Parliament has to approve the whole budget of ZEC other than that derived from the Consolidated Revenue Fund, and Parliament has had no role in, or oversight relating to the budgeting and accounting for elections. These raise serious questions about the ability of ZEC to properly resource and carry out the election, and to whom they pay allegiance for donations received for their operations.

## **2.5 Custody and maintenance of the voters' roll**

In terms of the new Constitution ZEC, rather than the R-G, Tobaiwa Tonneth Mudede, is now responsible for custody and maintenance of the voters' roll.<sup>49</sup> ZEC is supposed to direct and control the registration of voters and compile the voters' roll.<sup>50</sup> The Constitution and the electoral laws do not clearly demarcate the functions of ZEC and the R-G in relation to voter registration, and this appears to have been abused in the current exercise. While ZEC must "keep and maintain" the roll, the function of

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45 Section 235(1-3) of the Constitution of Zimbabwe Amendment (No 20).

46 See section 192(6) of the Electoral Act.

47 Section 12(1)(e) of the Electoral Act ; as late as 28 June it was being reported that there were serious funding gaps. See B Chitemba et al "Elections funding dilemma persists as nomination court sits today" *Zimbabwe Independent* (28 June–4 July 2013) p 1.

48 W Masvingise "Chinamasa scuttles poll funding" *Newsday* (19 July 2013) p 1.

49 Section 239(c-e) of the Constitution of Zimbabwe Amendment (No 20).

50 Section 6(2) of the Sixth Schedule of the Constitution of Zimbabwe Amendment (No 20). Section 239(c-e) of the Constitution of Zimbabwe Amendment (No 20).

registering voters and updating the roll remains with constituency registrars and the R-G who can alter the roll at any time.<sup>51</sup> Further, because it lacked the capacity to keep and maintain the roll in the past, ZEC has relied and continues to heavily rely on the R-G's office to assist it in carrying out its new responsibilities. This is a violation of the Constitution and the electoral laws by ZEC.

## **2.6 Voter registration and inspection of the voters' roll**

Voter registration and inspection in Zimbabwe is an ongoing exercise. Before the new Constitution became operative, there was general consensus that the voters' roll was in a shambolic state. This was confirmed by the Chairperson of ZEC as well as senior government officials such as the Vice-President.<sup>52</sup>

In mid-April 2013, the ZEC Chairperson indicated that at least 300 000 names had been removed from the voters' roll, whilst a total of 60 000 new voters were said to have been registered.<sup>53</sup> About 345 400 names of dead voters had also been removed from the voters' roll.<sup>54</sup> She further indicated that the voters' roll was being updated regularly and the mobile voter registration exercise that was supposed to start in January 2013 was still pending due to unavailability of funds.<sup>55</sup>

### **2.6.1 The first mobile voter registration exercise**

An initial mobile voter registration was finally set for 29 April to 19 May 2013<sup>56</sup>. It was undermined by lack of adequate funds and subsequent late disbursement of funds, which were only availed on 7 May. Details of how many people were registered and how many had been removed in this exercise were not easily available to the public.

### **2.6.2 The "special and intensive" mobile voter registration and inspection exercise**

In terms of the transitional provisions of the new Constitution that came into effect on 22 May, for the purpose of the first elections – being the 2013 harmonised elections – the R-G continues to be mandated to carry out voter registration and compile the voters' roll under the supervision of ZEC.<sup>57</sup> This is despite provisions in the Constitution for this function to be wholly ascribed to ZEC. The current R-G has repeatedly been accused of

51 Section 35 of the Zimbabwe Electoral Act, this provision was not amended although the RG has proved inefficient in implementing voter registration and has disfranchised many voter through misinterpreting citizenship laws despite the guidance of the court. As a result most citizens by birth with parents born outside the country have been arbitrarily removed from the voter's roll as they are required to renounce citizenship by descent even if they have not taken any positive steps to acquire it.

52 V Langa "VP finds only 9 on the voters roll" *Newsday* (23 May 2013) p 3.

53 K Bwititi "Over 300 000 off voters roll" *The Sunday Mail* (14 April 2013) p 1.

54 As above.

55 Note 61 above.

56 "US 4m released for voter registration" *The Herald* (7 May 2013) p 2; "Government rolls out national voter registration exercise" *The Herald* (30 April 2013) p 1.

57 Section 6(2) of Part 3 of the Sixth Schedule of the Constitution.

manipulating the voters' roll<sup>58</sup> and related electoral processes in order to favour ZANU PF. During the constitution-making process, the R-G attended the deliberations and participated in activities as a ZANU PF delegate.<sup>59</sup> This does not instil confidence in his impartiality and professionalism.

The new Constitution provides that a "special and intensive mobile voter registration and inspection exercise" be carried out under the supervision of ZEC for at least 30 days after publication of the Constitution.<sup>60</sup>

This exercise was conducted by the R-G and officials from his office. ZEC was confined to "overseeing" the exercise but had no meaningful input into, or scrutiny of, the process. The involvement of the R-G in voter registration violates the SADC Guidelines that provide that the SADC governments must facilitate an enabling and transparent system of voter registration.

The process suffered from a lack of publicity, and reports abounded of people who had no idea that the exercise was even going on. ZEC failed to accredit observers for this exercise and there was no independent oversight of the process and its challenges.

Challenges arose due to the inclusion of the opportunity for individuals to obtain other documents during this exercise, including national identity documents. It is common cause that Zimbabweans have struggled in the past to obtain identity documents and this opportunity added strain to the system as some were attending registration centres merely to obtain such documents and not to register as voters. Reports of police and army personnel being bussed to registration centres and jumping the queues were also rife and contributed to barriers to registration and inspection by ordinary citizens, who were pushed to the back of the queue.

First-time voters and lodgers also experienced insurmountable hurdles at registration centres due to their inability to provide proof of residence, which the R-G was requiring before registering people on the voters' roll. ZEC had to intervene and provide an affidavit template which was subsequently used to overcome this obstacle. The new Constitution further guarantees the political rights of every Zimbabwean. Although ZEC was said to be consulting stakeholders and working on modalities to ensure that 17 000 prisoners vote, there has been no update on progress on this issue.<sup>61</sup> As a result, all these prisoners were not registered and will not be able to vote on 31 July, in contravention of the new Constitution. These provisions clearly depart from the obligation to ensure non-discrimination in voter registration as enunciated in the SADC Principles.<sup>62</sup>

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58 J Makumbe "Zimbabwe's highjacked elections" *Journal of Democracy* Vol 13 no.4 (2002) p 96.

59 E Mushava "Mudede exposed ... registers as ZANU PF delegate" *Newsday* (22 October 2012) p 1.

60 Section 6(3) of Part 3 of the Sixth Schedule of the Constitution.

61 "Prisoners set to vote in polls" *The Sunday Mail* (9 June 2013) p 2.

62 This clearly violates the rights of the accused; this exclusion violates provisions of ACHPR as everyone is entitled to participate in the government of the day; Principle 2.1.1 of SADC Principles; Part IV of OAU Declaration; Guideline 4.1.3 of the SADC Principles.



A further challenge arose in relation to those Zimbabweans who had previously been disenfranchised as a result of their parent/s being born outside Zimbabwe, which had caused them to have their Zimbabwean citizenship revoked – the derogatorily-called “aliens”. The new Constitution clarified citizenship issues and restored Zimbabwean nationality (and therefore the right to be included on the voters’ roll as a registered voter) to such individuals. Nevertheless, these Zimbabweans faced great obstacles when they attempted to restore their names to the voters’ roll. The current R-G is also the R-G of Citizenship,<sup>63</sup> He has a long track record of unilaterally denationalising numerous Zimbabwean citizens by birth, rendering them stateless and disenfranchising them in the process due to his erroneous interpretation of citizenship laws.<sup>64</sup> He was at it again during the registration exercise, until the case of *Mawere* arose. The R-G refused to issue Mawere with identity documents to allow him to register as a voter using the excuse that he had lost his citizenship and should apply to the R-G before it could be restored.<sup>65</sup> The new Constitution allows for dual citizenship to those who are citizens by birth, as described above, but the R-G ignored this. The Constitutional Court had to order him to restore Mawere as a citizen; however it is not clear whether others in the same predicament as Mawere were as lucky when they attended registration centres.

Once again, the R-G used the excuse of lack of adequate resources to justify the fact that he was unable to ensure 30 days of continuous voter registration and inspection in each and every ward of the country (Zimbabwe currently votes using a ward-based system) despite the large numbers of individuals who wished to register and inspect the roll. Instead, the mobile teams spent only a maximum of 3 days in each district, with some mobile centres being too far from some areas and therefore restricting the number of individuals who could benefit from the exercise and access the station.<sup>66</sup>

Occurrence of registration and inspection at the same time also proved costly. Problems of long queues and the limited number of days for voter registration in each ward proved to be a challenge. At the end of the 30-day period, it was clear that there were still many people who wished to register and had not been able to do so. The Constitution provides leeway for ZEC to extend the 30-day period, and in light of the critical importance of this national election, it would have been prudent to do so. A contributing factor to this disenfranchisement was the imposition of an election date deadline by the Constitutional Court in the *Mawarire* case, which interfered with the

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63 He is also responsible for registering births, deaths and issuing passports. See the Births and Deaths Registration Act.

64 See ZLHR “Submissions to the Parliamentary Portfolio Committee on Defence and Home Affairs” available at <http://www.zlhr.org.zw>; Your link to citizenship. After submissions were made by ZLHR members to the Portfolio Committee a report was tabled before Parliament upholding ZLHR submissions. See Parliament of Zimbabwe “Fourth report of the Portfolio Committee on Defence and Home Affairs”, Second session sixth parliament presented to parliament on 13 June 2007; The concern of disenfranchising the citizens by birth was raised in *Tsvangirai v Registrar of Citizenship* High Court Harare case no. 29 of 2002 and other High Court and Supreme Court cases.

65 *Mawere v Zimbabwe Electoral Commission and 3 Ors* unreported Constitutional Court case 47/13; T Kamhungira “Mawere drags Mudede to constitutional court” *Daily News* (5 June 2013) p 2.

66 Nyashanu “Thousands denied vote, MDCs accuse CIO, RG’s office of being behind chaos” *Newsday* (10 July 2013) p1.

timelines for registration, nomination court and closing of the voters' roll for the 31 July election.

All in all, the involvement of the R-G whose office has proved to be controversial in voter registration and accused of incompetence and lack of transparency in the voter registration exercise has eroded public confidence in the voter registration and inspection aspects of the electoral process.

## 2.7 Access to voters' roll

The voters' roll is a public document which is open for inspection by members of the public free of charge.<sup>67</sup> There is an obligation imposed on the ZEC to provide candidates, political parties, observer groups and even individuals, with an electronic or hard copy of the voters' roll at a reasonable cost. This provision is progressive. On a positive note, the searchable format of the voters' roll, as stipulated by law, will allow for analysis and comparison with previous voters' lists and this is commendable.<sup>68</sup> However it appears that these copies were (and continue not to be) provided within a reasonable time to allow for a comprehensive inspection and audit of a roll whose state has been controversial for a number of years.

The evolution of the law relating to nomination of candidates and closure of voters' roll also presented challenges. Instead of the voters' roll closing before the process of nomination of candidates, the voters' roll was only closed 12 days after nomination court for anyone who wanted to vote in the 2013 elections.<sup>69</sup> This, again, was due to the imposition of an unworkable election date deadline by the Constitutional Court in the *Mwarire* case.

Before the second exercise of the special intensive voter registration, accessing the voters' roll proved to be a nightmare for some political candidates. A classic example was the case of *Dabengwa and ZAPU v Chairperson of ZEC & 2 Others*.<sup>70</sup> Dabengwa started requesting the electronic voters' roll from ZEC on 20 November 2012. There was no cooperation from the ZEC then. A number of letters were delivered and at one time Dabengwa was advised that he would be given the voters' roll by 10 February 2013. When Justice Makarau was appointed in March 2013, Dabengwa started receiving meaningful replies to his requests, but still was not provided with a copy of the roll. In May 2013, a case was filed against ZEC in the High Court, and it was only then that an electronic copy was provided in June 2013 to avert litigation.

The unwillingness of the R-G to submit himself, the registration and update exercise and the voters' roll itself to scrutiny continued. On 16 July, he filed an Urgent Chamber Application in the High Court and received an *ex parte* order against the Research and Advocacy Unit in the matter of *Registrar General v The Research and Advocacy Unit and*

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<sup>67</sup> Section 21(1) of the Electoral Act.

<sup>68</sup> Section of 21(7) of the Electoral Act.

<sup>69</sup> Section 26A of the Electoral Act.

<sup>70</sup> Unreported High Court case 3740/2013.

Another<sup>71</sup> to prevent the organisation from launching an audit it had prepared on the voters' roll.<sup>72</sup> This order was granted without giving RAU an opportunity to be heard. One has to question the tenacity with which the R-G in refusing to make the process and contents of the roll transparent and publicly available. This does nothing to increase public confidence in the state of the voters' roll and legitimises the concerns of those who argue that the roll will be used to manipulate the vote and its outcome on 31 July 2013.

It remains unclear when the consolidated and updated voters' roll produced after the end of the special and intensive mobile registration and inspection exercise will be made available to political parties, observers and other citizens. Four days before elections, and despite repeated requests, political parties had not yet been provided with copies of the updated voters' roll to be used in the elections. ZLHR had also made a request for the roll before the mobile voter registration exercise commenced; to date, the request has not been acknowledged and the voters' roll has not been provided to the organisation for scrutiny in violation of the Constitution.

## **2.8 Gendered aspects of voter registration and other challenges**

Women have traditionally been excluded from participating in certain activities because of their gendered roles. The voter registration exercise was one example of the failure of the electoral authorities to take into account the special needs of women, as the Electoral Act and relevant regulations on this aspect have not been engendered. There has been no effort to ensure that the law facilitates the participation of every citizen equally.

The mobile voter registration exercise that started before the Constitution was adopted and continued afterwards for a further 30 days, was said to have been more mobile than the people themselves. There were many hurdles for first time voters (especially young women) and for women in general. The times during which registration and inspection took place did not take into account the special situation of women and their roles in the household and in their communities. The requirement for proof of residence also proved to be too onerous. Many young people and women do not own properties or have utility bills in their names that can be used as proof of residence. Initial policy directives from the Minister of Home Affairs were not responsive to the peculiar position of women, who were required to have their residence certified by their husband or their child. On 30 June, the proof of residence requirement was finally relaxed to allow individuals to complete an affidavit at the registration centre.<sup>73</sup>

The authorities proved to be overwhelmed by registration of voters who were in polygamous unions as some men were said to have come with 15 wives and 40 children

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71 Unreported High Court Harare case 5790/13.

72 See V Langa "Shocking voters roll irregularities unearthed" *Newsday* (8 July 2013) p 1.

73 See ZEC statement on mobile voter registration *The Standard* (30 June 2013) p 5.

for registration.<sup>74</sup> Women were also affected by unilateral alteration of a voters' detail, such as surnames. In one such example during the intensive voter registration exercise, Primrose Matambanadzo (a married woman who retained her maiden name on her identity documents) discovered that her maiden name had been unilaterally altered to the surname of her husband on the voters' roll without consultation or her approval. This was not surprising due to the fact that the multi-tasking R-G may have forgotten to remove one of his hats. This also exhibits the patriarchal nature of the R-G himself, refusing to recognise that everyone, including women, have a right to a name. It was only after the threat of litigation, once again, that ZEC acted to restore Matambanadzo to the voters' roll using her maiden name. However they have thus far refused to issue a public clarification on how similarly affected married women will be dealt with at polling stations where their identity documents bear a different surname from that appearing on the roll, with the potential of disenfranchisement on voting day.

The registration process was also viewed by women's organisations as not being responsive to the needs of women because of their gendered roles.<sup>75</sup> Particularly of concern was the fact that pregnant women, the elderly and women living with disabilities either found the polling stations inaccessible or were not afforded the necessary treatment because of their status at the registration centres.<sup>76</sup>

## **2.9 Constituency boundaries and the delimitation process**

In terms of the new Constitution, electoral boundaries that were used in the 2008 harmonised elections will apply to the 31 July 2013 election.<sup>77</sup> These boundaries as delimited by ZEC and as constituted then, were disputed.<sup>78</sup> Points of contention included but were not limited to the fact that ZEC, as then constituted, was appointed by a candidate to the elections who also approved the proposed boundaries. This compromised the independence and impartiality of delimitation of boundaries by the then-ZEC, which position has not been corrected. The delimitation of boundaries for the 2008 elections was done in a clandestine manner and in a very short time even though considerable changes had to be made with the increase of constituencies from 120 to 210. As a result the then President, currently the incumbent who was also a candidate in the elections, had an undue advantage over his contemporaries.<sup>79</sup> There has therefore been no promotion of fairness as articulated in the SADC Principles and AU Guidelines.<sup>80</sup> There have also been several allegations of gerrymandering in 2013, with large

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74 Z Murwira "Polygamous families drag voter registration" *The Herald* (19 June 2013) p 3.

75 "Women petition ZEC, Mudede" *Newsday* (8 July 2013) p 5.

76 As above.

77 Part 3 section 5 of the Sixth Schedule of the Constitution of Zimbabwe Amendment (No 20)

78 See Zimbabwe Lawyers for Human Rights *Zimbabwe geared up for another election? Then and now 2008 elections in retrospect* (2010).

79 The first report was presented to the President by 14 January 2008 see *The Herald* "Delimitation report ready" (14 January 2008) p 1.

80 Principle 7.3 of the SADC Principles.

numbers of people being settled close to constituency boundaries and being registered as voters in the affected constituencies. Some examples include Harare North, Harare South, Epworth and Goromonzi. These complaints have not been addressed by ZEC.

## 2.10 Voter education

Voter education has always been regarded as essential to ensure that the electorate is informed and able to exercise the fundamental right to participate in government,<sup>81</sup> especially in instances where the process of voting changes and becomes more sophisticated. The electoral system is now indeed sophisticated: in some instances it remains a first-past-the-post system, and in others it is a mixed system with proportional representation. Many voters may not easily understand the implications of a mixed election system. Voter education by CSOs and other stakeholders therefore remains critical.

ZEC bears primary responsibility for conducting programmes of voter education,<sup>82</sup> and it must begin such programmes within 90 days before polling day in each election, with the obligation on the government to provide resources.<sup>83</sup> ZEC only deployed voter educators around 5 June 2013 – well outside the mandated 90-day period.<sup>84</sup> The obligation of the government to provide resources as enjoined by the SADC Principles<sup>85</sup> and the Electoral Act, also does not appear to have been met and it is not clear the extent to which the ZEC has fulfilled this mandate, as public information on funds provided for this exercise have not been forthcoming from ZEC.

The capacity of the ZEC to provide voter education to people living with disabilities, for example those who are visually impaired, is also not clear.

The current provisions on voter education in the electoral laws are harsh and cannot be said to be reasonably justifiable in a democratic society. They are designed to maintain the monopoly of ZEC and political parties in providing voter education to the exclusion of other independent stakeholders. It is common cause that inadequate voter education hinders full participation in the electoral processes as envisaged in the SADC Principles. The requirements for an organisation to participate in voter education have become more stringent, with identified groupings being recognised/limited on the basis of citizenship or residence status, the identity of those providing the training, the content of the materials to be used, and their funding sources. The Act also puts obstacles in the path of CSOs.<sup>86</sup> ZEC may require a civic organisation to furnish it with copies of all its proposed voter education materials; only ZEC may receive foreign funds for voter

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81 Part III(e) of OAU Declaration.

82 Section 61(4) of the Constitution and Part IV of the Zimbabwe Electoral Commission Act.

83 Section 15A(1) of the Zimbabwe Electoral Act, as amended. This deadline will be impossible to meet if the ... President calls an election at less than 90 days' notice – as he has done in the case of the forthcoming general election; Section 15A(2) of the Zimbabwe Electoral Act, as amended.

84 "ZEC deploys voter educators" *The Herald* (5 June 2013) p 2.

85 Principle 7 of SADC Principles.

86 See generally, sections 15, 15B and 16 of the Zimbabwe Electoral Commission Act as amended.

education, although it may distribute these funds to other organisations involved in the provision of voter education; and the persons providing voter education must be domiciled in Zimbabwe and must operate through an organisation with a specific mandate to provide voter education. ZEC is empowered to close down a voter education programme conducted by a CSO if it considers the organisation is providing materially false or incorrect information that is unfairly biased for or against a contesting political party. Although this provision is supposed to ensure that voters must receive “adequate, accurate and unbiased voter education” from ZEC, in practice it only consolidates ZEC’s monopoly on voter education.

Some CSOs engaging in civic education activities and voter information were arrested by the police and charged with carrying out voter education without accreditation. ZEC was engaged in order for them to clarify the differences between voter education and more general civic education, but thus far have failed to act in this regard. As a result, law enforcement authorities continued to clamp down on all forms of education and public sensitisation, violating fundamental rights and freedoms in the process.

As at 6 July 2013, only twenty three CSOs in a nation of more than 6 million voters had been accredited to carry out voter education around the country. For voter education to fulfil its role as an essential exercise in strengthening participatory democracy, it is essential that civil society be enabled to conduct effective nation-wide voter education. In the Principles of the Electoral Commissions’ Forum of SADC Countries it is pointed out that involvement of CSOs can ensure comprehensive distribution of voter education. It is therefore clear that legislative and administrative steps have been taken by the authorities to ensure that they actively dissuade organisations from carrying out educative activities and to prevent crucial information from reaching voters. It is imperative that CSOs must be allowed to conduct their own programmes as in accordance with AU Declaration.<sup>87</sup> This requirement has been violated in many ways. Police have requested for proof of approval, although the ZEC has not been providing this. Cases of Human Rights Defenders (HRDs) and CSOs who have been arrested and charged for carrying out voter education are discussed in more detail in Chapter 3.

## **2.11 Political party primaries and nomination of candidates**

Preparations for nomination by the two main political parties – ZANU PF and MDC-T – were very dramatic. The MDC-T had already carried out its primaries in advance, while ZANU PF was still working on finalising its rules and regulations to guide primary elections.<sup>88</sup> On 21 May<sup>89</sup> the ZANU PF rules were still outstanding. Consequently ZANU PF primaries commenced a mere two days before nomination and ended on 27 June.<sup>90</sup>

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<sup>87</sup> Part III (e) of OAU Declaration; Principle 1.3(5) of AU Guidelines.

<sup>88</sup> T Maodza “ZANU PF Politburo defers poll rules indaba” *The Herald* (12 April 2013) p 1.

<sup>89</sup> T Maodza “Politburo to finalise rules” *The Herald* (21 May 2013) p3.

<sup>90</sup> “ZANU PF fails own test” *Newsday* (26 June 2013) p1; B Chitemba “Fierce clashes in ZANU PF over candidates” *Zimbabwe Independent* (28 June 2013) p5; F Zaba et al “ZANU PF primaries leave trail of

The primaries for ZANU PF were characterised by boycotts, violence and confusion.<sup>91</sup> The primaries for the two political parties were contested with supporters of the parties refusing to support imposed candidates. Primaries for other parties such as MDC, Mavambo/Kusile/Dawn, and ZAPU appeared to have progressed without incident, as no negative reports were published. As a result, on nomination day, those that had not been endorsed by either ZANU PF or MDC-T hierarchies filed their papers as independent candidates. In some cases more than one candidate filed papers on behalf of a particular party as their nomination papers were supported by competing structures and hierarchies, something likely to cause confusion to voters on polling day.

Nomination of candidates ahead of the 31 July 2013 polls proceeded on 28 June 2013 according to the framework and requirements set out in the Electoral Act as amended. Several political parties attended at various Nomination Courts that had been set up throughout the country. Nomination courts were identified and publicised in the government gazette by the incumbent in Proclamation 2 of 2013.<sup>92</sup> The Nomination Court designated locations included Magistrates' Courts, government offices, and local government offices.<sup>93</sup> The Harare High Court was designated to accept nomination papers for the presidential candidates.<sup>94</sup>

In the case of local government, initially nomination proved to be a challenge for some, as ZEC once again imposed onerous requirements not supported by law, such as the production of a rates clearance certificate by candidates, and police clearance to show that they had not committed any fraud.<sup>95</sup> This requirement was later withdrawn. Other requirements included those set out in the new Constitution, and the Electoral Act. Application fees were also prescribed by law.

The Nomination Court was scheduled to start to sit from 10:00hours at the identified locations.<sup>96</sup> A total of 876 candidates were approved to contest elections – 5 were presidential candidates<sup>97</sup> and 871 National Assembly candidates competing for 210 constituencies.<sup>98</sup> Some nomination results were contested by way of appeals filed at the Electoral Courts that were set up on 1 July, although they were negligible in the grander scheme of the number of candidates. This is discussed in detail in Chapter 4. By 12 July ZEC started to publicise the results of nomination including the names of the candidates who had withdrawn.<sup>99</sup>

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acrimony" *Zimbabwe Independent* (28 June 2013) p 3; "High turn out forces extension of ZANU PF primaries" *The Herald* (26 June 2013) p 1; T Maodza "Chaos reigns in MDC T primaries" *The Herald* (10 June 2013) p 3.

91 As above.

92 Statutory Instrument 86 of 2013.

93 Note 102 above.

94 Note 102 above.

95 T Mugabe "ZEC announces nomination rules" *The Herald* (26 June 2013) p 2.

96 Proclamation 2 of 2013 Statutory Instrument 86/ 2013.

97 C Zvauya "ZEC turns down 35 Presidential aspirants" *Daily News* (1 July 2013) p3.

98 F Share "871 candidates to contest elections" *The Herald* (8 July 2013) p 3.

99 See ZEC insert *Newsday* (12 July 2013) p 6, 28, E1-E8, Z1-Z32.

### **2.11.1 Gender dynamics of nomination**

It has been argued that party rules affect the way that political parties carry out nomination processes. In most cases, women are not in influential positions in political parties and they remain outside the circle of power, and are excluded from the “all-boys” network. The new Constitution introduces quotas for women, with 60 reserved seats in the National Assembly, calculated using proportional representation, and a zebra-system for the 60 Senate seats. The nomination lists provided by ZEC indicate that only 18% of the local council candidates are women. Of particular concern is the fact that, in the National Assembly, women are only contesting in 110 constituencies. A number of factors could have contributed to this. Nomination processes for the 2013 elections were generally competitive across the political party spectrum. Incumbents sought to “protect their turf”, with some seeking to prevent newcomers from participating in the processes. As a result, it was “each man or woman for him/herself”. As the parties are generally unwilling to enter into another IG, they wanted to field perceived strong candidates, and this resulted in all political parties imposing candidates on the electorate, leading to disgruntled supporters taking action. Zimbabwean society is predominantly patriarchal, and it is possible that political parties fielded men in the belief that they had better chances of securing the seats. Women also continue to be relegated to their gendered roles of being child-bearers and care-givers, not made to enter into the political fray. Men are seen as the bread-winners and remain largely in control of the “purse”. Campaign-related costs are prohibitive for most women, and for women to be able to carry out effective campaigns, they would require assistance from the “all-boys’ network”, who will be likely to protect their own interests first. Even when such support has been provided to women candidates, they have then had to deal with and overcome politically-motivated gender-based intimidation and violence that affects them disproportionately from men. For all these reasons, the cards remain stacked against women candidates, and this election has seen them coming off worse than in previous elections in relation to political representation.

## **2.12 Accreditation of observers**

ZLHR reiterates that public confidence in electoral processes is greatly enhanced where local, regional and international observers who are well-versed in electoral processes and who are on the ground in large numbers are available to objectively scrutinise the various processes. This helps to ensure transparency and inject confidence into the whole electoral process. Given the fact that there has been widespread doubt about the fairness and integrity of the electoral process in Zimbabwe in the past, including the disputed 2008 elections, it is essential that there be extensive observation of the 31 July 2013 election by a wide cross-section of observation teams. The presence of observers<sup>100</sup> is essential to help confer legitimacy on the outcome and to provide an objective analysis of claims of fraud or other electoral malpractices. Observers must not

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100 The importance of election observers is articulated in Principle 7 of the SADC Guidelines.



be selected on the basis of their bias in favour of a particular party or position. In elections held in Zimbabwe in 2000, 2002, 2005 and 2008, a number of foreign and local observers were denied entry into Zimbabwe or accreditation to observe. This does not bode well for transparency and integrity of the entire electoral process and violates the SADC Principles.<sup>101</sup>

The importance of the role of observers is emphasised in the Guidelines for African Union Electoral Observation and Monitoring Missions, as well as the SADC Principles.<sup>102</sup> The provisions of the Electoral Act relating to observers<sup>103</sup> provide for local and foreign observers. The Electoral Act does not comply with the norms set out in the SADC Principles which require ZEC to invite SADC observers at least 90 days before the elections. The law does not give a timeframe within which to invite applications; it only prescribes timelines within which to lodge an application with the Accreditation Committee. The deadline for receiving applications is 4 days before special voting (for observation of the Special Vote) or 4 days before the actual poll (for observation of the harmonised elections).<sup>104</sup>

All observers have to be accredited by an Observers' Accreditation Committee (Accreditation Committee) set up by ZEC. It is now composed of 9 members, 5 from ZEC and 4 executive appointments including a member of the President's Office.<sup>105</sup> The legal framework must ensure that ZEC controls this whole process to the exclusion of political players or executive members who have an interest in the elections. Not only is the membership of the Accreditation Committee open to political bias, but it also does not have the discretion to choose foreign observers. The Electoral Act requires all foreign observers to obtain letters of invitation from the Ministry of Foreign Affairs before they can enter the country to observe the elections. The Minister of Foreign Affairs – himself an interested party – can veto foreign observers, and this is not a good practice.

On 17 July 2013, it was reported that the Minister of Foreign Affairs had said that observers from the European Union and the United States of America were not invited to observe the elections as they had imposed sanctions on Zimbabwe. At least 50 invited observer teams were from Latin America, Africa, and Asia.<sup>106</sup> A 10-member long-term AU observer mission arrived in Harare on 19 June.<sup>107</sup> SADC deployed 442 observers to observe elections in the ten provinces.<sup>108</sup> Fears by CSOs that the President and Minister would only accredit foreign observers coming from countries considered to be friendly towards the ZANU PF side of government have been vindicated. This detracts considerably from the Accreditation Committee's independence: apparently

101 Principle 7.8 of SADC Principles.

102 Principle 2.2 of African Union Guidelines.

103 Section 6 of the Electoral Act.

104 Section 40I(1)(a) of the Electoral Act.

105 Section 40H(1) of the Electoral Act.

106 "Over 50 foreign groups to observe polls" *The Saturday Herald* (6 July 2013) p 2.

107 M Chideme "AU 10 – member observer team arrives" *The Herald* (19 June 2013) p 2.

108 B Mananavire "EU observer mission barred" *The Herald* (17 July 2013) p 3.

government does not have faith in its capacity to choose who should observe its electoral processes.

ZLHR commends the AU for its deployment of long-term observers, even though the numbers were limited. It is further commendable that these observers will remain in-country beyond the announcement of results. Also notable is the size of the SADC Election Observation Mission, and it is hoped that the numbers will assist in reaching some inaccessible areas and areas outside main cities and towns, and a wide range of stakeholders are being consulted for purposes of establishing an accurate and substantive picture of the pre-election environment and challenges.

Commendably accreditation has been decentralised around the country unlike in previous elections where it took place in Harare and Bulawayo only. This will ease logistical problems for those who wish to be accredited from other areas of the country. In the past, huge costs have been incurred in transporting and accommodating observers during accreditation. Local observer accreditation has proceeded slowly but uneventfully; however in the last few days leading up to elections, shortage of materials, large queues and queue-jumping, and extremely long processing times have increased. It is also not clear how ZEC is implementing its discretion in relation to payment of an accreditation fee for some groups. Observers who attended the accreditation centre in Harare noted that some unknown civil society groups and war veterans were being accredited without payment of a fee and ahead of others who were in the queue. Observers are supposed to pay a fee if they are not exempted by ZEC.<sup>109</sup>

The role of election observers is limited to observing and they cannot give directions but they can bring anomalies to the attention of the presiding officer.<sup>110</sup> The accreditation is for the election period only, defined as the period from the proclamation to the declaration of results.<sup>111</sup> Observers thus are not privy to other electoral process such as registration of voters or the delimitation of constituency boundaries, and it is left to political parties to monitor and evaluate these processes. Observation of the post-election period to determine whether counting processes at all centres are progressing transparently, whether results are announced timeously, and whether, for instance, retribution is exacted against those considered to have voted for the wrong party is curtailed.<sup>112</sup> This provision vitiates the United Nations Declaration on International Election Observation (UN Declaration) which highlights that observation of election must start during delimitation and continue for a period after elections.

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109 Some observers are exempt from paying accreditation fees. The African Union, SADC, SADC Parliamentary Forum, Electoral Commissions Forum of SADC, COMESA, Electoral bodies from Africa similar to ZEC, embassies representing African countries in Harare and any other organisation that the commission decides to make exempt. Fees are pegged in United States dollars as follows; for a local observer – USD 10, observers from Africa countries that are not exempt pay USD 20, embassies that represent countries not from Africa pay USD 50, observers from countries outside Africa pay USD 100, Zimbabwean media practitioners working for foreign media houses pay USD 50 and local media practitioners pay USD 10 see Electoral (Accreditation of Observers) Regulations 2013 SI 89/ 13

110 See ZEC Code of Conduct for observers.

111 Section 6(1)(a) of the Electoral Act.

112 As above.

The Electoral Act further elaborates on the conduct of observers and accredited media practitioners.<sup>113</sup> They must exhibit the accreditation certificate and sign the register that is held by the Presiding Officer when they arrive at a polling station and must abide by the Code of Conduct. Use of mobile phones, telephones, taking pictures with mobile phones, or cameras, or kinetic images inside polling stations is prohibited. The presiding officer has the discretion to allow photographs or kinetic images to be taken as long as this does not interfere with the voting process. Observers that contravene the lawful instructions of a polling officer and provisions of the regulations can be told to leave the polling station.

## **2.13 Political party funding and use of state resources**

The new Constitution recognises multi-party democracy<sup>114</sup> – the existence of more than one political party.<sup>115</sup> Democracy and multi-partyism is further enhanced in cases where political parties are able to access resources to champion causes. The new Constitution provides that an Act of Parliament must provide for funding of political parties.<sup>116</sup> The Political Parties (Financing) Act provides that any political party requesting state funding must have secured at least 5% of votes in the last election. Small or start-up parties do not benefit from this provision.<sup>117</sup> Two such parties challenged this in the Constitutional Court. Their cases were dismissed, but the court has not yet provided reasons for its decisions. No information has been provided by any of the three political parties who have benefited from such resources in relation to how this funding has been used. This has a negative impact on transparency in relation to use and possible abuse of such resources.

The distinction between party resources and state resources has proved to be problematic in Zimbabwe over the years. There does not appear to be adequate regulation on this. In previous elections, allegations have been rife about the abuse of state resources by political parties – more specifically ZANU PF. In its primaries for the 2013 elections, ZANU PF used polling stations that are normally used for general elections, including schools.<sup>118</sup> Further, police were used to assist in the primary elections at the cost of the taxpayer, rather than the political party.

There is also inadequate enforcement of provisions on vote-buying and this continues to be rampant, especially when it comes to distribution of food aid ahead of the 31 July election.<sup>119</sup> With campaigning in full swing,<sup>120</sup> candidates have failed to distinguish their political and government offices. Local Government Minister Ignatius Chombo recently ordered local councils to write off all public debts in contravention of the Urban

113 Section 9(1) of the Electoral (Accreditation of Observers) Regulations 2013 SI 89/13.

114 Section 67(4) of the Constitution.

115 IDEA Political parties in Africa: Challenges for sustained multi party democracy (2007) p 51.

116 As above.

117 Section 3(3) of the Political Parties Finance Act.

118 “ZANU PF to hold primaries in one day” *The Herald* (12 June 2013) p1.

119 F Nleya “Chief blasts food aid” *Newsday* (20 July 2013) p 3.

120 F Machivenyika “Revolutionary party ignites star rallies” *The Herald* (11 July 2013) p1.

Councils Act, and this was largely perceived to be a vote-buying endeavour.<sup>121</sup> Vetting of ZANU PF candidates ahead of its primaries was also said to have been conducted by the central intelligence organisation – again the costs of which are borne by the taxpayer.<sup>122</sup> The MDC parties also accused ZANU PF of vote buying<sup>123</sup> by handing out food packages during campaign rallies, such as the First Lady donating 22 tonnes of food stuff in Mashonaland Central.<sup>124</sup>

In a country where poverty and formal unemployment levels are high, issues relating to vote-buying are a serious concern. Not enough has been done, either by way of legislation, or by the intervention of ZEC and the law enforcement authorities to ensure that this practice is discouraged and punished wherever it occurs.

## 2.14 The Special Vote

Amendments to the Electoral Act in 2012 introduced new voting procedures for some sectors of the Zimbabwean public. Special voting (or early voting) was introduced for the first time to benefit those from the disciplined forces and polling officers who will not be in their wards due to deployment on official duty on Election Day. “Disciplined forces” have been expanded to now include the Zimbabwe Prisons Service, and not just the Zimbabwe Republic Police and the Zimbabwe National Army.<sup>125</sup> The electoral law further stipulates that once an application is made for a Special Vote, that individual will not be allowed to vote on the main polling day.

This was the first time that disciplined forces were to vote outside their stations. Previously they used the postal voting system – criticised by many as not guaranteeing the secrecy of their ballots. Voting centres were identified and publicised. The actual Special Vote was open to observers.<sup>126</sup>

After proclamation of the election date and the sitting of the nomination court, ZEC set the dates for special voting as 14 and 15 July 2013.<sup>127</sup> Special voting had to be completed 16 days before polling day according to the Electoral Act,<sup>128</sup> and processing of the applications began on 1 July 2013.<sup>129</sup>

Before the process began, the ZEC Chairperson advised the nation that the process was foolproof.<sup>130</sup> Information about the actual applications that had been received was eventually made public with at least 120 000 applications having been said to have been issued to different sectors of the disciplined forces and polling officers.<sup>131</sup> After

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121 M Chideme “Write off all debts, Govt orders councils” *The Herald* (23 July 2013) p 1.

122 E Mambo et al “Politburo meets over primaries” *Zimbabwe Independent* (3 May 2013) p 3.

123 J Nyashanu “MDCs accuse ZANU PF of vote buying” *Newsday* (19 July 2013) p 3.

124 As above.

125 Section 4 of the Electoral Act as amended on 12 June 2013.

126 Z Murwira “Special Vote foolproof: Makarau” *The Herald* (11 July 2013) p 1.

127 F Share “Special voting dates announced” *The Herald* (3 July 2013) p 1.

128 Section 81A of the Electoral Act.

129 As above.

130 As above.

131 F Nleya “70 000 police officers apply for special vote” *Newsday* (9 July 2013) p 3.

processing of the applications, a total of just under 87 000 applications were approved, of which over 69 000 were for police, 15 000 for polling officers, and 2 000 prison officers. To date, the full list of those approved to vote by Special Vote have not been made public, although ZEC clearly indicated that the list would be available to anyone upon request. Further, requests made for clarifications regarding the inflated number of police officers have not been forthcoming, even after a High Court application was filed for this information to be released. In 2008, a total of only 4 350 police officers voted by postal ballot according to the executive summary of ZEC's own election report.

On 14 July, the first day of the Special Vote, the process proved to be chaotic, with severe challenges such as failure to deliver ballot papers on time, late commencement of actual voting, and no polling taking place at all in Masvingo province.<sup>132</sup> At the close of the first day, ZEC announced that just over 6 000 ballot papers had been delivered to the 9 other provinces. Voting was painfully slow on the first day, and by the end of the second day, less than half the approved applicants had cast their ballots. Reports were received from a number of the polling stations that voting had continued after the closing time of 19:00 hours on 15 July 2013, and beyond midnight on the same day, thus falling foul of the electoral law. In terms of the new Constitution and the electoral laws, ZEC was obliged to ensure it was ready for polling to commence at 07:00 hours on 14 July and clearly it violated these provisions.

At the end of this process a blame game ensued. Police accused the MDC-T for the failure of some of its force members to vote.<sup>133</sup> ZEC argued that nomination court challenges filed by the MDC parties had contributed to the delay in printing ballot papers, although the challenges were negligible and would not have affected more than a handful of constituencies and/or local councils.<sup>134</sup> The MDC-T blamed ZEC's lack of preparedness for the chaotic process, while the state-controlled media sought to blame a ZEC commissioner, Geoff Feltoe for "sabotage" on behalf of the MDC parties, without providing any credible evidence of such allegations.

What was clear was that, by its own admission, ZEC had acknowledged that the timelines set for elections were short.<sup>135</sup> The Commission underestimated the burden that would be placed on its office in relation to organising the Special Vote. It appeared that, in fear of putting down its foot and insisting that it needed more time to prepare for the Special Vote and elections in general, ZEC was put under pressure by the Executive and by political players, to the detriment and disenfranchisement of thousands of Zimbabweans. This heightens fears of ZEC's lack of independence and effectiveness and has seriously eroded public confidence that ZEC will be able to deliver an organised and "foolproof" election on 31 July 2013. The disappearance of the

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132 "Slow start to special voting" *The Herald* (15 July 2013) p 1; F Share "ZEC blames delays on MDCs appeals" *The Herald* (15 July 2013) p 1; "Chaos as police, soldiers vote" *Newsday* (15 July 2013) p 1; H Kadirire "Chaos logistical bottlenecks mar special vote" *Daily News* (15 July 2013) p 3.

133 "Police blame MDC-T for voting chaos" *Newsday* (16 July 2013) p 3.

134 F Share "ZEC blames delays on MDCs appeals" *The Herald* (15 July 2013) p 1.

135 F Kwaramba "Poll crisis election schedule tight: ZEC boss" *Daily News* (5 June 2013) p 1.

Chairperson once the process disintegrated also did not bode well for how any further challenges to the main poll will be handled.

Once it had regained its composure, ZEC notified the public of receipt of special vote packages,<sup>136</sup> opening of special ballots,<sup>137</sup> commencement of the verification process,<sup>138</sup> and the sealing of special ballot boxes.<sup>139</sup>

In relation to the disenfranchisement caused by ZEC's lack of preparedness and inefficiency, ZEC announced that it was going to make sure that those who did not vote on 14 and 15 July would be enabled to vote on 31 July 2013.<sup>140</sup> Through a fast-track court application filed in the Constitutional Court, it was ruled on 26 July that all those who had not voted by Special Vote would be allowed to vote on 31 July.<sup>141</sup> No reasons were provided for this decision by the Constitutional Court, in which it effectively ignored hard and fast provisions of the Constitution and the Electoral Act disallowing affected individuals from voting on 31 July. It also did nothing to allay fears by providing reasons why, suddenly, these disenfranchised voters who were going to be deployed outside their wards on Election Day will be available and will cast their votes on 31 July. ZEC has further still not provided a list of those who did vote on 14 and 15 July for scrutiny and neither has it satisfied those who have queried how the names will be removed from the main voters' roll to ensure that no double voting occurs. All in all, this process has raised serious concerns and unanswered queries, and the silence in providing critical information and answers lend credence to allegations that the Special Vote was part of the manipulation of the voters' roll and the numbers in favour of one political party.

## 2.15 Elections to Council of Chiefs

On 19 July 2013, ZEC conducted the first election of the Chiefs' Council as in accordance with the requirements of the new Constitution.<sup>142</sup> Previously ZEC was not involved in these elections. Observers were invited to scrutinise the process.

## 2.16 Postal voting and the Diaspora vote

In terms of the current electoral law, postal votes may currently only be cast by state officials and their spouses who will be absent from their constituencies on Election Day

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136 See ZEC Election Notice insert *Daily News* (17 July 2013) p 15.

137 L Gumbo "ZEC opens special ballots" *The Herald* (20 July 2013) p 1.

138 "Special vote verification process begins" *The Standard* (21 July 2013) p 3.

139 See ZEC election notice *Newsday* (24 July 2013) p C1.

140 ZMurwira "ZEC gives relief to special votes" *The Herald* (17 July 2013) p 3; L Gumbo "ZEC grants special voters reprieve" *The Herald* (23 July 2013) p 1.

141 Constitutional Court unreported case 64/14.

142 Section 239(a)(iii) of the Constitution of Zimbabwe amendment (No 20); M Chideme "Chief Charumbira, Khumalo elected" *The Herald* (22 July 2013) available at <[http://www.herald.co.zw/index.php?option=com\\_content&view=article&id=88097:chiefs-charumbira-khumalo-elected-&catid=38:local-news&Itemid=131](http://www.herald.co.zw/index.php?option=com_content&view=article&id=88097:chiefs-charumbira-khumalo-elected-&catid=38:local-news&Itemid=131)> last accessed on 24 July 2013.

on official duty.<sup>143</sup> There are large numbers of eligible voters who currently reside outside the country.<sup>144</sup> These people cannot vote by postal votes.<sup>145</sup> This means that a great number of Zimbabwean nationals in the diaspora are effectively being denied the right to participate in the government of their country, despite the fact that the *African Commission of Human and Peoples Rights*<sup>146</sup> issued provisional measures urging the government to put in place measures to facilitate the Diaspora vote.<sup>147</sup> The government has failed and refused to put these measures in place. An application was made to the Constitutional Court to enforce these provisional measures; the court dismissed the application and has not yet provided reasons for its ruling. Whilst the court and ZEC have gone out of their way to circumvent clear provisions of the law relating to the Special Vote, there has been a visible reluctance to extend the same fundamental right to other affected Zimbabweans who are generally in the Diaspora as political and economic exiles, but who continue to sustain the economy and nationals within Zimbabwe with their remittances to the homeland.

Applications for postal votes were processed at the same time as the Special Vote.<sup>148</sup> There has, however, been no information provided on this process by ZEC. The ZEC is mandated in terms of the law to make public the number of applications processed for special and postal vote and is currently in violation of this provision.<sup>149</sup> Further, there was no opportunity to observe the postal voting process to ensure its transparency, integrity and secrecy of the ballot.

## **2.17 Concerns with upcoming processes relating to the elections**

### **2.17.1 Voter education on actual polling**

Polling will be held on 31 July 2013. The proclamation announcing the election date was made on 12 June 2013.<sup>150</sup> The election to be held on 31 July 2013 is harmonised, with presidential, parliamentary and local government elections<sup>151</sup> being held at the same time. Although this ensures uniformity in the system, this time around, voters will be faced with three separate ballot papers: for a presidential candidate, member of the National Assembly, and local councillor. Their votes will also contribute to the Senate representatives, provincial council members and women's quota, which are all decided

143 Section 70(1)(a) of the Electoral Act.

144 G Marinovich "Desperately fleeing Mugabe" *Sunday Times* (1 April 2007) p 13; J Rademeyer "Refugees flood in as Mugabe triumphs" *Sunday Times* 1 April (2007) p 1 where it was highlighted that at least 49000 illegal Zimbabweans are crossing the border into South Africa; They left Zimbabwe either because of political persecution or for economic reasons, and many of them will not be able to return to cast their votes due to many reasons such as not having a valid passport as some are illegal immigrants.

145 Available for those who are not within the vicinity of their wards especially those in the diaspora.

146 *Shumba & Ors v The Government of Zimbabwe* Communication 430/2012.

147 S Ndhlovu "Zimbabweans in SA, Bots shun elections" *The Financial Gazette* (18 July 2013) p 1.

148 F Share "Special voting dates announced" *The Herald* (3 July 2013) p1.

149 Section 74(4) of the Electoral Act.

150 Section 38(1) of the Electoral Act as amended; See Statutory Instrument 7A 2008.

151 Sections 28(3) and 58(1) of the Constitution; All the elections are conducted on the same day.

by way of proportional representation. The fundamental changes introduced by the new electoral system are likely to cause considerable confusion among voters, and the number of spoiled ballots could increase dramatically, particularly if voter education is not escalated immediately.

### **2.17.2 Access to the final updated voters' rolls**

It is of immense concern that four days before the harmonised elections, the final voters' rolls have not been provided to political parties and observers despite request and promises to avail them by ZEC. Such access allows for audits, confirmation of the integrity of the roll, and allows for any amendments to be made where errors are found. The R-G has continued to privatise the voters roll. He has through print media advised the nation that 6,4 million voters have been registered.<sup>152</sup> ZEC must immediately reign in the R-G and provide access to assuage fears of manipulation of the voters' roll.

### **2.17.3 Slow pace of polling and insufficient polling stations**

In view of the number of ballot papers for voters, the pace of actual casting of ballot papers might be very slow, complicated and laborious, making it impossible for everyone to exercise their right in one day. This is especially so if we are to believe that the number of registered voters now exceeds 6 million Zimbabweans. Polling must be conducted for a continuous 12 hours from opening; however it is the norm that all potential voters still in the queue at the time of closing must be served before the polling station closes. It is vital for ZEC to ensure that its polling officers at each and every polling station are aware of this and will respect this in order to allow all voters to cast their ballots. ZEC must also be prepared to obtain court approval on short notice to extend the days for polling for more than one day and must reassure the public in this regard.

The actual polling can only be done at a polling station within the local authority ward in which the voter is registered as a result of the harmonisation.<sup>153</sup> There are a total of 1958 wards around the country.<sup>154</sup> It is unlikely that there will be adequate polling stations despite the fact that ZEC provided a provisional list of polling stations indicating that at least 9670 polling stations have been created. Although the number of registered voters has increased dramatically, there has not been a proportional increase in the number of polling stations to service them. ZEC must take all reasonable measures necessary to urgently address this.

Other problems will include accessibility for those who are involved in employment that involves a lot of travelling.<sup>155</sup> There is also a need to widely publicise polling stations –

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<sup>152</sup> L Gumbo "Over 6,4 to cast votes: Mudede" *The Herald* (22 July 2013) available at <http://www.herald.co.zw/over-64-million-to-cast-votes-mudede/> Last accessed 29 July 2013.

<sup>153</sup> Section 56(1) of the Electoral Act as amended.

<sup>154</sup> "ZEC Election notice" *Newsday* (24 July 2013) p C1.

<sup>155</sup> Section 56(1) of the Electoral Act, as amended; Section 61A(5) of the Constitution.



even in areas that have been termed as inaccessible in previous elections.<sup>156</sup> In the event of failure to provide wide publicity of wards, many people will not be able to vote, as this is restricted to the ward where one is registered.

#### **2.17.4 Challenges for voters whose names do not appear on the voters' roll**

In cases where the name of an individual does not appear on the ward voter's roll, production of a voter's registration certificate and identity document will suffice.<sup>157</sup> Polling officers need to be properly briefed in this regard so that they do not disenfranchise those who may have registered but do not appear on the voters' roll, especially in light of the late finalisation of the voters' roll. This will apply particularly to first-time voters and so-called "aliens" whose status has since been rectified according to the Constitution. The case of married women whose names may have been changed unilaterally by the R-G also has to be addressed. Widespread adverts advising women with registered marriages to carry a certified copy of their marriage certificate as well as Identity documents will suffice. The ZEC will also have to properly brief its polling officers on this.

#### **2.17.5 Presence of police in polling stations**

Police officers should not be allowed into the polling station unless they are called in by the presiding officer in instances when there is an assisted voter, who does not have a person of their choice to assist them.<sup>158</sup> This provision however undermines the order of the Supreme Court in the case of *Kuchera & Ors v The President of the Republic of Zimbabwe & Ors*.<sup>159</sup> The role of the police must be restricted to maintaining order outside polling stations.

#### **2.17.6 Counting of votes and posting of results**

The law is clear that votes cast must be counted at the polling station where they have been cast, and that the presiding officer must record them on a voting return sheet and post them outside the polling station, accessible to the general public before sending them to the constituency elections officer.<sup>160</sup> This procedure has to be done in the presence of the candidates and their agents. This will certainly go some way towards ensuring transparency in the counting process, so long as candidates and political

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156 K Phiri (n 77 above); ZLHR has received sporadic reports from the public and its members as they are not aware of their wards to date and some were moved from one polling station to another attempting unsuccessfully to access the voter's roll.

157 Section 56(1)(a) of the Electoral Act as amended; The problem of allowing one to vote when the name does not appear on the ward voter's roll when one shows a voter registration certificate or identity document and proof of residence is the fact that forms of proof of residence have not been expressly highlighted. In the absence of utility bills according to section 4 on interpretation of the Electoral Act as amended one can produce any other form of documentary evidence. This is vague and can be open to manipulation.

158 Section 59(1) of the Electoral Act.

159 Supreme Court unreported case 106/08.

160 Section 64(1)(e) of the Electoral Act, as amended.

parties are able to deploy agents at every polling station to witness the counting of votes. This has not been the case before, as some agents from opposition parties have been arrested in the past or otherwise prevented from accessing polling stations.<sup>161</sup> There have been concerns that the votes will not be counted at polling stations and the results will only be posted at ward centres, and ZEC must urgently confirm that this is not the case and its presiding officers will abide by the law and display these results.

The ward elections officer is obliged to give reasonable notice in writing of the time when the special and postal votes will be counted and the verification and collation of polling station returns.<sup>162</sup> The ward elections officer is required to contact observers. The provision explains how the verification and collation is to be done. The counting of special and postal votes at ward centres may distort the result given at polling stations significantly depending on the number of such votes, and for this reason, it is critical that political party representatives and observers are present during this counting process. It appears more ideal and appropriate to have these transmitted to the relevant polling station for inclusion on the polling station returns. Such counting must be done before the close of poll in the presence of party election agents and observers. The transmission of these special and postal votes must also be secured and monitored by election observers.

Election agents and observers must be allowed to make notes of the polling station returns transmitted to the ward. Special and postal votes are counted and added to the number on the polling station returns. Results at ward level are displayed before transmission to the constituency centre. Similar processes, with some alteration, are replicated at the constituency and command centres, save for the issue of special and postal votes that would have been dispensed with. The returns at the constituency command center are transmitted to the national command center. At all these stages, it will be critical for the results to be displayed and accessible to the public.

### **2.17.7 Announcement of results**

Winning candidates for National Assembly seats are declared at the constituency centre. The presidential election result must be announced by the ZEC Chairperson (or in her absence the Deputy Chairperson or another Commissioner). This must be done within 5 days of close of polls. It is imperative for this timeline to be respected and for the process not to be delayed, especially in light of the delays in 2008 which contributed to instability and public anxiety. It will not be good for such a situation to be repeated.

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161 J Makumbe (n 23 above 96); Makumbe highlights how several unmarked and full ballot boxes materialised at several polling stations.

162 Section 65 of Electoral Act.

## 3 Operating environment

### **Part A: Overview of compliance with human rights obligations**

#### **3.1 Interaction with human rights charter and treaty based organs**

Human rights are inter-related and interdependent. The right to participate in the government of the country can only be fully enjoyed if and when there is general respect for, promotion and protection of other rights that enable this participation. As previously stated in Chapter 1, Zimbabwe has ratified several human rights instruments that have a direct impact on credible, free and fair elections. Compliance with these instruments can impact on the right to participate in the government of the country. The freedoms of assembly, association, and expression, and other rights, will be referred to and fully discussed later in this chapter.

In October 2011, Zimbabwe's human rights record was under scrutiny during the 18th session of the UN Human Rights Council (HRC) Universal Periodic Review (UPR). This state-driven process reviewed how the country was faring in the human rights arena and recommendations were made on areas needing improvement in order for Zimbabwe to fulfill its human rights obligations. The process was completed in March 2012 during the 19th Session of the HRC with Zimbabwe finally accepting 130 recommendations out of 177.<sup>1</sup> Key recommendations such as strengthening the rule of law and increasing representation of women in decision making were accepted. Recommendations to investigate all credible allegations of human rights violation related to the Presidential elections in 2008, particularly in the areas of torture, arbitrary arrests and detentions and enforced disappearances were rejected.<sup>2</sup>

In May 2012, the United Nations High Commissioner for Human Rights, Ms Navanethem Pillay, visited Zimbabwe at the invitation of the IG. During a briefing she indicated that

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1 See Recommendations accepted by the government of Zimbabwe <<http://www.upr-info.org/database/>> Last accessed on 27 July 2013.

2 As above.

the 2008 election-related violence must be addressed and the culture of impunity must be arrested.<sup>3</sup>

In March 2013, alarmed at the clampdown on CSOs and blatant violation of fundamental rights and freedoms, three mandate holders from the UN Special Procedures mechanisms of the UN, continued to engage the IG ahead of the 2013 elections. They expressed concerns at the prevailing human rights situation in the country and the clampdown on human rights defenders (HRDs) ahead of elections.

The African Commission on Human and Peoples' Rights (ACHPR) has also encouraged Zimbabwe to take measures to fulfill its human rights obligations. In March 2013, the ACHPR urged Zimbabwe to put in place measures to ensure that the Diaspora votes in the referendum and the harmonised elections in the case of *Shumba & Ors v The Government of Zimbabwe*.<sup>4</sup>

Another institution that was set up to ensure that the rule of law is observed in SADC - the SADC Tribunal - was suspended at the 2010 SADC Summit of Heads of State and Government as a direct result of the active lobbying of the government of Zimbabwe.<sup>5</sup> The tribunal had handed down a decision that was not favourable to the government, and similarly to national judgments that were not acceptable to government, action was taken to weaken or remove criticism rather than comply with court decisions and respect the rule of law.

Despite undertakings made in the GPA, the existence of clear constitutional safeguards, and bearing in mind the continued clashes with regional and international bodies as outlined above, it is clear that the IG has failed, and continues to fail, to adhere to the rule of law and respect for human rights. The new Constitution incorporates human rights – civil, political, economic, social and cultural rights. It also recognises the rights of minorities and children. Laws still have to be reformed to give effect to the expansive "Bills of Rights". In addition, some human rights enshrined in international human rights standards have not been incorporated into domestic law. Such legislative reforms, impacting as they do on the conditions for credible elections, should have been put in place before the election date was so hurriedly proclaimed.

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3 See Opening remarks by UN High Commissioner for Human Rights Navi Pillay at press conference during her mission to Zimbabwe (25 May 2012) available at <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12192&LangID=E>> Last accessed 27 July 2013.

4 Communication 430/2012.

5 SADC Tribunal available at < <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>> Last accessed on 27 July 2013.

## 3.2 Compliance with and respect for fundamental rights and freedoms

### 3.2.1 Law reform

According to Thornton, legislation is written form of rules for the regulation and control of future conduct.<sup>6</sup> It restrains the exercise of various freedoms, and also confers and protects rights and benefits.<sup>7</sup> Over the years, and in particular since the 2008 elections, ZLHR has continued to advocate for reforms of draconian laws/provisions that undermine the enjoyment of fundamental rights and freedoms, as also agreed by the parties to the GPA. Of particular concern had been the introduction of repressive laws in 2002, undermining fundamental freedoms of assembly, association and expression, and provisions of the GPA that required the IG to reform laws in preparation for elections.

Following the adoption of the new Constitution, it was expected that the laws would be reviewed in a manner that was participatory to realign them with the new Constitution. Some of the laws that needed attention include the Public Order and Security Act (POSA), Access to Information and Protection of Privacy Act (AIPPA), and the Criminal Law (Codification and Reform) Act (the Code). The new electoral system also required reform of laws on the structure of local and provincial government, the election of local government representatives,<sup>8</sup> special interest groups, and other electoral laws. During the IG's subsistence there was very little progress on legislative reform. The proclamation of elections before the requisite reforms had been carried out by Parliament did not advance the IG's obligations to fully promote and protect the right to participate in the government of the country.

### 3.2.2 Institutional reforms

Rule of law institutions in Zimbabwe that collectively contribute to the right to participate in the governance of the country exhibited a general culture of “*rule by law*” and not “*rule of law*” during the period preceding the 31 July election. Some regressive elements within these institutions have taken centre stage, working independently or in collaboration with others to foster a culture of impunity. Human rights violations continue to be documented. As a result, persecution through prosecution persisted through the use of repressive provisions of the law to justify attacks on HRDs, while unreformed institutions continued with their “business as usual” attitude. The Minister of Justice & Legal Affairs is on record expressing his concerns of the state of the justice delivery system which he said was dogged by corruption at every level.<sup>9</sup> Some of the other institutions that remained unreformed and resistant to any transformation were

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6 GC Thornton *Legislative drafting* (2008) p 47.

7 As above.

8 Urban Councils Act [Chapter 29:15] and Rural District Councils Act [Chapter 29:13].

9 See D Nemukuyu “Zim Justice delivery system corrupt – Chinamasa” *The Herald* (30 April 2012) p 1; D Nemukuyu “Judiciary adopts code of conduct” *The Herald* (10 January 2012) p 1.

the security sector players – the police, army and Central Intelligence Organisation.<sup>10</sup> The R-G's office discussed in Chapter 2 also continued to perform duties as per the old constitutional dispensation rendering some citizens stateless in the process.

### 3.3 Social and economic rights

Following the 2008 electoral impasse and the formation of the IG in 2009, the multi-currency regimen stabilised the economy with basic goods and services becoming available once again. The hyper-inflation was contained although the “dollar” continued to be hard earned for many without a source of income. To some extent services in some sectors such as health delivery improved although issues of access to medicines and treatment for vulnerable groups such as people living with HIV and AIDs continued, and the maternal mortality rate remained high.<sup>11</sup> The IG made some attempts to progressively realise some social and economic rights, although bread and butter issues remained largely unresolved. The Constitution now recognises social and economic rights and obliges the state to progressively realise these rights within limits of available resources.<sup>12</sup>

#### 3.3.1 The right to shelter<sup>13</sup>

There were continued sporadic evictions of former farm workers who continued to reside at the farms affected by the land reform programme. They were arraigned before the courts and charged with violating provisions of the Gazetted Land (Consequential Provisions) Act. It appeared to be a deliberate effort by state actors to incapacitate vulnerable communities considerably before the occurrence of any future key political processes. A case in point was the 86 former farm workers from Mguti who were arraigned before the Harare Magistrates' courts and accused of occupying gazetted land in spite of the fact that the government had not provided alternative shelter to them in compliance with accepted human rights norms and standards. This adversely affected participation rights as the individuals affected were displaced and were discriminated against on the basis of continuing perceptions of their alignment to opposition political parties.

#### 3.3.2 Right to water<sup>14</sup>

It has been established that at any given time around half of the people in the developing world suffer from disease caused by drinking contaminated water or feeding

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10 See “ZDF won't entertain security sector reform” *The Herald* (12 November 2011) p 2; M Kashumba “Security Sector reforms a foreign agenda, says Chihuri” *The Herald* (1 December 2011) p 2; T Farawo “I have no time for sellouts: Chiwengwa” *The Sunday Mail* (5 May 2013) 1; V Langa et al “Furore over security sector reforms” *Newsday* (6 April 2013) p 3; L Gumbo “Sekeramayi dismisses security sector reform” *The Herald* (22 April 2013).

11 Note 4 above.

12 See sections 73-77 of the Constitution of Zimbabwe Amendment (No 20).

13 Now recognised in section 74 of the Constitution of Zimbabwe Amendment (No 20).

14 Section 77 of the Constitution of Zimbabwe Amendment (No 20).

on contaminated food.<sup>15</sup> Zimbabwe has over the last years been an active contributor to this regrettable phenomenon and steadily supplied information on such related statistics. Access to potable water remained of concern as the IG failed to deliver on this.

The right to participate in the government of the country fully can only be realised if people are able to enjoy their interrelated rights without impediments. Issues affecting the welfare and health of a person can prevent active participation as they affect the capacity to participate without distraction.

### 3.4 Civil and political rights

#### 3.4.1 Security of the person

There has already been increased evidence of the desire by both ZANU PF and MDC-T to prevent the formation of another IG at all costs. As ZANU PF continues its election rhetoric of “voting wisely” to preserve the country's resources and land reform programme unhindered,<sup>16</sup> re-orientation of citizens through forced attendance at rallies was recorded.<sup>17</sup> Intra-and inter-party violence has also been experienced.<sup>18</sup> ZANU PF has also been accused of using its old tactics of targeting citizens and HRDs, and leading in perpetrating human rights violations.<sup>19</sup> Arbitrary arrests, prosecutions and physical attacks have continued to undermine the security of citizens and HRDs. New tactics of manipulating electoral processes such as voter registration (preventing perceived opposition supporters from registering and independent observers from observing) have also been reported. All these concerns and allegations have been dismissed as unfounded by ZANU PF.<sup>20</sup>

Although levels of violence were lower than in the run-up to the 2008 elections, an MDC-T supporter was allegedly murdered towards the end of June 2013 in Mudzi in a case suspected to have been politically motivated.<sup>21</sup> Problems of political intolerance due to polarisation in communities persist ahead of 31 July elections. Police have acknowledged the occurrence of inter- and intra-party violence,<sup>22</sup> and some cases have been reported,<sup>23</sup> between MDC-T and ZANU PF supporters. These clashes had started as

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15 P H Gleick “The human right to water” *Water Policy* 1, 1998, 48.

16 “Vote wisely to preserve country's resources” *The Herald* (27 May 2013) p 2.

17 X Ncube “Tsvangirai warns chiefs” *Daily News* (24 July 2013) available at <<http://www.dailynews.co.zw/articles/2013/07/24/tsvangirai-warns-chief>> Last accessed on 28 July 2013.

18 L Gumbo et al “Violence rocks Chitungwiza” *The Herald* (7 November 2011) p 1.

19 T Zivira et al “ZANU PF leads in human rights violations” *Daily News* (14 July 2013) p 4.

20 G Mazara “Rigging claims mere politicking: President” *The Herald* (24 July 2013) available at <[http://66.135.59.88/index.php?option=com\\_content&view=article&id=88415:rigging-claims-mere-politicking-president&catid=37:top-stories&Itemid=130#UfRIJdJHKz4](http://66.135.59.88/index.php?option=com_content&view=article&id=88415:rigging-claims-mere-politicking-president&catid=37:top-stories&Itemid=130#UfRIJdJHKz4)> Last accessed 28 July 2013.

21 “MDC T activist killed in Mudzi” *Newsday* (28 May 2012) available at <<http://www.newsday.co.zw/2012/05/28/2012-05-28-mdct-activist-killed-in-mudzi/>> Last accessed 28 July 2013.

22 F Razemba “ZANU PF MDC T supporters clash in Tafara” *The Herald* (24 July 2013) p 4.

23 As above.

far back as 2011, with MDC-T failing to conduct a rally at Chibuku stadium in Chitungwiza on 6 November 2011.<sup>24</sup>

Citizens have had to deal with political turmoil in their lives such as barbaric acts of their neighbours who totally refuse to accept divergence of political opinion and undermine their security. Politically motivated violence has continued<sup>25</sup> despite the fact that political party leaders have on many occasions called for tolerance, and urged police to become effective when it comes to violence.<sup>26</sup> Acts of intimidation have also continued to be experienced. It was reported that people were being forced to register to vote by political parties and ZANU PF was singled out as the culprit.<sup>27</sup> ZANU PF youths were also accused of forcing people to buy party cards and provide them with their voter registration slips.<sup>28</sup>

The Organ on National Healing and Reconciliation has, during its life, failed to address political violence issues. The Joint Operations Monitoring and Implementation Committee (JOMIC) established through the GPA has intervened to quell some inter-party clashes as it was tasked to monitor the implementation of the GPA. It was composed of representative of the three main political parties, the MDCs and ZANU PF until the former pulled out citing abuse of vehicles as elections approached.<sup>29</sup>

The courts have also dealt with cases of politically motivated violence at different levels. Some of the cases are discussed in Chapter 5. The supposed vanguards of culture - Chiefs - have also been implicated in political violence cases and accused of being politically biased. In one case Chief Serima-Vengesayi Rushwaya was arrested for assaulting an MDC supporter and paid an admission of guilt fine to secure his release.<sup>30</sup> Chiefs and traditional leaders are now required to be apolitical in terms of the new Constitution.<sup>31</sup>

The police are mandated to maintain law and order by the Constitution and have been on record calling for non-violence during the elections. The Co-Minister of Home Affairs from the MDC-T has urged voters to desist from violence.<sup>32</sup> However security sector players such as the police, the military and intelligence services have been accused of being biased in favour of ZANU PF.<sup>33</sup> This has not been assisted by their continuing threats to refuse to recognise a leader who did not participate in the war of liberation, and their public utterances ridiculing and attacking Prime Minister Tsvangirai. The

24 L Gumbo et al "Violence rocks Chitungwiza" *The Herald* (7 November 2011) p 1.

25 The latest incident that was going to be explosive were the clashes between ZANU PF and MDC T supporters in Kuwadzana on 26 July 2013 see picture insert in *Newsday* (27 July 2013) p 1.

26 In particular at a meeting held in 2011, On 11 November the President indicated that they had received reports that the police were not being effective when dealing with violence see L Chikova "Violence: parties take action" *The Herald* (12 November 2011) p 1.

27 F Kwaramba Do not force people to register to vote-ZEC Daily News (6 June 2013) p 3.

28 Note 29 above.

29 W Masvingise et al "Mugabe recalls JOMIC vehicles" *Newsday* (27 July 2013) p3.

30 "Violent chief fined" *Newsday* (23 March 2013) p 2.

31 Section 281(2)(a) of the Constitution of Zimbabwe Amendment (No 20).

32 "Desist from violence vote peacefully" *The Herald* (17 July 2013) p 2.

33 "Security forces biased towards ZANU PF" *The Standard* (30 June 2013) p 5.



intelligence service has also been implicated in the harassment of HRDs, as seen in the case of *Maguwu v Co-Ministers of Home Affairs and 4 Ors.*<sup>34</sup>

Of concern is the active participation of some members of the ZRP in election processes – particularly being nominated as candidates. There was generally no clarity on whether/when these police officers resigned to actively involve themselves in politics – if they have resigned at all. Oliver Mandipaka, a senior police officer and police spokesperson, for example was nominated as a candidate for ZANU PF whilst still serving in the police force.<sup>35</sup> In the interim, other lower-rank police officers have been disciplined and removed from employment for being seen attending MDC-T rallies in their civilian clothes.

The state, through the police, has an obligation to provide adequate security to all political parties according to the AU Declaration. This has not been the norm in Zimbabwe as police have abused these powers in the past against opposition party members.<sup>36</sup> Some of the powers of ZRP that have been increased under the amended draconian POSA enable the police to impose conditions on how a gathering or meeting must be conducted. They continue to selectively apply and misinterpret their powers under this repressive legislation to block gatherings organised by opposition parties and CSOs, thus suppressing fundamental rights relating to participation.

### 3.4.2 Respect for pre-trial rights

ZLHR has continued to condemn the deprivation of liberty of HRDs and even ordinary citizens without just cause. Of particular concern, arbitrary arrests have continued to occur. The Chief Justice – Godfrey Chidyausiku – has censured the police from arresting in order to investigate, but they continue to contravene the law with impunity.<sup>37</sup> These arrests have been selective against HRDs and certain political players from the opposition.

Police have continued to torture some HRDs in their custody. Some blatant examples include the torture of International Socialist Organisation (ISO) activists after their arrest in February 2011. They were arrested for conducting a lecture series to discuss events in Egypt. Six of the leaders were tortured while in police custody by suspected state security agents.<sup>38</sup> The acts of torture were carried out to induce confessions, with serious charges of attempting to overthrow a government by unconstitutional means

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34 High Court Harare unreported case 404/12.

35 “Thrills, spills in primaries” *The Herald* (26 June 2013) available at < <http://www.herald.co.zw/thrills-spills-in-primaries/> > Last accessed on 28 July 2013.

36 The police shot dead Gift Tandare, a member of the MDC, on 11 March 2007 when they violently dispersed people trying to attend a Save Zimbabwe Campaign prayer meeting.

37 F Razemba “ZRP ready for polls” *The Herald* (4 June 2013) p 3.

38 “Gwisai bemoans torture as Muchadehama challenges placement of activists on remand” *HRDs Alert* ZLHR (24 February 2011).

being leveled against them subsequently.<sup>39</sup> In one case, a man was forced to swim in sewage by the police before he was placed under arrest.<sup>40</sup>

HRDs have also continued to be denied access to their lawyers and at times only been allowed such access after being served with court applications to compel them to do this. HRDs who have been denied access to lawyers have sometimes been detained *incommunicado*. In some cases, HRDs have been over detained and have not appeared in court within the statutory 48 hour provision. Selective application of repressive laws, for example, of section 121 of the Criminal Procedure and Evidence Act has resulted in at least 117 HRDs being maliciously detained for an additional seven days after being granted bail. In almost all cases, appeals have not been filed, or have been unsuccessful, resulting only in the HRDs having been unduly punished through this continued arbitrary detention.<sup>41</sup>

### 3.4.3 Right to equal protection of the law

Calls for non-partisan application of the law have remained largely ignored when dealing with supporters and members of certain political parties and HRDs. As a result, supporters from political parties such as the two MDC formations have been arbitrarily arrested for holding meetings, mobilising supporters and carrying out their lawful activities. Equally compelling has been the selective targeting of HRDs working with pro-democracy CSOs. The new Constitution provides that members of the security services who include the police, the army and the central intelligence to be non-partisan and not to actively participate in politics.<sup>42</sup> Although the GPA parties undertook to take steps to include within the training curriculum of members of the uniformed forces subjects on international humanitarian law, human rights and facilitate accountability of perpetrators of human rights violations, impunity at the highest level remains rampant. Generally the degree of non-compliance with those provisions guaranteeing observance of the rule of law and respect for human rights has been dismally high. All in all, state actors have continued to make little to no effort at all to ensure that there is a clean break from the past towards tolerance and total respect of human rights and fundamental freedoms. This *status quo* remains worrisome as Zimbabwe moves towards yet another election.

In the run-up to the 2013 election, MDC supporters are increasingly being dragged before the courts and accused of having torn ZANU PF posters, whilst ZANU PF supporters similarly implicated have remained at large, even when their transgressions have been reported to the police.<sup>43</sup> Between 1 and 28 July 2013, at number of MDC T activists/supporters have raised complaints with lawyers that they have not been afforded equal protection of the law. They have cited incidents of being arrested for

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39 As above.

40 "This is out police – swimming in sewage" *The Legal Monitor* Edition 135 (12 March 2012) p 1.

41 See the case of *Attorney General v Mabusa & 2 Ors* High Court Bulawayo unreported case 199/11.

42 Section 208 of the Constitution of Zimbabwe amendment (No 20).

43 C Zvauya "MDC officials up for tearing ZANU PF Posters" *Daily News* (24 July 2013) p 2.

trying to report crimes perpetrated against them by ZANU PF supporters. They have been re-victimised, through arrest and detention, and been unlawfully converted into perpetrators as police believe ZANU PF supporters' allegations at the expense of MDC complaints.

Selective targeting of CSOs and HRDs has been a matter of great concern in the pre-election period. Human rights work remains perhaps one of the most risky professions in Zimbabwe. The general existence of NGOs was characterised by the following trends; continued persecution through prosecution of HRDs working collectively in an organised manner as CSOs, and strategic targeting of those organisations and individuals involved in mobilising, education and sensitisation, and documentation and monitoring of human rights violations in order to destabilize and disrupt ongoing activities. (This is also covered under the freedom of association section in this chapter).

Criminalisation of the work of CSOs has continued. CSOs, with their watchdog role in a democracy of putting checks and balances on the other three arms of government, have been selectively targeted. At the moment activities of CSOs and HRDs are centered on elections, civic and voter education, information and observation. These activities of HRDs and CSOs continue to be undermined by the selective application of draconian pieces of legislation that remain unreformed and not realigned to the new Constitution. Application of these laws has inhibited HRDs from carrying out voter education, provision of critical public information, and civic education without exposing themselves to risk. Attempts to gag CSOs have resulted in some being accused of peddling falsehoods – especially those that are considered to be “western sponsored”, whilst local media has also been targeted and threatened with risks of prosecution.<sup>44</sup>

Since October 2012, ZLHR has documented an increase in attacks on CSOs, which is considered to be strategic, intentional, well-planned, well-resourced and implemented. CSOs have been raided. It has become evident that the police was using seemingly “legitimate processes” such as search warrants to conduct raids, arrest and prosecution to victimise CSOs and HRDs – an old tactic fuelled by partisan policing in Zimbabwe. Other CSO leaders have been charged with operating without registration (this will be discussed further under freedom of association).

Of particular concern, the police – through its leadership – has openly attacked CSOs. On 21 February 2013, during a recruits pass out parade, the Commissioner-General of Police, Augustine Chihuri, fuelled attacks on CSOs by accusing NGOs of pushing for a western backed regime change agenda. On that same day, the ZRP Deputy Commissioner-General Innocent Matibiri, who is in charge of “Operations” also launched an offensive against NGOs and outlawed broadcasts from Studio 7, an exiled radio station operating lawfully during a meeting of the Parliamentary Portfolio Committee on Defence and Home Affairs.<sup>45</sup>

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44 T Maodza “Falsehood peddlers risk prosecution” *The Herald* (22 November 2012) p1.

45 “ZRP puts NGO's under daily surveillance, outlaws exiled radio station” *HRDs Alert ZLHR* (25 February 2013).

Media attacks have become the order of the day. Columnists cum lawyers,<sup>46</sup> in a bid to gain prominence and curry political favour, have written negatively about CSOs in Zimbabwe. CSOs have been maligned through injurious articles actuated by malice, been described as pawns in the regime change agenda.<sup>47</sup> Other derogatory terms used include describing CSOs as puppets.<sup>48</sup> Media attacks on CSOs are covered in Chapter 4 under the hate speech section. The UN High Commissioner and the UN special mechanism have through statements urged the government of Zimbabwe to respect HRDs.<sup>49</sup> However this continues to be ignored.

As they continue to assert themselves in their watchdog role, HRDs will continue to be exposed to increased intimidation, unlawful arrests, detention or torture, even death should political tensions rise and the state apparatus, manipulated by ZANU PF, as always, seeks to silence any dissent and exposure of any human rights violations and electoral malpractices. HRDs who are on the frontline of promoting and protecting human rights therefore require continued support and protection in undertaking their critical activities and watchdog role.

### **3.4.4 Right to an effective remedy and representation by lawyer of choice**

The operating environment ahead of elections also continued to be undermined by the state of the justice delivery system. Independence of the legal profession has been severely curtailed during the run up to elections. One human rights lawyer has been arrested for carrying out her professional duties as an officer of the court, and ZLHR lawyers and the organisation have been attacked by state controlled media for seeking to assert the constitutional rights of citizens through judicial processes. The judiciary has also remained, in the public perception, generally compromised in Zimbabwe. Since March 2013 attacks on human rights lawyers and independent judges have been rampant with the media being used as a tool to vilify lawyers and judges. Articles calling for urgent review of the judiciary were maliciously written by *The Herald*.<sup>50</sup> As a result of failure to protect and ensure the independence of the judiciary, it has remained open to compromise with external and executive interference being prevalent. Recourse to remedies from other sources such as the regional and sub-regional bodies with the mandate of ensuring rights compliance within Africa and the SADC region, being the

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46 R Nyamurundira was in Civil Society before joining government.

47 R Nyamurundira "Civil society: the treasonous betrayal" *The Herald* (15 May 2013) available at <<http://www.herald.co.zw/civil-society-the-treasonous-betrayal/>> Last accessed on 29 July 2013.

48 As above.

49 "Zimbabwe: UN Condemns attacks on human rights defenders ahead of elections" United Nations News Center available at <<http://www.un.org/apps/news/story.asp?NewsID=43954&Cr=zimbabwe&Cr1=#.UfRzntJHKz4>> Last accessed on 28 July 2013; "Ahead of referendum, UN EXPERTS CALL ON Zimbabwe to respect fundamental rights" available at <<http://www.un.org/apps/news/story.asp?NewsID=44240&Cr=zimbabwe&Cr1=#.UfR2y9JHKz4>> Last accessed on 28 July 2013.

<sup>50</sup> "Calls for urgent review of the judiciary" *The Herald* (25 March 2013) p1.

African Commission on Human and Peoples' Rights (African Commission) and the SADC Tribunal respectively have been met with hostility by state actors in the country.

Human rights lawyers have also been arrested for carrying out their work. Beatrice Mtetwa is the most recent and high-profile victim. Arrested in March 2013, further details of her case are discussed in Chapter 4. Media attacks on legal profession have been rampant, lawyers who express their views in court cases have been referred to as "good for nothing" and "bush lawyers"<sup>51</sup> by Jonathan Moyo, a ZANU PF political spin doctor. The media attacks on lawyers are not a new phenomenon especially in *The Herald* opinion columns by Nathaniel Manheru.<sup>52</sup> Additional media attacks on lawyers are covered under the Hate speech section in Chapter 4. It is important to note that it is against this background that Zimbabwe heads for an election.

## **Part B: Compliance to foster participation**

### **3.5 Freedom of assembly and association**

Freedom of assembly and association are fundamental rights in any society, essential for the holding of democratic elections. These rights are recognised in the African Charter on Human and Peoples' Rights (ACHPR), SADC Guidelines, and the AU Declaration. The African Commission on Human and Peoples' Rights has extensively deliberated on this right.<sup>53</sup> Elections are considered free and fair in instances where all political parties are allowed to campaign freely in the period leading up to elections. They must be allowed to exercise their right to hold meetings and rallies to explain their policies to voters and try to persuade voters to elect them into power. They must exercise their rights in a peaceful manner, however, with due regard to the rights of others and reasonable measures may be taken to protect public order and reduces possibilities for violence.<sup>54</sup>

The new Constitution guarantees the freedoms of assembly and association. It further provides for the right to demonstrate and petition.<sup>55</sup> The police force and other law enforcement agencies are expected to ensure that everyone can exercise these rights freely. However, existing legislation has not been audited or amended to reinforce the new provisions in the Constitution. Selective application of the law by the police<sup>56</sup>

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51 C Mhike "Prof Moyo and company poisoning Zim society" *The Herald* (12 June 2013) p 8.

52 As above.

53 Article 11 of the ACHPR; Principle 2.1.2 of the SADC Guidelines; Part IV(4) of the AU Declaration. See also *Amnesty International v Sudan* (2000) AHRLR (ACHPR 1999) para 42& 79; *Malawi African Association and others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998); Other international law instruments which protect free association and assembly are Article 20 of the Universal Declaration of Human Rights (UDHR); Article 15 of the Convention on the Rights of the Child (CRC); The African Charter on the Rights and Welfare of the Child (ACRWC) article 8; The Convention on the Elimination of all forms of Violence against Women (CEDAW) article 7.

54 The right to free association and assembly is non-derogable and cannot be restricted under the ACHPR.

55 Section 58 & 59 of the Constitution of Zimbabwe Amendment (No 20).

56 See ZLHR submissions to Parliamentary Committee on Home Affairs and Defence (2010).

against members of the MDC and other HRDs persists. Pro-democracy CSOs have also been targeted. The most recent cases of selective application of the law against MDC is the case of *State v Tsunga and Ors*, wherein the police arrested an MDC-T candidate together with his supporters for carrying out a door to door campaign in Mutare.

### 3.5.1 Regulation of Public Gatherings and Meetings

#### 3.5.1.1 Notice for gatherings or meetings

In certain instances and for certain groups, POSA requires anyone who wishes to hold a public gathering to notify the police beforehand so that they can make arrangements if necessary to preserve public order.<sup>57</sup> The ZRP, however, have consistently misinterpreted, and continue to misinterpret, this provision to mean that gatherings can only take place when they give permission for them to go ahead.<sup>58</sup> They also have exhibited a pattern over time of barring gatherings on spurious grounds that are not laid out in the statute.

A “public meeting” or gathering for which notice must be provided to the police must be composed of more than 15 people in a public place or a meeting which the public or any section of the public is permitted to attend, whether on payment or otherwise.<sup>59</sup> Interpretation of this provision by the police has been problematic as shown below under exemptions section:

#### 3.5.1.2 Gatherings exempt from notification

As the country heads for another election, ZLHR notes that police continue to break up internal meetings of opposition political parties, claiming that the meetings contravene POSA. This conduct has violated the right to freedom of assembly and association.<sup>60</sup> This is despite the fact that POSA specifically excludes from its ambit a meeting of an organ or structure of a political party or other organisation held in a private place.<sup>61</sup> This means that political parties or other organisations may hold such meetings without notifying the police and the police may not interfere with such meetings by invoking POSA. Private meetings convened by CSOs have similarly been gate-crashed, or purportedly banned with police alleging that no “clearance” has been obtained. Some of the cases include the case of the International Socialist Organisation meeting that resulted in 46 labour activists being arrested. HRDs were also arrested for holding private academic meetings.<sup>62</sup>

<sup>57</sup> This was contained in section 24 of Public Order and Security Act, which has now been replaced.

<sup>58</sup> See decision against the police in the case of *ZCTU v Officer in Charge Kwekwe Police and Ors* High Court Bulawayo unreported judgment no. 90/2010.

<sup>59</sup> This helps to ensure that small meetings will not be arbitrarily dispersed.

<sup>60</sup> See case of *State v Kimberly Bhebhe and 12 Ors* unreported Beitbridge Magistrate CRB BB308 A-M/12.

<sup>61</sup> Section 24 of the Public Order and Security Act.

<sup>62</sup> F Nleya “Gwisai arrested for plotting another Egypt” *Newsday* (21 February 2013) p 1.

### 3.5.1.3 Procedure for clearance

A convener must be appointed by an organisation intending to hold a public gathering.<sup>63</sup> The convener gives written notice of the gathering to the police five days before it takes place (in the case of a meeting) or seven days before it takes place (in the case of a procession or demonstration). During an election period the notice is three days.<sup>64</sup> This notice can be given to the officer in charge of the police station nearest to the place where the gathering is to be held. It will be that officer's responsibility to inform the regulating authority. During the run-up to the 31 July elections, interpretation of this clearance provision has proved to be problematic. In the case of *Mtizwa v Co-Ministers of Home Affairs and Ors*, a magistrate dismissed an application to determine the legality of the conduct of police in changing goal posts of when the notice to hold a rally was given, saying that the court did not have jurisdiction to deal with the matter.<sup>65</sup> This was despite the fact that the provisions of POSA give magistrates review powers in such cases.<sup>66</sup> Police have provided spurious reasons for denying the holding of political gatherings. For example the "Cross-over" rally organised by MDC-T for Harare on Monday 29 July 2013 was initially not cleared as police used the reason that they did not have manpower to ensure this gathering did not turn violent.

### 3.5.1.4 Powers of police

Other than enforcing provisions of POSA as stipulated in the Act, police have also arbitrarily and unilaterally sought to ban the conduct of rallies at certain times. A few days before the upcoming elections, the police sought to impose a curfew on the time when rallies must stop (18:00 hours). Upon this unlawful action being challenged in court, a consent order extending the time for rallies to 20 00 hours was eventually granted.<sup>67</sup>

## 3.5.2 Provisions restricting gatherings or meetings

The new Constitution now provides that limitations to rights must be in terms of a law of general application and reasonably justified in a democratic society.<sup>68</sup> However Zimbabwe's conduct still falls short of safeguarding the right to association and assembly as stipulated in the AU Guidelines and the SADC Principles.<sup>69</sup> The ZRP cannot unilaterally decide to bar a meeting or demonstration on the ground that they believe that such gatherings will result in public disorder. They must first receive credible information on oath that a proposed gathering will result in serious disruption or traffic, injury to participants or others, extensive damage to property or other public

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63 I.e. a public meeting, procession or demonstration.

64 Section 25 of Public Order and Security Act.

65 Magistrate Court Harare unreported case no.18421/2013.

66 Section 40 of the Public Order and Security Act.

67 *Mutizwa v Co-Ministers of Home Affairs and 2 Others* unreported High court Judgment 5850/2013

68 Section 86(2) of the Constitution of Zimbabwe Amendment (No 20)

69 Part III(d) of the AU Declaration; Principle 7.4 of the SADC Principles.

disorder.<sup>70</sup> The police can then negotiate with the convener. Police have abused this negotiation procedure and imposed conditions on conveners regarding routes that can be used in processions, restricted other rights during meetings such as singing, or simply imposed stringent conditions to scare the conveners or defeat the exercise of the right to association and assembly.

### **3.6 Association**

Freedom of association as a fundamental right secures space for intimacy preventing the state from exercising too totalising an effect on “who we love and how we love them.”<sup>71</sup> Attacks on the freedom of association impair the foundations of society.<sup>72</sup> The new Constitution of Zimbabwe guarantees the freedom of association<sup>73</sup> although there are unpalatable inroads to this right that undermine it in certain provisions of the Private Voluntary Organisations Act (PVO) as well as many other laws selectively applied by the authorities. Once again, the laws were not harmonised before the elections in order to ensure they comply with the new Constitution.

#### **3.6.1 Purported ban of NGOs**

In February 2012, operating space for non-governmental organisations (NGOs) was undermined once again. At least 29 NGOs operating from Masvingo were prevented from carrying out their work by the governor of Masvingo. Initially, in February, there were renewed attempts to stop the activities of CSOs operating in certain provinces such as Masvingo by some political figureheads who sought to compel all NGOs operating in the province to sign agreements with the governor’s office for them to be able to continue operating. This illegal process was dogged with corruption to the highest levels. As a follow up to the illegal actions by politicians, police conducted raids at premises of select CSOs and obtained some documents that they wanted to use to formulate their criminal charges.

#### **3.6.2 Media attacks, raids, arrests and prosecutions of CSOs**

ZLHR witnessed disturbing trends of media attacks, arrests, raiding of offices, and confiscation of property of CSOs. The targeted attacks intensified before the Constitutional referendum that was set to take place on 16 March 2013. After this there was a short reprieve before attacks on CSOs continued in April 2013. Some targeted CSOs are involved in activities that contribute to realisation of human rights in general and also political rights in particular. These activities include civic education, voter education, voter information, assisting citizens to access voter registration facilities, elections observation, documentation of human rights violations, psycho-social support, litigation and access to information. The attacks were meant to destabilise the

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<sup>70</sup> Section of POSA.

<sup>71</sup> See I Currie et al *The Bill of Rights Handbook* (2013) p 397.

<sup>72</sup> As above.

<sup>73</sup> Section 58 of the Constitution of Zimbabwe Amendment (No 20).



organisations and prevent them from focusing on their core business. These attacks have alarmed UN special mechanisms that have continued to call for the protection of HRDs and the cessation of targeting of CSOs ahead of the elections.

### *3.6.2.1 Media attacks*

Deputy Commissioner-General Matibiri claimed that 99 per cent of NGOs operating in Zimbabwe were western sponsored and their presence in the country was a “*cause for worry and a serious threat to national security*”. Newspapers owned by ZANU PF supporters published articles that were tantamount to character assassination of certain leaders of CSOs and their organisation. At most, the articles in these newspapers could easily fuel hate against certain CSOs and their leaders. This is discussed in full under the hate speech section in the freedom of expression section.

### *3.6.2.2 Raids, and seizure of property*

In cases of raids of CSO offices attended to by ZLHR lawyers since August 2011, at least four police officers were present at the scene in each case. It was evident that the police were using seemingly ‘legitimate processes’ such as search warrants – but which were broad and very vague – to conduct raids. Some sections of the search warrants empowered police to “*Search for certain articles, that is to say, articles for criminal use, entry by evasion in contravention of Immigration Act and smuggling*”. It was clear that these raids were fishing expeditions as police confiscated property and in one case they took heaps of documents that they wanted to study in order to formulate a charge.

In February 2013, a month before the referendum, ZRP functionaries conducted 2 arbitrary searches at premises of Zimbabwe Peace Project (ZPP) and Zimbabwe Election Support Network (ZESN). During these two searches the police officers were armed with search warrants that had similar wording (very broad and generalised as highlighted above). They proceeded to seize property including documents, radios and cellphones. This targeting resulted in disruption of activities as staff members were temporarily traumatised. Other CSOs raided included Radio Dialogue, Counseling Services Unit and ZimRights. A total of six CSOs have been raided between August 2012 and 29 July 2013.

### *3.6.2.3 Arrests, prosecution*

In the case of ZPP, the national director was later charged with violating provisions of the Private Voluntary Organisations (PVO) Act. Just before the referendum, the Zimbabwe Electoral Commission (ZEC) also relied on the alleged pending charges to bar ZPP and other organisations from participating in observing the referendum. Leaders from CSOs who were arrested and or prosecuted include Okay Machisa together with his organization, ZimRights, although his case has since been finalised and he was acquitted. Abel Chikomo, the director of the Zimbabwe Human Rights NGO Forum will appear in court on 2 August 2013 on allegations of contravening the PVO Act. Jestina Mukoko, the national director of the Zimbabwe Peace Project was also formally charged with violating the PVO Act.

### 3.6.3 Free association and attacks on human rights lawyers

The role of lawyers is recognised in international human rights law and it translates to the right to be represented by a lawyer of one's choice. According to the ACHPR<sup>74</sup> and the ICCPR,<sup>75</sup> everyone has the right to legal representation of their choice. The United Nations Basic Principles on the Role of Lawyers also guarantees the right of every person to be represented by a lawyer of his/her choice.<sup>76</sup> The African Commission also developed guidelines to ensure that the rights enunciated in the ACHPR are realised. These guidelines are persuasive and insightful, shedding light on the importance of lawyers in the promotion and protection of human rights in Africa. As such due to being the "defenders" of the most unpopular (in some circles) dissenting voices that expose executive excess and the problems in the other arms of government, the unpopularity naturally extends to lawyers. State actors and their associates many a time find human rights lawyers to be inconveniencing them as they seek to preserve the status quo and escape scrutiny where they violate the law and administrative procedures.

Freedom of association of human rights lawyers has also been compromised in different ways. Lawyers who represent certain clients who are HRDs have been associated with the cause of their clients. They have been arrested for trying to carry out their duties since the consummation of the IG.

- On 9 February 2009, two ZLHR lawyers Tawanda Zhuwarara and Roselyn Hanzi were lodged at Harare Central after being associated with the cause of their clients. Initially Tawanda was arrested and when Roselyn tried to represent him she was again arbitrarily arrested. The lawyers were then said to have been caught up in a cross fire as police arbitrarily arrested members of Women of Zimbabwe Arise who had carried out a peaceful protest. They were acquitted of the charges of participating in a gathering with intent to cause violence
- Alec Muchadehama was arrested in May 2009 after he had secured the release of his clients on bail. He was accused of amongst other things defeating the course of justice.
- On 2 November 2009, another lawyer Mordecai Mahlangu was arrested after he had written a letter to the AG protesting against the subpoenaing of his clients to testify in a particular case.
- On 10 November 2009, Denford Halimani was threatened with unspecified action by Henry Dowa a senior police officer. This followed questions that Denford had posed to Dowa in court over his recall from the UN peacekeeping Mission. This was during a trial that Denford was acting as defence.
- On 9 July 2011, Chief Superintendent Majuta threatened to charge David Hofisi with obstructing the course of justice after he refused to surrender his phone. David is a

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74 Art 7 (1)(c) of African Charter on Human and Peoples' Rights (ACPHR) in *Centre for human rights Compendium of key human rights documents of the African Union* (2005) 20.

75 Art 14 (3)(d) of International Covenant on Civil and Political Rights (ICCPR) see T van Banning *Human Rights Instruments* (2004).

76 As above.

lawyer at ZLHR who had attended the police station to represent another lawyer who had been arrested. Police were interdicted by the High Court from breaching this privilege.

- On 24 October 2011, ZLHR lawyers Bellinda Chinowawa, Jeremiah Bamu and Kennedy Masiye who were representing sexual minorities were threatened with violence by one Jim Kunaka the ZANU PF youth Chairperson if they returned to represent their clients. This was done in the full view of court officials including police officers.
- On 14 December 2011, Ernest Jena was arrested and accused of insulting the Office of the President after asking a Public Prosecutor what he continued to prosecute people who made certain comments at campaign rallies. The AG eventually declined to prosecute.
- On 17 March 2013, ZRP officers arrested Beatrice Mtetwa on allegations of obstructing the course of justice. She had attended her clients' place of residence to represent him during a search. She was initially accused of saying 'Stop what ever you are doing, it is unconstitutional and illegal' later the allegations were expanded. She is currently on trial.

Despite these attacks, lawyers have remained steadfast in human rights litigation and have continued to defend the HRDs.

### **3.6.4 Electorate woes**

ZANU PF supporters have been accused of force-marching people to rallies, thus violating their right to freedom of association.<sup>77</sup> Some Chiefs who were supposed to be apolitical, have assisted in this.<sup>78</sup>

## **3.7 Freedom of expression and right to information**

The right to freedom of expression has two facets: imparting and receiving information. Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions of guaranteeing democracy, recognising and protecting the moral agency of society, and facilitating the search for truth by individuals and society generally. It is the core value in any democratic society.

The right to freedom of expression is guaranteed in several human right instruments such as the ACHPR. The African Commission's Declaration of Principles on Freedom of Expression in Africa also elaborates on this right. Further underlining treaty commitments are the Windhoek Declaration advocating for the promotion of an independent and pluralistic African press in that it calls for national media and labour laws to give an appropriate role to representative associations.

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<sup>77</sup> B Chiketo "ZANU PF forces people to rallies" *Daily News* (24 July 2013) p 1.

<sup>78</sup> X Ncube "Tsvangirai warns chiefs" *Daily News* (24 July 2013) p 2.

The government has displayed antagonism towards sectors of the print and electronic media that have been critical of it. Independent journalists have been physically assaulted by political party supporters and by the police; they have been arrested, assaulted and imprisoned, whilst others have gone into exile. The Access to Information and Protection of Privacy Act (AIPPA) has been a long-term weapon against dissenting voices. It introduced stifling restrictions on the operations of the print media such as registration of media houses and accreditation of journalists by a body whose members are handpicked by the President.

Although AIPPA was amended by an Act published at the beginning of 2008, the amended provisions do not restore holistic freedom of expression and freedom of the press that are critical components necessary for credible, free and fair elections. Undertakings in the GPA to further amend such repressive media laws were not realised during the lifetime of the IG. Vague criminal offences remain in AIPPA which can (and continue to) be used as a weapon against the press. Additionally there are various draconian offences in the Criminal Law (Codification and Reform) Act relating to insult and criminal defamation that can be, and have been used for the same purpose.

### **3.7.1 Imparting information**

#### *3.7.1.1 Experiences of individual HRDs<sup>79</sup>*

Genuine social conversation or innocent comments, as well as jovial campaign slogans during electioneering have landed many HRDs in trouble with the law. Word of mouth, Facebook posts, articles and any statement issued or uttered is closely monitored in Zimbabwe and reported to the authorities by overzealous citizens and political party supporters. Journalists have also been targeted for writing articles that are deemed to be injurious. Some have been charged with communicating falsehoods that are prejudicial to the state. Some examples appear below:

*The “biscuit man”* – A man who commented that his colleague was now enjoying biscuits and Cascade juice for lunch because of the presence of the Prime Minister in the IG was charged with undermining the office of the President. He was eventually acquitted of the offence.

*The “dreaming man”* – A man who was representing himself in court was convicted of insulting the office of the President after commenting that he was going to be able to buy a BMW car “after Mugabe dies”. The appeal against conviction is pending in the courts.

*The social media fanatic* – A man was charged with attempting to subvert a government by unconstitutional means over a comment he allegedly wrote on Prime Minister Tsvangirai’s Facebook page expressing his approval of the protests in Egypt that led to

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<sup>79</sup> These are actual cases that are being handled by human rights lawyers and the names of the HRDs have been protected.

the resignation of then President Hosni Mubarak. He was discharged at the end of the state case after the prosecutor failed to provide evidence of the Facebook post.

*The lawyers* – A human rights lawyer was charged with insulting the office of the President after asking a Public Prosecutor why he continued to prosecute – thereby persecuting – activists from a certain political party for sloganeering mentioning the incumbent's name.

*The investigative journalist* – A female journalist called a Chief to enquire about alleged cases of violence in his area. He did not respond to her questions and went on to report her for issuing threats against him.

### 3.7.1.2 Regulation of the media

The Zimbabwe Media Commission (ZMC) is the body that is responsible for regulating the media in Zimbabwe, and has the sole mandate of registering and accrediting journalists.<sup>80</sup> The President appoints the Chairperson after consulting the Parliamentary Committee on Standing Rules and Orders,<sup>81</sup> and eight Commissioners are appointed from a list of twelve nominees submitted by the Parliamentary Committee on Standing Rules and Orders.<sup>82</sup> The current ZMC was constituted according to the Lancaster House Constitution.<sup>83</sup> Nothing much has changed and in any event the ZMC has not been reconstituted. Appointments to ZMC are still the preserve of the executive, thereby compromising the independence of the members against the spirit of the Windhoek Declaration that expressly states that an independent press is one that is free from any form of interference by the government.

### 3.7.1.3 Registration of media houses

*Print* – Newspapers and news agencies have to be registered by the ZMC. They can be registered for a period of two to five years.<sup>84</sup> However, ZMC may only register a newspaper in which Zimbabwean citizens have a controlling interest.<sup>85</sup> The amendment, like the amended Broadcasting Services Act, also empowers the Information Minister, in his absolute discretion, to grant an exemption from this provision and permit ZMC to register a newspaper approved by the Minister in which the controlling interest or any portion thereof is held by persons who are not citizens of Zimbabwe.<sup>86</sup> However, no criteria is specified for the exercise of this Ministerial power. A politically partisan Information Minister could therefore exempt newspapers that are favourably inclined towards government. This provides unacceptable discretion which cannot be challenged, whilst expressly discriminating against deserving non-nationals, in violation

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80 Section 66& 66A of AIPPA.

81 Section 248(1) of the Constitution of Zimbabwe Amendment (No 20)

82 The Commissioners in the current ZMC were appointed according to the provisions of section 100N of the Constitution as amended by Constitutional Amendment No. 19.

83 As above.

84 Section 66 of AIPPA.

85 Section 65 of AIPPA.

86 Section 65(4) of AIPPA.

of international, regional and sub-regional human rights norms. ZMC can refuse to register or even suspend or cancel the registration of a newspaper on a wide variety of grounds.<sup>87</sup> Since 2008, at least 2 daily newspapers – *Newsday* and *Daily News* were registered, together with some weeklies – *Southern Eye* and *The Patriot*. However the cost of these papers remains prohibitive and so effectively bars ordinary Zimbabweans from obtaining them and accessing alternative information which will allow them to vote in an informed manner for their candidate of choice in the elections.

*Electronic Broadcasting Services* – Radio and television are important electronic communication mediums for political parties to disseminate manifestos or other policies to woo voters. Radio is capable of reaching large numbers of people, including people who are illiterate. According to independent media analyses conducted by the Media Monitoring Project Zimbabwe (MMPZ), the ruling party continues ahead of the 31 July 2013 elections to monopolise and dominate electronic media. Information disseminated is one-sided, self-serving party propaganda. The ZANU PF part of the IG is fully cognisant of the power of radio, and has taken steps to ensure that it retains exclusive control over it. The Broadcasting Authority of Zimbabwe (BAZ) has not been very willing to licence some radio stations.

*Regulation of broadcasting* – A distinguishing feature of a democracy is the independence of regulatory bodies from the executive. The Broadcasting Authority of Zimbabwe (BAZ) was reconstituted according to the amended Broadcasting Services Act, in which nine of the twelve members are appointed by the President after consultation with the Minister and Parliamentary Committee on Standing Rules and Orders.<sup>88</sup> The weight that the President must attach to the consultation is not clear; he can even ignore it. Three members are appointed by the President from the list of six nominees provided by the Committee on Standing Rules and Orders, without consultation. The new provisions merely transfer the overall appointment role from the Minister to the President.<sup>89</sup> In a democracy, such regulating bodies are usually appointed by multi-party parliamentary committees, preferably with the public playing a role in the nomination process; in Zimbabwe the process has been dominated by the ruling party, with no public participation at all. The BAZB administers the licensing régime for broadcasters.<sup>90</sup>

*Registration challenges* - VOX Media Productions (Pvt) Ltd t/a Radio VOP has been trying to get registered by BAZ for a number of years. It applied for a national commercial radio licence under the name and style of Voice of the People FM on 30 June

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<sup>87</sup> Even where a newspaper is controlled by Zimbabweans, ZMC still has wide powers over its registration or the cancellation of its registration. For example, ZMC can still refuse to register a newspaper if it has previously operated without being registered. (This was the main ground upon which the *Daily News*, previously Zimbabwe's only non-government controlled daily paper and the biggest selling daily paper, was refused registration); All the powers indicated in the preceding text are provided for in sections 65 – 71 of AIPPA.

<sup>88</sup> Section 4 of the Broadcasting Services Act as amended; see Statutory Instrument 7A / 2008.

<sup>89</sup> As above.

<sup>90</sup> It was amended by Act No. 19 of 2007, promulgated on 11 January 2008.

2011, following a call for applications for national commercial radio licences by BAZ. VOX was not granted the licence although two other stations - Zimpapers Talk Radio and AB Communications - successfully received national free to air commercial licences from BAZ. The process appeared not to be transparent and VOX has since filed court process that will enable it to challenge the refusal to grant it a licence by BAZ.<sup>91</sup>

The opening of the airwaves is thus regarded as being a crucial prerequisite for the holding of free and fair elections as emphasised by the African Commission's 'Declaration of Principles on Freedom of Expression in Africa (African Commission Declaration).<sup>92</sup> The African Commission Declaration encourages states to accommodate a diverse, independent private broadcasting sector and stipulates that state monopoly over broadcasting is not compatible with the right to freedom of expression.<sup>93</sup> It is clear, however, that although Zimbabwe has to some extent fulfilled its obligations to accommodate private broadcasting – for radio, but not television as in accordance with the African Commission's Declaration - it is only limited to radio stations. There are two radio stations – Star FM and ZiFM; one of them is owned by a ZANU PF candidate in the elections, whilst the other is owned and controlled by Zimpapers state media.

#### *3.7.1.4 Accreditation of Journalists*

*Eligibility* – Generally, only Zimbabwean citizens and permanent residents can be accredited as journalists. However, the ZMC has been given discretion to accredit non-Zimbabwean journalists for a maximum period of 60 days, which period can be extended for a further period for good cause shown or to enable a journalist to work for the duration of any event he or she has been accredited to cover.<sup>94</sup> There are no criteria for the exercise of this discretion, and it remains to be seen how it will be exercised.

Journalists who are Zimbabwean citizens and permanent residents still need accreditation from ZMC if they are employed on a full-time basis by registered newspapers. To obtain this accreditation they have to comply with the prescribed formalities and possess the prescribed qualifications. Unaccredited journalists can operate, but they are subject to severe restrictions. They cannot work on a full time basis for a newspaper or news agency operating in Zimbabwe, and they are not allowed access to Parliament and public bodies or to facilities allowing proper coverage of national and public events.<sup>95</sup>

*Election day coverage* - In terms of coverage of election-related activities, the Electoral Act does not require a journalist to be accredited unless they want to enter polling stations. However, if s/he is to access national and other events, accreditation is a pre-requisite, effectively making it imperative for a journalist to be accredited, despite what

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91 Vox Media Productions Pvt Ltd t/a Radio VOP v Broadcasting Authority of Zimbabwe & 2 Ors unreported Administrative Court case number BA 3/2012, BA 4/2012.

92 Adopted at the 32nd Session of the African Commission 17-23 October 2002.

93 Part V(2) of the African Commission Declaration.

94 Section 79(4) of AIPPA.

95 Sections 78 and 79 of AIPPA, as amended.

is stated in the laws. ZEC has new regulations that were promulgated in 2013. These regulations are on the number of Accredited Media Practitioners allowed in polling station and collation stations<sup>96</sup> where the presiding officer has discretion to control the numbers to avoid congestion. The Presiding Officer has too much discretion on numbers of media practitioners who can be in a polling station; there should be at least some indication of how many can be inside. The conduct of Observers and accredited media practitioners is also regulated. Media practitioners, just like observers, must exhibit their accreditation certificate and sign the register that is held by the presiding officer, must abide by the Code of Conduct, whilst use of mobile phone, telephone, taking pictures with mobile phone, or camera, or kinetic images inside polling stations is prohibited.<sup>97</sup> The presiding officer has the discretion to allow photographs or kinetic images to be taken as long as this does not interfere with the voting process or take pictures of voters casting their votes in the booths. This provision can be open to abuse and it is not clear whether it will not be selectively applied. Taking pictures inside polling station can be intimidatory to some observers, polling officers and voters, and the practice should be discouraged.

### 3.7.2 Media monitoring

The public broadcaster should be under an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.<sup>98</sup> Broadcasting relating to elections<sup>99</sup> must ensure equal treatment of all political parties and candidates in regard to the extent of their coverage and the timing and prominence of their coverage. They must also ensure that their reports are factually accurate, complete and fair and they must avoid language encouraging hatred or inciting violence.<sup>100</sup> Public broadcasters are obliged to “afford all political parties and independent candidates such free access to their broadcasting services as may be prescribed” in regulations made by ZMC,<sup>101</sup> which has an obligation to monitor broadcasters during the election period to ensure that they observe these provisions.

The sole television public broadcaster is the government-controlled Zimbabwe Broadcasting Holdings (ZBH), which (according to independent analyses) has been broadcasting a constant stream of propaganda strongly supporting ZANU PF and disparaging other parties, as was the case during the 2008 elections. State controlled media has continued to live up to its standards of being turned into the ZANU PF mouthpiece; it has been an instrument of launching propaganda campaigns aimed at maligning the MDC parties and candidates ahead of polls.<sup>102</sup> The MMPZ has reported that with only days to go before the 31 July 2013 election, the public broadcaster

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96 Section 8 of the Electoral (Accreditation of Observers) Regulations SI 89/2013

97 Section 9 of the Electoral (Accreditation of Observers) Regulations SI 89/2013.

98 Part 4(3) African Commission Declaration.

99 See Part XXIB of the Electoral Act.

100 Section 160(f) of the Electoral Act.

101 Section 160G(1) of the Electoral Act.

102 MMPZ *The propaganda war on electoral democracy – a report on the media's coverage of the 2008 elections* (2009) p 43.



continues to provide completely partisan coverage of the election campaign.<sup>103</sup> It is noted that ZBH showed no sign of observing either Zimbabwean law or regional guidelines to provide fair and balanced coverage.<sup>104</sup>

### 3.7.2.1 *Equitable access – but the jingles continue*

*The Herald* newspaper has proved to be an extension of ZANU PF, advancing party politics and positions ahead of factual and accurate news and moderate opinion.<sup>105</sup> Provisions of the Media Coverage regulations include equal access during election periods of all political parties to the public broadcasters<sup>106</sup> and the public broadcaster is required to allocate equal advertising airtime for political parties during the prime time.<sup>107</sup> A public broadcaster is also obliged to ensure that it creates programmes where political parties are invited to present their election manifestos and policies to the electorate.<sup>108</sup> This has not been the case, but neither the ZMC nor ZEC have acted upon the irregularities highlighted above. The SADC Principles very explicitly state that all stakeholders, individuals or political parties should refrain from using abusive, defamatory or hate language.<sup>109</sup> This provision has been blatantly violated and is a clear indication that the laws have been manipulated to create an uneven playing field. It can only be hoped that both ZMC and ZEC will confront publishers and broadcasters when the need arises since they have the jurisdiction to entertain any grievances by political parties or anyone affected by the conduct of a broadcaster or print publisher.<sup>110</sup>

The banning of short wave radios by the police also makes it impossible for the public to access alternate independent information other than the state controlled.

### 3.7.2.2 *Them and us – churning out hate speech*

Irresponsible reporting has been rampant, with the state-controlled media publishing inflammatory articles, usually without any factual basis, accusing political activists and HRDs of involvement in unlawful activities. MDC was blamed for the chaos that occurred during the Special Vote by the Deputy Chief Editor of *The Herald*. This individual is notorious for the vitriol with which he attacks and accuses individuals and organisations in his articles, inciting hate without factual basis. It is important to note at this juncture that this same person has previously been ordered, after violent outbursts, by the High Court of Harare in the case of *Chikwanha v Zvayi (High Court Harare unreported case number 1467/07)* for damages for pain and suffering, *contumelia*, and

103 MMPZ *Daily Election report* (27 July 2013).

104 As above.

105 F Machivenyika "ZANU PF conference date set" *The Herald* (8 November 2012) p 1.

106 See section 6(1), 8(1) of the Zimbabwe Electoral Commission (Media Coverage of Election) Regulations, (2008).

107 See section 5(2) of the Zimbabwe Electoral Commission (Media Coverage of Election) Regulations, (2008).

108 See section 3(a)(b)(c) of the Zimbabwe Electoral Commission (Media Coverage of Election) Regulations, (2008).

109 Principle 9 of the SADC Principles.

110 Section 10(1) of the Zimbabwe Electoral Commission (Media Coverage of Election) Regulations, (2008).

*injuria* arising out of wrongful, unlawful and physical assault.<sup>111</sup> He continues with his aggression and bid to fuel hate through his inflammatory articles in *The Herald*. He has targeted various individuals for unwarranted attack: For ZEC: Commissioner Feltoe was accused of attempting to scuttle the special voting exercise by trying to cause riotous behaviour with police officers trying to force their way into the polling station at Town House, as a result of which police support unit members had to be called in. For MDC-T: He blamed the failure to print ballot papers by printers that had won bids for the Special Vote, namely Print Flow and Fidelity Printers, on a conspiracy by MDC Ministers. He concluded by saying that this was a strategy by MDC-T to frustrate the elections. For Human Rights lawyers: In an attempt to fuel hatred against them from the public and the judiciary, he serialised purported minutes of a privileged lawyer-client consultative meeting that had been held to discuss possible litigation relating to election issues arising ahead of the polls. The articles were released on a daily basis for 10 days, in doses, with inflammatory comments as part of the headline and article content in the state-controlled Herald newspaper. The lawyers were accused amongst other things trying to subvert constitutional court judgments,<sup>112</sup> and trying to fold the courts with frivolous and vexatious applications. Not only was the direction of Zvayi's comments sensationalised but grossly misplaced as lawyers have a right to litigate by approaching the courts.

### 3.7.2.3 ZEC and media monitoring during elections

ZEC has a duty to monitor the media during an election period and take corrective action where violations occur. The ZEC Chairperson advised the public that the commission was going to publicly monitor the media as election dates had been set. Regrettably ZEC does not seem to have the willingness or capacity to effectively monitor, sanction and/or whip the editors of the papers into line although they should be responsible for ensuring that articles with hate speech do not see the light of day. Articles such as "*Mugabe Tsvangirai trade insults*" have been published,<sup>113</sup> with Tsvangirai accusing Mugabe of being a national liability because of his old age while in an apparent tag team, Mugabe and his wife ridiculed Tsvangirai's looks with Grace Mugabe describing Tsvangirai as ugly and with no morals.<sup>114</sup>

ZEC must ensure that the previous practice of documented biased and injurious articles that have appeared daily in the state monopolised newspapers is curtailed. Despite the fact that ZEC is by law required to monitor the media during election periods and has regulations that give it capacity to enforce the regulations and monitor the print and electronic media, it has failed to stem one-sided coverage and the escalation of hate speech and propaganda. A statement warning political parties, candidates and media was only issued on 21 July 2013.

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<sup>111</sup>Chikwanha v Zvayi High Court Harare unreported case number 1467/07.

<sup>112</sup>C Zvayi "MDC T launches litigation crusade" *The Herald* (12 June 2013) p 1.

<sup>113</sup>See *Newsday* (12 July 2013), p 1.

<sup>114</sup>As above p 2, see *Daily News* (12 July 2013) p 1.

#### *3.7.2.4 Implementation measures and other issues*

During elections the ZMC does not appear to carry out any function with regard to media content and ethics, despite the existence of a Media Council that is supposed to enforce a Code of Conduct. It only does so as and when the ZEC needs it to, and no cases have been reported as yet.

Media reforms that were required to be carried out before the elections do not seem to have been done. It has not been any easier for journalists or other individuals to access information. All in all, the ‘reforms’ to media laws are still outstanding and do little to encourage thorough, impartial or critical coverage of the elections.

## 4 Election dispute resolution mechanisms

### 4.1 Introduction

Effective resolution of complaints that arise during electoral periods is said to be an effective safeguard to election integrity,<sup>1</sup> further guaranteeing legitimacy of any electoral system.<sup>2</sup> The right to a remedy in cases of election-related disputes is recognised by the United Nations and the African Commission on Human and Peoples' Rights. The UN Draft General Principles on Freedom and Non-Discrimination in the Matter of Political Rights of 1962 recognises the power to enforce all suffrage rights by providing that any aggrieved person should be entitled to seek redress before independent and impartial tribunals.<sup>3</sup> The UN Framework for Future Efforts, adopted in 1989, also calls upon 'national institutions' to ensure universal and equal suffrage and impartial elections, partly by securing methods for resolving election disputes. In practical terms, the assessment of the manner in which election disputes are resolved and the extent to which they match certain minimum standards involves weighing up a number of key elements. Some of the key elements that have to be taken into consideration include issues of clarity of jurisdiction of what the courts and other institutions can react to prevent lawyers and litigants from 'forum shopping' for a desired result between the courts and the commissions that have been set up.

### 4.2 Election dispute resolution in Zimbabwe

In Zimbabwe, electoral processes have been highly competitive and not immune from complaints or disputes that have arisen before, during and after elections. A number of mechanisms have been set up to deal with these disputes. Disputes have arisen at different stages of the electoral process, with issues such as voter registration, inspection of the voters' roll and location of polling stations, amongst other issues, being

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1 See Justice Georgina T Wood, *Supreme Court of Ghana, manual and statutes on elections adjudicating in Ghana* (2008) available at <http://www.judicial.gov.gh/c.i/content/forward.htm>.

2 As above.

3 Part XIX.

contested in past elections. Ahead of the 31 July 2013 election, several pre-election disputes have already arisen. Some of the issues that have already arisen include the constitutionality of the proclamation and actual timing of election, political party funding, the Diaspora vote, nomination challenges and disputes relating to the Special Vote. Most of these issues have been dealt with by the courts – both the Electoral Court and the Constitutional Court. Polarisation and heavy contestation remain major challenges and, as already experienced, some election-related disputes have arisen amongst political parties and police have effected arrests subsequent to litigation, although these have been regarded as selective.

Following the amendment of the Electoral Act in 2012, the number of institutions that have a mandate to deal with election-related disputes has increased. Some of these institutions already existed prior to Constitution Amendment number 19. Article 22(1) of the GPA also established another organ, the JOMIC, which was supposed to play a role in mediating politically motivated disputes that arose between the three political parties in the IG. JOMIC is now not functioning after ZANU PF pulled out. The Electoral Act provides for election dispute resolution mechanisms that now not only include the Electoral Court<sup>4</sup> and the Multi-Party Liaison Committees but also the police and the Zimbabwe Human Rights Commission (ZHRC).<sup>5</sup> However, the existing laws do not clearly spell out the parameters of engagement of these institutions when it comes to election dispute resolution and there is a real potential that there may be duplication of roles or confusion by litigants on which institution has the proper mandate to effectively address disputes.

It is important to note that lawyers – and particularly lawyers who have been involved in election-related litigation – have come under immense strain and attack as a result of taking up cases on behalf of political parties and voters across the political divide. It cannot be stressed enough, that every person has a constitutional right to protection of the law and access to the courts where there is a violation or a potential violation of their rights. Asserting such rights therefore, no matter how “political” this may seem, is a legally recognised process and must be respected. Likewise, lawyers are protected from being identified with the cause of their clients and their professionalism as officers of the court must be respected. Consultations between lawyers and their clients are privileged in order to allow disclosure of full facts and the discussion of legal strategy. Those who attack lawyers and/or seek to interfere in such processes are therefore impeding the justice delivery process and the administration of justice.

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<sup>4</sup> Section 162(1) of the Electoral Act.

<sup>5</sup> Section 113H of the Electoral Act.

### 4.3 Alternatives for election dispute resolution in Zimbabwe

Due to the fact that election-related disputes vary due to the timing, the nature and the issues involved, different institutions have capacity to hear and determine them. In Zimbabwe, the courts, and other organs and institutions play a central role in election dispute resolution.

#### 4.3.1 Constitutional Court

As currently constituted, the constitutional court has 9 Judges. It was fully constituted after the new Constitution came into effect on 22 May 2013.<sup>6</sup> It hears petitions relating to the election of the President and violations of the Bill of Rights. In all the election-related cases that have been filed in the Constitutional Court, violations of the Bill of Rights have been alleged.

##### 4.3.1.1 Timing of elections

*Nyikadzino v President of Zimbabwe & Ors*,<sup>7</sup> *Phiri v Mugabe & Ors*,<sup>8</sup> *Chinamasa N.O v Mugabe & Ors*,<sup>9</sup> *Tsvangirai v Mugabe & Ors* CCZ 37/13

These cases – more commonly known as the “Super Application” - were filed to challenge the timing of elections as set out in the *Mawarire* judgment, which has been discussed previously in this report. Phiri approached the Constitutional Court under case number CCZ28/13 and CCZ32/13 seeking to assert her citizenship rights and the right to vote. She wanted the President to be compelled to proclaim an election date that would not infringe on her right to register as a voter within the mandatory thirty-day special and intensive voter registration exercise. Nyikadzino approached the court seeking to compel the President to follow due process in proclaiming an election date and ensure that none of his rights were violated in the process. Subsequently, a proclamation was issued for the elections, much to the protestations of the two formations of the MDC. This issue was taken to SADC, which urged the parties to jointly approach the Constitutional Court and seek an extension of the time within which to hold an election. Chinamasa, in his capacity as Minister of Justice, filed this application, stating that in so far as he (representing the President) was concerned, he had complied with the judgment according to law and did not require an extension but had only approached the court for such an extension at the behest of SADC. Welshman Ncube filed a counter application to this pointing out that what Chinamasa had done was to set the stage for his own application to be dismissed. Tsvangirai filed a separate application to the same effect, and giving further grounds necessitating the required postponement.

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6 D Nemukuyu “Supreme Court complies with Constitution” *The Herald* (24 May 2013) p 4.

7 Constitutional Court of Zimbabwe 31/13 & CCZ 34/13.

8 Constitutional Court of Zimbabwe unreported case 28/13 & CCZ32/13.

9 Constitutional Court of Zimbabwe unreported case 35/13.

These matters were consolidated and heard on 4 July 2013 and were all dismissed in an omnibus fashion. No reasons have been provided to date for the court's decision.

#### *4.3.1.2 Registration/citizenship*

##### *Mawere v Registrar General & 3 Ors<sup>10</sup>*

Mutumwa Dziva Mawere filed an application to the Constitutional Court seeking to assert his citizenship by birth. He wanted the R-G to be compelled to issue him with a national identity document and to register him to vote. The R-G was refusing to do so. The Constitutional Court ruled in his favour and granted the application by consent after the R-G's legal representatives indicated that the R-G had erred in refusing to register him and issue the ID.

#### *4.3.1.3 Nomination court challenges*

##### *Bere v Chairperson ZEC & Anor<sup>11</sup>*

Bere was an aspiring independent candidate for the Ward 19 Makonde Local Authority elections. He submitted his nomination papers on time and was advised that one passport size photograph was missing. He tried looking for it within the venue and failed to locate it. He went out and obtained more photos and presented them at around 1430hrs. At around 1715hrs he was advised that his nomination papers could not be found. He tried to submit a fresh set but was denied the right to do so on account of it being beyond 1600hrs, being the closing time for the nomination court. He was advised that his nomination papers had accordingly been rejected. He filed an ordinary application in the Constitutional Court under case number CCZ48/13 on 4 July 2013 and an urgent application for urgent hearing under case number CCZ 49/13 on 5 July 2013. The urgent application was granted and the main matter was set down for hearing on 18 July 2013. The application was dismissed on the basis that his proper relief would have had been to approach the Electoral Court within four days of the sitting of the nomination court and lodge his appeal there.

##### *Masamba v Minister of Justice & ZEC<sup>12</sup>*

Masamba filed an application seeking the postponement of the sitting of the nomination court arguing that he intended to file papers as an independent presidential candidate. He argued that he was not employed and needed more time to raise the required nomination fee of US\$500. He also argued that he did not have a car and it was not feasible to get to all the provinces in Zimbabwe to obtain nominees within the space of a day, given that he was only given copies of the nomination forms barely a day before the sitting of the nomination court. This application was dismissed on 18 July 2013 on the basis that it did not disclose a cause of action.

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10 Constitutional Court of Zimbabwe unreported case 27/13; Constitutional Court of Zimbabwe unreported case 30/13.

11 Constitutional Court of Zimbabwe unreported case 48/13 & Constitutional Court of Zimbabwe 49/13.

12 Constitutional Court of Zimbabwe unreported case 42/13.

*Moyo v President & 4 Ors*<sup>13</sup>

Moyo is the President of the Good Peoples' Movement. He filed an application for the extension of the nomination court sitting dates, arguing that the date set was full of technical flaws. He cited the absence of review of the Political Parties (Finance) Act in so far as it affected his right to access state funds. He also cited the apparent non-preparedness of ZEC to conduct the election, pointing out that his political party had requested for 210 nomination forms but was only given 40 on 21 June 2013. He therefore requested that the sitting of the nomination court be postponed by 2 weeks to enable fuller preparations to be made. This application, which had been filed as an ex-parte application, was dismissed on 28 June 2013. No reasons have been provided to date by the court.

*Gotoru v ZEC & Anor*<sup>14</sup>

Gotoru is the president of the Zimbabwe Organised Open Political Party. He filed his nomination papers for the presidential election at 15:00hrs on 28 June 2013. At 15:13hrs, he was asked to furnish his party lists by the nomination court. He went to obtain these and submitted them before 16:00hrs. At around 9pm, he was called and advised that his nomination forms were rejected on account of not having included nominees from nine provinces. This matter was not set down in the Constitutional Court and Gotoru was advised through a memorandum that his papers did not highlight any constitutional issue and his proper recourse would have had been to approach the Electoral Court.

*4.3.1.4 Political party funding**Zimbabwe Development Party v Minister of Justice & 3 Ors*<sup>15</sup>

In this application the Zimbabwe Development Party sought an order from the Constitutional Court compelling the Minister of Justice to release funds to it for the purposes of advancing multi-party democracy. It was argued that the 5% quota required before political parties accessed public funds for political purposes was an infringement of the constitutional guarantee to promote multi-party democracy in that it only favored those who were in Parliament and excluded the smaller parties. An urgent Application for this matter to be heard on an urgent basis was granted in case number CCZ33/13 and the matter was heard on 26 June 2013. The application was dismissed by the Constitutional Court. No reasons have been provided to date by the court.

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13 Constitutional Court of Zimbabwe unreported case number 39/13.

14 Constitutional Court Zimbabwe unreported case 59/13.

15 Constitutional Court of Zimbabwe unreported case 25/13 and 33/13.



### 4.3.2 Electoral court

The Electoral Court is set up in terms of the Electoral Act. It is not a permanent court; it is constituted by the Chief Justice and comprises judges from the High Court of Zimbabwe.<sup>16</sup> It was constituted in terms of section 161 – barely two days after nomination court. It appears that in terms of timing of the Electoral Court, it has been set up rather late ahead of the 31 July 2013 harmonised elections. The Electoral Court has thus far handled some cases relating to nomination court appeals.

#### *Eulitah Govo*

Govo is an aspiring candidate for Ward 21, Chikomba District. On 28 June 2013 she attended at the offices of the Chief Executive Officer of the Chikomba Rural District Council for the purpose of filing her nomination papers. She successfully submitted her papers, but was advised by the nomination officer that they had been rejected on account of a variance between her surname on her birth certificate and that on her national identity card. She explained that she had changed her surname when she got married, and was told to bring a copy of her marriage certificate, despite this not being a requirement in terms of the Electoral Act. Upon furnishing a copy of the marriage certificate, she was advised that she was out of time, and as such her nomination papers had been rejected. This conferred an unfair advantage on the male contenders for political office who had not been asked to produce the same. The effect of this rejection was that the ZANU-PF aspiring candidate for the same ward would be elected unopposed.

#### *Leonard*

An aspiring councillor in the Matopo District, Leonard lodged his application at the nomination court on 28 June 2013 and it was dismissed on the grounds that his name did not appear on the voters' roll. Leonard registered to vote in June 2013 and had a receipt to prove that he is a registered voter. An appeal was lodged on his behalf at the Electoral Court on 2 July 2013. The matter was set down by the Electoral Court on 8 July 2013. The appeal was upheld and he was confirmed as a duly nominated contesting candidate.

#### *Judge Ndlovu*

An aspiring councillor for Matabeleland South province, Ndlovu had his application dismissed by the nomination court because his name did not appear on the voters' roll. He is a registered voter, having registered on 12 November 2012. An appeal was lodged on his behalf at the Electoral Court. The appeal was upheld, and he was confirmed as a duly nominated contesting candidate for the upcoming elections.

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16 Section 161 of the Electoral Act.

*Jastone Mazhale*

An aspiring councilor in Gwanda, at the time of lodging his papers at the nomination court on 28 June 2013 Mazhale was a civil servant employed as a principal at Polytechnic College in Gwanda. He was advised upon arrival at the nomination court that his papers could not be accepted because he is a civil servant. He went back to his employer at the Polytechnic and tendered his resignation. He immediately went back to the nomination court where his papers were rejected on the grounds that he had not properly resigned and his employer had not yet accepted his resignation. An appeal was lodged at the Electoral Court on 8 July 2013 and it was upheld. He was confirmed him as a duly nominated contesting candidate.

*Richard Ncube*

An aspiring councilor in Matabeleland South, Ncube had his application dismissed at the nomination court on 28 June 2013 because his name did not appear in the register for Matabeleland. He had previously registered in Bulawayo and he had on 13 June 2013, transferred his name to the Matabeleland South register. ZEC however did not update its register; hence the nomination court refused to accept his papers, citing the fact that he was not registered in the area where he sought to be elected as councilor. The appeal was granted and he was confirmed as a duly nominated contesting candidate.

*Gertrude Moyo*

The ZAPU member made an application at the nomination court seeking to be confirmed as a candidate for senator in Beitbridge. Her papers were rejected because her name was not on the voters' roll. She registered as a voter on 13 June 2013, and had the receipt as proof. An appeal was filed on her behalf at the Electoral Court. The appeal was upheld and she was confirmed as a duly nominated contesting candidate.

*Philemon Ncube*

Ncube filed his papers at the nomination court on 28 June 2013, seeking to be confirmed as a candidate as councilor in Matopo. His papers were rejected on the basis that his name did not appear on the voters' roll yet he had registered as a voter on 16 June 2013. An appeal was lodged on his behalf at the Electoral Court and the matter was set down before Justice Makonese who upheld the appeal and granted the order sought to confirm Ncube as candidate.

*Emmanuel Chigango, Galaza Kanhumwa and Dhonanzi Gomo*

Aspiring ZANU PF candidates for wards in Hurungwe wanted to challenge the nomination of MDC-T councilors Kowen Muchemwa, Fungai Mavhura and Maxen Christopher from Hurungwe. Emmanuel Chigango, Galaza Kanhumwa and Dhonanzi Gomo attempted to set aside the nomination through an ordinary application at the High Court. They immediately withdrew the application on the hearing date. They then filed a fresh application alleging that the nomination closed whilst they were in the queue. The appeal was rejected as the applicants had no *locus standi* since the

nomination papers were never rejected and they had used the wrong procedure by filing an urgent application and not an appeal.

*Joshua Matope*

Matope appealed against the rejection of his nomination papers for the elections of Ward 21 Councillor in Mutoko South. His nomination papers had been rejected on the basis that he was under age. In terms of section 119(1)(b) of the Electoral Act [*Chapter 2:13*], the minimum age qualification for a councilor is twenty-one (21) years. Joshua Matope was born on 21 November 1992 and was only turning 21 on 21 November 2013. In the circumstances, as at the time of the sitting of the nomination court he was still below the required age. The appeal was accordingly dismissed with costs on 5 July 2013.

*MDC-T*

Appealed against the acceptance of nomination papers for six candidates using their party logo and emblem yet they were not representing the MDC-T but were standing as independent candidates. The application was opposed by ZEC who insisted that there was no proper Appellant as required by Section 46(19)(b) of the Electoral Act. The matter was withdrawn

*Cecelia Dube*

Dube appealed against the rejection of her nomination papers to stand as a candidate for Ward 3 in Mberengwa East, Midlands on the basis that she had brought a short form birth certificate instead of the long one. The appeal was successful. She however failed to re-submit her nomination papers within the new time frame given and the ballot papers were printed without her name.

*Marimo Foster*

Foster appealed against the rejection of his nomination papers on the basis that he had brought a short form birth certificate instead of the long one. He had filed to stand as a candidate for the Maramba Pfungwe ward 7 Council elections. His appeal was upheld.

*Christopher Chigwande*

Chigwande appealed against the rejection of his nomination papers on the basis that his birth certificate was not certified as a true copy of the original. He had filed to stand as a candidate for the Mt Darwin East ward 12 Council elections. His appeal was upheld but he did not re-submit his nomination papers within the new time frame given and ballot papers proceeded to be printed without his name.

*Beauty Manyika*

Manyika appealed against the rejection of her nomination papers for Mt Darwin West ward 35 council elections on the basis that the name on the birth certificate differed from the ID in spite of furnishing her marriage certificate. This appeal was struck off the roll as it was filed out of time.

### *Sekiwa Loveness*

Loveness appealed against the rejection of her nomination papers on the basis that she had produced a short form birth certificate instead of the long one. She intended to be a candidate for Hurungwe East ward 21 council elections. Her appeal was upheld.

### *Innocent Ncube & Farai Chonzi*

These aspiring candidates appealed against the rejection of their nomination papers on the basis that they had not produced proof of registration as voters. They intended to be candidates for Hwange East Wards 17 and 18 council elections. The appeal was dismissed with costs as it was filed out of time.

## **4.3.3 Magistrates' Courts**

Magistrates' Courts are identified in the Electoral Act to be designated by the Judicial Services Commission to deal with cases of electoral-related violence and fraud. They were established barely two weeks before the 31 July 2013 elections. These courts are supposed to play a critical role in dispute resolution, especially when these disputes are not contained and have resulted in political violence. Thus far it is not clear how many cases have been dealt with through this forum, especially as there has been a lack of voter education and publicity about these new courts and how complainants can access them.

## **4.3.4 Non-judicial**

### *The Zimbabwe Human Rights Commission*

A Zimbabwe Human Rights Commission (ZHRC) was established in terms of section 100R of the Lancaster House Constitution of Zimbabwe. The Electoral Act provides that it must establish special police units to deal with politically-motivated violence. The ZHRC has not been fully operational due to lack of human and financial resources. It has however managed to make a statement calling for peace during the elections.<sup>17</sup>

## **4.3.5 Multi-party liaison committees**

A political parties code of conduct was developed and adopted,<sup>18</sup> and subsequently amended to include the need for political parties to strive for political tolerance.<sup>19</sup> These committees have been set up rather late to meaningfully contribute to curb violence before the 31 July elections.

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<sup>17</sup> Z Lubombo "Commission calls for peace" *The Herald* (15 July 2013) p 2.

<sup>18</sup> Fourth Schedule to the Electoral Act.

<sup>19</sup> L Gumbo "ZEC tightens electoral code of conduct" *The Herald* (8 November 2012) p 2.