

Taking Stock of Zimbabwe's 2018 Elections and Evaluating Prospects for Democratic, Free and Fair Elections in the Future

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Abstract

In July 2018, Zimbabwe held a general election to elect the State President and members of the legislature as well as local councillors. As is the case with the previous round of elections, the credibility of the July 2018 election was disputed by some of the opposition parties as well as by some of the Zimbabwean civil society organisations. Reports by some of the international election observer missions also seem to cast doubt on whether these elections were free, fair and credible. This paper critically examines whether or not this election can be regarded as having been free, fair and credible. The paper examines the election process as it unfolded in 2018 and evaluates it against the minimum standards for a free, fair, and credible election binding on Zimbabwe. These minimum standards are stipulated in the 2013 Constitution of Zimbabwe; the African Charter on Democracy, Elections and Governance (African Charter on Elections) as well as the SADC Principles and Guidelines Governing Democratic Elections (SADC Principles and Guidelines on Elections). The paper concludes with recommendations on the nature of reforms needed to strengthen the credibility of future elections in Zimbabwe.

Keywords: Zimbabwe; Free; Fair; Credible; Democracy; Elections, Constitution; Reforms

Introduction

Zimbabwe is state party to the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (African Charter), and the African Charter on Democracy, Elections and Governance (African Charter on Elections).¹ These international conventions protect the right to vote and enjoin states party to conduct regular, democratic, free, fair and credible elections.² Additionally, Zimbabwe is state party to the Southern African Development Community (SADC) Treaty, which, under Article 4, stipulates that 'human rights, democracy and the rule of law' are principles that must guide the acts of SADC members. Article 5 of the SADC Treaty commits member states to 'promote common political values, systems and other shared values which are transmitted through institutions, which are democratic, legitimate and effective.' The meaning and implications of Articles 4 and 5 of the SADC Treaty are fleshed out and explained in the SADC Principles and Guidelines Governing Democratic Elections (SADC Principles).³ Zimbabwe has adopted the SADC Principles and thus is legally bound to implement them.

However, in 2007, the High Court of Zimbabwe in *Movement for Democratic Change v President of the Republic of Zimbabwe*⁴ rejected the argument that the SADC Principles are legally binding on Zimbabwe. This decision was handed down prior to the Constitution of 2013, which has stronger provisions that require constitutional rights to be implemented in a way that incorporates international legal obligations, norms and standards.⁵ Furthermore, the position taken by the High Court on the legal status of the SADC Principles is, with due respect, erroneous because (as shown above), these principles are an interpretation of Articles 4 and 5 of the SADC Treaty, as indicated in paragraph 1.5 of the SADC Principles:

Historically, the development of electoral norms and standards and relevant institutional mechanisms in the region [SADC Principles] have been motivated by the provisions of the SADC Treaty of 1992, specifically, Article 4 of the Treaty, which stipulates that 'human rights, democracy and the rule of law' are principles guiding the acts of its members; and Article 5, which commits the member states to 'promote common

1 Zimbabwe signed the charter on 21 March 2018. See <<https://au.int/sites/default/files/treaties/36384-sl-african%20charter%20on%20democracy%2c%20elections%20and%20governance.pdf>> accessed 3 February 2020.

2 See Article 25 of the ICCPR, Article 13 of the African Charter; Articles 3 and 17 of the African Charter on Elections.

3 Adopted in 2004 and revised in 2015.

4 ZWHHC 28 (8 May 2007) 6.

5 Unlike the previous Constitution, the 2013 Constitution specifically requires courts to incorporate obligations arising from international treaties ratified by Zimbabwe, when interpreting the Bill of Rights and legislation. See ss 46(1)(c) and 327(6) of the Constitution of Zimbabwe of 2013.

political values, systems and other shared values transmitted through institutions, which are democratic, legitimate and effective’.

Furthermore, paragraphs 3.1 and 3.1.1 of the SADC Principles state that:

3.1 In conformity with the applicable provisions of the SADC Treaty and the Protocol on Politics, Defence and Security Cooperation, therefore, Member States do hereby affirm and endorse the following:

3.1.1 The SADC Principles and Guidelines Governing Democratic Elections, including Annexures I and II, shall, subject to national laws, apply to all elections held in the Member States of SADC.

The SADC Treaty is legally binding on Zimbabwe. Therefore, to the extent that the SADC Principles interpret Articles 4 and 5 of the SADC Treaty, these Principles are legally binding on Zimbabwe. It is also critical to note that the SADC Principles and Guidelines on Elections differentiate between ‘principles’⁶ and ‘guidelines.’⁷ This differentiation must be considered when determining this instrument's legal status. The provisions that set out ‘principles’ have legal force, while the provisions set out ‘guidelines’ have persuasive force but are not legally binding. The High Court’s decision in *Movement for Democratic Change v President of the Republic of Zimbabwe* erroneously failed to take note of this distinction.

However, even if it were to be argued that the SADC Principles are not legally binding, the point still remains that by adopting these principles, Zimbabwe formally committed to fully implement the right to free and fair elections—a duty that already exists in the ICCPR, the African Charter, the African Charter on elections and the SADC Treaty. Through section 67(1)(a) of the Constitution of 2013, Zimbabwe has domesticated the right to free and fair elections, making the duties outlined in Article 25 of the ICCPR, Article 13 of the African Charter, Article 3(4) and 17 of the African Charter on Elections, and Articles 4 and 5 of the SADC Treaty enforceable by Zimbabwe.

The United Nations General Comment No. 25,⁸ the United Nations Human Rights Council’s ‘Report on the Promotion, Protection and Implementation of the Right to Participate in Public Affairs’⁹, the African Charter on Elections¹⁰ and the SADC

6 SADC Principles and Guidelines, para 4–10.

7 *ibid* para 11–14.

8 United Nations ‘General Comment No. 25 Article 25: (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’ (adopted 12 July 1996).

9 Human Rights Council ‘Promotion, Protection and Implementation of the Right to Participate in Public Affairs in the Context of the Existing Human Rights Law: Best Practices, Experiences, Challenges and Ways to Overcome Them’ (adopted 23 July 2015).

10 See Art 17(1)–(4).

Principles interpret the right to free and fair elections by providing a comprehensive set of minimum standards which states party to the ICCPR, African Charter and the SADC Treaty must adhere to when conducting elections. Thus, these interpretive documents offer a comprehensive theoretical framework for evaluating whether or not the Zimbabwe elections of 2018 were free and fair.

Were the 2018 Elections Free?

In terms of the ICCPR, as interpreted in General Comment No. 25,¹¹ and the SADC Treaty,¹² as interpreted by the SADC Principles, a ‘free election’ is one that is conducted in an environment where fundamental rights are fully respected.¹³ These rights include freedom of expression and association, freedom of assembly, freedom of movement, the right of access to information and the right to cast a secret ballot. Thus, in practical terms, an election is free when it has been held in an environment where people are free to express and associate with political views, and they are free to campaign. There should be no reprisals or threats of retribution for exercising these freedoms. These standards are underscored in the United Nations Human Rights Council Report on the right to participate in public affairs.¹⁴ The Constitution of Zimbabwe guarantees these freedoms in section 67 as follows:

- (2) Subject to this Constitution, every Zimbabwean citizen has the right (a) to form, to join and to participate in the activities of a political party or organisation of their choice;
- (b) to campaign freely and peacefully for a political party or cause.

In addition, the Constitution guarantees the right to vote and the right to contest in elections,¹⁵ freedom of expression, freedom of peaceful assembly, freedom of movement and the right of access to information.¹⁶

In order to establish if the 2018 elections were free, we must, therefore, examine whether Zimbabweans enjoyed their right to freely express political views and associate with, campaign and vote for their candidates in the period leading up to and during the 2018 elections. In its report, the African Union Election Observer Mission noted that:

Political parties and candidates were able to freely associate and function without much inhibition to their rights ... [And] the election campaign was largely peaceful, and

11 See ‘General Comment No. 25’ (n 8) para 12.

12 See Arts 4 and 5.

13 See SADC Principles and Guidelines ii.

14 See para 7.

15 Sections 67(3)(a) and (b) of the Constitution of Zimbabwe, 2013.

16 See ss 58, 61, 62, 66 of the Constitution of Zimbabwe, 2013.

parties and candidates were able to exercise their fundamental rights of association, free speech and assembly without inhibitions or restrictions.¹⁷

Similar observations were made by the SADC Elections Observer Mission.¹⁸ However, these conclusions are debatable. The absence of open violence in the period leading up to and during the 2018 elections does not necessarily mean that the environment was peaceful. On the contrary, the general population was gripped with fear and trauma due to the unhealed wounds from past election violence, the 2017 coup, and the subsequent deployment of the military to campaign for the ruling party—ZANU PF.¹⁹

In order to provide context to this argument, I briefly venture into Zimbabwe's political history.²⁰ Zimbabwe gained independence from Britain through an armed struggle led by the guerrilla armies of ZANU²¹ and PF ZAPU.²² In order to end the war, a political settlement was reached between ZANU and PF ZAPU (on one side) and the colonial administration. In terms of this settlement, an election to choose the next government was conducted in 1980. ZANU won these elections.

Although ZANU was fronted by the then President Robert Mugabe as its political leader, the real holders of power were the commanders of the armed wing of ZANU, which assumed the leadership of the country's military in the post-independence era. As will be shown below, it is the military that has sustained ZANU PF's continued stay in power as the governing party. Since 1980, whenever ZANU PF faced political competition, the military intervened through violence against the opposition to save the ruling party from potential electoral defeat. For instance, when ZANU faced growing competition from PF ZAPU in the early 1980s, the government deployed the military, which conducted a genocide (*Gukurahundi* massacres) against supporters and perceived supporters of PF ZAPU, who were predominantly in the Matebeleland and Midlands

17 African Union Election Observation Mission to Zimbabwe, 'Zimbabwe 30 July 2018 Harmonised Elections Preliminary Statement' (1 August 2018) <<https://reliefweb.int/report/zimbabwe/african-union-election-observation-mission-aeom-zimbabwe-30-july-2018-harmonised>> accessed 3 February 2020.

18 SADC Election Observation Mission, '2018 Zimbabwe Harmonised Elections Preliminary Mission Statement' (1 August 2018) <http://www.sadcpf.org/index.php?option=com_content&view=article&id=223:preliminary-mission-statement-by-the-sadc-parliamentary-forum-election-observation-mission-to-the-2018-zimbabwe-harmonised-elections&catid=125:news-a-events> accessed 3 February 2020.

19 Zimbabwe African National Union Patriotic Front.

20 A more detailed account on the history of election violence has been provided by other scholars. For example, see Jocelyn Alexander and JoAnn McGregor, 'Introduction: Politics, Patronage and Violence in Zimbabwe' (2013) 39(4) *J of Southern African Studies* 749–763. Also see Brian Raftopoulos, 'The 2013 Elections in Zimbabwe: The End of an Era' (2013) 39 *J of Southern African Studies* 971–988. See Gabriel Shumba, 'International Standards and the 2002 Presidential Election in Zimbabwe' (2003) 10 *J of Intl and Comp L* 96–116.

21 Zimbabwe African National Union.

22 Zimbabwe African People's Union Patriotic Front.

provinces. At least 20 000 people were killed, and several others were displaced due to this military operation.²³ Eventually, PF ZAPU was forced to join ZANU (to form ZANU PF) under the guise of a unity agreement.²⁴

In the early 1990s, ZANU faced opposition from the Zimbabwe Unity Movement party. Since 2000, ZANU PF has faced opposition from the Movement for Democratic Change (MDC). In the run-up to the 2002 presidential elections, 112 people were killed, and 2 868 cases of torture were recorded as a result of a military assisted ZANU PF campaign of terror against supporters of the opposition MDC. A similar crackdown coordinated by the military ensued, leading to 40 deaths, thousands of people being brutally assaulted, and the eventual decimation of the opposition party.²⁵ Since 2000, ZANU PF has faced opposition from the Movement for Democratic Change (MDC). In the run-up to the 2002 presidential elections, 112 people were killed, and 2 868 cases of torture were recorded as a result of a military assisted ZANU PF campaign of terror against supporters of the opposition MDC.²⁶

On the eve of the 2002 presidential elections, the military commanders issued a televised statement in which they said:

We wish to make it very clear to all Zimbabwean citizens that the security organisations will only stand in support of those political leaders that will pursue Zimbabwean values, traditions and beliefs for which thousands of lives were lost [during the liberation struggle]...Let it be known that the highest office in the land is a straightjacket whose occupant is expected to observe the objectives of the liberation struggle. We will therefore not accept, let alone support or salute, anyone with a different agenda that threatens the very existence of our sovereignty, our country and our people.²⁷

This statement was issued at a time when the ruling party had won parliamentary elections held in the year 2000 by a very small margin.²⁸ Since then, the opposition's popularity grew exponentially, and independent poll surveys were predicting that

23 Catholic Commission for Justice and Peace in Zimbabwe and the Legal Resources Foundation, 'Breaking The Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980–1988' (1997) <<http://hrforumzim.org/wp-content/uploads/2010/06/breaking-the-silence.pdf>> accessed 3 February 2020.

24 Jonathan Moyo, *Excelgate: How Zimbabwe's 2018 Presidential Election was Stolen* (SAPES Books Zimbabwe 2019). See also Joshua Nkomo, *The Story of my Life* (SAPES Books Zimbabwe 2001).

25 Edgar Zivanai Tekere, *A Lifetime of Struggle* (SAPES Books Zimbabwe 2007).

26 Ross Parsons and Tony Reeler, 'Trauma and Mental Health in Zimbabwe' (2011) Research and Advocacy Unit 3.

27 Caesar Zvayi, 'It's MDC-T that Needs Reform' *Chronicle* (Bulawayo, 28 June 2011) <<https://www.chronicle.co.zw/caesar-zvayi-its-mdc-t-that-needs-reform/>> accessed 4 February 2020. The video of the press statement can be accessed at <https://www.youtube.com/watch?v=R5ex00A9Tj0>.

28 ZANU-PF got 63 seats while the opposition (MDC) got 57 seats.

ZANU-PF would most likely be defeated in the upcoming 2002 presidential election.²⁹ During the campaign for the 2002 presidential election, ZANU PF had accused the opposition MDC to be a foreign-funded organisation and a puppet of the global west. The military generals then issued the above veiled threat to complement this, warning the electorate against voting for the opposition. ZANU PF went on to 'win' the 2002 presidential elections.

However, the biggest challenge to ZANU PF came in 2008 when the ruling party lost both the presidential and parliamentary elections to the MDC. However, the electoral commission withheld the presidential election results for over a month. The results were eventually announced that the opposition presidential election candidate (Morgan Tsvangirai) had won by 47.87 per cent³⁰ and had therefore not garnered enough majority to form the next government. The country's electoral laws stipulate that a presidential election candidate must win by more than 50 per cent of the total cast vote in order to be declared the winner.³¹

This precipitated a run-off presidential election between the opposition MDC candidate Morgan Tsvangirai and ZANU PF leader former President Mugabe. The military coordinated a massive campaign of violence against supporters of the opposition,³² which resulted in 107 murders, 137 abductions, 1 913 cases of assault, 19 cases of forced disappearances and 629 people being displaced from their homes.³³ This forced the opposition candidate to withdraw from the run-off election. The ZANU PF's candidate, former President Mugabe, was declared the winner of that run-off election. With mediation from the SADC, ZANU PF and MDC formed a coalition government, but ZANU PF was the dominant party in that government. ZANU PF bounced back as the sole governing party after the 2013 elections.

Thus, when one takes into account the post-independence history of elections in Zimbabwe, it is clear that the military played a significant part to prevent possible ZANU PF defeat in elections.³⁴ It is, therefore, fair to conclude that, historically, elections in Zimbabwe have been conducted merely as a regular political ritual meant

29 Brian Raftopoulos, 'Briefing: Zimbabwe's 2002 Presidential Election' (2002) *African Affairs* 416.

30 See results table provided by the Electoral Institute for Sustainable Democracy in Africa <<https://eisa.org.za/wep/zim2008results5.htm>> accessed 3 February 2020.

31 Section 110(3) of the Electoral Act.

32 Human Rights Watch, 'Bullets for Each of You: State-Sponsored Violence Since Zimbabwe's March 29 2008 Elections' (2008) 10–12.

33 Zimbabwe Human Rights NGO Forum, 'Political Violence Report: December 2008' (2008) <<http://www.hrforumzim.org/wp-content/uploads/2010/06/200812MPVR.pdf>> accessed 3 February 2020.

34 A defeat for ZANU PF would trigger transfer of power which would leave the military generals exposed to account (legally) for the atrocities they committed in the past.

to confer a veneer of legitimacy on ZANU PF. Therefore, the question is, did anything change politically to create a free electoral environment in 2018?

We will recall that the 2018 elections were held on the back of the 2017 military coup, which resulted in former President Robert Mugabe being forced to resign.³⁵ A key motivation for this coup was the concern by the military that the ruling party, ZANU PF, was more likely to lose the elections to be held in 2018 if President Mugabe had remained as its leader. These concerns were raised during the negotiations between the military generals and former President Mugabe during the period leading to the coup.³⁶ ZANU PF was likely to lose the elections because former President Mugabe was now too old and failing to hold the party together. Consequently, the party had become riddled by factionalism as various sub-groups angled to succeed him as party leader.

However, the trigger for the coup was that the military was fast losing control of government and ZANU PF, as a rival faction within ZANU PF had outflanked it.³⁷ The military preferred the then Deputy President Emmerson Mnangagwa to be Mugabe's successor.³⁸ However, former President Mugabe dismissed Emmerson Mnangagwa from the government and successfully instigated the party structures to expel Mnangagwa and his associates from the party.³⁹ The military generals responded by mounting a coup against former President Mugabe. It should, however, be noted that this coup was meant to restore the military's control over the government and ZANU PF and to save ZANU PF from a likely defeat in the impending 2018 elections. Indeed, through this coup, the military regained its control of both the party (ZANU PF) and government because its preferred candidate (Emmerson Mnangagwa) was installed as President, who was deputised by the military general who led the coup. Two other generals were appointed into key cabinet positions.⁴⁰ A former military general, Mr Engelbert Rugeje, was appointed as the party's political commissar, responsible for preparing the party for the impending 2018 elections.⁴¹ Thus, the 2018 elections were held at a time when the military had regained control over both the ruling party ZANU PF and the government.

35 For details on the events leading to and during the coup, see Douglas Rogers, *Two Weeks in November: The Astonishing Inside Story of the Coup that Toppled Mugabe* (Faber 2019).

36 Moyo (n 24) 212–233.

37 *ibid.*

38 *ibid.* 35. Rogers (n 35).

39 *ibid.*

40 British Broadcasting Corporation, 'Zimbabwe's Mnangagwa gives Key Cabinet Jobs to Military Figures' *BBC World* (London, 1 December 2017) <<https://www.bbc.com/news/world-africa-42190457>> accessed 3 February 2020.

41 Andrew Kunambura, 'Military Assumes Control of ZANU PF' *Daily News Live* (Harare, 16 December 2017) <<https://www.dailynews.co.zw/articles/2017/12/16/military-assumes-control-of-zanu-pf>> accessed 3 February 2020.

The question, therefore, remains, what was the impact of these developments on the electoral environment? Soon after the coup, the ruling party began its election campaign which was anchored in what can be characterised as smart intimidation. This type of intimidation does not involve openly engaging in physical violence but rather involves issuing veiled threats of violence. As part of this strategy, ZANU PF officials warned the electorate of possible retribution by the military if they voted against ZANU PF in the impending elections. For instance, while addressing a public gathering, a senior ZANU PF politician said:

Do you know I am the leader of this new dispensation here in Masvingo, and I say *ichi chinhu chedu chatakaita* (We are the ones who mounted the coup against President Mugabe). Our leader Mnangagwa is a soldier, and you know that a soldier is always equipped with a gun to do whatever he wants. If you want to run away from him (meaning if you want to vote against him), he can shoot you. So, you should always know that.⁴²

Another senior ZANU PF politician issued a similar threat.⁴³ Although these threats were not backed up with open violence against the opposition, they were adequate to intimidate voters, especially given that the country had just undergone a military coup, whose motivations included restoring military control over the government and rejuvenating the party in order to avoid an electoral defeat.

Furthermore, as has been recounted earlier, Zimbabweans had experienced unprecedented magnitudes of violence in previous elections. Up to the time the 2018 elections were held, nothing substantive had been done to promote national healing from the trauma caused by these episodes of violence. Therefore, the generality of the population, especially in the rural areas, still lived in fear of the possibility of similar retribution if they voted against ZANU PF. A survey conducted by Afro Barometer in July 2018 confirmed this state of fear because 76 per cent of those surveyed said ‘they were still careful about what they say about politics’ while 43 per cent expressed fear that there would be retributive violence if ZANU PF loses the elections.⁴⁴

In light of this, the environment in the period leading up to and during the 2018 elections could not be described as peaceful. Perhaps this is why the Zimbabwe Elections Support Network (ZESN),—a local non-governmental organisation with more than 20 years of

42 Maxwell Sibanda, ‘Mnangagwa Will Shoot to Keep Power’ *Daily News* (25 May 2018) <<https://www.dailynews.co.zw/articles/2018/05/25/mnangagwa-will-shoot-to-keep-power>> accessed 3 February 2020.

43 *ibid.*

44 Michael Bratton and Eldred Masunungure, ‘AD223: Zimbabwe’s Presidential Race Tightens One Month Ahead of July 30 Voting’ (*Afro Barometer*, 2018) <<http://www.afrobarometer.org/publications/ad223-zimbabwes-presidential-race-tightens-one-month-ahead-july-30-voting>> accessed 3 February 2020.

experience monitoring elections in Zimbabwe chose to describe the pre-election environment as ‘relatively peaceful’⁴⁵ compared to previous elections where there was open violence. But still, the absence of physical violence during that period did not necessarily mean that the people were free to exercise their freedoms, such as the freedom to vote for candidates of their choice. While the opposition parties were able to campaign without restriction, the voters (especially in the rural areas) were already traumatised due to past decades of violence and ongoing threats of retribution in the event of a ZANU PF defeat.

Given this context, these elections could not have met the standard of a free election where the voters are able to freely express their will, as required by section 67(1)(b) of the Constitution, Article 25 of the ICCPR, Articles 3 and 7 of the African Charter on Elections and the SADC Principles.

Were the Elections Fair?

In terms of Articles 4 and 5 of the SADC Treaty, as interpreted by the SADC Principles, ‘fair elections mean electoral processes conducted in conformity with established rules, managed by an impartial and competent Electoral Management Body (EMB).’⁴⁶ These norms and standards are also echoed in Article 25 of the ICCPR⁴⁷ and Article 17 of the African Charter on Elections. Put simply, the test for evaluating the fairness of an election involves inquiring into the following set of questions: Was the election held in accordance with established rules?; were the rules substantively fair?;⁴⁸ were the election processes managed by democratic institutions that are capable of enforcing the rules impartially? and; did the competing candidates enjoy equitable access to resources including the public media? In the paragraphs below, I demonstrate that some of the electoral rules were unfair, while key electoral processes were conducted in violation of the rules, and there were no strong democratic institutions to enforce the rules. The challenge of unequal access to the state-owned media, which is the main platform for communication with the electorate, does not form part of this discussion. Notwithstanding, it is apposite to point out that the ruling party enjoyed more coverage (57%) than the main opposition MDC Alliance (15%) and any other party (28%).⁴⁹

Unfair Discriminatory Electoral Rules

Certain groups were and remain disenfranchised by the rules governing elections in Zimbabwe, and these are voters in the diaspora and those who are visually impaired.

45 See ZESN, ‘Report on the 30th of July 2018 Harmonised Elections’ (2018) 41.

46 SADC Principles (n 5) iii.

47 As interpreted in ‘General Comment No. 25’ (n 8).

48 In the sense that they do not disenfranchise persons or groups and they guarantee equality of votes as well as guarantee equal benefits to and protection for all the contesting candidates.

49 See ZESN (n 45) 50.

Zimbabwe has over a million citizens⁵⁰ who live in the diaspora and are most likely to be in foreign countries on the polling day. Others are likely to be away on polling day because of personal reasons such as seeking education and medical care in foreign countries. Section 72 of the Electoral Act provides that:

Where an election is to be held in a constituency, a person who is registered as a voter on the roll for that constituency shall be entitled to vote by post in terms of this part if, on all polling days in the election, he or she will be—(a) on duty as a member of a disciplined force or as an electoral officer; or (b) on duty in the service of the Government outside Zimbabwe; or (c) outside Zimbabwe as the spouse of a person referred to in paragraph (b); and so unable to vote at a polling station in the constituency.

Thus, the Act makes provision for postal voting but only for the category of persons listed in the Act, which excludes eligible voters who would be outside of the country on the polling day for personal reasons. This category of persons is excluded even though the Constitution guarantees for every citizen above 18 years the right to register and vote in presidential elections.⁵¹

Another group that was disenfranchised in the 2018 elections is visually impaired registered voters. In terms of Article 25 of the ICCPR, as interpreted both in the United Nations General Comment No. 25⁵² and the Human Rights Council Report;⁵³ in order to be fair, electoral rules and processes must not unfairly discriminate against any persons, including those with disabilities. This obligation is reinforced by Article 29 of the Convention on the Rights of Persons with Disabilities,⁵⁴ which imposes a duty upon the state to protect persons with disabilities against discrimination that prevents them from participating in public affairs on an equal footing with the rest of society. In the United Nations General Comment No. 25,⁵⁵ the Human Rights Council specifically interpreted Article 25 of the ICCPR to imply that States Parties have a duty to undertake all necessary measures to ensure that all voters, including those with disabilities, are able to cast their ballot in secrecy. As indicated above, these norms and standards are domesticated in section 67(3) of the Constitution of Zimbabwe, which guarantees every registered voter the right to vote by way of casting their ballot in secret.

Whilst the Electoral Act makes provision for every physically able-bodied person to vote in secrecy, it does not provide for any measures to enable visually impaired

50 Abel Chikanda and Jonathan Crush, 'Global Zimbabweans: Diaspora Engagement and Disengagement' (2018) *J of Intl Migration and Integration* 1037.

51 See s 67(3) (a) of the Constitution of Zimbabwe, 2013.

52 'General Comment No. 25' (n 8) paras 3 and 10.

53 Human Rights Council, 'Promotion, Protection and Implementation of the Right to Participate in Public affairs in the Context of the Existing Human Rights Law: Best Practices, Experiences, Challenges and Ways to Overcome Them' (adopted 23 July 2015) para 7, 30–31.

54 As interpreted by the Human Rights Council in 2014 Report, para 79.

55 See paras 11 and 20.

registered voters to vote secretly.⁵⁶ Consequently, visually impaired voters, who are estimated to be 150 000,⁵⁷ were denied their right to vote by secret ballot. To date, this legislation has not been amended. In a political environment characterised by voter intimidation, the failure to enable visually impaired voters to vote by secret ballot may have discouraged some of them from voting in the elections or may have exposed those who voted to further intimidation.

Unlawful Transmission of the Presidential Election Results

In order to be fair, electoral processes must be conducted in accordance with the established rules. This is underscored in Article 25 of the ICCPR, as interpreted in the United Nations General Comment 25.⁵⁸ The African Charter on Elections⁵⁹ and Articles 4 and 5 of the SADC Treaty, as interpreted by the SADC Principles, prescribe similar norms and standards that an election must meet to qualify as a fair election. Yet, certain critical 2018 electoral processes were conducted unprocedurally and, therefore, unlawfully. As explained by Moyo, one of these processes was the procedure followed by the Zimbabwe Electoral Commission (ZEC) to collate and transmit the presidential election results.

In Zimbabwe, all elections are conducted at polling stations that are dotted across the country. For purposes of vote counting, collation and transmission, the Electoral Act enjoins the Electoral Commission to set upward counting centres, constituency counting centres, provincial counting centres and a national counting centre.⁶⁰ A total of 10 985 polling stations were established in the 2018 elections.⁶¹

Section 37 C(4) of the Electoral Act elaborately and in peremptory terms sets out the procedures to be followed when compiling and transmitting results from all these polling stations. The procedures can be summarised as follows: (i) results at each polling station must be counted and verified; (ii) verified results must be transmitted to the ward centre where the results from all polling stations which fall under the ward must be collated and verified; (iii) verified results from the ward centre must be transmitted to the constituency centre where the results from all the ward falling under the constituency shall be verified and transmitted to the provincial counting centre; (iv) at the provincial

56 Section 59(1) of the Electoral Act only makes provision for visually impaired persons to be assisted to vote.

57 Tarisai Machakaire, 'Challenges Facing Voters with Disabilities' *Daily News* (27 May 2018) <<https://www.dailynews.co.zw/articles/2018/05/27/challenges-facing-voters-with-disabilities>> accessed 3 February 2020. There is a dearth of information on these statistics in official documents.

58 See para 5.

59 See Art 17.

60 Sections 37C(1) to (3) of the Electoral Act. District counting centres are also established for purposes of special voting.

61 European Union Election Observer Mission, 'Final Report Republic of Zimbabwe Harmonized Elections 2018' (2018) 10.

counting centre, the results from all constituencies falling under the provincial counting centre must be verified and transmitted to the national counting centre; and (v) at the national counting centre, the results from all the provincial counting centre must be counted and verified, and after which, the results of the presidential election must be declared. At each stage of transmission, the results must be verified in the presence of political party agents and election observers if they are available.⁶²

The Electoral Act⁶³ stipulates that the above procedures ‘must’ be followed and cannot be varied. The rationale for these strict procedures is to prevent the manipulation of results during transmission between the thousands of polling stations and the national counting centre. However, these procedures were violated by ZEC. In its 2018 election report, the Commission said:

Results for the presidential and the national assembly elections were transmitted using different routes from the ward collation centre. While the destination for the national assembly election results was the constituency centre, the presidential [election] results were forwarded to the district centre for onward transmission to the national command [counting] centre in Harare.⁶⁴

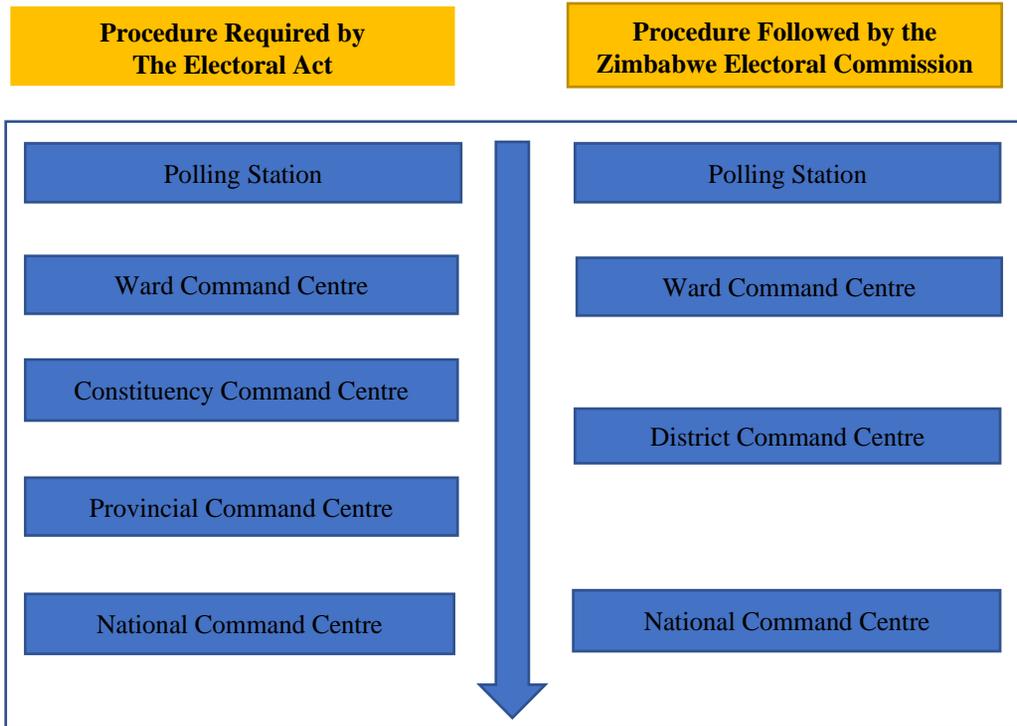
Thus, the Electoral Commission admits that the procedure is followed is such that the results of the presidential election were counted at polling stations and were transmitted to the ward centre. They were transmitted to a district centre from the ward centre and then forwarded straight to the national counting centre. This is contrary to the preemptory procedures set out in section 37 C(4) of the Electoral Act in that when it transmitted the results, the Electoral Commission bypassed the constituency centres and the provincial counting centres. The table below, adapted from Moyo,⁶⁵ portrays the difference in procedures required by the Electoral Act and the procedures that the Electoral Commission followed.

62 Section 110(3)(e) of the Electoral Act.

63 See s 37 C(4).

64 Zimbabwe Electoral Commission, ‘Zimbabwe 2018 Harmonised Elections Report’ (2019) 67.

65 Moyo (n 24) 136.



This violation renders the 2018 presidential election to be unfair in the sense that the Electoral Commission did not transmit the election results in accordance with the established rules.

The factors which may have motivated the Electoral Commission to violate these legal procedures are thoroughly discussed by Moyo.⁶⁶ He posits that the decision to bypass the constituency and provincial ward centres was meant to facilitate the manipulation of results in favour of the incumbent. Moyo argues that the results from the polling stations showed that the opposition presidential candidate had won by 66 per cent against the incumbent candidate's 33 per cent.⁶⁷ Moyo argues that if the Electoral Commission had followed the procedures laid out in the Electoral Act, it would have been difficult to justify any other presidential election result other than the one which tallies with the results verified at each stage of the transmission process, namely the polling stations, the ward centres, the constituency centres and the provincial command centres. During the 2018 elections, there were 10 985 polling stations, 1958 ward centres, 210 constituency centres and 10 provincial counting centres and one national counting centre.⁶⁸ Therefore, by law, the results announced at the national counting

66 *ibid* 13, 17, 81 and 92–112.

67 *ibid* 4.

68 Zimbabwe Electoral Commission (n 65) 67.

centre must tally with (i) the total results collated from the 10 provincial centres, (ii) the total results collated from the 210 constituency centres, (iii) the total results collated from the 1 958 ward centres and (iv) the total results collated from the 10 985 polling stations.

Moyo argues that, to manipulate the result, the Electoral Commission deliberately disrupted the transmission process of the election results to make it impossible to verify the results backwards, as is outlined above. By bypassing the constituency centres and the provincial counting centres, the Electoral Commission made it impossible to reconcile the results to be announced at the national counting centre with those declared at the constituency and provincial centres. Although it would still be possible to verify the result announced at the national counting centre by comparing it against the total results collated at the polling stations and the ward centres, Moyo argues⁶⁹ that the results at the polling stations were also corrupted because the opposition candidate did not have polling agents to monitor voting at 500 polling stations. This made it easier for the Electoral Commission to manipulate results from these polling stations.

However, the incumbent had been defeated by an overwhelming majority to the extent that manipulation of results at these 500 polling stations was not enough, so Moyo argues.⁷⁰ Thus, as a further step of rigging the result, Moyo argues,⁷¹ the Electoral Commission had to abandon the legally prescribed results transmission procedures in order to ‘originate new untraceable and unverifiable voting data to generate a new result’ at the national counting centre level.⁷² Moyo alleges that the new result was generated by further creating new polling station voting results. Some may find these arguments to be plausible, while others may find them to be speculative.

However, what cannot be disputed is that the Electoral Commission violated the Electoral Act in the way that it transmitted the results between polling stations and the national counting centre. While the motivations for these violations may remain a subject of political science debate for the unforeseeable future; in legal terms, there cannot be any reasonable doubt as to whether the presidential election of 2018 was fair or not. The election was rendered unfair by virtue of the Electoral Commission’s failure to adhere to the legally prescribed procedures of transmitting the election results. In comparative jurisdictions such as Malawi and Kenya, the failure to adhere to legally prescribed procedures has led the courts to declare the elections to be unfair.⁷³

69 Moyo (n 24) 30.

70 *ibid* 13 and 30.

71 *ibid* page 13.

72 *ibid* 17.

73 *Mutharika v Chilima and Another* MWSW 1 (08 May 2020) and *Odinga v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR.

Lack of Strong Democratic Institutions

There must be strong democratic institutions that ensure that elections are conducted in accordance with the established rules. The key institutions are the Electoral Management Body and the judiciary. These must be independent and technically competent to impartially enforce or apply the law.

The duty of the states party is to conduct elections that meet these norms and standards prescribed in Article 25 of the ICCPR⁷⁴ and Article 17 of the African Charter on Elections. This obligation is also underscored in Articles 4 and 5 of the SADC Treaty, as interpreted by paragraph 4.1.9 of the SADC Principles, which enjoins member states to uphold and guarantee the impartiality and independence of the judiciary, the Electoral Management Bodies (EMBs) and all other electoral institutions.’ This obligation has been domesticated through sections 164 and 235 of the Constitution of Zimbabwe, which guarantee the independence of the judiciary and the Zimbabwe Electoral Commission. However, as will be shown below, the conduct of both the judiciary and the Zimbabwe Electoral Commission during the 2018 elections have demonstrated that these institutions lack independence and adequate technical capacity to execute their constitutional functions.

The Zimbabwe Electoral Commission

The Electoral Management Body lacked independence and/or adequate technical capacity to conduct elections fairly, as indicated by the manner in which it violated the law when it compiled and transmitted presidential election results from polling stations to the national counting centre, as illustrated above. Given the high level of skill and experience of the commissioners and staff who lead the Electoral Commission, these violations could not have been done as a result of the ignorance of the law. As Moyo⁷⁵ argues, it is more likely that the violations were intentionally committed in order to manipulate the election results in favour of the incumbent. However, even if it were to be accepted that the electoral commission violated the law out of ignorance rather than malice, the fact would still remain that this commission committed a gross violation of the law, and this is indicative of an institution that is technically incapable of managing elections in accordance with the established rules.

The Judiciary

Although the Constitution⁷⁶ guarantees the independence of the judiciary, the manner in which the courts have dealt with cases which concern the 2018 election demonstrates

74 See para 20 of General Comment 25.

75 Moyo (n 24) 13, 17, 81 and 92–112.

76 Section 164 of the Constitution of Zimbabwe, 2013.

either speaks to lack of independence or diligence or both. In this regard, the following three topical cases are discussed:

(a) *Mavedzenge v Minister of Justice* CCZ 05/18

The Electoral Act confers upon the Election Management Body the power to make regulations that govern the way elections are managed. However, the Act requires the Election Management Body to seek ministerial approval before promulgating those regulations.⁷⁷ The applicant, in this case, challenged the constitutional validity of the statutory powers given to the minister to approve and disapprove regulations proposed by the Electoral Commission. Despite the glaring inconsistency of the Electoral Act with the Constitution, the Constitutional Court upheld the statutory powers of the minister's ruling that such powers are constitutionally valid.

It is necessary to recast the constitutional provisions in order to understand how absurd the Court's ruling was. Section 235(1)(a) of the Constitution stipulates that the Electoral Commission is 'independent and [is] not subject to the direction or control of anyone.' In addition, section 235(3) of the Constitution prescribes that 'No person may interfere with the functioning of the Independent Commissions.' By virtue of the principle of constitutional supremacy, which is expressly entrenched in the Constitution,⁷⁸ the Electoral Act cannot be inconsistent with the above.

Section 192(1) of the Electoral Act gives the Electoral Commission the authority to promulgate regulations to ensure that elections are conducted fairly. However, section 192(6) of the Act stipulates that:

Regulations made in terms of subsection (1) and statutory instruments made in terms of subsection (4) shall not have effect until they have been approved by the minister and published in the Gazette.

The applicant challenged the constitutionality of the above provisions on the basis that they give a minister the power to veto regulations proposed by the Electoral Commission. By so doing, the Act unconstitutionally subjects the Electoral Commission to the control of a government minister, as the minister can determine whether or not the Electoral Commission can promulgate regulations. The Court dismissed this challenge, holding that the power to approve regulations does not imply that the minister has authority to disapprove what is proposed to him or her by the Electoral Commission.⁷⁹ Yet, the impugned provisions of the Act clearly give the minister the power to veto the proposed regulations because if he or she withholds the approval, the Electoral Commission will not be able to enact those regulations into law. The court's

⁷⁷ Section 192(6) of the Electoral Act.

⁷⁸ Section 2(1) of the Constitution of Zimbabwe, 2013.

⁷⁹ *Mavedzenge v Minister of Justice* CCZ 05/18, 10–11.

decision effectively allowed the government to continue enjoying the power to undermine the independence of the Electoral Commission. For instance, the government has blocked the promulgation of certain regulations,⁸⁰ which would have enhanced the transparency of the election and minimised the chances of results manipulation. Thus, the Court failed to uphold the Constitution, and by so doing, it demonstrated its lack of independence and/or limited technical capacity to enforce the law to protect the independence of the Electoral Management Body.

(b) *Mateta v Zimbabwe Electoral Commission and Minister of Justice* HC 4349/18

As indicated above, the Constitution guarantees every registered voter, the right to vote by secret ballot. The state has an obligation to implement the relevant measures in order to fulfil this right. However, by the time the 2018 elections were held, there were no measures in place to enable visually impaired voters to vote through secret ballots. The applicant, in this case, challenged the inaction by the state and sought an order compelling the Electoral Commission to provide visually impaired voters with ballot papers printed in braille, so that such voters could have the option to vote by secret ballot.

The legal context within which this application was made is that section 67(3)(a) of the Constitution provides that:

Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right to vote in all elections and referendums to which this Constitution or any other law applies and to do so in secret.

In sections 155(1) and (2), the Constitution further directs the state to undertake measures that enable all registered voters to vote by secret ballot. When developing such measures, the state must be guided by the equality provisions set out as follows in sections 56(1) and (3) of the Constitution:

All persons are equal before the law and have the right to equal protection and benefit of the law ... Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race ... disability or economic or social status ...

Thus, when undertaking measures to protect and fulfil the right to vote by secret ballot, the government cannot unfairly discriminate against any eligible voter. Yet the Electoral Act, enacted by the government as part of the measures to implement the right to vote by secret ballot, does not make any provision for visually impaired voters to exercise their right to vote by secret ballot if they so wish. The Act only makes provision for

80 Such as those which allow candidate to witness the printing of ballot papers and to inspect the results server.

such voters to be assisted to vote by persons of their choice or by the presiding election officer.⁸¹ Therefore, it was the applicant's contention that the Electoral Act unfairly discriminates against visually impaired voters by failing to make provision for them to be supplied with braille ballots or other means to enable them to vote by secret ballot. After a full hearing, the Court dismissed the application, and to date, it has not delivered a written judgment to explain its order. By virtue of this ruling, the Court abdicated from its duty to enforce the Constitution impartially and protect the rights of vulnerable members of society. In the process, the Court demonstrated its inability to apply the law impartially.

(c) *Gabriel Shumba v Minister of Justice* CCZ 3/18

This case concerned a challenge to the constitutional validity of a rule that denied the right to register and vote in presidential elections for Zimbabweans who are 18 years or older but who live in foreign countries or who are on private business in foreign countries. Section 67(3)(a) of the Constitution guarantees for every Zimbabwean who is 18 years or older the right to register and vote in elections. However, the Constitution further states that when enacting laws to regulate voter registration, the state:

May prescribe additional residential requirements to ensure that voters are registered on the most appropriate voters roll, but any such requirements must be consistent with this Constitution, in particular with section 67 [which guarantees the right to vote].

The state enacted the Electoral Act, which generally restricts the right to vote in presidential elections to Zimbabwean registered voters, who ordinarily live in defined electoral constituencies in Zimbabwe, and who are physically in Zimbabwe on the polling day.⁸² As an exception, the Act makes provision for voting by postal ballots but only for registered voters who are on Zimbabwean government business in a foreign country on the polling day.⁸³ This rule was challenged in the Constitutional Court on the grounds that it unlawfully denies a large section of Zimbabweans who live in foreign countries, for personal reasons, their right to register and vote in presidential elections. The Court dismissed this challenge, holding that the Constitution does not confer such a right to persons who live outside of Zimbabwe.⁸⁴ The Court said:

One significant provision of section 92 is para (3) which makes reference to registered voters 'throughout Zimbabwe'. This phrase delineates geographical parameters for the Presidential election, and since the election is held concurrently with the rest of the harmonised elections, it (the phrase) is in perfect harmony with section 160 of the

81 See s 59(1) of the Electoral Act.

82 Section 72 of the Electoral Act.

83 *ibid.*

84 The Court had dealt with a similar case before, during the 2013 elections. See *Bukaibenyu v ZEC Chairman & Others* [2017] ZWCC 12 (28 June 2013) and it reached a similar conclusion.

Constitution, which relates to electoral boundaries. The clear meaning is that the Presidential election is to be conducted in Zimbabwe, and in order for a person to participate in it, he or she has to be in Zimbabwe or deemed so.

Thus, the Court relied on sections 92(3) and 160 of the Constitution to hold that the government does not have a constitutional obligation to provide those in foreign countries, or on private business, with facilities to register as voters and to vote in presidential elections. Section 92(3) stipulates that:

The President and the Vice President are directly elected jointly by registered voters throughout Zimbabwe, and the procedure for their election is as prescribed in the Electoral law.

Section 160 states:

For the purpose of electing Members of Parliament, the Zimbabwe Electoral Commission must divide Zimbabwe into two hundred and ten constituencies.

For the purpose of elections to local authorities, the Zimbabwe Electoral Commission must divide local authority areas into wards according to the number of members to be elected to the local authorities concerned.

It is clear that none of the provisions under section 160 of the Constitution relates to presidential elections. Section 160 relates to the demarcation of constituencies and wards for purposes of holding parliamentary and local council elections, respectively. Therefore, the Court wrongly relied on these provisions as they do not govern presidential elections.

The only provision cited by the Court in its *ratio*, which is relevant to the conduct of presidential elections, is section 92(3) of the Constitution, which states that:

The President and the Vice President are directly elected jointly by registered voters throughout Zimbabwe, and the procedure for their election is as prescribed in the Electoral law.

Thus, in terms of the above, the President is elected by registered voters ‘throughout Zimbabwe,’ which implies throughout the Zimbabwean territory. Zimbabwean territory includes the territory covered by the country’s physical borders as well as the territory covered by Zimbabwean embassies in foreign countries.⁸⁵ Therefore, the President is to be elected by registered voters and such an election must be conducted not only within

85 By virtue of the concept of extraterritoriality as recognised in the Vienna Convention on Diplomatic Relations of 1961 of which Zimbabwe is State Party and ratified the Convention on 13 May 1991. See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=en> accessed 30 March 2021.

the country's physical borders but also at the embassies in foreign countries. The Court was therefore wrong in its findings because there is a constitutional obligation to avail voter registration and voting facilities for Zimbabweans who live in foreign countries to register and vote in presidential elections.

Furthermore, the Court erroneously held that the country's presidential electoral system is constituency-based and, therefore, voters must reside in certain constituencies.⁸⁶ As mentioned above, the Constitution clearly recognises that in parliamentary elections, legislators are elected by voters in the demarcated constituencies, while in presidential elections the President is elected by voters throughout Zimbabwe. Thus, an important distinction between parliamentary and presidential elections is that the former is constituency-based while the latter is not constituency-based.

Although the Constitution permits the state to enact legislation that prescribes residential requirements for those who intend to register as voters. It is imperative to note that the same Constitution puts a caveat: 'such [residential] requirements must be consistent with this Constitution, particularly with section 67', which guarantees every Zimbabwean who is 18 years or older, the right to vote. Imposing residential requirements for one to qualify to register as a voter in presidential elections is not consistent with section 67 of the Constitution because such requirements unfairly exclude people who do not ordinarily live in certain constituencies, yet the conduct of the presidential election is not meant to be constituency-based.

Thus, the Court misinterpreted the Constitution to deny millions of Zimbabweans their right to vote in the presidential election. Zimbabweans working in the diaspora are generally suspected to be opposed to the ruling party because most of them were forced to leave the country due to the economic crisis, which is blamed on government corruption. Government opposed legislative reforms that were proposed⁸⁷ to enable these people to vote in elections, hence this constitutional application which was meant to seek the Court's intervention to vindicate the right to vote for this group. The Court's failure to vindicate these rights has led some scholars⁸⁸ to argue that the Court's decision was meant to protect the ruling party's interests. Whether the Court's decision was motivated by political interests or innocent ignorance of the law may remain a subject of debate. However, what is clear is that the Court's decision was based on gross

86 *Gabriel Shumba v Minister of Justice* CCZ 3/18, 10.

87 Most of the reforms were proposed by the opposition parties and civil society during the 2010–2013 Constitution making process.

88 Alex Magaisa, 'Big Saturday Read: Diaspora Vote: the Law and Politics' *Big Saturday Read* (London, 3 February 2018) <<https://www.bigsr.co.uk/single-post/2018/02/03/big-saturday-read-law-and-politics-of-the-diaspora-vote-in-zimbabwe>> accessed 17 May 2021.

misinterpretation of the Constitution, and this demonstrates a court which either lacks independence⁸⁹ or technical competence to enforce electoral rules impartially.

Conclusion

The 2018 elections were neither free nor fair and, therefore, cannot be classified as credible. These elections were conducted in an environment characterised by fear due to past electoral violence and ongoing intimidation. The electoral rules unfairly discriminate against visually impaired voters and the electorate in the diaspora. The legislative framework undermines the Electoral Commission's independence while the Electoral Commission violated the legal procedures required for collating and transmitting presidential election results. When called upon to protect the rights of the electorate against these unconstitutional rules and practices, the judiciary failed to enforce the Constitution.

Thus, the challenges confronting electoral democracy in Zimbabwe can be classified as unfair rules, weak democratic institutions and subversion of electoral democracy by the military. Therefore, in order to guarantee that future elections be conducted fairly, legal and judicial reforms must be implemented to protect the independence of the electoral commission and the judiciary. However, these must be complemented by political reforms targeted at ending the military's meddling in governmental and electoral processes and promoting national healing of the trauma caused by past electoral violence. Inevitably, such political reforms require a broad-based stakeholder engagement involving the ruling party, the military, civil society and the opposition. This engagement must be mediated and facilitated by an international envoy with support from regional actors, which include SADC, the African Union and the United Nations, of which Zimbabwe is a member state.

89 See Justice Alfred Mavedzenge, 'The Zimbabwean Constitutional Court as a Key Site of Struggle for Human Rights Protection: A Critical Assessment of its Human Rights Jurisprudence during its First Six Years' (2020) 20 AHRLJ 181–205.

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