
ELECTORAL LAWS AMENDMENT BILL, 2007

AN ANALYSIS BY THE ZIMBABWE ELECTION SUPPORT NETWORK

28 November 2007

Executive Summary

For an election to be free and fair the entire process must be free and fair and the body running the election must perform its duties efficiently and in a scrupulously impartial manner.

If passed, the Electoral Laws Amendment Bill will significantly improve some of the current election laws. Some proposed amendments, however, do not go far enough, and some important areas are not addressed. Additionally, other laws impeding the holding of free and fair elections will also need to be overhauled.

The effectiveness of any electoral reforms depends on how the electoral laws are applied and enforced in practice. Legislation alone cannot prevent malpractices. The best remedies against them are an impartial, efficient and active Electoral Commission; rigorous observation and monitoring of all stages of the electoral process; and impartial and professional enforcement of the laws by law enforcement agencies.

Experience in past elections suggests that, at best, implementation of reforms will be patchy. For electoral reforms to be effective, a climate must be created before, during and after elections in which voters will believe that they can vote freely to a change government through the ballot box, and that the elections will be conducted fairly. It will take time to restore voter confidence in the electoral process. It is therefore essential that there should be a sufficient period between the coming into operation of reforms and the elections. Only when voters see the new laws being enforced will their confidence be restored. The political parties contesting the elections will also need to test the efficacy of the new laws and satisfy themselves that they are being properly implemented.

These are some of the important points made in this report in relation to the proposed reforms:

Zimbabwe Electoral Commission

The method of appointment of Commissioners should be changed to reassure political parties and the electorate that Commissioners will be impartial.

As well as army, police and prison service personnel, intelligence officers should also be excluded from the Commission's staff. The management of elections must not be dominated by persons with military backgrounds.

Commissioners should each be given areas of responsibility.

Electoral Court

This Court should be given jurisdiction to resolve disputes before the election has taken place.

The judges appointed to this Court must not display political bias.

Delimitation of Wards and Constituencies

Before finalising boundaries, it should be compulsory for the Commission to receive and take into account representations about proposed changes.

Accuracy of voters' rolls

There should be an independent audit of the electoral rolls.

Observers

The Commission should decide on which observers to accredit and there should be no Ministerial veto power.

The Electoral Commission must accredit sufficient numbers of local and international observers to allow comprehensive observation of elections.

SADC should also request to send a special pre-election mission team to assess the pre-election environment.

Voter education

Instead of placing emphasis on controlling the programmes of voter education conducted by civic organisations, the Electoral Commission should establish joint structures with civil society to plan and implement a shared voter education strategy. Only by full involvement of civic organisations will it be possible to run an effective voter education campaign.

Civic organisations should be entitled to receive foreign funding for voter education programmes.

Ballot papers

The Commission should be required to disclose the total number of ballot papers printed for each election.

Illiterate and physically handicapped voters

Such voters should be allowed to be assisted by friends or relatives rather than electoral officials.

Postal voting

The Electoral Commission should be given the power to establish a system that allows Zimbabweans living outside the country to vote by post if they are unable to return to Zimbabwe to cast their votes.

Media coverage of elections

The maintenance of the *de facto* broadcasting monopoly of ZBH makes it imperative that this sole public broadcaster behave in a professionally impartial manner when covering elections.

The Commission must draw up as soon as possible the regulations governing reporting by public broadcasters to ensure that it gives fair coverage of the election. It must have effective mechanisms to monitor observance of these regulations and to take effective measures to prevent continuing breaches.

Before the next elections more broadcasters should be allowed to start to operate so that the public can receive a greater diversity of information and viewpoints.

The Commission will also need to establish effective mechanisms to monitor the conduct of the print media and to take steps to prevent continuing breaches of its obligations to report fairly on the election.

The ruling party controls the sole provider of daily national newspapers and the Access to Information and Protection of Privacy Act has brought about a complete lack of diversity in the print media. These restrictions should be removed and other newspapers should be allowed to commence operations without delay.

Intimidatory practices

In past elections there have been repeated allegations of political intimidation.

The Bill introduces new provisions specifically criminalising a range of practices, which will constitute the offence of intimidation. An intimidatory practice will also constitute an electoral malpractice.

For these provisions to be effective they will need to be properly enforced by the law enforcement agencies.

Where complaints of political intimidation are made to the Electoral Commission, the Commission should be given powers to direct the Commissioner-General of Police to ensure that an urgent and proper investigation is conducted into the complaints.

Misuse of state funds for electioneering

The Amendment Bill does not address this problem, and this is a serious defect since it allows the ruling party, by default, to exploit an unfair advantage.

INTRODUCTION

An election is a process, not an event. For an election to be free and fair the entire process must be free and fair. The electoral process includes the pre-election period, polling day, counting of ballots, announcement of the results and acceptance thereof as well as the post-electoral period. All eligible persons wishing to register as voters must be permitted to do so. In the lead-up to an election political parties contesting the election must be able to campaign freely. Voters must be able to attend whatever political rallies they wish. The public media should be obliged to provide voters with balanced and accurate information about the political contestants in the election. No political party should be permitted to use violence and intimidation to force voters to vote for them against their will. Voters must be assured that they will not face persecution before or after they vote because of their electoral preference. The body responsible for running the election must be independent and impartial and must do its utmost to ensure that the voting and counting processes are scrupulously fair and honest so that the outcome of the election will accurately reflect the preferences of the electorate. All voters who wish to vote in an election must be given a fair opportunity to do so. Foreign and local observation of the elections should be encouraged as their presence helps to reassure voters and enhance the legitimacy of the electoral process. The ruling party must not be permitted to use State rather than party resources to gain an unfair advantage in the election.

A key institution for ensuring free and fair elections is a properly resourced and independent Electoral Commission. This body should be given the responsibility of managing the entire electoral process to ensure that elections are free and fair. It will not discharge this mandate if it displays bias in favour of one of the political parties contesting the election or if it conducts itself in such a manner as to give rise to reasonable suspicion that it is politically partisan.

The legitimacy of recent elections in Zimbabwe has been much disputed. There have been numerous accusations that political parties opposed to the Government have been prevented from campaigning, that voters have been subjected to widespread intimidation and that the results of the elections have been fraudulently manipulated.

The Electoral Laws Amendment Bill, 2007 (HB 13, 2007) (which will be called “the Amendment Bill” in this memorandum) seeks to bring about a series of changes to the electoral laws of Zimbabwe. If passed, it will significantly improve some of the current election laws. Some of the proposed amendments, however, do not go far enough, and there are some important areas that the amendments do not address, although it is possible that the continuing mediation talks will lead to further reforms. The effectiveness of all the amendments will depend on how the electoral laws are applied and enforced in practice. Experience in past elections suggests that, at best, implementation of the Amendment Bill’s reforms will be patchy, at best.

Furthermore, there are other laws that will impede the holding of free and fair elections, such as the Public Order and Security Act, aspects of the Criminal Law (Codification and Reform) Act, the Broadcasting Services Act and the Access to Information and Protection of Privacy Act. All these laws will need to be completely overhauled if the forthcoming elections are to be free and fair.

If the Amendment Bill is to be effective, a climate must be created before, during and after elections in which voters will believe that they can vote freely and that the elections will be conducted fairly. It will take time to restore voter confidence in the electoral process. Additionally as a result of a widespread perception that has developed that the present electoral system does not work, voter apathy has become a serious problem. It is therefore essential that there should be a sufficient period between the enactment of the amendments and the elections. Only when voters see the new laws being enforced will their confidence be restored.

In this memorandum the more important of the Bill's amendments will be examined and an attempt will be made to assess their likely effect on the forthcoming elections. It is possible that the current South African led mediation process will result in further changes to laws that have a bearing on the electoral environment. A further analysis will be done when these changes are announced. The political parties contesting the elections will also need to test the efficacy of the new laws and satisfy themselves that they are being properly implemented.

Electoral Institutions

The Bill will affect the composition and functions of the Zimbabwe Electoral Commission, the Registrar-General of Voters and the Electoral Court.

Zimbabwe Electoral Commission

The Commission's composition is dealt with in section 61 of the Constitution rather than in the Zimbabwe Electoral Commission Act, and many of the amendments made by the Bill are intended to reflect this fact. In passing, it should be said that making the Commission a constitutional body, rather than one which owes its existence to an Act of Parliament, should theoretically make the Commission more independent, and for that reason is a welcome move.

Some of the changes made by the Bill are more substantial:

- The Commission is given functions in addition to those set out in the Constitution.¹ In particular, the Commission will be enjoined to undertake research into electoral matters, to promote co-operation between the Government and political parties and other bodies concerned with elections, and to inform the public about all issues relating to elections. These extra functions are admirable, so long as the Commission is given the resources to exercise them. At present it probably lacks the capacity to do so. Its attempts at voter education, for example, have been inadequate in previous elections, and it does not even seem to have a website through which electoral information could be disseminated very cheaply.²
- Commissioners and the Commission's staff and agents will be prohibited from divulging or making personal use of "any confidential ... gained through being a Commissioner or an employee or agent of the Commission".³ This provision may discourage commissioners and staff members from disclosing irregularities in electoral processes or misconduct on the part of the Commission. Generally, the Commission's business is not confidential: its proceedings should be as transparent as possible.
- The Chief Elections Officer is stated specifically to be the chief executive of the Commission.⁴ Unfortunately, the Bill does not go further and demarcate clearly the functions of the Commission, on the one hand, and those of the Chief Elections Officer, on the other.

¹ Clause 3 of the Bill.

² There is a pressing need for such information to be disseminated widely. For example, a voter whose application to be transferred to another roll has been rejected under section 25 of the Act will have a right to appeal to a "designated magistrate", i.e. a magistrate designated by the Minister of Justice, Legal and Parliamentary Affairs. But which magistrates have been designated? Currently there is no way that the ordinary person can easily find out.

³ Clause 4 of the Bill.

⁴ Clause 7 of the Bill.

- When the Commission reports on an election to the President and Parliament, it will be obliged to give the report to the political parties that contested the election. It will also be obliged to prepare the report within six months from the date of the election.⁵ It is certainly appropriate for political parties to be given the Commission's electoral reports, but it is doubtful if the Commission will be able to meet the six-month deadline. It has not yet prepared its report on the 2005 election.
- The Executive in particular the Minister already has considerable power to control the Commission in the exercise of its functions, and the Bill extends that control still further by prohibiting the Commission from accepting donations or grants, whether from local or foreign donors, without the Minister's permission.⁶ The Commission will also have to obtain the Minister's approval before investing its funds.⁷ On the other hand, the Commission will no longer have to provide the Minister with copies of all minutes of its meetings and will be able to enter into arrangements or contracts with governmental bodies in Zimbabwe without getting the Minister's permission.⁸

None of the changes made by the Bill will have much effect on the functioning of the Commission unless the Commission's members are perceived to be politically independent, efficient, and dedicated to ensuring that elections are held in accordance with the law. This can be achieved only by changing the way in which members of the Commission are appointed and carry out their duties. The Commission is established in terms of the Constitution, as pointed out earlier, and consists of a chairperson who is a judge appointed by the President in consultation with the Judicial Service Commission, and six other members appointed by the President from nominees submitted by the parliamentary Committee on Standing Rules and Orders.⁹ The Amendment Bill cannot of course change the way in which commissioners are appointed, but it could prescribe the way in which the Committee on Standing Rules and Orders selects nominees to be recommended for appointment. It would be helpful if the Bill were to state that each party represented on the Committee (ZANU (PF) and the MDC) had to nominate an equal number of persons for appointment, and that the other party had a right to veto any of the persons so nominated. In other words, each party would put forward a list of nominees knowing that the other party could veto any or all of them. This would lead to both parties putting forward relatively non-partisan nominees who would be likely to survive a veto, and the final list of nominees sent to the President would consist of politically independent people. To improve the Commission's effectiveness, the Amendment Bill should require the commissioners to divide among themselves responsibility for the Commission's different activities so that each commissioner would be responsible for a particular activity. This would avoid what has happened in previous elections, where the chairman has assumed control of all the Commission's activities, to the exclusion of his fellow-commissioners. An alternative way of distributing functions between Commissioners would be to give each Commissioner the responsibility for a particular Province.

The Commission's effectiveness and impartiality would also be enhanced if officials from electoral commissions were seconded to its service for the forthcoming elections. Some of the electoral commissions in the SADC region are notably effective, and their officials could show their Zimbabwean counterparts how to carry out their duties professionally.

⁵ Clause 8 of the Bill.

⁶ Clause 5 of the Bill.

⁷ Clause 6 of the Bill.

⁸ Clauses 13 and 14 of the Bill.

⁹ Section 61 of the Constitution.

The Electoral Commission obviously will need a substantial body of staff to carry out the work needed on the ground to fulfil the Commission's onerous functions in connection with elections. It is vitally important that these staff members be properly trained and they must perform all their duties professionally and without political bias.¹⁰ It is commendable that under the Bill employees of the Police Force, Defence Forces and the Prison Service can no longer be seconded as staff of the Commission except where their services are required for the provision of security.¹¹ However, it is hoped that this provision will not be circumvented by seconded persons such as recently retired members of the armed forces. It should also be pointed out that on the staff of the Commission there are already a number of ex-military officers dealing with electoral management. Even though these persons resigned from their military positions when they were engaged, there is a perception that the management of elections has been heavily militarised.

The Bill should also explicitly exclude members of intelligence services. Members of these forces are now viewed as being politically partisan and the use of such personnel in connection with elections is intimidatory.

The pool of persons who can now be seconded to the Commission has been expanded. Now not only persons employed by the Public Service Commission may be seconded; the Commission can also call upon the Health Services Board and responsible authorities of any statutory or local government body to make their employees available for election service.

The Registrar-General of Voters

The Bill will make the Commission, rather than the Registrar-General, responsible for keeping and maintaining voters rolls.¹² This is a welcome change, but the Bill fails to make a clear demarcation between the functions of the Commission and the Registrar-General in regard to voter registration. Thus, while the Commission will "keep and maintain" the rolls, the function of registering voters and updating the rolls will remain with constituency registrars, who are under the control of the Registrar-General. Furthermore, it is doubtful if the Commission has the capacity to keep and maintain the rolls itself, and it will probably have to rely heavily on the Registrar-General's office to help it carry out its new responsibilities.

The Bill will require the Registrar-General to get permission from the Commission, rather than the Minister, before delegating his functions to some other member of the Public Service.¹³ To the extent that this gives the Commission greater responsibility over the electoral process, it is to be welcomed.

The Electoral Court

The Electoral Court has remained in limbo since the Supreme Court's judgment in *Marimo & Anor v. Minister of Justice, Legal and Parliamentary Affairs & Ors* (S-25-2006) was delivered in July last year. The Supreme Court held that the method by which judges of the Electoral Court were appointed contravened section 92 of the Constitution. The Bill will correct the Electoral Act in this regard.¹⁴ The amendment is welcome, but long overdue.

¹⁰ A number of senior staff of the Commission have recently been appointed from the public service. A view has been expressed that these appointments should not have been made until the issue of the composition of the Commission itself had finally been resolved during the mediation process.

¹¹ Clause 18 of the Bill.

¹² Clause 21 of the Bill.

¹³ Clause 20 of the Bill.

¹⁴ Clause 77 of the Bill.

The Bill will not make any significant changes to the jurisdiction of the Electoral Court, which is restricted to the hearing of appeals and petitions under the Electoral Act. No attempt has been made to give the court power to adjudicate on other electoral disputes. The court, in other words, is largely restricted to deciding whether or not an election which has already taken place was free and fair. This is unfortunate: the court should be able to resolve expeditiously disputes before the election has taken place. The current Electoral Act requires the Court to determine election petitions within six months of the date of its presentation. The determination of pre-election disputes should be done fairly but within a very tight time frame.

In the past many judgments of the High Court and Supreme Court in electoral cases appeared to have displayed bias in favour of the ruling party. It is hoped that the judges appointed by the Chief Justice as Electoral Court judges will adjudicate such cases on a scrupulously impartial basis.

Delimitation of Wards and Constituencies

The Zimbabwe Electoral Commission is now responsible for delimiting constituencies and other electoral boundaries. The Commission will be obliged to give public notice before embarking on a delimitation exercise, and “so far as is practicable within the time available” will have to entertain representations from political parties and other interested parties who are likely to be affected by its decisions.¹⁵ The Constitution requires that the final delimitation report must be tabled in parliament. Any requirement of consultation is an improvement on the lack of openness that has characterised the delimitation process in previous years, but it is regrettable that consultation need not take place if the Commission is pressed for time as will be the case if new constituencies have to be delimited for an election in March next year.

Before the 2005 parliamentary elections the current Chairperson of the Electoral Commission headed what was then a separate Delimitation Commission. That body redrew the constituency boundaries of a number of constituencies and it was alleged that these boundaries were redrawn in a manner that gave the ruling party an electoral advantage. Certain constituencies dominated by ZANU (PF) like Gokwe were split to create individual constituencies without any justification of demographic changes. On the other hand, some urban constituencies which are the stronghold of MDC support were redrawn to incorporate abutting rural areas where ZANU (PF) has support. For instance, in Mashonaland West the new constituency of Manyame was deliberately created to give ZANU (PF) a better electoral chance in this constituency.

Presently only the President has the power to require the Commission to give “further consideration” to its report before finalising it.

Because of the controversies that are likely to rage around the redrawing of constituency boundaries for the 2008 elections, after it publicises proposed changes, it should be compulsory for the Electoral Commission, to give political parties and other interested persons the opportunity to make meaningful representations about these changes. The Commission should then have the obligation to take these representations properly into account before finalising its work on drawing new boundaries. This should apply particularly to the extensive changes that will be necessitated by the large increase in numbers of seats in the lower house brought about by the recent constitutional amendments. The redrawing of these boundaries must not be rushed and there should be ample opportunity for objections to be taken into account. It would also be useful if the Commission made public the main criteria it took into account when arriving at its proposals for new boundaries. The tabling of the final delimitation report in par-

¹⁵ Clause 28 of the Bill.

liament will only be of relevance if parliament has not already been dissolved prior to an election. This is a further indication that the delimitation exercise should be carried out well before elections take place.

It is clear therefore that the Bill does not adequately deal with the danger that gerrymandering can take place during the process of delimitation.

Registration of Voters and Voters' Rolls

As indicated above, the Commission will be responsible for maintaining voters' rolls while the Registrar-General will retain responsibility for registering voters. This seems a recipe for confusion.

Registration of voters

Registration will be continuous, with citizens entitled to apply for enrolment at any time.¹⁶ Rolls will not be regarded as closed for new registrations in any election until the day before nomination day in the election concerned.¹⁷ By and large these are commendable changes, but their effectiveness will depend on how quickly the Registrar-General's office can process applications for registration; past experience makes one doubt the office's capacity in that regard.

Persons who claim registration on a particular roll will be able to produce any satisfactory documentary evidence reasonably proving where they live¹⁸. This is a welcome change because at present the Act makes the process of establishing residence difficult, and this would cause problems for people displaced by the farm invasions or "Operation Murambatsvina".

Copies of voters' rolls

The Commission will be obliged to provide, on payment of a fee, one electronic copy of a voters roll to each political party contesting an election.¹⁹ The copy will have to be provided within seven days after the calling of the election concerned, which means that the copy will never be entirely up to date since as indicated above —additional voters may be registered until the day before nomination day in the election. Printed copies of voters' rolls will be made available to interested parties on payment of a reasonable fee.²⁰ (It may be noted that there is no requirement that the fee for the electronic copy of the roll must be reasonable).

It is not clear why the Bill requires the Commission to provide printed copies of voters roll on request at any time, while its obligation to provide electronic copies is restricted to the period after an election has been called. If voter registration is continuous and the rolls are stored electronically, they should be available at any time in both printed and electronic form.

Checking of voters rolls

There is provision for voters' rolls to be checked by voters and the general public,²¹ but neither the Bill nor the Act requires an independent audit of the rolls. This is a serious defect in view of the chaotic state of voters rolls prepared for previous elections. It should be noted, however,

¹⁶ Clause 19 of the Bill.

¹⁷ Clause 23 of the Bill.

¹⁸ See the new definition of "proof of residence" inserted in the Act by clause 16 of the Bill.

¹⁹ Clause 21 of the Bill.

²⁰ Clause 21 of the Bill.

²¹ See clauses 21 and 65 of the Bill.

that there is nothing in the Bill or the Act that would prevent the Commission from arranging for rolls to be audited by an independent organisation.

Observers

The *African Union Guidelines for African Union Electoral Observation and Monitoring Missions* states, “International, regional and national observers have come to play an important role in enhancing the transparency and credibility of elections and democratic governance in Africa.”

Elections are given legitimacy if they are endorsed by local, regional and international observers. Observers help to provide transparency and reassurance and inject confidence into the electoral process. Given the fact that there has been widespread doubt about the fairness and integrity of the election process in Zimbabwe in the past, it is vitally important that there should be extensive observation of the next election by a wide cross-section of observation teams. The presence of local, regional and international observers 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 be selected on the basis of their bias in favour of one party or another. In the 2002 presidential election a number of foreign observer missions were denied entry to Zimbabwe, whilst many domestic observers were denied accreditation due to the discriminatory procedures. In the 2005 parliamentary elections only organisations and persons considered to be sympathetic to the ruling party were invited to conduct electoral observation. All other institutions and persons were excluded.

The provisions of the Amendment Bill relating to observers²² fail to effect the changes that would ensure that a wide cross-section of observers are accredited and that the ruling party will not be able to cherry-pick who will be accredited.

Under the new provisions all observers will have to be accredited by the Electoral Commission’s Observation Accreditation Committee. The observers will be accredited to observe over the election period. Election period is defined as the period from as from the calling of an election to the declaration of the result. This means that observers will not be in place in time to observe the process of registration of voters or delimitation of constituencies. It will be left to the political parties to monitor and evaluate these processes. It would have been preferable if at least local observers had been accredited before the start of voter registration and constituency delimitation so that they had the official status to monitor these processes properly.

They will also not observe the post-election period to determine whether, for instance, retribution is exacted against those considered to have voted for the wrong party. It is a criminal offence to obstruct the performance by an observer of his or her duties.

Previously the Observation Accreditation Committee had five members. It was chaired by the chairperson or vice-chairperson of the now defunct Electoral Supervisory Commission. The other four members were ministerial and presidential nominees. Under the Amendment Bill, this Committee will consist of six members, three of them being commissioners (the Commission’s chairperson will chair the Committee.) The Commission’s vice-chairperson will also sit on it, together with one other Commissioner designated by the Commission. The other three members are ministerial and presidential nominees.

The new composition of the Accreditation Committee is thus somewhat better than before as half the members are commissioners and the ministerial and presidential nominees have been reduced from four to three. However, the three Ministerial nominees will still be likely to exert a

²² See clause 17 of the Bill.

partisan influence when it comes to inviting observers. To counteract any such partisanship, a number of additional persons should be added. For example, there could be a member nominated by the Law Society of Zimbabwe and a member nominated by National Association of Non-Governmental Organisations.

The amendment provisions still place severe restrictions upon the persons and organizations that can be accredited as observers. In particular, there is a potential ministerial veto over many of the appointments. This detracts considerably from the independence of the Electoral Commission: it is apparently not trusted by the Government even to choose who should observe its electoral processes.

The table that follows compares the old and the new provisions.

Persons and organisations	Present provisions	New provisions
Individuals representing foreign countries or international or regional organisations & foreign eminent persons	Foreign Affairs Minister decides whom to invite	Such persons can apply to Electoral Commission & Observer Committee decides whom to accredit, <i>but it cannot accredit a person if the Foreign Minister objects to such person observing the election</i>
Individuals representing local organisations & eminent persons from within Zimbabwe	Justice Minister decides whom to invite	Such persons apply to Commission & Observer Committee decides whom to accredit, <i>but it cannot accredit a person if the Justice Minister objects to such person observing the election</i> Additionally Justice Minister can himself invite such persons to observe elections
Individuals representing bodies in the region that exercise functions similar to those of Commission	Electoral Supervisory Commission invite to observe election	Electoral Commission invites such persons to observe, <i>but it cannot accredit a person if the Foreign Minister objects to such person observing the election</i>

The Electoral Commission through its Observer Committee should surely be the body that decides upon the accreditation of observers. The Ministerial power of veto under the new provisions is likely to be used to exclude observers who might be prepared to find fault in the electoral processes. The Ministerial power of veto over the accreditation of representatives from other regional electoral bodies is particularly startling. It is a gross insult to the integrity and independence of the Electoral Commission.

It is recommended that the discretion to decide upon the accreditation of observers should rest solely with the Electoral Commission and should be based on recommendations from the Observers Committee. There should be no Ministerial veto power.

It should be noted that the Amendment Bill will repeal the provisions in the Electoral Act dealing with monitors. Under the Electoral Act election monitors had to be public servants appointed and deployed by the Electoral Supervisory Commission. Previously civic organisations used to deploy teams of monitors. The idea behind the abolition of monitors, apparently, is that there is no need to have monitors as well as observers. Observers can and will perform the functions that previously were performed by monitors. Observers will:

- Observe the election process between the calling of the election and the declaration of the result of the poll;
- Observe the conduct of the polling at the election;
- Be present at the counting or collating of votes cast at the election and the verification of polling station returns by presiding officers;

- Bring any irregularity or apparent irregularity in the conduct of the poll or the counting or collating of the votes to the attention of the Commission.

Previously monitors could, in addition to the above, request the presiding officer of a polling station or a constituency elections officer to take appropriate corrective action to redress irregularities and apparent irregularities.

The Electoral Commission must obviously accredit sufficient numbers of local and international observers to allow comprehensive observation of elections. In particular, it would be expected to accredit adequate numbers of persons from local civic organisations, especially those who have had experience previously in observing elections. The numbers of observers accredited in 2008 will need to be far higher than in previous elections, since there will be many more polling stations as a result of the increased number of parliamentary constituencies as well as the number of elections taking place simultaneously.

The system of accreditation should be non-bureaucratic. For local observers the system should be decentralized. Foreign observers should be able to apply for accreditation by post.

One possible anomaly arising from these provisions is that no one who is unaccredited will be allowed to “observe” elections. In view of the very wide definition of “observe”, this could mean that anyone who tries to bring apparent irregularities in polling to the Commission’s attention will contravene the Act if he or she is not an accredited observer. Journalists who take an interest in the electoral processes may also contravene the Act.

SADC has sought to mediate between the two main political parties to try to ensure that a framework is put in place to ensure that the upcoming election in Zimbabwe is free and fair. It is important that the period leading up to the next election be free of the sort of violence and intimidation that has marred previous elections. SADC therefore has a strong interest in ensuring that there is a peaceful climate over the entire period leading up to the election. It would therefore be a salutary measure for SADC to request to send a special pre-election mission team, say three months in advance of the election, to assess the pre-election environment.

Voter education

Under the current Electoral Act, the Zimbabwe Electoral Commission has primary responsibility for conducting a programme of voter education. The Amendment Bill includes further provisions on voter education (Clauses 9, 10 and 11.). The Commission must commence a programme of voter education not later than 90 days before the polling day of an election. The elections in 2008 could be held as early as March 2008, and this would require the Commission to start voter education immediately. However, the Commission has been provided with a totally inadequate budget and as a result has had to cut back its voter registration. Its ability to conduct a thorough and effective voter education campaign will obviously be adversely affected by financial and human resources constraints. However, the Amendment Bill does provide that the Government must give the Commission whatever assistance it may require to conduct voter education.

In conducting its programme the Commission will be expected to ensure that those it employs have sound knowledge of the electoral laws and processes and that they remain scrupulously impartial and do not show bias for or against any particular political party. This obligation is provided for in the current Zimbabwe Electoral Commission Act, which obliges the Commission to conduct accurate and unbiased voter education.

Given the likely constraints upon the Commission in providing an effective campaign of voter education, it is imperative that civic organisations be allowed to conduct their own programmes. The current Zimbabwe Electoral Commission Act contains various restrictions on civic organi-

sations that wish to conduct programmes of voter education: the Commission may require a civic organisation to furnish it with copies of all the proposed voter education materials; the materials must be adequate and not misleading or biased in favour of any political party; and only the Commission may receive foreign funds for voter education, although it may distribute these funds to other organisations involved in the provision of voter education; the persons providing voter education must be citizens or permanent residents, domiciled in the country and they must, operate through an organisation with a specific mandate to provide voter education. The Amendment Bill contains further provisions allowing the Commission to control voter education by other organisations. The Commission is empowered to close down a voter education programme being conducted by a civic organisation if it considers the organisation is providing materially false or incorrect information that is unfairly biased in favour or against a contesting political party, and the programme therefore is likely to prevent a substantial number of voters from making an informed choice in an election. Before closing down a programme the Commission must give the affected organisation an adequate opportunity to make representations in the matter.

Although there must obviously be controls to prevent the dissemination of erroneous, misleading and biased voter education materials, the capacity of the Commission to scrutinise proposed voter education within a reasonable period of time is doubtful. If it insists on perusing all such materials there may be inordinate delays in the implementation of such programmes to the detriment of the electorate. It should be noted that before the 2005 parliamentary elections civic groups alleged that the Electoral Commission gave them only two weeks to carry out voter education programmes throughout the country.

For voter education to fulfil its role as an essential exercise in strengthening participatory democracy, it is essential that civil society is enabled to conduct effective nation-wide voter education. The *Electoral Commissions Forum of SADC Countries Principles* state that “civil society capacity, such as NGOs, CBOs, the faith based organisations and other institutions should harness and support civic and voter education to ensure an effective distribution through the country.”

The Amendment Bill retains the prohibition against civic organisations receiving any foreign funding for their voter education programmes. Given the current parlous state of the economy, it is very difficult for civic organisations to garner enough finance locally to conduct comprehensive voter education programmes, and they cannot base their plans on the possibility that they may receive some funds from the Commission. The imposition of a ban on receiving outside funding is thus unreasonable and unjustifiable.

A better way of approaching voter education would be for the Electoral Commission to establish joint structures with civil society to plan and implement a shared voter education strategy. Voter education providers could then be accredited and required to operate within the framework of an agreed Code of Conduct. The South African experience in this regard is instructive.

Polling

The Constitution requires presidential, parliamentary and local authority elections to be held simultaneously,²³ and the Bill makes the necessary amendments to the Electoral Act.²⁴ It may not be a good idea to hold all these elections together. Voters will be faced with four separate

²³ Sections 28(3) and 58(1) of the Constitution.

²⁴ See clause 29 of the Bill.

ballot papers: one to choose a presidential candidate, one to choose a Senator, one to choose a member of the House of Assembly, and one to choose a councillor. In municipalities, voters will get a fifth ballot paper for the election of a mayor. Unsophisticated voters are likely to be confused by all these bits of paper, and the number of spoiled ballots will probably increase enormously. Extensive programmes of voter education will be needed to enable most voters to exercise a meaningful choice.

Polling days

The Electoral Act allows polling to be held over one or more days, and the Bill does not change this. In view of what has been said in the preceding paragraph, voting will have to take place over more than one day since each voter will be expected to make at least four choices. Polling days will be regarded as public holidays²⁵, so presumably they will be fixed so as to coincide with a weekend. There are, however, dangers in having polling over more than one day. Observers must be on their guard against possible irregularities occurring during the time that the polling stations are not in operation.

Conduct of poll

Before polling begins, every presiding officer will have to count and record the number of ballot papers received at his or her polling station, and the count will have to take place in the presence of candidates, election agents and observers.²⁶ This will help to ensure transparency in the electoral process, but the Bill should have gone further and required the Commission to disclose the total number of ballot papers printed for each election.

The number of voting compartments and ballot boxes to be provided in each polling station will no longer be fixed in the Act but will be left to the discretion of the presiding officer,²⁷ though presumably the Commission will be able to specify the number through directives or regulations.

Police officers will not be allowed into polling stations except to vote;²⁸ this will allay fears, expressed in previous elections, that the police were taking over the voting process. Presiding officers will be entitled to call on the police to quell disturbances, however, which means that police officers will have to be stationed fairly close to polling stations.

Hitherto, in presidential and parliamentary elections, voters have generally had to cast their votes at a polling station within the constituency in which they are registered. Now they will have to vote at a polling station within the local authority ward in which they are registered.²⁹ This is a necessary consequence of holding local authority and parliamentary elections simultaneously, but it may cause confusion even though wards must be delimited so that they fall wholly within constituencies.³⁰

Voters will be entitled to vote even if they are not registered on the ward voters roll, so long as they can produce a voters' registration certificate (which, presumably, must show that they are entitled to be registered on the roll)³¹. Before being issued with a ballot paper, a registered voter will have to produce a voters' registration certificate or proof of identity. It should be

²⁵ See clause 29 of the Bill.

²⁶ See clause 39 of the Bill.

²⁷ See clause 40 of the Bill.

²⁸ See clause 40 of the Bill.

²⁹ See clause 41 of the Bill.

³⁰ Section 61A(5) of the Constitution.

³¹ See clause 41 of the Bill.

noted that few if any voters have been issued with voters registration certificates, it unlikely that many unregistered voters will in fact be able to vote in the forthcoming elections.

Illiterate and physically handicapped voters

The Bill will permit illiterate and physically handicapped voters to be assisted to vote by two electoral officers or employees of the Commission, rather than by the presiding officer of the polling station in the presence of a policeman, which is provided by the Act at present.³² Keeping the police out of polling stations is a good idea, as noted above, but it would have been better to allow incapacitated voters to choose whom they want to assist them.

Postal voting

There are large numbers of eligible voters outside the country. These people left the country either because of political persecution or for economic reasons, and many of them may not be able to return to Zimbabwe to cast their votes. The current Electoral Act does not allow for postal voting by such Zimbabweans and the Amendment Bill will not change that position.

The current Electoral Act restricts postal voting to:

- disciplined force members and electoral officers who will be absent from their constituencies on electoral duties;
- Government officials who are absent from the country on Government service;
- spouses of such persons.

It is strongly recommended that the Zimbabwe Electoral Commission, in conjunction with appropriate external agencies such as the United Nations, should establish a system that allows all Zimbabweans who are outside the country and unable to return, to cast postal votes in the forthcoming elections. Several SADC countries use systems of postal voting and could provide technical assistance in setting up a postal voting system for Zimbabwe.

Counting of Votes and Collation of Results

The Bill makes several minor changes most of them useful to the way in which votes are counted and the results of elections are collated and announced.

Counting of votes at polling stations

Candidates and their agents will no longer be allowed to put their thumb-prints, signatures or seals on ballot boxes which are sealed in a polling station at the close of polling.³³ According to the Bill's memorandum, the new translucent ballot boxes have no space for additional seals or signatures. This seems an inadequate reason for abolishing a small but valuable safeguard against electoral fraud.

When the votes have been counted at a polling station, the presiding officer will have to record them on a return and post them up outside the polling station before sending them to the constituency elections officer.³⁴ And he will have to do so 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 parties are able to deploy agents at every polling station to witness the counting of votes.

³² See clauses 42 and 43 of the Bill.

³³ See clause 44 of the Bill.

³⁴ See clause 46 of the Bill.

Recounts

The Commission is given power to order a recount of votes at any polling station, either on its own initiative or at the request of a candidate or political party contesting the election, if the Commission has reason to believe that a miscount occurred which might affect the result.³⁵ The Commission's decision to order, or not to order, a recount will not be subject to an appeal; it would have been better if the decision was appealable.

Conflict management

The Amendment Bill will move the provisions on conflict management from a Schedule into the body of the Electoral Act, thereby affording them greater prominence and importance. The Bill will also provide for the establishment of multi-party liaison committees to be set up for local as well as national elections. It will further provide for independent candidates to be included in multi-party liaison committees.³⁶

Misuse of state resources

In past elections the ruling party has made extensive use of state resources such as State vehicles when campaigning. This is an unacceptable misuse of State property and resources. The party should only be permitted to use its own party resources for this purpose. The Amendment Bill does not seek to address this problem, and this is a serious defect since it allows the ruling party, by default, to exploit an unfair advantage.

Media coverage of elections

The Amendment Bill contains a number of provisions that seek to ensure fair media coverage during the election period.³⁷ The provisions relate to public broadcasters and other news media.

Public broadcasters

The Amendment Bill will empower the Zimbabwe Electoral Commission, with the approval of the Justice Minister, to pass regulations governing electoral reporting by the public media. As the Commission should be independent of political influence, the requirement that these regulations receive Ministerial approval should be removed. It is noteworthy that the Commission can make these regulations without consulting with the Media and Information Commission or the Broadcasting Authority suggests that even the Government has doubts about the impartiality of these two bodies.

Public broadcasters will be obliged to "afford all political parties and independent candidates such free access to their broadcasting services as may be prescribed" in the regulations. The regulations must provide for:

- the total time allocated to each political party or candidate;
- the duration of each broadcast by the party or candidate;
- the times when and areas to which such broadcasts are to be transmitted.

³⁵ See clause 48 of the Bill.

³⁶ See clauses 76, 81 and 84 of the Bill.

³⁷ See clause 12 of the Bill.

The regulations must ensure that:

- there is a fair and balanced allocation of time between each political party and independent candidate;
- each political party and independent candidate is allowed a reasonable opportunity to present a case through the broadcasting service concerned.

The Commission is placed under an obligation to monitor broadcasters during the election period to ensure that they observe these provisions.

The sole public broadcaster presently is the government-controlled Zimbabwe Broadcasting Holdings. It operates national television and radio broadcasting services. These stations broadcast a constant stream of propaganda strongly supporting the ruling party and disparaging opposition parties. Their news reporters and news presenters are partisans of the ruling party. During previous elections, these media have been accused of biased reporting by giving excessive and favourable coverage of the election campaigns of members of the ruling party and minimal and unfavourable coverage of the election campaigns of the opposition.

Since the Broadcasting Services Act was passed not one single broadcaster has been licensed to operate broadcasting services. The maintenance of the *de facto* broadcasting monopoly of ZBH makes it imperative that this sole public broadcaster behave in a professionally impartial manner when covering elections.

Ideally, before the next elections in Zimbabwe more broadcasters should be allowed to start to operate so that the public can receive a greater diversity of information and viewpoints. However, it is unlikely that other broadcasters will be able to commence operations before the next election even if they were to receive the requisite licences.

Print media

The Amendment Bill also provides for various obligations on the print media and broadcasters. During the election period such media must ensure that

- they treat equitably all political parties and candidates in regard to the extent of their coverage and the timing and prominence of their coverage;
- their reports are factually accurate, complete and fair;
- they make a clear distinction between factual reporting and editorial comment;
- they rectify inaccuracies in reports without delay and with due prominence;
- they give a reasonable right of reply to political parties and candidates where they claim that the reports about them are false;
- they do not promote political parties or candidates that encourage violence or hatred against any class of persons in Zimbabwe;
- they avoid in their reports language encouraging racial, ethnic or religious prejudice or hatred or inciting violence or likely to lead to undue public contempt towards any political party, candidate or class of persons in Zimbabwe.

Monitoring of media coverage

The Amendment Bill imposes a duty on the Zimbabwe Electoral Commission to monitor news media to ensure that political parties, candidates, broadcasters, print publishers and journalists do not breach the new provisions of the Act. The Bill does not, however, address the issue of how the Commission is to deal with any such breaches. It is not given any explicit powers to sanction the media institution concerned by imposing penalties.

The Commission will have a difficult task to ensure that the public broadcaster transforms from an out-and-out propaganda agency into a politically neutral public broadcaster that will fairly report political campaigns of all political parties and will allow them equitable access to transmit information about their political campaigns. The Commission's regulations governing these matters must be in place well in advance of the elections and, in drawing up these regulations, it should draw from Media Codes in operation in other countries and should consult media experts. The Commission must also assign a sufficient number of officers to monitor properly observance of its regulations, and these officers, in turn, should seek assistance from the Media Monitoring Programme of Zimbabwe and the Media Institute of Southern African and other non-governmental organisations that analyse the operations of the media in Zimbabwe.

The Amendment Bill requires broadcasters and print publishers, when required to do so by the Electoral Commission, to publish the Commission's statements informing voters about aspects of the voting process. The Commission is required to pay a reasonable fee for such publication.

In its post-election report the Commission is obliged to include a report on the coverage of the election by the news media.

As regards the print media, the main problem that exists is that the sole provider of daily national newspapers is a company which is controlled by the ruling party and whose coverage is completely biased in favour of the ruling party. The closure of the only other daily newspaper, the *Daily News*, under the draconian Access to Information and Protection of Privacy Act, has brought about a complete lack of diversity in the print media. The weekly financial newspapers are beyond the reach of ordinary people, as is the only independent Sunday newspaper.

It is important that prior to the elections, other newspapers should be allowed to commence operations without unreasonable obstacles being placed in their paths. The Electoral Commission should use its influence to press for the removal of all unreasonable restrictions upon the starting up of new newspapers.

It is significant that the Amendment Bill provides that these provisions relating to the media will prevail even if they are inconsistent with the Broadcasting Services Act, the Access to Information and Protection of Privacy Act or any other enactment. This clearly implies that these pieces of legislation need to be changed because they stand in the way of proper dissemination of information during elections.

Intimidatory practices

In past elections there have been repeated allegations by the main opposition party that their candidates, election agents, party officials and supporters have been subjected to widespread intimidation. The ruling party has dismissed these allegations as fabrications, even though there is credible evidence of it. The law enforcement agencies have conspicuously failed to conduct proper investigations into the allegations.

The Amendment Bill introduces new provisions that will specifically criminalise a range of practices which together will constitute the offence of intimidation. The maximum penalty for most of these practices, except theft or destruction of voter identification, is five years' imprisonment.³⁸ An intimidatory practice will also constitute an electoral malpractice in terms of Part XX of the Electoral Act; this will allow the Electoral Court to declare void an election where the Court finds in an election petition that the intimidation was committed by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge

³⁸ Clause 71 of the Bill.

and consent or approval of any of his or her agents, and the effect of such practice was such as to have materially affected the outcome of that election.³⁹

The provisions on intimidation are a welcome addition to the electoral law. They spell out in detail what constitutes the offence of intimidation. For example, inflicting or threatening to inflict bodily harm, causing or threatening to cause bodily harm or abducting a person is an offence if the person doing these things compels a person or persons generally to vote for a political party or to refrain from voting or to attend a political meeting. The offence will also be committed by a person who, in order to compel another person to vote for a political party, withholds or threatens to withhold any assistance to which that other person is entitled or illegally does or threatens to do anything to the disadvantage of another person. These latter provisions would cover a traditional leader who threatens to expel a villager if he does not vote for the ruling party or a traditional leader or government official who withholds or threatens to withhold food aid to persons unless they vote for the ruling party.

There are further provisions, which seek to stamp out other forms of intimidation that have dogged previous elections within Zimbabwe. Thus it is an offence for a person to use intimidation to prevent or obstruct or attempt to prevent or obstruct a political party or candidate from campaigning in any election. It is also an offence for a person to prevent or discourage a person from voting by taking, destroying or damaging another person's proof of identity, voters' registration certificate or other document by which that person may be identified as a voter.

The Amendment Bill also contains provisions that are intended to ensure that polling stations are not located at sites, which may be intimidatory to voters. Thus polling stations may not be sited:

- in premises owned or occupied by a political party or a candidate;
- in a police station, barracks or other place where police officers or Defence Forces are permanently stationed;
- at any other place that may give rise to a reasonable apprehension by voters that their votes will not be secret or that the integrity of the voting process could be compromised.⁴⁰

It is suggested that the last provision should be interpreted so as to exclude setting up a polling station at the homestead of a Chief. Regrettably many Chiefs are now perceived as being staunch supporters of the ruling party and villagers in the area would thus have a reasonable apprehension that the Chief in question might seek to regiment them and seek to influence the way in which they vote.

The Bill also provides that police officers will be excluded from polling stations, except when they are voting or when they are specifically summoned to assist election officers in quelling a disturbance.⁴¹

Finally, as already indicated, under the Electoral Act at present, illiterate or physically handicapped voters must be assisted in voting by a police officer on duty in the polling station. Some of these voters felt intimidated by the presence of the police officer, and the Bill now excludes police officers from the process.⁴²

These provisions, however, will have an impact in suppressing such electoral malpractices only if they are properly enforced. Regrettably the law enforcement agencies in the past have dis-

³⁹ See the new sec 155 of the Act.

⁴⁰ Clause 38 of the Bill.

⁴¹ Clause 40 of the Bill.

⁴² Clauses 42 and 43 of the Bill.

played serious political partisanship. They have conspicuously failed to prevent or apprehend ruling party supporters who committed assaults on members of the opposition. Even worse, members of these agencies have themselves committed illegal assaults on opposition members. It is imperative that the law enforcement agencies change their patterns of behaviour and enforce these new provisions vigorously, professionally and in a politically neutral manner so as to create an environment in which free and fair elections can take place. A recent report on policing in Zimbabwe states:

Instead of conducting itself as a national security force charged by the Constitution and statute with ensuring public order and security in the country, the ZRP has abandoned its constitutional mandate in favour of an approach to policing which is blatantly partisan. The police repeatedly characterise government opponents and critics and their lawyers as ‘agents of the West’ or ‘enemies of the state’ and routinely violate the rights of these persons during policing operations.

Biased policing further polarises Zimbabwean society and heightens insecurity and political tensions. Everyone in Zimbabwe should be guaranteed equal protection of the law. The IBAHRI asserts that **the absence of such protection is a major obstacle to democracy in Zimbabwe and a considerable impediment to free and fair elections.** (emphasis added)⁴³

It must be added that in the past militia forces have played a very prominent role in intimidating voters. It is therefore essential that all these forces be disbanded immediately.

Where complaints of political intimidation are made to the Electoral Commission, the Commission should be given powers to direct the Commissioner-General of Police to ensure that an urgent and proper investigation is conducted into the complaints. The Commission should specify a time limit within which the Commissioner-General should report back to the Commission on the results of the investigation. Consideration should also be given to empowering the Commission to order the postponement of an election in a constituency if there is evidence that there is widespread intimidation of voters in that constituency or widespread intimidation that is preventing a political party from campaigning in that area. In its draft Electoral Commission Bill, ZESN included these draft provisions:

“In the exercise of its functions, the Commission will have power—

- (a) to take such measures and to do any such thing as may be necessary to secure compliance by every person required to discharge any function whatsoever, including judicial functions, in terms of this Act or the Electoral Act, with any rules or regulations governing the discharge of any such function failure of which will constitute a dischargeable act of misconduct;
- (b) within a period of 14 days of any petition for that purpose, the postponement of an election in any constituency for up to six months if it has reasonable cause to believe that, as a result of actual or threatened intimidation or violence or any other cause, it is unlikely that a free and fair election can be held in that constituency;
- (c) to obtain from or to require the production to it of any information by any person, including persons in the employment of the State, who has custody of any such information as may be required by the Commission for the purposes of discharging its functions in terms of this Act or any other enactment.

⁴³ *Partisan policing: An obstacle to human rights and democracy in Zimbabwe* An International Bar Association Human Rights Institute Report October 2007

Even more drastically, but possibly justifiably in the light of previous experience, the Commission could be given the power to order the postponement of the entire election if there is convincing evidence that the conditions prevailing in the country do not permit the holding of free and fair elections.

Conclusion

It will be apparent from the foregoing discussion that, on the whole, the Amendment Bill introduces welcome changes to the law, which, if properly implemented, will go some way towards remedying the defects in the Zimbabwean electoral system. The qualification “if properly implemented” is an important one, however. Many of the malpractices that have marred elections in previous years have been illegal, that is to say have been carried out in defiance of the provisions of the Electoral Act. For example, in the 2005 election to the Senate, many voters found that their names had been removed from the voters roll on the ground that they, or their parents, had been born outside Zimbabwe and so were not Zimbabwean citizens. This was done without informing the voters concerned, in contravention of the Electoral Act, and without ascertaining whether or not the voters had indeed lost their Zimbabwean citizenship. As a result, the voters concerned were unable to cast their votes in the election. Most of the voters have since been restored to the roll, but there is nothing in the Amendment Bill that will prevent or, indeed, that can prevent their being disenfranchised once again, capriciously and illegally.

Legislation alone cannot prevent such malpractices. Even positive provisions that existed previously were sometimes ignored. The best remedies against them are, firstly, an impartial, efficient and active Electoral Commission; secondly, rigorous observation and monitoring of all stages of the electoral process; and thirdly, impartial and professional enforcement of the laws by law enforcement agencies. Whether the Amendment Bill will provide these remedies is open to doubt.