

Was Statutory Instrument 225A of 2022 a subversion of the independence of the Zimbabwe Electoral Commission?

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Key Words: Elections; Independence; COVID-19; Democracy and Constitution

Abstract

Holding regular elections is an essential characteristic of participatory democracy. However, a case for postponing elections was made during the COVID-19 pandemic following the gazetting of Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (NO. 4) (SI 225A/2020). Despite the critical nature of the issue for democracy, there has been sparse literature on election suspensions in Zimbabwe. The decision to suspend an election and prevent citizens from exercising their right to vote is a major one and should be taken only in a limited set of circumstances. The suspension of elections raised critical questions that have never been addressed before in Zimbabwe's legal framework.

The legislative lacuna surrounding electoral suspension is complicated by the absence of explicit legal provisions that indisputably govern election postponement and suspensions. This research investigates the constitutional and judicial interpretation of suspensions to elections in light of SI225A of 2020, investigating whether the interpretation adhered to the premises of the Constitution and whether a statutory instrument can infringe on constitutionally guaranteed rights and the independence of the Electoral Commission. The analysis and effects of the suspension on electoral integrity will be traced through a comparative analysis of regional and international standards.

1 Introduction

Free and fair elections are a necessary but not sufficient condition of democracy¹ and are central to the development of democratic and inclusive societies. Not only do democratic elections provide means to economic growth and development, since citizens can elect leaders based on their campaign promises and policies on socio-economic development; regular elections also contribute to peacebuilding by conferring authority on leaders, facilitating peaceful transfers of power, and promoting citizens' participation and inclusion in governance.²

In Africa, through the African Union Charter on Democracy, Elections and Governance (ACDEG)³ and Southern Africa Development Community (SADC) Principles and Guidelines Governing Democratic Elections,⁴ among others, member countries have been provided with guidelines and standards which they must comply with to ensure that they conduct credible, free and fair elections. The principles of good governance are founded on supremacy of the constitution and the holding of democratic and credible elections.

1 Schmitter PC and Karl T.L. *What democracy is and is not*. Journal of Democracy, Volume 2 (3) 1991. <https://www.ned.org/docs/Philippe-C-Schmitter-and-Terry-Lynn-Karl-What-Democracy-is-and-Is-Not.pdf> (Accessed 28 September 2022) pp. 75–88

2 Oduro, F. *The Changing Nature of Elections in Africa: Impact on Peacebuilding*. In: McNamee, T., Muyangwa, M. (eds) *The State of Peacebuilding in Africa*. (Palgrave Macmillan, 2021) pp. 163–180

3 African Charter on Democracy, Elections and Governance. Date of Adoption: January 30, 2007

4 Southern Africa Principles and Guidelines Governing Democratic Elections. Adopted on 20 July 2015, Pretoria, Republic of South Africa

The outbreak and subsequent spread of the coronavirus pandemic (COVID-19) has claimed a significant number of lives across the world. The spread of the virus and various government responses have had a significant impact on the electoral cycle. These different approaches to managing elections during a pandemic raise a number of questions about the risks to democracy in the presence of an external threat, such as COVID-19, and join a wide range of questions concerning risk, democracy, and public participation.⁵

In this article, I argue that the COVID-19 pandemic posed a significant risk to Zimbabwe's ability to guarantee free and fair elections and that appropriate measures needed to be taken to offset the risks that the public health emergency posed on both public health protection and electoral integrity. I illustrate how the pandemic may affect critical elements that constitute free and fair elections. However, any action to mitigate the electoral risks from the pandemic, including cancellation and postponement of elections, must be dictated by legislation and the constitution. Postponement of elections outside of legislative authority can create a power vacuum, constitutes abuse of power, and potentially can be used to further consolidate authoritarian rule and undermine the reconsidering.

This article provides a comparative overview of the use of postponement of elections in Africa. The argument is made that elections should be viewed as a central part of democracy. Their effectiveness is dependent on the regularity, inclusiveness and credibility of the processes and outcomes. However, in situations where the delivery of these tenets is in doubt because of a public emergency, the decision to suspend or cancel elections must be lawful, that is it must be explicitly guided by law including laws governing the time frames for holding elections.

2 Constitutional Framework for Elections

The Constitution of Zimbabwe⁶ guarantees political rights,⁷ and electoral principles, which are central to Zimbabwe's democracy. These principles include free, fair and regular elections;⁸ a multi-party democratic political system;⁹ timing of elections¹⁰ and the filling of electoral vacancies¹¹ when they occur. These principles dictate the conduct, manner, and timing of elections.

3 Timing of Elections

As is the case with all other principles guaranteed in the Constitution, rights and principles guiding elections are fully justiciable. The state through the Zimbabwe Electoral Commission (ZEC) has duties to protect, promote and fulfil these rights. The duty extends to refraining from interfering with the existing access to these rights and obligations.

The timing of elections is expressly guaranteed in section 158 and section 159 of the Constitution and sections 38 and 39 of the Electoral Act which designate that a general election must be held not more than thirty days before the expiry of the five-year period of Parliament.¹² In the case of electoral vacancies, section 159¹³ states that whenever a vacancy occurs, an election to fill the vacancy must be held within ninety days. The Constitution and subsidiary legislation do not provide for the extension of this term of five years nor an extension of a vacancy beyond the ninety-day period envisaged by the Constitution.

5 Weblert T, Tuler. S. *Four Decades of Public Participation in Risk Decision Making*. Society for Risk Analysis (2018) <https://doi.org/10.1111/risa.13250> (Accessed 21 September 2022)

6 Constitution of Zimbabwe Amendment (No. 1) Act, 2017

7 See s 67 of the Constitution

8 See s 3 (2) b ii of the Constitution

9 See s 3 (2) a of the Constitution

10 See s 158 of the Constitution

11 See s 159 of the Constitution

12 See section 158 of the Constitution of Zimbabwe 2013 which states that:

- (1) A general election must be held so that polling takes place not more than—
 - (a) thirty days before the expiry of the five-year period specified in section 143;
 - (b) where Parliament has passed resolutions to dissolve in terms of section 143(2), ninety days after the passing of the last such resolution; or
 - (c) where Parliament is dissolved in terms of section 109(4) or (5) following a vote of no confidence, ninety days after the dissolution.

13 See s 159 of the Constitution

4 Postponement of Elections

4.1. Comparative Law

4.1.1 African Court on Human and Peoples' Rights

On July 16, 2021, the African Court on Human and Peoples' Rights issued an advisory opinion¹⁴ on the right to participate in a country's election that are held during a public health emergency or a pandemic, such as the COVID-19 crisis. With regard to the questions brought forward by the applicant, the Court condensed them as follows:

- A. On the decision to conduct or not to conduct elections in the context of a public health emergency or a pandemic
- B. On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic
- C. On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic.

Regarding the first issue (A), the Court noted that the African Charter of Human and Peoples Rights¹⁵ (as supplemented by Article 2 and 3¹⁶ of the African Charter on Democracy, Elections and Governance) leaves the decision to conduct or not to conduct elections, with the competent organs of the State concerned;¹⁷

“Concerning the postponement, the Court notes that, Article 13(1) of the Charter, as supplemented by Articles 2 and 3 of the ACDEG, by referring to domestic law, the determination of conditions for the exercise by citizens of the right to participate freely in the governance of their countries, gives the competent bodies of each State the power to decide to postpone elections in accordance with its domestic law.”¹⁸

Domestic law dictates the conditions under which elections are held and therefore, subsequently it is also for the states to determine whether to postpone an election in an emergency.

“The Court is of the view that the provisions refer back to domestic law the definition of the conditions for the exercise by the citizens of their right to participate in elections, including in particular their postponements.”¹⁹

However, a postponement should be an exception to the principle that elections must be held regularly, within the required timeframe. In making such a decision, the Court must take steps to ensure that, if an election is held during such a situation, it is safe and inclusive.

4.1.2 South Africa

Section 21 (1) of the Electoral Act of South Africa²⁰ allows the Independent Electoral Commission of South Africa (IEC) to request the person who called an election to postpone the voting day for that election, provided the Commission is satisfied that the postponement is necessary for ensuring free and fair elections.²¹ The new voting day for the election must still fall within the 90-day period as required by section 159 (2) of the Constitution.²² The IEC has a constitutional duty in terms of section 190(1)(b) of the Constitution²³ to ensure that free and fair elections take place in terms of the relevant legislation.

14 ACHPR Advisory Opinion on Request No. 001/2020 by the Pan African Lawyers Union (PALU) on the Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic, such as the COVID-19 Crisis

15 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

16 ACDEG, Article 2: “The objectives of this Charter are to: 3. Promote the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments;” Article 3: “State Parties shall implement this Charter in accordance with the following principles: 4. Holding of regular, transparent, free and fair elections.”

17 ACHPR Advisory Opinion at para 54

18 At para 52

19 At para 96

20 Act No 73, 1998

21 Section 21 (1) (a) Electoral Act No 73, 1998

22 Constitution of the Republic of South Africa, 1996

23 Ibid

4.1.3 Nigeria

In Nigeria the authority to postpone elections is vested in the Independent National Electoral Commission (INEC). The Electoral Act, section 24 (2) states that:

“Where a date has been appointed for the holding of an election, and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the Commission may postpone the election and shall in respect of the area, or areas concerned, appoint another date for the holding of the postponed election, provided that such reason for the postponement is cogent and verifiable.”²⁴

Before the first cases of Covid-19 in Nigeria were identified, the INEC had scheduled two gubernatorial elections in Edo and Ondo States which were originally scheduled for 19 September and 10 October 2020, respectively. According to the INEC, it would have been legally impossible to postpone these two elections.²⁵ The INEC Chairman explained that the INEC considered it imperative to synchronise all electoral planning and activities to avoid a possible legal lacuna, arguing that *‘[o]ur democracy and electoral processes cannot be truncated due to [a]pandemic.’²⁶*

5 Electoral Framework in Zimbabwe – Suspension of Elections

The Zimbabwe Electoral Commission (ZEC) is the constitutional body empowered to prepare for, conduct and supervise elections.²⁷ Historically, section 123 of the Electoral Act²⁸ provided for the postponement of elections. It provided that: “Notwithstanding any other provision of this Part, if the Commission considers that it is necessary to postpone any election— (a) to enable a voters’ roll to be prepared or updated; or (b) for any other reason, to enable the election to be held properly in accordance with the Electoral Act.”²⁹ The provision empowered the Commission to postpone elections to a date not later than one year after the date on which the postponed election was due. However, this section was repealed by s.68 of Act No. 17 of 2007.

Currently, there are no expressed statutory provisions that explicitly allow ZEC, the authority, to postpone elections. Sections 192 (5) and 132 (1) of the Electoral Act³⁰ qualify alterations to the dates on which electoral processes and by-elections must occur. According to s192 (5), the Commission may alter any period specified arising out of or resulting from any election, while section 132 (1) (a) states that where anything is to be done by a particular date, the Commission may direct that the thing is to be done by a different date. However, the alterations to by-elections should occur within the confines of the timelines established by the Constitution. In January 2019, following nationwide protests during which security forces fired live ammunition, killing 17 people, and raped at least 17 women,³¹ the Electoral Commission altered the dates of Chitungwiza Ward 24 and Bulawayo Municipality Ward 28 Local Authority By-Elections citing that *‘It is now not feasible to conduct free and fair by-elections on the fixed days due to unforeseen circumstances.’³²* The by-elections were postponed to a date within the 90-day period prescribed for holding those by-elections. The legislative framework does not provide for altering dates beyond the constitutionally prescribed periods for holding elections.

24 Electoral Act, 2010 (No. 6 of 2010) Section 24 (2)

25 Sani. I. “Nigerian State Elections during the Covid-19 Pandemic Case Study”, *International Institute for Democracy and Electoral Assistance*, 23 August 2021. <https://www.idea.int/sites/default/files/nigerian-state-elections-during-the-covid-19-pandemic-en.pdf> (Accessed 31 October 2022)

26 Sani. I. “Nigerian State Elections during the Covid-19 Pandemic Case Study”, *International Institute for Democracy and Electoral Assistance*, 23 August 2021. Accessed at <https://www.idea.int/sites/default/files/nigerian-state-elections-during-the-covid-19-pandemic-en.pdf> on 31 October 2022

27 See s 239 of the Constitution

28 Electoral Act [2:13] of 2007

29 Section 23 of the Electoral Act [2:13] of 2007

30 Electoral Act [Chapter 2:13]

31 Human Rights Watch. *Zimbabwe: Excessive Force Used Against Protesters* 12 March 2019 <https://www.hrw.org/news/2019/03/12/zimbabwe-excessive-force-used-against-protesters> (Accessed 5 August 2022)

32 Zimbabwe Electoral Commission. *Local Authority By-Elections: Alteration Of Dates: Chitungwiza Ward 24 And Bulawayo Municipality Ward 28* <https://www.dropbox.com/s/5nb1wsrkadrofwh/Election%20Notice%20-%20%20local%20authority%20%20by%20elections%20chitungwiza%20and%20bulawayo%20%28%29.pdf?dl=0>

On the 25th of March 2020, the ZEC suspended electoral activities by tweet, as a “precautionary measures to protect its employees and the general public from the (COVID-19) pandemic.”³³ Electoral activities that were suspended included by-elections. The Constitution³⁴ and the Electoral Act³⁵ prescribes timeframes for holding by-elections and filling vacancies. Elections and by-elections are constitutionally and legally prescribed and could not be suspended by way of a press statement only, as ZEC had not taken any subsequent steps beyond the tweet to legalise the suspension of electoral activities by gazette as envisioned by section 192 (6) of the Electoral Act.³⁶

In response to criticism,³⁷ the Minister of Health and Child Care, Retired General Constantino Dominic Chiwenga, issued Statutory Instrument 225A of 2020.³⁸ The purpose of the decree was to suspend;

*“the holding of any by-election to fill a casual vacancy in Parliament or in a local authority is, for the duration of the period of the declaration of COVID-19 as a formidable epidemic disease, suspended ...”*³⁹

6 Principles taken into account when suspending elections

When considering the concept of free and fair when faced with a postponement of an election, due consideration needs to be given to the value of the crisis and its impact on free and fair elections. In the *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs*⁴⁰ case, the Constitutional Court was faced with an application that would result in the postponement of elections in the light of the Covid-19 pandemic and its impact on free and fair elections. On 20 May 2021, the IEC had appointed Justice Moseneke in terms of section 14 (4) of the Electoral Commission Act to inquire into the likelihood of the 2021 local government elections being free and fair in light of the Covid-19 pandemic.⁴¹ The IEC considered it prudent to commission this process following representations by political parties in the National Political Party Liaison Committee⁴² concerned with the trajectory of the pandemic and the holding of elections under those conditions.⁴³

On 20 July 2021, the Moseneke Inquiry produced its report in which it recommended that the local government elections be postponed to February 2022,⁴⁴ as they were unlikely to be free and fair if held in October 2021.⁴⁵ The IEC, on the recommendations of the Moseneke Inquiry, approached the Court on the basis that, although it had a constitutional and statutory obligation to hold the forthcoming local government election in October 2021, it would not be able to hold a constitutionally compliant election. It, therefore, sought an order that declared that it could hold the local government election outside the 90-day period.⁴⁶

33 Zimbabwe Electoral Commission 2022 [Twitter] 26 March. Available at <https://twitter.com/ZECzim/status/1243124683131817985> (Accessed 18 September 2022)

34 Section 159 of the Constitution of Zimbabwe

35 Section 39 of the Electoral Act

36 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*

37 Election watchdog, Election Resource Centre had raised concerns around the conduct of the Zimbabwe Electoral Commission and that ZEC should be guided by the relevant legislation and the Constitution of the land in suspending electoral activities. Available at <https://kubatana.net/2020/06/09/erc-statement-on-zec-press-release-on-suspension-of-by-elections>

38 Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 4)

39 At section 2

40 [2021] ZACC 29

41 The Commission appointed Justice Moseneke in terms of section 14(4) of the Electoral Commission Act, 1996, which provides that that “[t]he Commission may, if it deems it necessary, publish a report on the likelihood or otherwise that it will be able to ensure that any pending election will be free and fair.”

42 Electoral Commission Act, 1996

43 See <https://www.gov.za/speeches/electoral-commission-appoints-former-deputy-chief-justice-dikgang-moseneke-evaluate> (Accessed 30 October 2021)

44 Justice Dikgang Moseneke. A Report to the Electoral Commission of South Africa in Terms of Section 14(4) Read With Section 5(2)(A) Of The Electoral Commission Act (2021). [https://www.elections.org.za/freeandfair/Live/20210720%20A%20REPORT%20TO%20THE%20ELECTORAL%20COMMISSION%20OF%20SOUTH%20AFRICA%20IN%20TERMS%20OF%20SECTION%2014\(4\)%20READ%20WITH%20SECTION%205\(2\)\(a\)%20OF%20THE%20ELECTORAL%20COMMISSION%20ACT%20\(Final%20edits%20-%2020210726\).pdf](https://www.elections.org.za/freeandfair/Live/20210720%20A%20REPORT%20TO%20THE%20ELECTORAL%20COMMISSION%20OF%20SOUTH%20AFRICA%20IN%20TERMS%20OF%20SECTION%2014(4)%20READ%20WITH%20SECTION%205(2)(a)%20OF%20THE%20ELECTORAL%20COMMISSION%20ACT%20(Final%20edits%20-%2020210726).pdf) (Accessed 30 October 2022) at paras 256 and 321

45 Moseneke Report at para 321

46 Referred to in section 159 of the Constitution and section 24(2) of the Municipal Structures Act

The Court,⁴⁷ when faced with the application to postpone elections, emphasised the importance of regular elections for local government to remain democratic, accountable, responsive, and open⁴⁸ and adhering to the time-limit is therefore of utmost importance.⁴⁹ Importantly, the Court also emphasised that the determination would depend on the standard for free and fair elections which applies in the context of Covid-19 and whether the standard should be altered in the face of a public emergency. It does not follow that the resultant elections would, in an *ex post facto* (after the fact) assessment, be found to be free and fair. An *ex post facto* challenge would be the occasion to decide what exactly the standard of freeness and fairness entailed in the circumstances.

The Court referred to the judgement in *Kham v Electoral Commission*⁵⁰ in which it held that there was no internationally accepted definition of the term “free and fair” elections, an election must be assessed in context, and that the assessment ultimately involves making a value judgement.⁵¹ The Court also held that the standard of free and fair elections “must at least to an extent be conditioned by the circumstances prevailing in a country.”⁵² The Court noted that the standards by which international observers assess free and fair elections remain vague. There had been little progress in the development of a practical set of criteria by which to judge whether an election has been free and fair.⁵³ The Court held that the Commission’s constitutional duty was to conduct the elections, making them as free and fair as circumstances reasonably permitted.⁵⁴

If in law the standard of free and fair elections must be adjusted to take into account the existence of the pandemic and the restrictions brought in its wake, it cannot be said at this stage that timeous elections will not meet that standard.⁵⁵

First, the standard of free and fair elections may be altered in light of the Covid-19 pandemic, making it more difficult to establish that the 2021 local government elections were not free and fair in terms of an altered standard with paramount importance being placed on the following elements:

*“First, every person who is entitled to vote should, if possible, be registered to do so. Second, no one who is not entitled to vote should be permitted to do so. Third... the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area are registered and permitted to vote. Fourth, the Constitution protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.”*⁵⁶

The Constitutional Court has been reluctant to provide relief in postponing elections with emphasis given to the importance of regular elections to “remain democratic”. Echoing the sentiments of Chief Justice Mogoeng, postponement of elections beyond prescribed constitutional timeframes “would create a constitutional crisis.”⁵⁷

7 Independence of ZEC

Independence of an electoral commission implies free from undue interference from anyone including not being subject to the direction or control of the executive, political parties, interest groups and individual candidates. Independence in an election management body is essential for establishing public trust in elections. This is also in the spirit of the African Charter on Democracy, Election and Governance in article 15.2,⁵⁸ which stipulates that “state parties shall ensure that the independence of or autonomy of institutions [that promote and support democracy] is guaranteed by the constitution.”

47 *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29

48 *Ibid* at para 161

49 Para 154(d)

50 *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC)

51 *Ibid* at para 34

52 Kruyer. C. *The Prospects Of Legal Challenges To The 2021 Local Government Elections*. 26 October 2021 <https://hsf.org.za/publications/hsf-briefs/the-prospects-of-legal-challenges-to-the-2021-local-government-elections> (Accessed 27 July 2022)

53 *Kham v Electoral Commission* at para 190

54 *Ibid* at para 206

55 *Ibid* at para 226

56 *Ibid* at para 34

57 *Ibid* at para 131

58 African Union (2007) African Charter on Democracy, Elections and Governance, Addis Ababa, African Union, Assembly/AU/Dec.147 (VIII)

The issue is whether the conduct of the Minister of Health, in implementing SI 225A of 2020, impinged on the affairs of the Commission in a manner which affected its independence in the carrying out of its functions, or whether such conduct constituted a threat to do so.

It is clear that the Zimbabwe Electoral Commission perceived itself as bearing responsibility for election administration in Zimbabwe. On 19 August 2020, the Commission published the ZEC Covid-19 Policy on Electoral Activities which amongst other,

“to provide guidance on procedures and conduct of electoral activities/processes in a Covid-19 prone environment. This stems from the realization that the pandemic will be with the world for some time to come and it is now the “New Normal”, hence the need to navigate through it.”⁵⁹

Nor was it the only instance in which ZEC believed this perception. On 15 September 2020, the ZEC Chairperson Priscilla informed the public that,

“It (ZEC) had lifted with immediate effect the suspension of electoral activities... with the lifting following cautionary observation of the pandemics trends and the drafting and operationalisation of the COVID-19 Policy on Electoral Activities.”⁶⁰

What emerges clearly is that the Chairperson of the ZEC and the Chief Elections Officer regarded the Electoral Commission as the competent authority vested with the constitutional mandate to administer elections. The Constitution places a constitutional obligation on organs of state to assist and protect the Commission in order to ensure its independence. The Constitution guarantees that the Electoral Commission is independent and is not subject to the direction or control of anyone. Section 239 of the Constitution details the functions of the Commission, being to prepare for, conduct and supervise elections and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law.

Constitutionally, it is apparent from the functions listed under section 239 of the Constitution that the Commission's function in the electoral environment is not supervisory. The functions relate to an active administration of elections which no other constitutional and statutory body is vested with the authority to administer elections. The Minister of Health caused SI 225A of 2020 to be passed notwithstanding the fact that the Commission had published their COVID-19 Policy on Electoral Activities and had lifted the suspension on electoral activities. Additionally, the Minister of Health caused the statutory instrument to be gazetted even though it could lead to the disenfranchisement of voters, violating the constitutional right to regular elections.

The statutory instrument was inconsistent with the Constitution because according to section 158(3) of the Constitution,⁶¹ the holding of by-elections is mandatory and must take place within ninety days after the vacancies occurred. The instrument purported to suspend the holding of by-election which contradicted the Constitution. The legality of the provision was questioned in the *Ellah Tayengwa v ZEC & Ors*⁶² case, where the court held that the Zimbabwe Electoral Commission, a key player in the preparation for, conducting and supervision of an election was not designated as an essential service in the national lockdown legislation.⁶³ It meant that it was constrained from fulfilling its constitutional mandate to hold elections within the prescribed timeframes. The court held that the legality of that legislation was not questioned, missing an opportunity to address the concerns around the independence of the electoral commission in light of SI 225A of 2020.

The Public Health Act, under which the statutory instrument was issued had no capacity to amend or vary the provisions of the Constitution governing the timeframes for holding elections and by-elections. Unlike other

59 Zimbabwe Electoral Commission. *Covid-19 Policy on Electoral Activities*. 19 August 2020. https://www.veritaszim.net/sites/veritas_d/files/ZEC%20COVID%2019%20POLICY%20ON%20ELECTORAL%20ACTIVITIES%20%283%29.pdf (Accessed 15 November 2022)

60 ZEC Lifts Suspension of Elections. *Herald*. (15 September 2020) <https://www.herald.co.zw/just-in-zec-lifts-suspension-of-elections/> (Accessed 15 November 2022)

61 Constitution of Zimbabwe Amendment (No. 1) Act, 2017

62 *Ellah Tayengwa & 7 Ors v ZEC & 2 Ors*. Case No HC 5854/20

63 S.I. 83 of 2020

jurisdictions, such as Kenya and Nigeria where the law permits the postponement of elections in the event of public emergencies, in Zimbabwe the law does not permit this. The Constitution clearly provides that “statutory instruments must be consistent with the Act of Parliament under which they are made.”⁶⁴ The suspension of electoral activities through SI 225A of 2020 undermined the administrative independence of and electoral democracy.

The decision by the Minister of Health to suspend electoral activities subverted the political rights of Zimbabweans, in particular their right to political representation. The extent that the SI promulgated by the Minister of Health sought to bar ZEC from organising elections, it unlawfully interfered with ZEC’s constitutional mandate to administer elections. While, there is no doubt that the power to postpone or suspend elections are necessary in situations of emergencies, such powers must be exercised lawfully and in accordance with certain minimum standards namely: to postpone elections in accordance with its domestic law and for the domestic law to define the conditions for postponing elections taking into account the practicality of conducting a free and fair election, with due consideration given to making them as free and fair as circumstances reasonably permitted. With the Electoral Commission implementing their COVID-19 Guidelines on Electoral Activities as a preliminary step to holding by-elections, SI 225A of 2020 infringed on the Commissions independence.

8 Ellah Tayengwa Case

In response to the gazetting of SI 225A of 2020, Ellah Tayengwa and seven others filed a High Court⁶⁵ application seeking a relief against the ZEC, the President of Zimbabwe and the Minister of Health that the ZEC and President of Zimbabwe’s omissions in not holding by-elections, was in breach of The Electoral Act, Public Health Act and sections 258 and 259 of the Constitution of Zimbabwe. Additionally, SI 225A/2020 was *ultra vires* Section 158 and Section 159 of the Constitution of Zimbabwe and sections 39 and 121A of the Electoral Act.

The applicants averred that s158(3) of the Constitution required that by-elections for vacancies in Parliament and local authorities take place within 90 days after the vacancy arose. Section 159 of the Constitution and Section 39 of the Electoral Act required that whenever a vacancy occurred in any elective public office, the authority charged with organising elections to that body must cause an election to be held within ninety days to fill the vacancy.

The court determined that the Amendment Regulations are not *ultra vires* ss 158 of the Constitution, 39 and 121A of the Electoral Act since the regulations were made in terms of a law of general application which, in terms of the Constitution, can be utilized to limit certain fundamental human rights and freedoms. The right to vote and the holding of an election that was free, fair and credible were all part of the fundamental rights and freedoms that were subject to limitation in terms of a law of general application.

In responding to the administrative independence of the Electoral Commission, the Court fell short in addressing the independence of the Commission in relation to SI225A of 2020. The Court held that ZEC was a key player in the preparation for, conducting and supervision of an election. However, it was not designated as an essential service in the national lockdown legislation. Therefore, it meant that it was constrained from fulfilling its constitutional mandate as a result of that legislation. The legality of that legislation was not questioned. It was not an issue before the court.⁶⁶

9 Conclusion

Elections are at the bedrock of the democratic process. They are indispensable towards achieving participatory democracy. The paradox around the postponement of elections is that postponing elections will break constitutionalism and can trigger breakdown and trust in the electoral system. However, there is also a fiduciary duty on the State and State Institutions to protect citizens from public emergencies and an even greater duty on the Electoral Commission to ensure that it delivers an election that is free and fair when mandated to do so.

64 See Section 134(c) of the Constitution

65 *Ellah Tayengwa & 7 Ors v ZEC & 2 Ors* Case No HC 5854/20

66 *Ellah Tayengwa* at pages 24–26

In the *Kham v Electoral Commission*⁶⁷ case, the court aptly addressed this paradox when faced with a postponement of elections beyond the prescribed time frames and the delivery of a free and fair election. The Court held that there is no internationally accepted definition of the term “free and fair elections”⁶⁸ Whether any election can be so characterised must always be assessed in context. Ultimately it involves a value judgement,⁶⁹ conditioned by the circumstances prevailing in a country at any given time, with paramount importance being placed on ensuring that every person who is entitled to vote should, if possible, be registered to do so. Second, no one who is not entitled to vote should be permitted to do so.⁷⁰ Electoral stakeholders must attempt to take clear steps to develop a practical set of criteria by which to judge whether an election has been free and fair; however, this criterion must be assessed based on the prevailing environment.

But what is clear from the discourse is the reluctance of institutions to postpone elections beyond constitutional and legal time frames due to the constitutional crisis that would prevail. It is up to domestic law to dictate the conditions under which elections are held, and therefore, subsequently, it is also for the states to determine whether to postpone an election in an emergency; however, the grounds for postponement should be entrenched in law and be clear. Electoral stakeholders in Zimbabwe must take steps to implement legislative reforms to entrench clear laws around election postponement and the grounds which qualify for postponements.

Elections rely heavily on procedure. ZEC must remain true to that approach. Whether it is proposals for the implementation of a legal amendment, the introduction of new rules or policies or the provision of new guidelines, changes must be properly and clearly articulated to offer guidance to the electoral officials who will be implementing them or the stakeholders who need to comply with them. In executing these responsibilities, ZEC must be practical and adaptive to the changing environment.⁷¹

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67 [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC)

68 There is even a shift among international observers towards abandoning the “free and fair” standard and to ask instead whether the election is a legitimate expression of the will of the people or properly reflects the wishes of the people. In response to a question from the Swedish Ministry of Foreign Affairs regarding this shift in the public discourse over elections, the ACE Electoral Knowledge Network said:

“[A] shift has indeed taken place in the discourse of terms used to characterize the conduct of elections, and that consequently there are fewer references to elections as “free and fair”. This shift was seen as a trend which began in the 1990s, when elections that were described as “free and fair” at the same time could be seen by analysts to lack integrity, and it was also predicted to become a more widespread trend in the future. Moreover, one [Practitioners’ Network] member expected that the trend would go further as countries engage with new elections related technologies.

Information available from the ACE website (15 February 2013). Accessed at <http://aceproject.org/electoral-advice/archive/questions/replies/54818966>

69 *Kham v Electoral Commission* at para 34

70 At para 34

71 Commonwealth Elections and COVID-19 Briefing Paper. *COVID-19 and Election Management in Africa: Challenges, Innovations and Opportunities*. Issue 1 of 2021. The Commonwealth. <https://www.thecommonwealth.io/wp-content/uploads/2021/03/CWElection-andC19AfricaFN.pdf> (Accessed 21 October 2022)

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