A CRITICAL ANALYSIS OF VOTERS' RIGHT TO PARTICIPATION IN ELECTORAL PROCESS IN UGANDA: THE DISTINCTION BETWEEN THE THEORY AND PRACTICE AFTER THE 1995 CONSTITUTION

A Thesis

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Degree of Master of Laws in Public International Law

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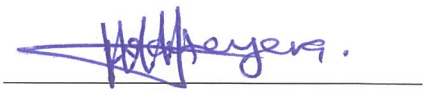
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DECLARATION A

"This Thesis is my original work and has not been presented for a Degree or any other academic award in any University or Institution of Learning".



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DECLARATION B

"I confirm that the work reported in this Thesis was carried out by the candidate under my supervision".



NOVEMBER 12, 2014.

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APPROVAL SHEET

This Thesis entitled "**A Critical analysis of Voters' Right to participation in electoral process in Uganda: The distinction between the theory and practice after the 1995 constitution**" prepared and submitted by Watenyera Richard in partial fulfillment of the requirements for the degree of a Master of laws -Public International Law; has been examined and approved by the panel on oral examination.

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DEDICATION

I dedicate this research work to my brothers, Makugi Bosco and Makuyi Michael and to my Wife Dr. Winfrida Halinga, friends and course mates. To all Ugandans whose rights were violated during election periods.

ACKNOWLEDGEMENTS

Above all, the researcher thanks God Almighty for His provision towards the accomplishment of this program in his life time.

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I also thank my family members my brothers Makuyi Bosco, Makuyi Michael and all my sisters Nabuso Catherin, Sarah Nandutu and Nekesa for the financial support rendered to me right from the time I began my studies to the time of completion. In addition to the above, To Dr. Tom Mulegi and his wife Elena Mulegi, Ochwo Geoffrey, without them, my study would not be successful.

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AU	Africa Union
CD	Compact Disk
CSSDCA	Conference on Security, Stability Development and Co-operation in Africa
EC	Electoral commission
EAC	East African Community
EACPGG	East African Community Protocol on Good Governance
EOM	Europe Union Observer Mission
EU	European Union
FDC	Forum for Democratic Change
FM	Frequency Modulus
ICCPR	International Covenant on Civil and political Rights
IPC	Inter-Party Coalition
LC	Local Council
MoU	Memorandum of Understanding
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organization
NRA	National Resistance Army
NRM	National Resistance Movement
NTV	Nation Television
NUWODE	National Union of Women with Disabilities

SADC	Southern African Development Community
UBC	Uganda Broadcasting Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPC	Uganda People's Congress
UPDF	Uganda People's Defense Force
WBS	Wava Broadcasting Service

LIST OF LEGISLATIONS

Supreme law

The Constitution of the Republic of Uganda Amended 1995 [as at 15 February 2006].

Acts

Political Parties and Organisations Act No. 18 of 2005 (Amendments) Act 2010, Act No.13 of 2010

The Presidential Elections Act No. 16 of 2005. (Amendments) Act 2010, Act No.14 of 2010

Parliamentary elections Act of 2005 (As Amended) Act 2010, Act No.12 of 2010.

Electoral Commission Act (Amendments) Act 2010, Act No.15 of 2010

The Local Government Act Cap: 243 of 1997

The Access to Information Act 2005.

The Anti-Corruption Act, No.6/2009, 14 May 2009.

The Press and Journalist Act (PJA), Cap. 104.

The Public Order Management Act 2013

Regional legislations

Constitutive Act of the African Union (2000)

African Charter on Human and Peoples' Rights, ACHPR, (1981)

African Charter on Democracy, Elections and Governance, ACDEG, (2007)

African Union Declaration on the Principles Governing Democratic Elections in Africa (2002)

Protocol to the African Charter on Human and Peoples' Rights on the Women in Africa (2003)

International instruments

Universal Declaration of Human Rights (UDHR) (1948)

International Covenant on Civil and Political Rights (ICCPR) (1966)

United Nations Declaration on the Rights of Disabled People (1975)

United Nations Convention on the Elimination of all Forms of Discrimination against Women (1979).

United Nations Convention on the Rights of Persons with Disabilities (2006)

Inter-Parliamentary Union Universal Declaration on Democracy (1886)

LIST OF CASES

Dr. Kizza Besigye v. The Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006., the Judgment of Kanyeihamba JSC,

Kakooza John Baptist Vs Electoral Commission and Iga Anthony Supreme Court Election Petition Appeal No.11/2007.

Election Petition Appeal No.12 of 2002: Amama Mbabazi vs Musinguzi Garuga and Election Petition Appeal No.24 of 2006.

The case of Iddi Lubyayi kisiki v Kiyingi Deogratius, electoral commission and others in Bukomansimbi district in election petition No. 0001 of 2011.

Morgan vs Simpson & Another (1974) 3 All ER 722 at 728.

Gunn vs. Sharpe (1974) 2 All ER 1058.

Hackney case (1874) 2 O'M & H 77.

Ishington case (1901) 17 TLR 210.

Major General David Tinyefuza vs. Attorney General in Constitutional petition No.1 of 1996.

Major Rubaramira Ruranga v. Attorney General, Const. Pet. No. 8 of 2006.

Ssemwogerere and Others vs. Attorney General, Constitutional Appeal 4/2002.

Charles Onyango Obbo & Andrew V Anthony General, (2004).

Abdu Katuntu vs. All Kirunda Kivenjinja and the Electoral Commission, Election Petition No.7 of 2006.

Katangese Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights, Comm. No.75/92, 1995.

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ABSTRACT

This research focused on a critical analysis of voters' right to participation in electoral process in Uganda: The distinction between the theory and practice after the 1995 constitution. The major objective was to Critic the legal framework of Uganda electoral legislation standards to voter's rights of participation in election process, to critic the legal system of institutions in ensuring voter's rights of participation in elections periods in Uganda, to draw the gap between the theory and practice of the election administration process in respect of voter's rights of participation in election process in Uganda. Research used relevant tools to this study was a combination of desk research, primary research (through qualitative techniques and methods of data collection. Chapter two: looked at the legal framework of voter's rights of participation in election process. Chapter three: focused on the legal system of institutional management in ensuring voter's rights of participation in elections in Uganda. Chapter four: examined the respect of voter's rights of participation: the theory and practice of election administration process in Uganda, it was revealed that Uganda's electoral laws do not inhibit the practice of free and fair elections, voters' rights have increasingly violated in elections show that there is a shortfall of legal demand as a result of intimidation, fraud manipulation that have continued to influence the gist of election outcome. Election Administration, in its preparations, have eventually succumbed to the excessive pressure of administering presidential and direct parliamentary elections. Chapter five looked at the summary, conclusion and recommendation of the findings, it was recommended that voters rights of participation in election has not been fully realized and the problem of lack of trust in the Electoral Commission could be addressed by amending the law on the basis for the transparent appointment of Commissioners and other related laws for respecting voters rights of participation in election process in Uganda.

CHAPTER ONE

THE PROBLEM AND ITS SCOPE

1.0 Introduction

This chapter presented the background, problem statement, purpose of the study, specific objectives, research questions and corresponding scope and significance of the study, definition of the key terms, review of related literature, and methodology of the study and chapterization of the thesis.

1.1 Background of the study

The research focused on a critical analysis of voters' right to participation in electoral process in Uganda: The distinction between the theory and practice after the 1995 constitution. Uganda has a presidential system of governance with the President elected to act as Head of State and of Government and Commander in Chief of the Armed Forces. The Constitution empowers the President to make executive appointments, subject only to simple majority confirmation by Parliament.

The right to vote and participate in the political process of a state is a core of the foundation of state's democracy. [1]It is a voter's right which is of immense practical as well as a symbolic importance, for it is enshrines the principle of political and civil equality under the law and thereby underpins of the contemporary rights of the voter's for political, economic, social and cultural rights. Fair elections allows ordinary voter to be accountable in power control as individual rights.[2] Election empowers citizens to govern and interpret what is of public interest as it reflects good governance.

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[1] *Article.1 of the 1995 constitution, "All power belongs to the people who shall exercise their sovereignty in accordance with this constitution.*

[2] *The 1948 Universal Declaration of Human Rights.*

Electoral freedom is the ability of the people to freely express their will, determine their political status and choose their representatives without coercive pressure, which is ensured by the specific rights that electoral freedom encompasses include the right of equal access to direct or indirect political participation;[3] the right to non-discrimination; and the freedoms of expression, assembly, association, and access to media. Furthermore, states are required to ensure that elections proceed smoothly and produce fair outcomes by passing clear laws regarding electoral management and election dispute mechanisms; and establishing independent institutions, such as an EC and observers to enforce and monitor these election management laws. It is especially crucial that the government implements adequate voter education and takes proactive measures to prevent election-related violence.

States have four elements of which a constitution should provide: legislative whose members should consist of representatives of the people, universal adult suffrage, elected at regular intervals by means of majority vote, the chief Executive elected by the people or chosen from among the members of the legislature and independent judiciary whose basic duty should be to safe guard the liberties of the people as defined in the law and the constitutions[4].

The primary indicator of electoral freedom is the ability of the people to freely express their system, and any other democratic and representative political system. [5]The Constitution stipulates the principles to which the Movement political system must conform, as well as the fundamental features and principles of the multi-party political system; it is silent, however, with regard to the features and

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[3] *Article 69(1) of the 1995 Ugandan Constitution.*

[4] *Babwegyera T. (2000), People's Power: challenges and Prospect s of Democracy in Uganda.*

[5] *Ibid, Article 69(2).*

principles attached to the third political system provided. Overall, Uganda's legislation recognizes the importance of conducting free and fair elections and requires that the country's elections proceed accordingly. Compliance in practice, however, will be determined by assessing the compliance with the rest of the electoral administration requirements.

The first national elections in Uganda were organized in 1958 to the parliament, during the Uganda protectorate. In 1961 elections of members to the legislative Assembly were held, those where the first general elections in the history of Uganda based on Universal Adult Suffrage but they were boycotted by Buganda at the instigation of the Mengo establishment.[6] Since independence in 1962 the country has held a number of general elections under varying political conditions. The fact that after the 1964 referendum on the lost counties, no major elections were held in Uganda immediately after independence with the exception of the local council elections of 1965, in Buganda, Ankole, and Busoga.[7] These elections were nullified after it became clear that the Democratic Party was victorious and new elections announced after changing polling stations which made voting more difficult.[8]

The election law by the time of independence was the legislative council (elections) ordinance, 1957 which was later on modified and became the National Assembly Election Act 1964. In accordance with 1962 constitution, the party with the majority seat took over the government. Consequently, then the prime minister Apolo Militon Obote abrogated the 1962 constitution and introduced the

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[6] *Williams Breytenbach (1992): Democratization in Sub-Saharan Africa.*

[7] *Morris and Read (1965); Uganda Development of its Law and Constitution.*

[8] *Samwiri Karugire(1980); a political History of Uganda. The nullifications have been attributed to the fact that Democratic Party membership was predominantly catholic while Uganda still had a large protestant majority.*

military rule overshadolled Uganda's electoral politics.[9] In 1967, two years after enactment of the 1967 constitution, the National Assembly, government introduced a one party state, where political parties were banned. In 1971, Idi Amin assumed power through a military coup, and Uganda was under military rule up to 1979.[10] Obote and his UPC party ruled under a one-party system until it was overthrown by Idi Amin's 1971 military coup, after which even the UPC was banned, making Uganda a no-party state. In December, 10th, 1980 the chairman of the elections contrary to section 47(6) of the national Assembly (elections) act 1964 which granted power to the returning officer to declare results once all polling stations had tailed to outcome of an election process.

The election was weak and the secretary to the electoral commission, who had originally entrusted in himself the duty to announce results, and usurped power of the electoral commission and declare, UPC winner of the 1980 election. Apollo Milton Obote became the president of Uganda.[11] During Amin's violent, repressive and bloody eight-year regime, he ruled the country by decrees. Amin was overthrown in 1979 by Tanzanian forces, after which a military junta, of which current President Yoweri Museveni was a senior member, organised elections for 1980. The 1980 elections were fraud and manipulation of results and intimidation of the opposition candidates marred and the opposition candidates met obstacle on nomination days impromptu roadblocks were staged, candidates arrested and they missed nominations.

The period of transition leading to the 1980 elections was characterised by unconstitutional manoeuvring, which saw the overthrow of the government and

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[9] *Charles Osowa Okwe(1992); politics in Uganda: thirty years of Independence.*

[10] *Report of the Uganda Constitution Commission (1993).*

[11] *Report of the Electoral Commission 1980.*

hijacking of the electoral process by the Pro-UPC Military Commission. The 1980 elections, which were supposed to usher in a new democratic government, remain contested. They were fraught with heavy gerrymandering and riddled with many irregularities and coercion,[12]

There was widespread concern about the nomination and appointment of members to this body, which cast the legitimacy of impartial administration in doubt. Under Article 69(1) of the 1995 Ugandan Constitution stipulates a process for the establishment of government, conferring on the electorate the right to choose a political system of their choice through free and fair elections or referendums.[13] In this regard there are three constitutionally permissible political systems in Uganda: The elections which were characterized by gerrymandering, ballot-box stuffing, coercion, violence and obvious fraud, resulted in the junta issuing an outright declaration of Obote as the winner of the Presidency. Having been outmaneuvered, Museveni declared an armed rebellion and launched the gruesome five-year Uganda 'Bush War' against Obote's government, after which Museveni and his National Resistance Army (NRA) took power in 1986.[14]

From 1986, there were no presidential elections for a full decade, until after the new Constitution of 1995 was implemented, and National Resistance Movement (NRM, formed from the NRA) ruled under the no-party 'Movement' system of government. Under the Movement system, which lasted until the Constitution was amended in 2005 to allow multi-party elections; the Constitution mandated that only NRM members could stand for elections on individual merit. The first

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[12] *(2005), From Whence Have We Come, and Where Exactly are We Going: The Politics of Electoral Struggle and Constitutional (Non) Transition in Uganda Human Rights and Peace Centre, Working Paper Series No. 1.*

[13] *Article 69(1) of the 1995 Ugandan Constitution.*

[14] *Electoral Reforms in Uganda', Report by the Foundation for Human Rights Initiative, 2008, p.80.*

multi-party elections of 2006, as stated by the EU EOM, "fell short of full compliance with international principles for genuine democratic elections, in particular because a level playing field was not in place". The election results were not accepted by the Forum for Democratic Change (FDC) presidential candidate, Dr. Kizza Besigye, who subsequently appealed against the validity of the elections. The Supreme Court found that a wide variety of serious irregularities had occurred, including disenfranchisement of voters, counting and tallying irregularities, bribery, intimidation or violence, multiple voting, ballot box stuffing, the continued intrusion of the security forces in the elections and apparent partisan conduct of some election officials. The 2011 general elections provided an opportunity to consolidate the multi-party system and further develop the electoral and wider democratic process.[15]

1.2 Statement of the problem

The increased voters' rights violations in elections show that there is a shortfall of legal demand as a result of intimidation, fraud manipulation that has continued to influence the gist of election outcome. Indirect Special Interest Group elections constitute a breach of equality of vote, particularly since in all but one case there is no clear justification for giving particular advantages to the groups concerned.

Election Administration, in its preparations, have eventually succumbed to the excessive pressure of administering presidential and direct parliamentary elections, while also administering several stages of nationwide polling for Local Council one (LC1), Local Council two (LC2) and for Special Interest Group youth

[15] *G.W Kanyeihamba (1996): An overview of the 1996 Uganda President and Parliamentary Elections.*

elections. The Electoral Commission did not enjoy widespread trust by failing to organize such elections by violating voter's rights and participation. Article 59 of the Constitution enshrines universal suffrage for all citizens of Uganda of eighteen years of age or above. Article 59 further imposes a duty on all eligible citizens to register to vote, and on the State to take all necessary steps to ensure the exercise of the right to vote.

There was no provision made to enable the registration of citizens who turned 18 during the seven months between the closure of the NVR and Election Day. In addition, the Electoral Commission did not seek to register citizens resident in institutions, nor those in prison as a result of sentencing or on remand. In this respect, several groups of citizen were effectively disenfranchised, despite the fact that the law does not impose any restriction on the right to vote and despite the legal onus on the State to ensure registration of all eligible citizens.

The role of the security forces while the Ugandan People's Defence Forces exercised more restraint in the use of force during the 2001, 2006 and 2011 general elections. The Uganda Police Force has not yet embraced its constitutional role as an impartial enforcer against breaches of electoral law, lack of police impartiality frustrates citizens' expectations of compliance with the legal framework. As in 2011, and in violation of constitutional due process guarantees, Special Forces such as the Rapid Response Unit arbitrarily arrested and detained electoral stakeholders in ungazetted "safe houses."

The above problems were worthy needed for investigation and address the legal enforcement measures and made the recommendations in line with the findings of the study.

1.3 General Objective

The main objective of the study is to analysis voters' right to participation in electoral process in Uganda with the views to draw a distinction between the theory and practice after the 1995 constitution.

1.4 Specific objectives

To Critic the legal framework of Uganda electoral legislation standards to voter's rights of participation in election process

To Critic the legal system of institutions in ensuring voter's rights of participation in elections periods in Uganda

To draw the challenges between theory and practice of the law of election administration in respect of voter's rights of participation in election process in Uganda

To suggest the recommendations on the Compliance of the law in respecting voter's rights of participation in election process in Uganda

1.5 Research Questions

What are the legal framework of Uganda electoral legislation standards to voter's rights and participation in election process?

What are the legal system of institutions in ensuring voter's rights and participation in elections periods in Uganda?

What are the challenges between theory and practice of law of election administration in respect of voter's rights of participation in Uganda?

What is the Compliance of the laws in respecting voter's rights in participation in election process in Uganda?

1.6 Scope of the study

1.6.1 Contextual scope

This study focused on the critical analysis of voters' right to participation in electoral process in Uganda: The distinction of the theory and practice after the 1995 constitution.

This study reviewed documentary instruments of both international and municipal human rights instruments in Analysis of Voter's Right and Participation in Electoral Process. Looking at distinction of the theory and practice after the 1995 constitution.

1.6.2 Theoretical scope

Guinier's theories Civil Rights Theories 1994 publication as an Alternative Voting Systems *The Tyranny of the Majority*. In this work and others, Guinier suggests various ideas to strengthen minority groups' voting power, and rectify what is, according to her, an unfair voting system. She claims that she is referring not only to racial minorities, but any numerical minority group, such as fundamentalist Christians, the Amish, or in states such as Alabama, Democrats; she also states that she does not advocate any single procedural rule, but rather that all alternatives be considered in the context of litigation *"after* the court finds a legal violation." The ideas she considers are:

Cumulative voting, a system in which each voter has "the same number of votes as there are seats or options to vote for, and they can then distribute their votes in any combination to reflect their preferences"--a system often used on corporate boards in 30 states, as well as by school boards and county commissions.

Multi-member "super districts" is another strategy which "modifies winner-take-all majority rule to require that something more than a bare majority of voters must approve or concur before action is taken."[16]

This research covered the theories of democracy in relations with the set of ideas, ideologies and concepts of universal principles of law applicable to all.

1.6.3 Geographical scope

The study was carried out in Uganda with specific area in three districts which included Sironko, Mbale and Jinja district in Eastern Uganda by offering the overall Uganda's legal framework workable and detailed foundation for the conduct of democratic elections, generally in accordance with the nation's, regional, international, and constitutional commitments and obligations. Remaining legislative shortcomings call for amendments to level the playing field to deter illegal practices.

1.6.4 Time scope

This study covered the elections period after the constitution of the Republic of Uganda between (2001- 2011) on the critical analysis of voters' right to participation in electoral process in Uganda: The distinction of the theory and practice after the 1995 constitution of Uganda.

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[16] *Guinier's theories Civil Rights Theories (1994) publication as an Alternative Voting Systems The Tyranny of the Majority.*

1.7 Operational definition of key terms

The purpose of this study, the following terms are operationally defined good governance and international human rights instruments

Human rights: are "commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. (Human rights are thus conceived as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights or as legal rights, in both national and international law.

Vote: a choice between candidates for office, expressed by a written ballot, voice or show of hands.

Voter: a person who has a right to vote, elect or to carry into effect, fulfill accomplish, to provide the mean for the carrying out for given policy.

Election process: choosing or being chosen for office by vote.
Elect: to pick out or select by voting.

Role: the functional part performed in a particular operation or process.

Multiparty: means more than two political parties that advances multiparty political system which is provided for under article 69 and 71 of the 1995 Ugandan constitution.

Political party: means a political organization of which its main objective is to influence of a political process and sponsor a candidate for political agenda.

Political organization: any association of person with the aim of influencing a political process for election to a particular political system in election process.

Challenge: hindrances or unforeseen circumstance to make the intended activities or a law which is difficult to achieve.

Opposition: means alternation of the government results from the discontention of people with different political agenda of the current government in fighting the needs of the citizens.

Intimidation: violence or threats to person compelled to such person to do or obtain from doing any act which is against his or her legal rights.

Bribery or corruption: giving any reward to any person to influence his or her decisions in your favour out of that reward.

Violence: physical force used to injure damage or destroy extreme roughness of action

1.8 Significance of the study

The research will help recommend on better policies on relating Electoral regulations that would benefit from clear and detailed procedural regulations for every stage, including voter registration, equal treatment of candidates on the ballot paper, and all elements of polling, counting and tallying and serve to enhance the confidence of all stakeholders in the process.

The research will enable the researcher to attain deep inside in relation to Civic education and voter information on a comprehensive and effective programme would ensure that all citizens are informed of all necessary elements of the

electoral process, from registration to the precise modalities and location for voting.

The study will enable the community to understand their rights, advocate for the implementation of Special Interest Group elections runs contrary to democratic standards in a number of respects.

The study will boost the documentary literature of Kampala International University and enable more researchers for future references.

1.9 Review of related literature

This part revealed what other scholars have contributed to the study. It was a deliberate effort to analyze how the literature was in line with the objectives and all issues under study and vice versa. This part gave an overview of literature and models that were related to the research problem presented in the previous chapter.

1.10 Concepts, Ideas, Opinions from Authors/ Experts

Free and fair elections are the key for any peaceful transition from one government to another for they are readily acceptable. To that end, the right to vote is by far the bedrock of any democratic society for it buttresses people's participation in their governance as well as enhances accountability.[17] A disenfranchised population cannot therefore be in position to influence policies that affect them. The need for a transparent and effective process for election of representatives can therefore not be overemphasized.

[17] *Schumpeter, J. (1942). Capitalism, socialization and democracy. London: Allen and Unwin.*

Many authors have come up with different concepts, ideas and made observations about elections in a free and democratic society which have provided relevant and valuable information. The report finds that Uganda's legislative framework is mostly in compliance with international and African standards, though there are some significant exceptions in relation to freedom of assembly and association, and the rules for party funding. In practice, there are much more serious concerns, especially about the respect for the rights of opposition parties to organize and the media to report on political developments, the lack of a 'level playing field' in access to resources, and the threat of violence during the campaign[18].

The right to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage held by secret ballot, is also discussed. However, he made no critical examination of the implementation of the right to vote the commentary only highlights the requirements for a genuine election. This research therefore shall critically discuss the steps taken by various states in implementing the right to vote. The issue of the nature and scope of the right to vote has been canvassed by M.Norwark (1996) on the discussion of Article 25 of the international Covenant on Civil and political Rights (ICCPR), which makes provision for the right to vote. In this commentary, Manfred Norwark considered the requirements for an election, which are provided for under Article 25 of the ICCRP. He say that every citizen has a right and the opportunity without any of the distinctions mentioned in Article 25(2) ICCPR and without unreasonable restrictions, to take part in the conduct of public affairs directly or through freely chosen representatives.[19]

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[18] *European Union Election observation mission final report General elections 18 February 2011.*

[19] *Manfred Norwark (1996): UN Convention on Civil and Political Rights, CCPR Commentary. N.P Engel Publications.*

The importance of elections does not lie in their frequency and direction but rather in their quality. Although both frequency and quality are equally important if an election is to conform both to the international standards of holding an election and more importantly, to the ownership by the people of their electoral process interestingly.[20]

The concept of analyzing the outcome of election results especially in Africa. Election outcomes,[21] Africa are not always free and fair and factors other than elections are important in consolidating democracies. However, he does not discuss those factors he deems necessary in carrying out free and fair elections in democracies. He does not stress the electoral processes which must act as incentives and not disincentives for further democratization. He further says that Africa has produced a number of examples of election results being rejected. Though he does not make recommendations to remedy this, I agree with him on this point bearing in mind that the 1980, 1996 and 2001 election results in Uganda were disputed by main opponents of the eventual winner who was in all cases the incumbent or in control of national affairs.

The provisions of the Universal acceptance of the standards governing the conduct of elections which the international instruments emphasis the periodic free and fair elections.[22]

Uganda's legislation generally complies with international and regional standards, the 1995 constitution article 59, states that every citizen of Uganda of eighteen years of age and above has a right to vote.

i. *It's the duty of every citizen of Uganda of eighteen years of age or above to register as a voter for public elections and referendum.*

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[20] *Cohn D.L.P and Parson J. (1973). The Uganda People's Congress Branch, and Constituency elections 1970 journal of Common wealth Political studies Vol. XI No. 1*
[21] *Willie Breytenbach (1992): Democratization sub-Saharan Africa.*
[22] *The 1995 constitution Article 59.*

ii. *The state shall take all necessary steps to ensure that all citizens qualified voter register and exercise their rights to vote.*

With four main exceptions: the NGO Registration (Amendment) Act 2006; the Political Parties and organizations (Amendment) Act 2010; laws restricting media freedom and freedom of assembly and inadequate legislation relating to a state of emergency and election-related violence. One of the main overall complaints in the current pre-election period is that new election related laws were not passed sufficiently in advance of the February 2011 elections, making it extremely difficult or impossible for the responsible institutions to implement the measures, due to budgetary and other hindrances.

In accordance with the national standards, the Republic of Uganda's legislative framework is found principally in the 1995 Constitution, inclusive of amendments up to 21 November 2005, which is the supreme law of Uganda and has binding force on all authorities and persons throughout the country.[23] Under this framework, Parliament's legislative powers and all the other organs of government are subordinate to the supremacy of the Constitution. Election standards in Uganda are governed by the 1995 Constitution, the Presidential Elections Act of 2005, the Political Parties and Organisations Act of 2005 (Political Parties Act), the Parliamentary Elections Act of 2005, and the Electoral Commission Act of 1997. [24]The provisions of the Political Parties Act have been amended twice, through the Political Parties and Organisations (Amendment) Act of 2009 and the Political Parties and Organisations (Amendment) Act of 2010.[25]

The Presidential Elections Act provides further specifications for presidential elections, including the qualifications for candidates and the manner of

[23] *The 1995 Ugandan Constitution.*

[24] *The Electoral Commission Act of 1997.*

[25] *The Presidential Elections Act of 2005.*

establishing equivalent qualifications. It also provides procedural standards for nomination, campaigning, polling, counting and tallying votes, declaring results of a presidential election and challenging the declared results. The Political Parties Act implemented the multiparty system of government in Uganda and provided rules for party leadership, elections, party funding, and a Code of Conduct for political parties. The Act provides a basis to enhance transparency and accountability in relation to the financing of political parties.

Another major gap that has caused significant grievance is the government's failure to implement codes of conduct for political parties and for the media. The Political Parties and Organisations Act 2005 provides for the adoption of Code of Conduct for political parties and the establishment of a NCF for parties, and for the EC to resolve issues in advance of the elections. The Political Parties and Organisations include funding provisions that discriminate against small political parties.[26] The Act guarantees equal levels of financing to all political organisations and parties specifically for election-related activities.

Elections must be free and fair, they must be transparent, and they must occur periodically. The UDHR states that the will of the people, as expressed through periodic and genuine elections, shall be the basis of a government's authority.[27] International instruments forbid discrimination on any grounds that constrain these individual rights, requiring that states prove reasonable and objective criteria, established by law, in order to infringe upon these rights for any reason. Although there are a number of fundamental criteria in international law for free and fair elections, there is no legal instrument that outlines specific procedural requirements. Therefore, the general standards in place give governments some

[26] *The Political Parties and Organizations (Amendment) Act 2010.*

[27] *Universal Declaration on Human Rights, Article 21(3).*

freedom to choose the means by which they will achieve the international electoral standards.

The legal provisions relating to elections before the advent of the movement government and points out the flaws there in.[28] He discusses the criteria for a free and fair election considering among others, a fair administrative framework, public enlightenment, free media and fair reportage. The 1996 elections stated that the Uganda Presidential Elections 1996 were free and fair but the parliamentary elections had short comings and defects. [29] The parliamentary elections but he does not analyze the laws that governed the conduct of the elections and the surrounding social and economic factors that impacted on the electorate. The conclusion that the presidential elections were free and fair is erroneous in my view because both elections were conducted under the same conditions. The experience has shown that the electoral process is one of the instruments that have helped to deliver and continues to nature democracy in Uganda. For this to remain so, elections must continue to be free and fair but the elections that have been held in Uganda since 1986 have so far pushed forward the quality imperative in democratization process.[30]

In a referendum on the political system held in 2000 under the terms of the 1995 Constitution, Ugandans voted to retain the then existing Movement system. However, in 2005, Parliament approved a constitutional amendment proposed by the NRM which allowed a return to multi-party politics while also scrapping

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[28] *Kiddu Makubuya (1996) the law and practice of election in Uganda Prospect for the future (1996).*

[29] *Kanyeihamba (1996), G.W Kanyeihamba (1996): An overview of the 1996 Uganda presidential and Parliamentary elections.*

[30] *TB. Kabwegvere (2000): people's choice, people's power: challenges and prospects of Democracy in Uganda.*

presidential term limits. The multi-party elections of 2006 saw only slight improvements from 2001, notably in the area of media freedom. Dr Besigye ran against President Museveni for the second time, but now as the leader of a new political party, the Forum for Democratic Change (FDC), and garnered 37.39% of the votes, as against Museveni's 59.26% majority.[31] Dr Besigye's Supreme Court case regarding the 2006 elections has become famous due to the ruling that Museveni was the rightful winner despite the Court's acknowledgement of widespread electoral malpractices and vote rigging which were considered not to have substantially affected the results of the elections.

In the case of ***Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2006*** Odoki CJ, citing article 126(2)(e) of the Constitution, held:[32]

> "*The doctrine of substantial justice is now a part of our constitutional jurisprudence. ... Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice.*"

This was emphasized in against this legal yardstick;

I now proceed to determine the issues framed in the present petition. I shall address the issues in their order of record, save for issues 1 and 2, which I shall determine concurrently. I must state from the onset that the 2nd respondent was late in filing his written submissions therefore they shall not be considered for purposes of this judgment.[33]

The Uganda Presidential and parliamentary elections of 1996, the aspects that resulted in electoral fraud. However his analysis is based on a single constituency and is therefore much localized although he argues it to take general

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[31] *Ibid, 2008.*

[32] *See the case of Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2006.*

[33] *Odoki CJ, citing article 126(2)(e) of the Constitution.*

conclusions.[34] The army as the critical factor in the incumbent's victory and seems not to think much of the factors such as weak civil society, bribery, intimidation and manipulation.

Although the subsequent 1996 elections can be said as having been free and fair to a large extent, the 2001 and 2006 cannot be said to have been free and fair given that they were both challenged before the Supreme Court with the court holding on both occasions, the electoral process was marred by irregularities although they were not substantive to annul the election. As a result the key opposition leader has vowed never to petition court again and most recently one of the senior members of the bench observed that the court erred in not annulling the 2006 election after finding that the process was marred by irregularities.[35]

The 2011 elections ran smoothly in that multiple candidates were allowed to run under little threat of violence, yet millions of dollars where reportedly paid out to electoral officials to assure another NRM term. Some reports suggested that the ruling party has bankrupted its coffers in paying out bribes to ensure their re-election. Irregularities such as mass disorganization at polling stations and the absence of registered voter names on voter rolls further characterized the election. With nearly all the ballots counted, Museveni had 68% of the vote, according the country's electoral commission. His nearest challenger, Kizza Besigye, won 26%. According to the Africa Union (AU), armed military personnel are not allowed within 200 yards of a polling station; yet National resistance movement party used the authority as a party in power to heavily armed troops

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[34] *Mujaju (1996), the 1996 presidential and parliamentary Election in Mbale District with particular reference to Bungokho Constituency.*

[35] *See Kanyeihamba: Court Messed up 2006 Petition, Monitor Interview with Justice Kanyeihamba, Daily Monitor, June, 1 2009.*

surrounded polling stations. UPC Presidential Candidate for the United People's Congress (UPC) could not vote because his name was missing at the location where he was registered to vote.[36]

Dame Billie Miller observed that: "The magnitude of resources that was deployed by the ruling National Resistance Movement (NRM), the huge level of funding and overwhelming advantage of incumbency, once again challenged the notion of a level playing field in the entire process,"[37] he does not emphasis on the entire process of NRM play in elections since resources alone does not provide leveling ground for respect of free and far elections for citizens exercise their right to vote.

Mbazira[38] opinion on and observed that NEPAD emphasis on democracy and good governance, if taken seriously, is likely to promote such rights as the right to take part in the conduct of public affairs directly or through freely chosen representatives and to vote in and be elected at genuine periodic elections.[39] Additionally, through the various socio-economic projects envisaged, NEPAD has the potential to promote economic, social and cultural rights and to uplift the people's standard of living.[40] Therefore, the researcher needs to investigate and preach the gap in this study.

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[36] *Gerald Rulekere, 'Museveni's Win in the 2011 Elections: What Does it Mean for Uganda's Politics?' 1 March (2011).*

[37] *Dame Billie Miller, the head of the observer group (2011) general election in Uganda.*

[38] *Mbazira opinion on and observed that NEPAD on Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and article 13 of the African Charter on Human and Peoples' Rights.*

[39] *Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and article 13 of the African Charter on Human and Peoples' Rights.*

[40] *See Mbazira, 2004, op. cit.*

1.11 Research Methodology

This part looked at the method of tools in relations to a critical analysis of voters' right to participation in electoral process in Uganda: The distinction between the theory and practice after the 1995 constitution.

According to the purpose of this study of design adopted the desk legal research meaning the research was conducted using the library materials both primary source and secondary source. The primary sources that the researcher used included the 1995 Constitution of the Republic of Uganda as Amended (2005) and other laws of the Republic of Uganda like Acts relating to a critical analysis of voters' right to participation in electoral process in Uganda: The distinction between the theory and practice after the 1995 constitution. The secondary sources that the researcher used include the available literature on the voter's rights such as books, articles, papers, reports and journals by visiting libraries and internet websites.

1.10.1 Desk Research

This involved the collection and review of relevant documentation on the study there was rich documentation on election in Uganda and other countries. Data was exploited which include: Unpublished reports/ records; the archives of opposition parties, Published reports (research studies/ Case studies and so on); Conference abstracts, poster presentations and materials, Newspaper articles, other media coverage, information accessed through the Internet and any other authentic available sources of information that was documented

In conclusion of this part, looked at issue of whether the current provisions of the law deny absolute limits voter's right and participation in accordance with the practical legal standards.

1.10.2 Data Collection: Primary and Secondary

Primary Data included on the study and adopted qualitative methodology which included the Constitution of the 1995 of the Republic of Uganda and other laws the Presidential Elections Act of 2005, the Political Parties and Organisations Act of 2005 (Political Parties Act), the Parliamentary Elections Act of 2005, and the Electoral Commission Act of 1997. The provisions of the Political Parties Act have been amended twice, through the Political Parties and Organisations (Amendment) Act of 2009 and the Political Parties and Organisations (Amendment) Act of 2010.

1.10.3 Document Reviews

This involved the use of qualitative techniques of data collection. The researcher made a request of recorded information such as those records from the electoral commission, courts of law, and international organizations: Like European Union, Amnesty International etc. the parliament of the Republic of Uganda and the political opposition group libraries which enabled researcher in getting documents and those records which helped in writing Thesis. The researcher made a request of those records, which was read by the researcher, hence provided vital information for the research Thesis.

1.11 Limitations of the study

The researcher faced difficulty in formulating mechanisms or scales for measuring the research variables.

1.12 CHAPTERISATION OF THESIS

CHAPTER ONE

Chapter one presented the background of the study which revealed the problem that was worthy for investigation. The objectives of the study was formulated, the research questions was in line with the objectives of the study, null hypothesis

was presented, scope and significance of the study was indicated in this chapter. Definition of terms review of related literature that revealed what other scholars have contributed to the study, It was a deliberate effort to analyze how the literature was in line with the objectives and all issues under study and vice versa. Methodology of the study identified ways of how research was carried.

CHAPTER TWO

This part discussed on the Constitutional Provisions and other legal frame work to critic Ugandan electoral legislation to voter's rights and participation in election process: The distinction of the theory and practice after the 1995 constitution.

CHAPTER THREE

This part looked at the legal system of institutions in ensuring voter's rights and participation in elections periods in Uganda.

CHAPTER FOUR

Looked at the challenges of the theory and practice in respect of voter's rights of participation in election process in Uganda in relations with other countries.

CHAPTER FIVE

Under this part, there were recommendations and conclusions. This was based on the findings of the Compliance of voter's rights of participation in election process in Uganda which was reflected in the rest of the chapters.

CHAPTER TWO

2.0 LEGAL FRAMEWORK OF VOTER'S RIGHTS OF PARTICIPATION IN EL ECTION PROCESS

> *"Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development"*[41]

2.1 Introduction

National, Regional and International legal standards on elections are based on three central rights: the right to take part in government; the right to vote and to be elected; and the right to enjoy equal access to the public service.[42] Within this overall framework of rights, the international standards for elections can be placed into three basic categories general standards, standards on the rights of individuals in the election process, and standards that national bodies must fulfill in the electoral process.

The Republic of Uganda's legislative framework is found principally in the 1995 Constitution, inclusive of amendments up to 21 November 2005, which is the supreme law of Uganda and has binding force on all authorities and persons throughout the country.[43] Under this framework, Parliament's legislative powers and all the other organs of government are subordinate to the supremacy of the

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[41] *Article 2 (2), OAU/AU Declaration on the Principles Governing Democratic Elections in Africa - AHG/Decl. 1 (XXXVIIIi), 2002.*
[42] *International Covenant on Civil and Political Rights (ICCPR), Article 25. See also: Universal Declaration of Human Rights (UDHR), Article 21.*
[43] *Uganda Constitution, Article 2.*

Constitution. Election standards in Uganda are governed by the 1995 Constitution, the Presidential Elections Act of 2005, the Political Parties and Organisations Act of 2005 (Political Parties Act), the Parliamentary Elections Act of 2005, and the Electoral Commission Act of 1997. The provisions of the Political Parties Act have been amended twice, through the Political Parties and Organisations (Amendment) Act of 2009 and the Political Parties and Organisations (Amendment) Act of 2010.

2.2 The Constitutional Mandate

The 1995 constitution bestows power on the people and under the same Constitution people's will and consent on who shall govern them and how they should be governed, shall be expressed through regular, free and fair elections.[44] This article remarkably buttresses the people's right to participate in elections.

Similarly Article 59 of the same Constitution guarantees the people's right to vote and enjoins the state to take steps to ensure that all citizens qualified to vote register and exercise the right to vote. To ensure that free and fair elections are indeed achieved, the Electoral Commission is established as an independent body, to ensure regular free and fair elections, demarcate constituencies, declare election results, maintain a voter's register, adjudicate over election complaints and to implement voter education.[45]

Article 69(1) of the 1995 Ugandan Constitution stipulates a process for the establishment of government, conferring on the electorate the right to choose a political system of their choice through free and fair elections or referendums. In this regard there are three constitutionally permissible political systems in Uganda:

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[44] *See Article 1, 1995 Constitution*

[45] *See Article 60 and 61, 1995 Constitution.*

the Movement political system, the multi-party political system, and any other democratic and representative political system.[46] The Constitution stipulates the principles to which the Movement political system must conform, as well as the fundamental features and principles of the multi-party political system; it is silent, however, with regard to the features and principles attached to the third political system provided.[47] Overall, Uganda's legislation recognises the importance of conducting free and fair elections and requires that the country's elections proceed accordingly.[48] ***Supreme Court Election Petition Appeal No.11/2007: Kakooza John Baptist Vs Electoral Commission and Iga Anthony,*** and invited court to find that the learned trial judge was right when he refused to use the Declaration Result Forms for the four (4) polling stations since the same were not original documentary evidence and did not also satisfy the requirement for being admitted as secondary evidence of public documents.

As to the second ground of appeal, respondent's counsel argued that the trial judge was justified in his finding that there was none compliance with the electoral laws and that the non compliance affected the results in a substantial manner. The fact that the number of registered voters at the six(6) polling stations who were disenfranchised exceeded the difference in votes between the appellant and the Respondent, the failure to control the use of ballot papers resulting in cancellation of results In practice, however, is determined by assessing the compliance with the rest of the electoral administration requirements.

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[46] *Constitution of Uganda, Article 69(2).*

[47] *Ibid., Articles 70 and 71.*

[48] *Supreme Court Election Petition Appeal No.11/2007.*

2.3 Periodicity

The Ugandan Constitution requires periodic elections for the president[49] and for Parliament.[50] It states that parliamentary elections must be held in the last 30 days of the term, and that the presidential elections must be held in the first 30 days of the incumbent president's last 90 days of term. Presidential elections can only be postponed in a few limited cases, namely when an election has been validly challenged and annulled, or when an election must be postponed due to a state of war or a state of emergency. If such latter cases occur, Parliament shall prescribe the revised election schedule to which the government must adhere.[51] Under the terms of the 2005 constitutional amendments, Uganda has no term limits for the presidency.[52]

In reference to the Court of Appeal decisions of ***Election Petition Appeal No.12 of 2002: Amama Mbabazi vs Musinguzi Garuga*** and ***Election Petition Appeal No.24 of 2006: Kirunda Kivejinja Ali vs Abdu Katuntu,*** respondent's counsel invited this court to uphold the trial judge on this issue. With regard to ground 4 of remedies, Respondent's counsel prayed that the appellant's appeal be dismissed with costs. The law applicable was the Constitution (1995) and the Parliamentary Elections Act 17 of 2005 and the rules made thereunder are the electoral laws relevant to this appeal.

As to the principles underlying the above laws, Article 1 (4) of the Uganda Constitution incorporates the universal principles as relate to elections propounded in article 21 of the Universal Declaration of Human Rights 1948, and article 25 of the UN Covenant on Civil and Political Rights, 1966. Article 21 of The Universal Declaration of Human Rights provides:

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[49] *Uganda Constitution (1995),.Article 103(3).*
[50] *Ibid., Article 81.*
[51] *Ibid., Article 103(3).*
[52] *Ibid., Article 81.*

"The will of the people shall be the basis of the authority of government: this will, shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures".

In conformity with international law, elections must be conducted on a periodic basis, within a framework of laws that guarantees the effective exercise of voting rights.[53] International instruments do not prescribe a specific schedule of electoral periodicity, but there is a general consensus that elections must be held frequently enough to ensure that the governmental authority continues to reflect the will of the people, which, as previously stated, is a fundamental aspect of governmental legitimacy. Generally, scheduled elections may not be postponed, except for when a public emergency makes it necessary to do so, and even then, postponement may only be to the extent strictly required by the exigencies of the situation. In addition, the election calendar must be widely available in the public domain, so that potential candidates can prepare themselves to campaign effectively, so that voters can inform themselves, and so that the relevant institutions can take all necessary measures to ensure that free and fair elections are smoothly administered.

2.4 Election standards on the right to vote, organize and campaign

Freedom of participation

Article 1 (4) of the Uganda Constitution embodies the above principles by providing that: *"The people shall express their will and consent on who shall govern them and how they should be governed through regular free and fair elections of their representatives or through referenda".*[54]

Through periodic elections, the citizens make their choices as to how they are to be governed. It follows therefore that if the choices are to be genuine and

[53] *See UDHR Article 12, paragraph 3 and ICCPR Article 25(b).*

[54] *Article 1 (4) of the 1995 Uganda Constitution.*

credible, the exercise of carrying out those choices must be through ways and means whereby the rights of the individual voters are protected and there is assurance that each vote cast is counted and reported properly. Thus the Uganda Supreme Court has propounded that:

> *"An electoral process which fails to ensure the fundamental rights of citizens before and after the election is flawed".* See *Presidential Election Petition No.1 of 2001: Besigye Kizza Vs Museveni Yoweri Kaguta & Another: Judgement of Odoki, C.J; at page 60.*[55]

Accordingly, a free and fair election process must have sufficient time given for all stages of the election, candidates' right to stand for election must be ensured and so too the right of a citizen to register and vote for a candidate of that voter's choice. No one should have an unfair advantage over others. There must be no intimidation, bribery, violence, coercion or anything to take away the will of the people. The ballot must be secret, the counting accurate and the results announced in a timely manner. The electorate must be made knowledgeable and sensitized about the electoral laws and guidelines in sufficient time. Fairness and transparency must be maintained. Those committing electoral wrongs must be punished and election disputes resolved fairly and speedily. In the case of ***Iddi lubyayi kisiki v kiyingi deogratius, electoral commission and others in Bukomansimbi district in election petition no. 0001 of 2011.*** Iddi Lubyayi Kisiki (herein the Petitioner) who was then the incumbent Member of Parliament for the Constituency, Kiyingi Deogratius (herein the 3rd Respondent), and others not parties to this petition. The elections were held simultaneously at the same polling stations, with the same polling officials (agents of the 1st Respondent)

[55] *Presidential Election Petition No.1 of 2001: Besigye Kizza Vs Museveni Yoweri Kaguta & Another: Judgement of Odoki, C.J; at page 60.*

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presiding over them; and Ms Ahebwa Anna (herein the 2nd Respondent) being the District Returning Officer.[56]

It was stated that "4(c) Contrary to section 27(a) of the Parliamentary Elections Act, 2005, the 2nd respondent through its Returning Officers failed to control the distribution and use of ballot papers to eligible voters resulting in multiple voting and vote stuffing by a number of people.[57]

1. *Contrary to sections 29(4) and 34(2), (3) and (5) of the Parliamentary Elections Act, the 2nd respondent's officers and agents allowed persons whose names did not appear on the voters' roll and/ or who did not hold valid voters cards to vote.*
2. *Contrary to sections 30(4) and 32(1) of the Parliamentary Elections Act, the petitioner's agents were denied access to some of the polling areas/ polling stations by the 1st respondent's agents and 2nd respondent's officers during polling and counting exercise and therefore prejudiced the petitioner's interests ...*
3. *Contrary to section 34(3) and (5) of the Parliamentary Elections Act, the 2nd respondent's officers in connivance with the 1st respondent's agents denied the petitioner's open supporters the right to vote by failing and/ or neglecting to check the voters names on the voters register or roll for the purposes of being issued with ballot papers.*
4. *Contrary to section 46(1) and (2) of the Parliamentary Elections Act, the Presiding Officers failed and/ or neglected to record the petitioner's agents' complaints raised during the voting and counting exercise and also failed and/ or neglected to register them as part of the official records of the polling stations.*
5. *Contrary to sections 47(5) and (6), and 50(1)(d) of the Parliamentary Elections Act, the 2nd respondent's officers in connivance with the 1st respondent's agents denied the petitioner's agents copies of the Declaration of Results Forms at several polling stations."*[58]

In support of his case, the petitioner deposited an affidavit dated 30th March 2011, the gist of which for present purposes was that he was informed of

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[56] *Iddi lubyayi kisiki v kiyingi deogratius, electoral commission and others in Bukomansimbi district in election. Election petition no. 0001 of 2011.*

[57] *Section 27(a) of the Parliamentary Elections Act, 2005.*

[58] *Parliamentary Elections* Act No. 17, *2005*

numerous acts of non-compliance with the relevant provisions of the Parliamentary Elections Act as highlighted above. His evidence was largely based on information from his polling agents and/ or supporters save for paragraphs 1, 2, 3, 4, 5, 7, 9, 10, 26, 28, 30 and 31; the contents of which were within his knowledge.

In this case, it was acknowledged that the election was non-compliance with the Parliamentary Elections Act.[59]

2.5 The right to vote and be voted for without discrimination

The promotion of public participation in the process of governmental decision-making is a significant feature of the 1995 Constitution.[60] Article 38(1) recognises the right of every Ugandan to participate in the affairs of government individually or through representatives.[61] With respect to representation of minority groups, the Constitution[62] and the Parliamentary Elections Act 2005 establish that the Parliament should be composed of members directly elected to represent constituencies. There shall be one female representative, elected through universal suffrage, for every one of Uganda's districts, and twenty-five representatives of special interest groups, elected by electoral colleges, for the army, youth, workers and disabled people.

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[59] *Ibid sections 30(4) and 32(1), section 34(3) and (5), section 46(1) and (2), 47(5) and (6), and 50(1)(d).*

[60] *Paragraph 11 (Democratic Principles) of the National Objectives and Directive Principles of State Policy of the Constitution.*

[61] *ibid Article 38(1) recognises the right of every Ugandan to participate in the affairs of government individually or through representatives.*

[62] *Uganda Constitution (1995), Article 76.*

The interests of women and disabled people have been recognised in the Act in compliance with the different international instruments.[63] Article 33 of the Constitution further ensures equality for women in the recognition of their rights.[64] These constitutional provisions protect and enhance the rights and work of civil-society organizations. For civil-society organizations to be effective and impartial, it is crucial that their autonomy is recognized and protected, so that they can carry out their activities without fear or favor. The right to electoral participation provided for in Article 38 is key to the work of civil society organizations, which often monitor and follow up on government policies, practices and performance.[65]

The East African Community protocol on good governance under article 7 states that*: (r) Enacting electoral laws that allow citizens including those living abroad to participate in electoral processes*[66]

This enables, committed to entrench the culture of observance of human rights, adherence to the principles of democracy, regular, transparent, free and fair elections conducted by independent and impartial national electoral management bodies as a preventive measure against instability and conflicts within the region

At international level, Uganda is party to the International Covenant on Civil Political Rights (ICCPR) which guarantees the right to vote without

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[63] *United Nations Convention on the Elimination of all Forms of Discrimination against Women (1979), United Nations Convention on the Political Rights of Women (1990), Protocol to the African Charter on Human and Peoples' Rights on the Women in Africa, United Nations Declaration on the Rights of Disabled People (1975).*

[64] *Article 33(4) reads: 'Women shall have the right to equal treatment with men, and that right shall include equal opportunities in political, economic and social activities.' and Article 33(5) recognises the importance of affirmative action in ensuring that women are able to realize their rights.*

[65] *Article 38, the 1995 constitution.*

[66] *Article 7 of the East African Community protocol on good governance.*

discrimination on basis of race, colour, sex, language, religion, political or other opinion, national, social origin, property, birth or social status.[67]

Under international law, states have only very limited permission to place restrictions on the right to vote. Each country's laws must include guarantees of the right to vote at referendums and at elections and effective mechanisms for enforcing every eligible citizen's free exercise of the right to vote. This right may only be subject to reasonable restrictions such as a minimum voter age limits. Restricting the right to vote based on physical disability, educational limitations or illiteracy, or property requirements are examples of unreasonable limitations.[68] In addition to refraining from restricting the right to participate, international law further requires states to proactively help enable individuals to exercise their ability to participate in the electoral process. The UN Human Rights Committee's 1996 General Comment requires that states implement positive measures to overcome specific obstacles to the enjoyment of the right to assemble, associate, and engage in politics. Examples of such obstacles include illiteracy, language barriers, poverty, and any impediments to freedom of movement that prevent eligible people from exercising the right to vote, and states are required to take active measures against them.

Regionally level, African Union standards, Article 13 (1) of the African Charter on Human and Peoples' Rights (ACHPR) provide that: *Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law;*[69]

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[67] *See Article 2, ICCPR.*

[68] *United Nations Centre for Human Rights, Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections, United Nations, New York and Geneva, 1994, p.9.*

[69] *Article 13 (1) of the African Charter on Human and Peoples' Rights (ACHPR).*

The African Charter on Democracy Elections and Governance (ACDEG) and the AU Declaration guarantee individuals and political parties the right to campaign and express political opinions, within the limits of national law. ACDEG's principles include 'strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law'. In addition to echoing the non-discrimination language included in the ACHPR and in international instruments on elections, the AU Declaration requires states specifically to encourage African women to participate in all aspects of the electoral process[70]. Similarly, the ECOWAS Protocol advocates for its West African member states to take all appropriate measures to participate in the formulation of government policies and the implementation thereof, and to hold public offices and perform public functions at all levels of governance.

The AU Declaration requires that elections be 'at regular intervals, as provided for in National Constitutions', while for West Africa, the ECOWAS Protocol requires that all elections shall be organized on the dates or at periods fixed by the Constitution or by the electoral laws. The CSSDCA MoU, meanwhile, specified that the AU should adopt a Code of Conduct for political office holders that stipulates 'an inviolate constitutional limitation on the tenure of elected political office holders based on nationally stipulated periodic renewal of mandates'.[71] The NEPAD Declaration also refers to leaders having a 'fixed term of office'.[72]

2.6 Voter eligibility requirements

According to the Uganda Constitution, every citizen of Uganda 18 years of age or above has a right and duty to register and for public elections and referendums.

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[70] *AU Declaration, Part III(j).*

[71] *CSSDCA MOU, Key Performance Indicator 16.*

[72] *NEPAD Declaration, Article 7.*

The state is required to take all necessary steps to ensure that all qualified citizens register and exercise their right to vote. Parliament must make laws to facilitate the ability of citizens with disabilities to register and vote.[73] The Electoral Commission Act further stipulates that eligible voters must be registered to vote in either the parish or ward where the person resides or from where she or he originates.[74]

International law requires fairness in voter registration requirements. Voter education and voter registration laws are necessary to ensure that the right to participate is effectively exercised by an informed community. Where voter registration is required, it should be implemented without imposition of any obstacles. Any residence requirements posed must be reasonable and should not be invoked so as to exclude the homeless from voting. The Human Rights Committee General Comment bars residency requirements for citizens altogether for national elections, but recognises that residency requirements for local and regional elections are reasonable.

The right to freedom from discrimination based on gender or any other grounds is guaranteed by Articles 2 and 7 of the UDHR, and is further defined in Articles 2(1), 3 and 26 of the ICCPR. States have a positive duty to protect citizens from discrimination in the electoral process, as well as a negative duty to themselves refrain from discriminating against others. Only a few limited types of discrimination are permitted, such as those aimed at correcting past discrimination (e.g. affirmative action); otherwise the state is absolutely bound to ensure that all eligible citizens have equal access to all electoral events. A voting environment where discrimination is treated with impunity is likely to foster intimidation and manipulation of the electorate.

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[73]. *Uganda Constitution (1995),Article 59.*
[74] *Electoral Commission Act, Article 19(1).*

Indeed, in ***Morgan vs Simpson & Another (1974) 3 All ER 722 at 728*** *Lord* Denning addressed the substantiality question as follows:[75]

"I suggest that the law can be stated in these prepositions:

1. *If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by* ***Hackney case (1874) 2 O'M & H 77****, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.*
2. *If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the* ***Ishington case (1901) 17 TLR 210*** *where 14 ballot papers were issued after 8.00 pm.*
3. *But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by* ***Gunn vs. Sharpe (1974) 2 All ER 1058*** *where the mistake in not stamping 102 ballot papers did affect the result."*[76]

The first preposition would appear to address the overall quality of an election regardless of the numerical effect thereof. In my view, the sealing of ballot boxes as required by section 50(2) of the Parliamentary Elections Act is quite critical to the electoral process. Section 50(3) of the same Act outlines the contents of a sealed ballot box and these, in my view, go to the crux of an election. Indeed, section 52(1) makes it the responsibility of a Returning Officer to whom sealed boxes are delivered to keep sealed ballot boxes in safe custody until the settlement of all disputes arising from the election. Similarly, in the present petition the petitioner sought to rely on the contents of the ballot boxes to impeach the 1st respondent's election. Hence his prayers for a vote recount.

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[75] *Morgan vs Simpson & Another (1974) 3 All ER 722 at 728.*
[76] *Supra Hackney case (1874) 2 O'M & H 77, Ishington case (1901) 17 TLR 210, Gunn vs. Sharpe (1974) 2 All ER 1058.*

2.7 The Right of Access to Information Media and Democracy in Uganda

Uganda has had a checkered political history, moving from a one party state, to a military dictatorship, to a civil war and then the enactment of the 1995 Constitution. According to Bussey (2005), the development of the right to access information can be traced to the recommendations of the Uganda Constitutional Commission under the Chair of Justice Benjamin Odoki who was by then a High Court Judge. The 21 member committee appointed in 1988 by the President of Uganda, Yoweri Museveni was charged with drafting a new Constitution for Uganda.

Reflecting on Uganda's history characterized by lack of respect for human rights and democratic values, the Odoki Commission in its 1993 report pointed out that the fundamental freedom of expression and the right of every person to information were important rights at the centre of the struggle for the defence of human rights and democracy. The Odoki Commission therefore recommended that:

> *The freedom of expression which includes freedom to research, receive, hold and impart opinions, information and ideas without interference should apply to all individuals, groups and the media; and 'public officials' should be free to disclose information they come across in the course of their duties, provided it is not classified.*

That recommendation was incorporated into the 1995 Constitution under Article 41 stating:

> *Every citizen has a right of access to information in the possession of the State or any other organ and agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.*[77]

[77] *Article 41 of the 1995 Constitution of Uganda.*

The Constitutional provisions such as Article 29 (1) of the 1995 Constitution of the Republic of Uganda which states that:[78] "Every person shall have the right of freedom of speech and expression which shall include freedom of the press and other media "laid a firm background for Article 41 of the Constitution.

It should be noted that prior to the enactment of the Access to Information Act 2005, access to information right was problematic since there was no specific legislative framework to enforce the right of access to information.

Some of the leading cases include ***Major General David Tinyefuza vs. Attorney General in Constitutional petition No.1 of 1996*** where the State objected to the admissibility of a secret document of the high command of the Army as evidence in Court on the grounds that it was not obtained in accordance with Section 121 of the Evidence Act where the consent of the head of department was a requirement. The decision of the Constitutional Court was upheld on appeal by the Supreme Court in Constitutional Appeal No.1 of 1997 that Section 121 of the evidence Act was inconsistent with Article 41 of the Constitution and could not bar the admissibility of the document in question.[79]

The right of access to information is an important aspect of media freedom and a vital component in the media's role as public watchdogs. The media is therefore an essential component of society because it facilitates communication and guarantees the existence of an informed and communicative society by providing a democratic public sphere.

The democratic process among other issues is characterized by access to various sources of information and it is the media that creates an open public forum for debate and discussion of a broad range of issues. Informed citizens are able to

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[78] *Ibid Article 29 (1).*
[79] *Supreme Court in Constitutional Appeal No.1 of 1997.*

participate in the political process and can ultimately play their role as decision makers.

According to McChesney (1998):

> *Democracy requires a media system that provides people with a wide range of opinion, analysis and debate on important issues, reflects the diversity of citizens and promotes public accountability of the powers-that-be and the powers –that-want-to-be.*

According to Oloka (1999), media freedoms and freedom of expression in general relate to the wider issue of the status of democratic freedom as a whole. He argues that if the avenues for the expression of ideas are closed off, then the extent to which a government can be said to be respecting the overall ideals of democracy are necessarily limited. This analysis shows the vitality of the media regarding access to information

Nassanga (2002) argues that the media undoubtedly has a major contribution to make towards development especially if it is a gender sensitive media which can meet the information needs of both men and women.

Mareike (1998) notes that the media in Uganda has to provide adequate information with background analysis and contextualize issues to ensure public participation in the decision making process. In addition the media has to present different opinions and perspectives for frank and public discussion. He adds that for the media to fulfil this task an open flow of information is required between the political and economic players and the groups of civil society on one hand the media practitioners on the other. He notes that Journalists need to be able to access information from authorities, professional associations, business community and NGO's. This makes it necessary to study the media and the kind of

information they seek in relation to the legal framework under which they operate.[80]

Media circles have often criticized Article 43 of the Constitution of the Republic of Uganda (1995) which imposes a general limitation on the enjoyment of the rights and freedoms prescribed in the bill of rights.[81] They argue for example that protecting military operations is fine as a law for the security or sovereignty of the state but it may be used by government to impose a news blackout thus denying information to its citizens.[82]

The findings from Transparency International Research (2005) highlighted the importance of access to information laws in supporting the media to create awareness among the citizens about issues of national importance:

> *The existence of access laws may allow journalists to pursue potential corruption cases which without public access to official information would be difficult to substantiate.*[83]

2.8 Freedom of assembly and freedom of association

The right to assemble allows citizens to take part in the conduct of public affairs and exert influence in public debates and dialogue. Especially around elections, freedom of assembly enables citizens to organise, and allows NGOs and informal groups to help monitor electoral freedoms, educate voters and encourage active and informed participation. Article 29(1)(e) of the Constitution states that every person has the right to freedom of association, including the

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[80] *See comment of Mareike (1998) on the notes of the media in Uganda has to provide adequate information with background analysis and contextualize issues to ensure public participation.*

[81] *Article 43 of the Constitution of the Republic of Uganda (1995).*

[82] *See criticized Article 43 of the (1995), Constitution of the Republic of Uganda.*

[83] *See the Report of Transparency International Research (2005) highlighted the importance of access to information laws.*

freedom to form and join political organisations.[84] As related to elections, the right to freedom of association implicates the right to form political parties, and therefore relies heavily on the equitable access to state funding, freedom of speech, and freedom of access to information and the media.

This is reinforced in Articles 71 and 72, which restate the right to form 'political parties and any other political organisation'; and provide principles for the organisation of political parties, including that they shall not be based on 'sex, ethnicity, religion or other sectional division', that they shall respect internal democracy, and that Parliament should provide legislation to regulate 'the financing and the functioning of political organizations.[85]

Freedom of assembly is provided for in Article 29(1)(d) of the 1995 Constitution, which states that every person has the right to freely 'assemble and demonstrate together with others peacefully and unarmed'. The freedom to organise and associate is broad, and includes the freedom to form and participate in political parties or other political organisations. In protecting the right to freedom of association, states incur both positive and negative duties. In addition to not hindering this fundamental freedom, states should actively seek to promote it by, for example, ensuring that all political parties enjoy equal rights and equal access to state resources, including public funds.[86]

But also the East African community protocol on good governance on its committed to entrench the culture of observance of human rights, adherence to the principles of democracy, regular, transparent, free and fair elections

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[84] *Ibid Article 29(1)(e).*

[85] *Ibid Articles 71 and 72.*

[86] *29(1)(d) of the 1995 Constitution.*

conducted by independent and impartial national electoral management bodies as a preventive measure against instability and conflicts within the region; under article 7 (3) states that: *o) Creating an enabling environment for the exercise of freedom of expression, association and assembly, a free and independent media, robust civil society and a strong private sector;*[87]

Similarly, the right to freely assemble is guaranteed in Article 21 of the ICCPR. Political rallies and public demonstrations are essential to educating voters and disseminating information about the electoral process. So long as the assembly is non-violent, it may, by law, only be subject to narrow restrictions, in the interest of national security or public order, or for the protection of public health, morals, or the rights and freedoms of individuals.[88] The ACHPR provides for freedom of assembly in its Article 11.[89] The AU Declaration requires states to safeguard the civil liberties of all citizens including 'freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes. The freedom to organise and associate is broad, and includes the freedom to form and participate in political parties or other political organisations. In protecting the right to freedom of association, states incur both positive and negative duties. In addition to not hindering this fundamental freedom, states should actively seek to promote it by, for example, ensuring that all political parties enjoy equal rights and equal access to state resources, including public funds.

The East African community protocol on good governance to upholding the fundamental principles that govern the achievement of the objectives of the community as enshrined in article 6 of the treaty for the establishment of the east

[87] *article 7 (3, o) East African community protocol on good governance.*
[88] *See Article 21 of the ICCPR.*
[89] *See Article 11of ICCPR.*

African community(treaty), which emphasizes the significance of good governance, including adherence to the rule of law, accountability, transparency, respect for human rights, gender equality and equal opportunities; article 6 on the Protection of Human Rights and Promotion of Equal Opportunities as *1 Partner States undertake to cooperate in ensuring that citizens enjoy human rights and fundamental freedoms, taking into account their universality, interdependence and indivisibility as well as equal opportunities.*[90]

It encourages the state to promote democracy as it states under article 7 on Democracy and democratization processes as Partner States commit themselves to the principle that the exercise of public authority emanates from the will of the people through regular, transparent, free and fair elections.[91]

Under Article 22 of the ICCPR lays out a broad scope for the right to freedom of association. The freedom of association is subject to the same narrow limitations as the freedom of assembly.[92] The UN Human Rights Committee's General Comment declares that states cannot impose any 'unreasonable' limitations on the right to freely organise and associate.[93] The ACHPR provides for freedom of association in its Article 10 of the charter.

2.9 Electoral Commission Act (Amendments) Act 2010, Act No.15 of 2010

The Electoral Commission Act in the main provides for the functions of the Electoral Commission under the Constitution and other related matters. These include; regulation of national voter registration and voter rolls; regulation of

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[90] *Article 6 of the East African community protocol on good governance on the Protection of Human Rights and Promotion of Equal Opportunities.*
[91] *Ibid article 7 on Democracy and democratization processes.*
[92] *ICCPR, Article 22.*
[93] *United Nations Human Rights Committee, 'General Comment on Standards for Democratic Elections', 1996.*

returning officers and other election officers as well as boundary demarcation appeal tribunals.

Under section 18, the commission is required to display the National voters register and voters rolls.

Section 18states that:

> *"The commission shall compile, maintain and update, on a continuing basis, a national voters register, in this Act referred to as the voters register, which shall include the names of all persons entitled to vote in any national or local government election.*
> *(2) The commission shall maintain as part of the voters register a voters roll for each constituency under this Act.*
> *(3) The commission shall maintain as part of the voters roll for each constituency a voters roll for each polling station within the constituency as prescribed by law"*[94]

Under amended section 18A was introduced to provide for the period of two weeks before the polling day with in which the commission is supposed to have transmitted the voters register containing photographs of the voters to be used on the polling day, to political parties and organizations.[95]

2.10 Political Parties and Organisations Act No. 18 of 2005 (Amendments)

Act 2010, Act No.13 of 2010.

This Act makes provision for regulation, financing and functioning of political parties and organizations, their formation, registration, membership and organization as provided under the Constitution. The Act goes further to make provision for prescription of a code of conduct for political parties and organizations as well as establishment of a national consultation forum for political parties and organizations. Article 69(1) of the 1995 Ugandan Constitution

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[94] *Section 18 of Electoral Commission Act Cap 140*

[95] *Ibid section 18A of the act.*

stipulates a process for the establishment of government, conferring on the electorate the right to choose a political system of their choice through free and fair elections or referendums. [96]

In this regard there are three constitutionally-permissible political systems in Uganda: the Movement political system, the multi-party political system, and any other democratic and representative political system.[97] The Constitution stipulates the principles to which the Movement political system must conform, as well as the fundamental features and principles of the multi-party political system; it is silent, however, with regard to the features and principles attached to the third political system provided.[98] Overall, Uganda's legislation recognises the importance of conducting free and fair elections and requires that the country's elections proceed accordingly. Compliance in practice, however, are determined by assessing the compliance with the rest of the electoral administration requirements.

2.11 The Presidential Elections Act No. 16 of 2005. (Amendments) Act 2010, Act No.14 of 2010.

The Presidential Elections Act provides further specifications for presidential elections, including the qualifications for candidates and the manner of establishing equivalent qualifications.[99] It also provides procedural standards for nomination, campaigning, polling, counting and tallying votes, declaring results of a presidential election and challenging the declared results. The Political Parties

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[96] *Article 69(1) of the 1995 Ugandan Constitution.*

[97] *Constitution of Uganda, Article 69(2).*

[98] *Ibid., Articles 70 and 71.*

[99] *Act No. 16 of 2005 amended Act No. 14 of 2010.*

Act[100] implemented the multiparty system of government in Uganda and provided rules for party leadership, elections, party funding, and a Code of Conduct for political parties. The Act provides a basis to enhance transparency and accountability in relation to the financing of political parties.

2.12 Parliamentary elections Act of 2005 (As Amended) Act 2010, Act No.12 of 2010.

The Parliamentary Elections Acts regulate parliamentary elections respectively. In the main they set qualifications of intending candidates as well as disqualifications. Under Section11. Procedure for the nomination of candidates Subsection (2) was substituted to require a candidate's nomination paper be endorsed and sealed by the party or organization sponsoring him or her.[101] Consequently, the Provision is also made for nomination, campaigning, polling, vote counting, tallying and declaration of election results.[102] The Acts further put in place mechanisms for petitioning challenging election results. Other matters provided for under these Acts include, election offences as well as tenure of office for the respective candidates.

2.13 The Local Government Act Cap: 243 of 1997

The Local Governments Act on the other hand substantially incorporates most provisions of the Parliamentary Elections Act in as far as electoral regulation at local council level is concerned. It lays down qualifications for Local Council representatives and procedures for carrying out these elections. Glaringly however, whereas both the Presidential and Parliamentary Elections Acts have since been modified to make provision for the new multiparty

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[100] *Act No. 18 of 2005.*

[101] *Section 11 of Parliamentary elections Act of 2005 (As Amended) Act 2010, Act No.12 of 2010.*

[102] *Ibid Section 18.*

dispensation, the Local Government Act is yet to be modified. Significantly, the Act does not provide for multiparty politics at LC 1 and LC 2 levels following the recent annulment of these provisions by the constitutional court.[103] In the case ***Major Rubaramira Ruranga v. Attorney General, Const. Pet. No. 8 of 2006*** under the Local Governments Act on the other hand substantially incorporates most provisions of the Parliamentary Elections Act in as far as electoral regulation at local council level is concerned. It lays down qualifications for Local Council representatives and procedures for carrying out these elections. Glaringly however, whereas both the Presidential and Parliamentary Elections Acts have since been modified to make Under Section 123 (2) of the Act .Equal treatment to candidates states that:

> *States that Subject to the Constitution and any other law, every candidate shall enjoy freedom of expression and access to information in the exercise of the right to campaign under this Act, but shall not be protected against any abusive or slanderous statements.*[104]

Therefore, Section 124 on Rights of candidates; "Every candidate in an election shall be afforded reasonable access to and use of State-owned communication media, if he or she requires it."[105] But still under Section 129 Assistance to illiterate voters and other voters with disabilities states:

1. *Where a voter is by reason of blindness, illiteracy, old age or any other disability unable to fix the authorised mark of choice on the ballot paper, that voter may report at the polling station accompanied by a person of his or her choice to assist the voter to fix the authorised mark of choice on the ballot paper, on the voter's behalf, or the voter may, subject to subsection (3), request another person present at the polling station to assist the voter in that behalf.*

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[103] *See Major Rubaramira Ruranga v. Attorney General, Const. Pet. No. 8 of 2006*
[104] *Section 123 (2) The Local Government Act Cap: 243 of 1997.*

[105] *Section 124 of the Local Government Act Cap: 243 of 1997.*

2. *Any member of a voter's family may assist a voter under subsection (1) notwithstanding the fact that the former is below the age of eighteen years.*[106]

In conclusion, the Standards of Free and Fair Elections to appreciate whether a particular legal frame work comprehensively encourages free and fair elections, it is important to take into consideration the ten standards of free and fair elections as identified by the 1994 Inter- Parliamentary Union. These were identified to include; electoral law and periodic elections, the right to vote, constituency delimitation, election management, voter registration, civic education participation of candidates and political parties, electoral campaigns, balloting and monitoring and complaints and dispute resolution. A fair electoral system should also strive to achieve; Fairness between political parties; Effective representation of minority and special interest groups; Political Integration; Effective representation of constituents; Effective voter participation; Effective government; Effective Parliament; Effective parties and Legitimacy. these standards can only be achieved where there is a comprehensive and effective electoral legal framework in place which Uganda is yet to have. This is attributable to the fact that both the 2001, 2006 and 2011 elections were widely disputed with court finding on both occasions that the electoral process was marred by many irregularities.

[106] *Ibid Section 129.*

CHAPTER THREE

3.0 LEGAL SYSTEM OF INSTITUTIONAL MANAGEMENT IN ENSURING VOTER'S RIGHTS OF PARTICIPATION IN ELECTIONS IN UGANDA

3.1 Introduction

In Uganda, the legal framework for election management is provided by the Electoral Commission Act 1997 as amended (2010). The 1995 Constitution provides for the Electoral Commission under Articles 61 and 62. The Electoral Commission as the institutional body charged with administering elections in Uganda.[107] Article 60 of Uganda's 1995 Constitution creates the EC and outlines requirements for the Commission's staff.[108]

3.2 The Electoral Commission management

The Electoral Commission is in charge of voter registration, under section 18A of the Act, requires the electoral commission to "transmitte the voters register containing photographs of the voters to be used on the polling day, to political parties and organizations".[109] The commission is charged with Poll conduct, regulation of political parties and candidates as well as final declaration of results.[110] Other relevant laws include; The Presidential Elections Act 2005, The Parliamentary Elections Act 2005 and the Political Parties and Organizations Act 2005.

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[107] *Articles 61 and 62 of the 1995 Constitution.*

[108] *Article 60 of Uganda's 1995 Constitution creates the EC and outlines requirements for the Commission's staff.*

[109] *Section 18A of the electoral commission Act. (As amended 2010)*

[110] *Ibid Article 61 and 62.*

The Commission's Mission is "FOR REGULAR, FREE AND FAIR ELECTIONS". There stands the immense commission, which has laid strategies of various prongs to enhance its efficiency, and has made appeals to government and the public to avoid the stampede in the electoral process. Therefore, during the period of elections, the Electoral Commission is supposed also to update Voters' Register. Upon the Voters' register, the 1997 EC Act provides that:

> *18(i) "The Commission shall compile, maintain, and update, on a continuing basis, a national voters' register, in this Act referred to as the Voters' register, which shall include names of all persons entitled to voter in any national or local government election".*[111]

To this, the voters rights of participation in an election is provided for in the electoral commissions Act and it's the role of the electoral commission to ensure those entitled to vote , their names appear on the voters register at national and local government elections. Although under section 18 of the Electoral Commission Act, the commission is enjoined to compile, maintain and update voter's registers, this is different in practice. Accurate voter registration is widely perceived as authoritative and legitimate and every democratic aspiring country should strive to achieve accurate voter registration.[112]

It was noted in case of ***Dr. Kizza Besigye v. The Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006., the Judgment of Kanyeihamba JSC,*** indicated that the Electoral Commission was accused of disenfranchising eligible voters by unreasonably deleting their names from the Registry and relocating polling stations without providing affected voters with sufficient notice.[113] The fact the Electoral Commission itself admitted that

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[111] *Section 18(i) of the Electoral Commission Act 1997 (as amended 2010).*
[112] *Ibid section 18 of the Act.*
[113] *Judgment of Kanyeihamba JSC, Dr. Kizza Besigye v. The Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006.. see also CMI Report*

over 150,000 voters' names were deleted from the register at the conclusion of 2006 elections.[114] In this regard, voters' rights of participation in an election were not respected by the election commission.

3.3 The Parliamentary as an institution in ensuring voters rights of participation

Thus, Parliament has a central role in streamlining the work of the Electoral Commission. It needs to use its power vested in Article 76 of the Constitution to make all enabling laws with in time so that the Commission can fairly perform its task.[115] The new Commission (which was appointed after the President's disappointment with the old one, citing administrative loopholes) needs to be guarded against the setbacks faced by the former one. The Commission has resolved:[116]

> *"To promote public confidence in the Electoral Commission as a credible institution in charge of management of the electoral process through a transparent accountable and efficient human resource, conducting continuous voter education and update of the Voters' Register in order to deliver peaceful, free and fair elections and referenda in accordance with the Constitution".*

Therefore although Article 61(1) stipulates that Parliament shall ensure that adequate resources and facilities are provided to the Commission to enable it to perform its functions, the Ministry of Finance, Planning and Economic Development does not usually live up to its expectations. The budget submitted to

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"Uganda's 2006 Presidential and Parliamentary Elections" 2. It was reported that 27% of the 553 registered voters in Kabonero, Masaka were turned away by election officials on grounds that their names were not on the register yet they has voters cards. Similar incidences were also reported in the districts of Kampala, Luwero, Kalangala, Mukono and Jinja.

[114] *Mugisha, Anne,etaal (2006), 'EC Removed 150,000 voters' New Vision March 28 2006.*

[115] *Article 76 of the 1995 Constitution.*

[116] *The Electoral Commission Bulletin Vol.2 Number 3, Dec. (2004).*

Parliament is often reduced and the one approved does not sufficiently cover all election activities. This explains the continual shortage of funds to carry out vital programmes such as civic education and the recruitment of quality and well-trained staff. The Country Report gives evidence of this by quoting financial figures in the Commission's budget, which indicate shortfalls and substantial arrears. It is, for instance, reported that out of UGs 30,211,323,000 requested for the current financial year, only 17,240,000,000, approximately 57% was provided. The Country Report notes that this shows the lack of commitment on the part of Government to the activities of the Commission.[117] The other challenge, according to the Country Report and other authorities,[118] is the failure to pass enabling legislation on electoral matters on time.[119]

Traditionally, parliaments are seen as having three primary roles: legislation, oversight and representation. Legislation concerns passing the laws which make up a country's legal framework. Oversight is about keeping an eye on the activities of the executive and holding the executive to account on behalf of the country's citizens. And representation is about collecting, aggregating and expressing the concerns, opinions and preferences of the country's citizens, through the political process. Hudson and Wren,[120]Uganda parliament has made the transition from what was effectively a system of one-party rule under the National Resistance Movement Organisation to a multi-party democracy, there are particular challenges for Parliament.

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[117] *Country Report, 2007, at 51.*
[118] *Ibid, at 52.*
[119] *See Sabiti, et al op.cit, at 98.*
[120] *Hudson, A. and Wren, C. (2007) Parliamentary strengthening in developing countries: A review for DFID.*

Furthermore, In Uganda, the key feature is that the country moved to a multi-party system of politics as 2005, with the first multi-party elections for 25 years held in 2006. The legacy of one-party rule and the continuing dominance of the NRM, the Executive and President Museveni now able to run for the Presidency again in 2011 continue to shape the functioning and performance of the Ugandan Parliament.[121]

3.4 The role of movement political system visa-vis multiparty political system

The second presidential election in 2001, Museveni was re-elected as expected, with a majority of 69.3 percent of the votes. His closest challenger, Kizza Besigye, who ran on an anti-corruption platform, received 27.8 percent. Movement actually continued governing the country under a "no-party democracy" for 20 years. It was only in 2005, that the system finally changed and Uganda formally introduced a multiparty system. The NRM now officially transformed into a party was still able to maintain its superiority over other parties and stay in power. Following the regulations laid down in the 1995 Constitution, the first referendum about the future political system was held in 2000. With over 90 percent of the poll, the vast majority of Ugandans voted for the Movement system which the NRM and president Museveni had massively promoted.[122]

An internal debate that started after the 2001 elections led to the decision of the NRM in 2003 to open up the political system and transform the Movement into a political party. In 2005 a second referendum was held, with Museveni himself

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[121] *Deepening Democracy Programme Uganda: Programme Strategy Document, January 2007.*

[122] *Hansen, Holger Bernt & Twaddle, Michael, (1995). "Uganda: The Advent of No-Party Democracy", in iseman, John A. (ed.), Democracy and Political Change in Sub-Saharan Africa, London: Routledge.*

spearheading the campaign in favour of multiparty. This time, the vast majority of voters again more than 90 percent opted for the introduction of a multiparty system. In February 2006, the first elections under the new multiparty system took place and brought a decisive victory for the NRM, although the number of votes significantly declined. Museveni won the presidential election with a majority of 59 percent, while the leading opposition candidate, Kizza Besigye, got 37 percent of the votes.[123] In the parliamentary elections the NRM won 202 seats, while the main new opposition force, the Forum for Democratic Change (FDC) won 40 seats.[124]

Although, since the freeing of political parties in 2005, they demonstrated their efficacy in various ways. Parties have actively fought for human rights, pressed for alternative policies as well as exposing the weaknesses of the government's positions on several issues. They have also been seeking to mobilise voters, as evidenced by the increasing the share of opposition votes in relation to the NRM ones. For example, the NRM experienced a decline in national election results as follows: 75 percent in 1996, 69 percent in 2001 and 59 percent in 2006. This reduction in the NRM's share of votes is an indication of the growing strength of opposition parties, and the population's disaffection with government policies.

The opposition political parties have influenced voters rights of participation in elections by their legal struggles in courts of law were a key instrument used by parties which helped to compel the Movement government to open up political space. An example is the case in which the DP President General and

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[123] *Diamond, Larry, "The Rule of Law versus the Big Man", in Journal of Democracy, Vol. 19, No.2, April 2008.*

[124] *Bid pp. 138-149 (2008).*

others challenged the constitutionality of the provisions of the Political Parties and Organisations Act (PPOA) 2002, seeking to distinguish between a Movement and a party. In the case of ***Ssemwogerere and Others vs. Attorney General, Constitutional Appeal 4/2002)***, in the petition, they successfully challenged the constitutionality of the Movement, arguing it was a political party. Their petition was upheld by the constitutional laws.[125]

3.5 The role of the judiciary in ensuring voters rights in election process

The extraordinary role played by the judiciary in the 2006 election process in Uganda. For better and for worse, judicial procedures and decisions played a role at every stage. Cases arose over election rules; over nomination of candidates; campaign practices; and election results, in the case of ***Ssemwogerere and Others vs. Attorney General***, Constitutional Appeal 4/2002. As significant as the explicitly election related cases were criminal cases with political implications. Election battles were fought in and through the courts with related battles over the loyalty and integrity of the courts themselves. That courts are important in elections is not unique to Uganda, it is an aspect of their constitutional function. The extent to which these elections were 'judicialized' is exceptional, however, both regarding the scope of judicial involvement and its significance. The argument demonstrate that Ugandan courts influenced the elections in four analytically distinct ways: they influenced electoral rule-making as evaluators of the legal framework's constitutionality; enforced electoral rules; became a campaign arena; and served as a safety-valve diffusing tensions. In the respect these aspects of the court's roles came into play at various stages of the election process, seeking to understand the driving forces, as well as the implications for the elections, and the broader process of building democratic institutions and the

[125] *Ssemwogerere and Others vs. Attorney General, Constitutional Appeal 4/(2002).*

rule of law. We find the courts' impact on the Ugandan election process to be ambiguous. Opposition parties had a reasonable chance of winning in court and judicial decisions contributed towards the integrity of the elections but did not secure a level playing field. The judicial process was also open to misuse by the parties and by the government in particular, and the opposition was severely hampered by adverse litigation.

Rule evaluation and enforcement are functions that the judiciary is entrusted with as part of its constitutional mandate and that facilitate elections and enhance democracy. But an active judiciary also presents dilemmas, theoretically and in practice. Rule evaluation implies that un-elected judges overrule decisions taken by the people's representatives. This is not necessarily undemocratic, since this aims to protect the people's most profound long term priorities, laid down in the constitution, against short-sighted decisions taken in the heat of battle (Ackerman 1991). Nevertheless, it raises a counter majoritarian dilemma (Ely, 1980). Judicial power may be abused, and even when acting in a democratically justifiable manner, activist courts face practical dilemmas. Once they become an effective check on political power, they are often targeted in return and risk loosing powers and independence, thus jeopardizing their future role in the case of ***Charles Onyango Obbo & Andrew V Anthony*** General, (2004).In addition to the judiciary's formal functions, courts may (usually inadvertently) affect the fairness of election processes in other ways, most importantly by serving as a campaign arena.[126] The court processes are used and abused by the parties contesting the elections to score political points, or to fight their opponents, discrediting or disabling them. Court proceedings may also serve as safety valve, easing tensions that arise as part of an electoral process. This may happen throughout the electoral cycle, but is particularly salient in the aftermath of the polling. For the

[126] *Charles Onyango Obbo & Andrew V Anthony General, (2004).*

loosing candidates and their supporters the possibility of going to court represents a channel for frustration and anger that might otherwise erupt into violence. When one party eventually looses, the verdict normally comes in a less politically charged atmosphere and with reaction by the fact that all sides could state their case and been heard. Again, this is not a formal function of the court, but rather a result of how political actors use them. When we aim to understand the role courts actually play in electoral processes, these are nevertheless significant aspects to consider. . ***Kizza Besigye v. The Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006., the Judgment of Kanyeihamba JSC,*** indicated that the Electoral Commission was accused of disenfranchising eligible voters by unreasonably deleting their names from the Registry and relocating polling stations without providing affected voters with sufficient notice.[127] In the period leading up to, during and after the 2006 elections, Ugandan courts influenced the process in all four capacities: judges evaluated the constitutionality of aspects of the legal framework; they enforced rules governing the electoral process; they became a campaign arena; and functioned as a safety valve. Before turning to the analysis of the Ugandan courts and the 2006 elections, an outline is warranted of the court structure in Uganda, and the court's formal roles in the election process.

3.6 The management of the 2001 elections proved controversial.

This was the first time that the NRM experienced competition from within its ranks. That was the time Kiiza Besigye dared to stand against Museveni, though

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[127] *Judgment of Kanyeihamba JSC, Dr. Kizza Besigye v. The Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006.. see also CMI Report "Uganda's 2006 Presidential and Parliamentary Elections" 2. It was reported that 27% of the 553 registered voters in Kabonero, Masaka were turned away by election officials on grounds that their names were not on the register yet they has voters cards. Similar incidences were also reported in the districts of Kampala, Luwero, Kalangala,* Mukono and Jinja.

the political system was still the Movement. The management of elections was far from free and fair. The voters' register was bloated, electoral procedures were not followed and violence took a centre-stage. The state orchestrated violence. This prompted the Parliament to set up a select committee to investigate the causes of violence. The findings of the committee pointed a finger at state security officials especially the presidential protection brigade. This probably explains why the report was never tabled for debate in Parliament. The commission headed by Aziz Kasujja did nothing to manage the elections fairly. To this extent, in the aftermath of the elections, the discredited Kasujja Commission was disbanded, and the voters' roll was destroyed. The present Electoral Commission was appointed in 2002.

Both the 1996 and 2001 presidential and parliamentary elections were held under the Movement System, causing much protest from opposition politicians belonging to the 'banned' political parties. It was, however, clear that in spite of the legal position that all candidates contested the elections under the umbrella of the Movement, during the campaigns, some candidates were more 'movementist' than others. It was clear that the 'pure movementists' had government support and on many occasions used state resources and security agencies to boost their support. Indeed, in what would be a paradox under the Movement System, the incumbent, President Yoweri Kaguta Museveni, was on these two occasions nominated to contest the elections by Movement structures, clearly indicating that the Movement was but a political party suppressing other parties. When Kizza Besigye, who was then still in the Movement, announced that he also intended to run for the presidency under the Movement system, he was quickly denounced by Museveni in what mirrors the Robert Mugabe versus Simba Markoni contest.[128]

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[128] *Christopher Mbazira, Democracy and Good Governance: An Assessment of the Findings of Uganda's Country Self-Assessment Report under the African Peer Review Mechanism (2008).*

Aseka 2005 noted that Political parties and donors continued with their opposition to the no-party Movement system, arguing that this crippled democracy. Government agreed to hold a referendum in 2000 on possible change of the political system. A Referendum Bill was passed in 1999, but was later challenged in Court.[129] The opposition, led by P.K Ssemwogerere petitioned the Constitutional Court challenging the way Parliament had passed the 1999 Referendum Act.[130] Court ruled, in 2003, that Parliament had wrongfully passed the Act. But government appealed, and the decision of the Constitutional Court was reversed. Thus, a constitutional crisis was looming. The referendum held in 2000 resulted into the continuation of the Movement system, under which the 2001 presidential elections were also held.[131]

3.7 Management of 2006 multiparty elections

The 2006 elections were the first multiparty elections under the NRM government. These took place in the context of President Museveni's decision to change the constitution, scraping the two-term limits for President, hence allowing indefinite eligibility for him to stand for the office. At the same time, the amendments were made on the Political Parties and Organisations Act (PPOA) to allow the freedom of parties to operate freely, and compete for all offices. The Electoral Commission was mandated under Article 61 of the Constitution of the Republic of Uganda (1995) to organize, supervise and conduct regular free and fair elections. Cognizant of the Constitutional provisions

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[129] *Aseka, E.M. (2005). Transformational Leadership in East Africa: Politics, Ideology and Community. Fountain Publishers,Kampala.*

[130] *NEMGroup-U. (2001)."Promoting Good Governance Through Election Monitoring". Final NEMGroup-U Monitoring Report of Uganda's 2001 Presidential Elections. NEMGroup, Kampala.*

[131] *Aseka, E.M. (2005). Transformational Leadership in East Africa: Politics, Ideology and Community. Fountain Publishers,Kampala.*

as stipulated above, the Electoral Commission continued with its mandate to organize, conduct and supervise regular, free and fair elections and referenda through an impeccable electoral process.[132]

Again, in the 2006 elections the main protagonists were Museveni (NRM) and Besigye of Forum for Democratic Change (FDC). Other candidates included: Miria Obote of UPC, Ssebaana Kizito of DP and Abed Bwanika (an independent), who fared poorly. Observers of the 2006 elections Makara, Rakner and Savsand[133] noted that compared to the ones of 2001, these were less violent and reasonably well organized. Despite the level of improvement in election management, the elections ended in courts of law which ruled that the Electoral Commission (EC) had failed in several aspects of its constitutional responsibilities and that the elections fell short of passing as free and fair. Stakeholders in the election were dissatisfied with the way the EC handled the update of the voter register, deletion of voters from the register, counting, transmitting and tallying of results. Like was the case in 2001, the final verdict of the court was that the anomalies did not warrant overturning Museveni victory. In the present campaign the opposition has been vowing not to go courts of law. This has created uncertainty about their motives in case they lose elections.

3.8 Management of 2011 second multiparty elections

The presidential election campaign began on 18 October 2010 and the parliament ary election campaigns on 16 December 2010, providing ample time for the eight r egistered presidential candidates to conduct campaign activities throughout all 112 districts of Uganda. For parliamentary elections, the 238 regular constituency parli

[132] *The Electoral Commission Act, 1997 (as amended).*
[133] *Makara, S. et al (2003). Voting for Democracy in Uganda: Issues in Recent Elections. LDC Publishers, Kampala.*

amentary seats and 112 district constituency seats reserved for women were cont ested by more than 1,730 candidates and EU EOM observers reported a more com petitive landscape compared with the elections in 2006. In ensuring voters rights of participation, about 15 political parties fielded almost thousands, [134] although only the NRM and the IPC/FDC were able to contest elections in almost all constituencies.[135]

Although the NRM continued to dominate the political scene, in several constituen cies the major challenge to the NRM candidates came from candidates who had lost in the NRM primaries and decided to contest the elections as independents.[136]The NRM claimed to have more than 9 million members, many of these joining the party during the NRM party primaries. It was feared that such groups could become involved in intimidation of voters and in violent activities duri ng Election Day. At a General Stakeholder Briefing, the Electoral Commission Chair man addressed reports that some political parties had organized militia groups, an d warned illegal vigilante and militia brigades and their leaders not to interfere wit h the election process.[137]

3.9 Role of the media in elections

Radio is the key medium and is considered the most important source of news inf ormation for the public. About 160 privately owned radio stations are established throughout the country. However, the concentration of private media ownership is a concern as the overwhelming majority of the radio stations are owned

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[134] *In addition more than 700 independent candidates contested 350 directly elected parliamentary seats.*

[135] *Out of 350 constituencies: the NRM fielded 347 candidates (99%), IPC 297 candidates (85%), UPC 131 can didates (37%) and DP 103 candidates (29%).*

[136] *More than 40 NRM MPs who lost in the party's primaries ran as independent candidates for the p arliamentary elections. Many of these MPs were former ministers and senior NRM members.*

[137] *On 19 January 2011, the Commission warned illegal vigilante and militia brigades and their leade rs not to interfere with the election process. Brigades and their leadership who were warned by the EC are Kikankane, Blue Cobra, Red Brigade, Black Mamba, Bamboo Youth Brigade, Kibooko Squad , 3K Brigade, Mwoyo Gwagwanga, and Black Brigade.*

by politicians and businessmen linked to the ruling NRM party.[138] This had an impa ct on the election campaign, with many opposition candidates complaining of extr emely limited access to up country-based radio stations.

The stateowned broadcaster, Uganda Broadcasting Corporation (UBC), operates ra dio and television services. UBC Radio is the only broadcast network covering almo st all areas of the country thanks to repeaters and sister channels broadcasting in a variet of vernacular languages. During the election campaign, UBC Radio and UBC Television remained subservient to the interests of the government and the r uling party. There is a growing privately owned television sector which includes six terrestrial channels, but only two of them, NTV Uganda and WBS, are really signif icant in terms of news programming.

The print media is also diverse with five daily newspapers and several weekly and monthly magazines. The two newspapers with the greatest circulation are the Dail y Monitor and the partially state ' owned New Vision. Although serving small urba n elite, they effectively had a bigger impact on the electorate since many radio an d television stations broadcast their own news bulletins based on news items from the papers. Forty or so significant incidents affecting the media's freedom were re ported during the campaign period. These included the wounding of 10 journalists covering events on Election Day. Six other journalists sustained severe injuries foll owing assault by NRM militants, while covering alleged ballotstuffing in the cancell ed Kampala mayoral elections on 23 February. These incidents give rise to concer

[138] *Findings of a book published by the Eastern Africa Media Council showed that, as of 2008, 75 per cent of registered FM stations were owned by politicians, and 75 per cent of these were memb ers of the ruling party.*

n about the ability of the media to exercise fully their fundamental right and freed om to report during the election period.[139]

The media constitute an important political space, and in Uganda there have been several cases against journalists. In the earlier mentioned case of ***Charles Onyango obbo & Andrew V Atoney General***, two of Uganda's leading journalists, who prosecuted for publication of false news, challenged the constitutionality of section 50 of the penal code, which makes publication of false news a criminal offence. The constitutional Court, dismissed the partition for technical reason. The case went on appeal to the Supreme Court and on 11 February 2004, the judgment, delivered by justice Mulenga overturned the constitutional courts' decision and struck down section 50 of the Penal Code as inconsistent with article 29 of the constitution. The judgment emphasized the importance of freedom of speech to the democratic process and established a high threshold for limiting the freedom of the press. The foundation laid by the Supreme Court in this case is highly relevant to the charge currently faced by journalist in election process.

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[139] *Cases reported by the Uganda Journalists Association (UJA) and the Human Rights Network for J ournalists (HRNJ-Uganda) which both noted an increasing number of cases of journalists' harassme nt in the last week of the campaign. On 9 February soldiers belonging to the Army's Special Forces Group (SFG) allegedly assaulted a Daily Monitor journalist in Sembabule District as he attempted to take pictures of them stopping Lwemiyaga County MP Theodore Sekikubo from erecting a campai gn poster. On 10 February, a Masaka-based NTV correspondent was detained by the SFG for filmin g a scuffle involving Rwemiyaga area Member of Parliament, Theodore Ssekikubo, ahead of Presid ent Museveni's campaign rally.*

3.10 Conclusion

Uganda has constitutional provisions relating to free media in line with its regional and international commitments, but primary legislation, most notably the 1995 Pre ss and Media Law, sometimes unduly restricts the freedom of the press. Some typ es of libel are still considered criminal offences and punishable by a prison sentenc e, while the Penal Code contains provisions on sedition and the promotion of secta rianism, both of which are applied selectively.The clampdown on FM radio stations , coupled with new stricter legal proposals through the Press and Journalist (Amen dment) Bill 2010, created an atmosphere of intimidation.[140]

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[140] *Uganda is ranked 96th in the Paris-based NGO Reporters Without Borders Press Freedom Index (2010), a fall of 10 places from 2009. US-based NGO Freedom House's annual survey of media free dom (2009), notes that "in the last five years Uganda has experienced one of the most dramatic de clines in press freedom comparatively, with its global ranking declining from 98th place to 109th pl ace worldwide". Kampala-based Human Rights Network for Journalists index report (2010) indicate s that "the media in Uganda is consistently under attack" and is "concerned about the declining saf ety and security environment for journalists in Uganda, and the growing overall threat to freedom of expression in the country"*

CHAPTER FOUR

4.0 RESPECT OF VOTER'S RIGHTS OF PARTICIPATION: THE THEORY AND PRACTICE OF ELECTION ADMINISTRATION PROCESS IN UGANDA

4.1 Introduction

Kizza, J Sabit and Makara[141] submitted that one of the key prerequisites for ensuring the legitimacy of an electoral process is 'the capacity of the administrative unit mandated to administer the elections, and the unit's autonomy from political forces.'[142] One could support this view with the post election violence in the 2007 Kenya elections and the uncertainty created by the ZEC in Zimbabwe; these cases demonstrate that a compromised and partial electoral commission is a recipe for disaster. It is on the basis of this, among others, that the effectiveness of Uganda's electoral commission should be assessed.

Tumwine Mukubwa [143] in his view observed that the state and position of the Electoral Commission in Uganda has gone through two Phases: Phase I is the period of partiality and lack of independence, and Phase II is the transition to relative independence and impartiality. The height of Phase I can be seen in the 2001 Parliamentary and Presidential elections: the Commission was found to have failed to manage these elections, which were marred by violence. Indeed, when Besigye petitioned the Supreme Court to challenge the results, the Court held, amongst others, that the ability of the Electoral Commission to manage the

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[141] *Kizza, J., Makara, S., and Rakner, S., (2008) 'Introduction' in Kizza, J Sabit Makara and Lise Rakner (eds) Electoral Democracy in Uganda: Understanding the Institutional Processes and Outcomes of the 2006 Multiparty Elections Fountain Publisher, Kampala.*

[142] *Sabiti etal, 2008 in Kiiza etal, op.cit, at 90.*

[143] *Tumwine-Mukubwa, G., (2003), Free and fair Democratic Elections: A Commentary on the Ugandan case of (Rtd) Colonel Dr. Kizza Besigye versus Lt. Gen. Kaguta Museveni and Another Makerere University Printery, Kampala.*

elections in an impartial manner was in doubt.[144] The Court found that there were incidents of multiple voting by single voters, the harassment of voters and the existence of pre-ticked ballot papers.[145] In one of the many incidents of admonishment, the Court held:

> *"I must state that I cannot excuse the Electoral Commission for the creation of 1179 polling stations on 11th March 2001 when there was no corresponding voters roll. How did the ElectoralCommission expect people to vote from these new polling stations when there was no corresponding voters roll in those polling stations. This meant That the Electoral Commission expected people to go and vote without voter do cards, with no voters roll at polling stations".*[146]

4.2 Polling process

The EC is supposed to ensure the prompt delivery of election materials such as election kits for the registration process, enough equipment such as cameras and computers, staff professionalism in the administration of the process, and sufficient resources to pay electoral officials manning electoral activities.

Traditionally, the set-up of polling stations is expected to start at 7:00am in a gazetted zone. As required by law, polling can only start with the arrival of at least five registered voters. At every polling station there must be a presiding officer, four polling assistants and an election constable (police officer). Where there are more than 1000 voters at a polling station, two constables would be deployed. Transparent ballot boxes are used, which increases accountability and electoral security. In the past, there have been criticisms of the way polling issues are handled. Such allegations include voters being duly registered and holding of voter's cards but still being unable to vote because their names did not appear on

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[144] *See Besigye v Museveni & Anor Election Petition No. 1 of 2001.*

[145] *See Tumwine-Mukubwa, 2003.*

[146] *Judgement of Karakora JSC, at 127, as quoted by Mukubwa, 2003 op.cit., at 58.*

the voters roll, voters being transferred without their knowledge, deregistration and deletion of voters' names. Accordingly a Justice of the Supreme Court ruled in connection with the 2006 elections:

> *On the evidence adduced, I am satisfied that quite a number of voters were disenfranchised or denied the right to vote through removal of their names from the register during the exercise of cleaning or up-dating the voters register. Disenfranchisement can be effected by law or by action or omission of electoral officials. In the instant case it seems that some voters were disenfranchised by change in the law requiring them to register either where they originate or reside, and not where they work. Some voters who registered where they work could have been removed from the voters roll due to this change in the law. But there was also evidence that those who ceased to reside in the parishes where they were registered were also removed from the voters register allegedly on the recommendations of parish tribunals.*[147]

The Constitution requires voter's rights to be respected in elections but in practice voters have been violated by not respecting their rights to vote and participate in an election.

The question of respecting voters rights of participation in elections in sironko district it's a dramatic tale about meticulous planning, luck and hard work. It is also about the courage of one man, Nandala Mafabi, who, on election day, risked his life and physically engaged the heavily armed security personnel, who he alleged had been sent to intimidate the people and rig the vote in favour of his opponent, NRM's Beatrice Wabudeya.[148] To outsiders and residents, the heavy deployment and patrol by security personnel atop mambas in remote villages with no known recent history of rebel activity conjured up images of a battle front. But it was also a statement about how high the stakes were so high that the NRM government had to pull all the stops to ensure that FDC did not take Sironko and that Wabudeya defeats Mafabi in Budadiri West. In the end, Mafabi won, but not

[147] *Justice Benjamin Odoki, in the Presidential Election Petition No. 1 of 2006*
[148] *Eupean Union Observer mission (2012).*

after an outbreak of violence between his supporters and security, that left dozens of people injured, including a journalist who was trying to capture the events.

Cooperation (IPC) stated, 'In fact, if any one of us wanted to walk away with a ballot box, it was the easiest thing to do at Goma sub-county. The EC seemed not to care, and if they did, they were thoroughly exposed as an incompetent lot. Imagine a whole national institution failing to organise credible elections in one constituency'.[149]

Ensuring participation for all Ugandans including gender based rights, it was noted that vulnerable groups are at times denied freedom of participation in the electoral process. Respondents in Mbale, Sironko, and Jinja noted that disenfranchisement of women occurs sometimes as a result of some cultural practices that are highly demanding of women. Such cultures expect women to undertake housekeeping duties to the extent that they generally would not be expected to be outside their homes during the day, even to attend to electoral activities. Thus, these women are denied their constitutional rights to vote.

Article 29(1)(e) of the Constitution states that every person has the right to freedom of association, including the freedom to form and join political organisations. As related to elections, the right to freedom or association implicates the right to form political parties, and therefore relies heavily on the equitable access to state funding, freedom of speech, and freedom of access to information and the media.[150] This is reinforced in Articles 71 and 72, which restate the right to form 'political parties and any other political organisation'; and provide principles for the organisation of political parties, including that they shall not be based on 'sex, ethnicity, religion or other sectional division', that they shall

[149] *Nganda, Semujju 'EC Weakness exposed in Mukono', The Observer, 26 May 2010*
[150] *Article 29 (1) (e) of the 1995 Uganda Constitution*

respect internal democracy, and that Parliament should provide legislation to regulate 'the financing and the functioning of political organizations'.[151]

However, there are legislative restrictions on freedom of assembly and freedom of association. For example, Statutory Instrument No.53 of the Police Act, which came into effect in September, 2007, places restrictions on meetings of more than 25 people. The APRM Country Review Report for Uganda recommended the repeal of this provision.[152]

4.3 The media environment in respect of voters rights of participation in elections

The findings showed that the State-owned media made it hard for political parties to flourish and the right to freely and fairly compete for political power to materialize fully. This section of the media is fond of marginalizing opposition candidates and giving more coverage to members of the ruling party. For instance, it was reported that during the 2006 Presidential campaigns, Prime news on Uganda Broadcasting Corporation (UBC) TV, gave Museveni 62.4% coverage in comparison to 11.5% given to Besigye.[153] The partiality of UBC has been confirmed in a survey conducted and concluded that the national broadcaster runs skewed programmes to propagate the partisan views of the ruling NRM.[154] Political parties have also found it hard to operate in an environment where the rule of law is not observed and the supremacy of the Constitution is not respected.

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[151] *Articles 71 and 72 of the 1995 Uganda Constitution*
[152] *APRM Country Review Report for Uganda, 2009, paragraphs 276 and 284.*
[153] *Democracy Monitoring Group Presidential and parliamentary elections 2006 Final Report [on file with author].*
[154] *UBC a mouthpiece of the government – report' Daily Monitor 25 April 2008.*

4.4 Funding of political parties as their rights of participation

There are regional standards on the funding of political parties that require that fund distribution is impartial and well-regulated,[155] and that it is directed not only to all Parties represented in Parliament, but also to political bodies that have significant electoral support and that have candidates contesting in the elections.[156] At the continental level, the AU Declaration requires all state parties to ensure the availability of adequate logistics and resources for carrying out democratic elections, especially by ensuring funding for all registered political parties, in order to enable them to effectively organise their work and participate in electoral process.[157]

The CSSDCA specifically provides for 'disclosure of campaign funding sources and for proportionate state funding of all political parties, to ensure transparency, equity and accountability in electoral contests', while also providing for public funding of political parties based on a threshold of voter support.[158] In line with this commitment, the SADC Principles and Guidelines Governing Democratic Elections also state that funding of political parties must be transparent and based on agreed threshold in accordance with the laws of the land.[159] The ECOWAS Protocol provides that each member state may adopt a system for financing political parties, in accordance with criteria set under the law.

Domestic legislation about the funding of political parties mostly focuses on restrictions to accessing government funds, rather than provisions ensuring equitable access to funds. The constitutional language merely states that political parties are required by law to account for the sources and uses of their funds and

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[155] *IPU Universal Declaration on Democracy, Article 12.*
[156] *Council of Europe Venice Commission, "Guidelines on the Financing of Political Parties', Part (a)*
[157] *AU Declaration on Principles Governing Democratic Elections in Africa, part 111 (g).*
[158] *CSSDCA Memorandum of Understanding, key Performance Indicators 20 and 23.*
[159] *SADC Principles and Guidelines Governing Democratic Election, Article 4.*

assets.[160] Part V of the Presidential Elections Act 2005 provides that the EC shall offer each candidate a contribution amounting to one-thousand currency points as a contribution to be used solely for the election, in addition to other facilities as may be approved by Parliament.[161] The Political Parties and Organisations Act 2005 does not include provisions to ensure equitable funding, but rather merely outlines rules that parties must follow in collecting and accounting for campaign funds raised.

The funding provisions in the Political Parties and Organisations (Amendment) Act 2010 discriminate against small political parties in their day-to-day operations. Political parties and organisations are entitled to use government funds and public resources for their activities, subject to monitoring by the Auditor General. On the one hand, for elections, the Act guarantees equal levels of financing to all political organisations and parties.[162] For normal day-to-day activities, however, the level of funding each party receives those activities is based on the number of representatives the party has in Parliament.[163] It is clear that the ruing party, the NRM, has the majority of seats in Parliament, so there appears to be an inherent bias against smaller political parties with little or no parliamentary representation, especially since they already face financial disadvantages. The distinction between elections-related activities and day-to-day activities is not made clear. Without explicit guidelines to this regard, the ruling and larger parties will undeniably have more disposable funding to use in preparation for elections, or even for staffing and other resources that are fundamental to, but not directly related to, electoral campaigns. Therefore, when applied in practice, this Amendment Act means that the ruling parties are assured more government funding that could be used

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[160] *Uganda Constitution (1995), Article 71 (e)*
[161] *Presidential Elections Act 2005, Part V, Section 22 (2)*
[162] *The Political Parties and Organizations (Amendment) Act 2010, 9 April 2010, Section 14A (b)*
[163] *Ibid., Section 14 A (c)*

toward elections than the other registered contending parties. It thus becomes very difficult indeed to establish and campaign with a new party.

It is my submission that the transition to multi-party democracy has not resulted in full democracy as quickly as expected. This has arisen, amongst others, from the unfamiliarity with multi-party democracy and the frail nature of the parties themselves. The cause of this can be found in the observation made in the Country report:

> *"For most of the period ...Uganda was governed under the Movement political system. In turn, this hindered free operations of political parties and alienated the majority of the population from [sic!] understanding the concept of political pluralism. Uganda held its first multiparty election in twenty years in 2006. All stakeholders- voters, political party leaders andthe Electoral Commission were not accustomed to this form of elections".*[164]

4.5 Failure to address intimidation and harassment

The EC has not been empowered by law to effectively handle challenges such as intimidation and the harassment of political actors by militia groups, especially in urban areas. During the 2006 elections, the forms of election violence reported included the intimidation of opponent supporters; threats through agents, phone calls and public and radio statements; assaults; killings; intimidation, arrests and beatings by security personnel; and destruction of property.[165] There were hot spot areas of reported violence in all of Uganda's five geographical regions.

After these violent incidents were reported, the main complaint that arose is that the EC's handling of the cases was extremely slow and altogether inadequate,

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[164] *See Uganda African Peer Review Mechanism (APRM) National Commission The country self-assessment report (November 2007), available at <http://www.nepaduganda.or.ug> (accessed on 15 February 2008) (Country Report, 2007).*

[165] *Towards the Uganda 2011 Elections: An Assessment of Conflict Risks and Mitigating Mechanisms,' Akijul Report, sponsored by the Deepening Democracy Programme, April 2010, p.42*

especially at the district level in large part, it seems that this can be attributed to inadequate resources and funding.[166] However, there has not been any attempt to put in place safety measures relating to the pre-election period or electoral processes, such as holding peaceful assemblies and exercising the right to association and holding campaigns freely.

A statement released by the police Friday evening, indicates that there were isolated incidences of election related violence, which the police is either investigating or have caused arrests. Judith Nabakooba, the Police Public Relations Officer says "*major towns that have had such cases include Mbale, Sironko, Nakapiripirit, Iganga and other towns. She says that police have not been spared either. Several officers have been attacked in Serere District".*[167] Corporal Francis Olupot, was seriously injured on the head while responding to a false distress call that thugs were holding a man. His firearm was grabbed from him during the scuffle but was later recovered. The officer has since been rushed to hospital and is in a stable condition.

Nabakooba says that "*three people have been arrested in connection to that incident. They arrested are: Waiswa Mutwalibu, Olinga Ali, and Okiria Paul".* Another incident in Iganga, seven police officers were ambushed by a mob of IPC supporters which took them hostage, stuffed sugar and soap in their vehicle to allege that police had been aiding supply of gifts on behalf of NRM[168]

The denial of freedom of expression and speech, especially on the media waves by state agents, is something that the EC has failed to handle as an electoral body knowing that the overall credibility of an electoral process is substantially

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[166] *Ibid., P. 43.*
[167] *Report of Judith Nabakooba, the Police Public Relations Officer in Kampala 2012.*
[168] *Report of Judith Nabakooba, police public relations 2012.*

dependent on all relevant groups (including political parties, government, civil society and the media) being aware of and participating in the debate surrounding the formation of the electoral structure and processes. In areas such as Kampala, militia groups such as the Kiboko squad[169] continue to subject people to intimidation and beatings during electoral activities that include peaceful assembly and campaigns.

In the 2006 elections, the High Court resolved several parliamentary election petitions and annulled a number of results. For instance, in ***Abdu Katuntu vs. All Kirunda Kivenjinja and The Electoral Commission, Election Petition No.7 of 2006***, the petitioner and first respondent contested for the parliamentary seat in Bugweri County, Iganga district in 2006. The petitioner filed a petition on the following grounds: the electoral process was non-compliant with the provisions and principles of the Parliamentary Elections Act 2005, failure to conduct the election in compliance with the provisions and principles in the electoral law benefitted the first respondent and affected the final result in a substantial manner; the first respondent personally or through his agents, with his knowledge, consent or approval, committed numerous election offences and illegal practices[170]

The Court ruled that there was widespread intimidation, violence and torture by gangs trained and deployed by the first respondent, and furthermore that incidents of multiple voting occurred at a number of polling stations. The Court concluded that there were instances of noncompliance with the provisions and principles established in the Parliamentary Elections Act and this affected the results of the election in a substantial manner.[171]

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[169] *Op. cit.114*
[170] *Abdu Katuntu vs. Ali Kirunda Kivenjinja and the Electoral Commission, Election Petition No. 7 of 2006*
[171] *Ibid election petition No. 7 of 2006.*

Contesting presidential elections validity of electoral results. The question of how valid Uganda's previous elections have been since 2001 is contentious, and disputes have always been resolved by the courts of law. In some constituencies and in general elections, candidates opted to seek redress in the courts of law where they were either upheld and by-elections held, while others were dismissed due to lack of sufficient evidence. Following the presidential elections of 2006, the runner-up in the vote, Col. (Rtd) Dr Kiiza Besigye, sought to have the results declared null and void based on malpractices and irregularities that were not in conformity with the electoral laws. The following issues were framed at the hearing of the petition in the Supreme Court:

1. *Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2006 Presidential Election.*

2. *Whether the said Election was not conducted in accordance with principles laid down In the Constitution, Presidential Elections Act and the Electoral Commission Act.*

3. *Whether if either issue 1 or 2 or both is answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.*

4. *Whether the alleged illegal practices or any electoral offences in the petition, were. committed by the 2nd Respondent personally, or by his agents with his knowledge and consent or approval.*

5. *Whether the petitioner is entitled to the reliefs sought. The Court's decision on the / issues framed above was as follows:*

'On issue No.1, court found that there was non-compliance with 4the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections, by the 1st Respondent in the following instances:

(a) In disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote.

(b) In the counting and tallying of results.

On issue No. 2, there was non – compliance with the principles laid down in the Constitution, the Presidential Elections Act, and the Electoral Commission Act, in the following areas:

- The principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.
- The principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting and vote stuffing, in some areas.

On issue No. 3, by a majority decision of four to three, the Court found that it was not proved to the satisfaction of the Court, that the failure to comply with the provisions and principles laid down in said Acts and the Constitution, as found in the first and second issues, affected the results of the presidential election in a substantial manner.

On issue No.4, by a majority decision of five to two, court found that no illegal practice or any other offence, was proved to the satisfaction of the Court, to have been committed in connection with said election, by the 2nd Respondent, Y.K. Museveni, personally or by his agents with his knowledge and consent or approval. 'In the result, by a majority decision, it was ordered that the petition be dismissed, 'with no order as to cost'.[172]

Similarly having interview with the Secretary General of Uganda People's Congress, Joseph Bbosa, has said that *"his party and its supporters have faced considerable psychological violence this campaign season".* Bbosa said his candidate has

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[172] *Col. (Rtd) Dr Kiiza Besigye vs. Electoral Commission and Yoweri Kaguta Museveni, Election Petition No. 1 of 2006.*

faced numerous challenges in the run up to the elections that have negatively impacted his bid.[173]

Speaking at the UPC headquarters in Kampala today, Bbosa said that:

> *"Although physical violence around the elections is less than it was five years ago, Ugandans have faced consistent psychological assaults. He said there is an atmosphere of fear and apprehension surrounding the elections, which he blames on President Yoweri Museveni and the National Resistance Movement".*[174]

In Mbale district, the shooting incident: Perhaps one of the major setbacks for the NRM was the shooting incident in which the minister of state for housing, Michael Werikhes' bodyguard shot at a vehicle in which Mutendes' campaign team was travelling. Mutendes' supporter Abdallah Kayiwa was rushed to Mbale hospital with injuries. The incident occurred at 1:00pm and is widely believed to have swayed the undecided voters to go against the NRM. Being a working day, most people voted after 1:00pm. When the news started trickling through the local radio stations, people changed their minds and voted against Wambogo, Joseph Elunya, a resident in Industrial Division says.

The Mutende factor Prior to the disputed January 16 NRM primaries, a party meeting presided over by the NRM chief whip, Daudi Migereko, at Sunrise Hotel had agreed that all other candidates should back the winner of the primaries. Unfortunately, the register was displayed on the polling date, where many NRM voters found their names missing. The disenfranchisement gave Mutende the guts to defy the President and continue as an independent. In the interview

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[173] *Readmore:http://ugandaradionetwork.com/a/story.php?s=31530#ixzz27MvsflOL*

[174] *Interview with Secretary General of Uganda People's Congress, Joseph Bbosa 2012. Stated that: his party and its supporters have faced considerable psychological violence this campaign season.*

conducted, Out of about 3,000 expected voters, only about 1,000 voted in the primaries.

4.6 Access to voting for persons with disabilities

People with disabilities do not fare well in the electoral process either. While the Constitution instructs Parliament to make laws to provide for the facilitation of citizens with disabilities to register and vote, this has not been put into effect. Therefore, people with visual impairments and other sensory disabilities often face extra challenges in participating in the electoral process, requires by its Article 29 that states 'ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected'.[175]

Uganda is a party to that treaty to the National Union of Women with Disabilities (NUWODE), Ugandans with various disabilities 150 experience routine discrimination in their communities, which extends to the electoral process. During elections, there are no special arrangements made for people with disabilities, thus impairing their ability to freely associate and to freely exercise their basic right to vote. Necessary arrangements such as tricycles or wheelchairs, crutches, and calipers for the disabled are expensive, and disabled voters cannot afford them.

Kanyeihamba observed that their positive changes brought about by the NRM were the freedom of the press and civil society to operate; this is in addition to the attention given to the need to protect human rights. Also, for the purposes of widening the principles of participation in governance and development, the NRM

[175] *The UN Convention on the Rights of Persons with Disabilities, which entered into force in 2008.*

accorded equal rights to men and women and brought on board a number of marginalised groups including persons with disabilities.[176] To comply with international and regional commitments and domestic legislation, the government should undertake to assist these voters so that they can freely and easily participate in the electoral process.[177]

4.7 UPDF Elections

In practice army representatives sit on the NRM side in parliament and tend to vote in favour of the ruling NRM. The 10 SIG seats reserved for the army have given rise to a constitutional petition. In breach of the separation of powers, military MPs remain in active service,[178] and thus subject to the chain-of-command, which is headed by the President as commander-in-chief.[179] Military MPs are accountable to the President, rather than to constituents. On appeal against the Constitutional Court, the Supreme Court has awarded military MPs freedom of speech inside Parliament, but not in public. Chief of Staff Major General Joshua Masaba, argued that the army required listening posts in Parliament, which might have a chilling effect on debate. The army's argument prompted the Supreme Court to question the democratic "desirability" of military MPs.[180]

4.8 Dispute resolution

4.8.1 Legislation relating to electoral disputes and resolutions.

The Constitution of the Republic of Uganda 1995, the Presidential Elections Act 2005, the Parliamentary Elections Act 2005 and the Electoral Commission Act 1997 provide for ways and means in which electoral disputes shall be dealt with by the

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[176] *Kanyeihamba, 2002, at 243. Kanyeihamba describes the guarantee of the equal rights of men and women as the greatest innovation introduced and practiced by the NRM.*
[177] *National Union of Women with Disabilities (NUWODE).*
[178] *Article 208 (2) of the Constitution states the UPDF are subordinate to the civilian authority*
[179] *The annual Parliamentary Scorecard ranks Military MPs at the very bottom in terms of committee attendance and the tabling of parliamentary questions and private members' bills*
[180] *Brigadier Henry Tumukunde V AG and EC, 2008.*

EC and by courts of law such as tribunals. Article 61(1) of the Constitution empowers the EC to hear and determine election complaints arising before and during polling. In addition, Article 64(1) provides that any aggrieved person may appeal to the High Court a decision on an elections complaint.[181] While any dispute relating to demarcation of electoral boundaries may be appealed to a tribunal and further appeals can be before the High Court, whose decision shall be final in respect to the above.

4.8.2 Electoral adjudication by the Electoral Commission

The EC has been involved in dispute resolution during and after polling. For example in the year 2005/06 the EC handled a total of 856 complaints which ranged from questionable academic papers during nominations, resignations (failure to resign from public office), intimidation during campaigns/polling, missing/misallocations of symbols and names of candidates, under aged persons in the register, double registration, request to nullify declared results, voter bribery, ballot stuffing, defacing of posters, disrupting rallies and use of abusive language. The courts of law do also determine or resolve electoral disputes. In 2006, the courts received 112 post- election petitions /complaints,[182] some of which have been resolved, while others are yet to be resolved. There has been a general complaint in the delays at which election petitions are disposed off especially the parliamentary and local government election petitions, Another concern is the high awards provided to successful litigants that discourage potential litigants from petitioning courts whenever they are not satisfied with the results of an election.[183]

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[181] *Article 64 (1) the 1995 Uganda Constitution: provides that any aggrieved person may appeal to the High Court a decision on an elections complaint.*

[182] *Electoral Commission Report 2005/06,*

[183] *Ibid report 2005/06*

In the 2006 elections, the High Court resolved several parliamentary election petitions and annulled a number of results. The case of ***Abdu Katuntu vs. Ail Kirunda Kivenjinja and the Electoral Commission, Election Petition No.7 of /2006.*** The Electoral Commission, the petitioner and first respondent contested for the parliamentary seat in Bugweri County, Iganga district in 2006. The petitioner filed a petition on the following grounds: the electoral process was non-compliant with the provisions and principles of the Parliamentary Elections Act 2005, failure to conduct the election in compliance with the provisions and principles in the electoral law benefitted the first respondent and affected the final result in a substantial manner; the first respondent personally or through his agents, with his knowledge, consent or approval, committed numerous election offences and illegal practices.[184] The voter's rights were not respected according to election management in ensuring voters rights of participation in election process in Uganda.

In this Abdu Katuntu vs. Ali Kirunda Kivenjinja and the Electoral Commission, Election Petition No.7 of 2006, The Court ruled that:

> *"there was widespread intimidation, violence and torture by gangs trained and deployed by the first respondent, and furthermore that incidents of multiple voting occurred at a number of polling stations. The Court concluded that there were instances of non-compliance with the provisions and principles established in the Parliamentary Elections Act and this affected the results of the election in a substantial manner"*[185]

4.8.3 Contesting presidential elections: Validity of electoral results

The question of how valid Uganda's previous elections have been since 2001 is contentious, and disputes have always been resolved by the courts of law. In some constituencies and in general elections, candidates opted to seek redress in

[184] *Abdu Katuntu Vs. Ali Kivenjinja and the Electoral Commission, Election Petition No. 7 of 2006*
[185] *Bid Commission, Election Petition No. 7 of 2006*

the courts of law where they were either upheld and by-elections held, while others were dismissed due to lack of sufficient evidence. ***Following the presidential elections of 2006, the runner-up in the vote, Cot (Rtd) Dr Kiiza Besigye,*** sought to have the results declared null and void based on malpractices and irregularities that were not in conformity with the electoral laws. The following issues were framed at the hearing of the petition in the Supreme Court:

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> *"On issue No.1, court found that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections, by the 1st Respondent in the following instances:*

(a) In disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote.

(b) In the counting and tallying of results. On issue No.2, there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act, and the Electoral Commission Act, in the following areas:

- *The principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.*
- *The principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting and vote stuffing, in some areas. On issue No. 3, by a majority decision of four to three, the Court found that it was not proved to the satisfaction of the Court, that the failure to comply with the provisions down in said Acts and the Constitution, as found in the first and second issues, affected the results of the presidential election in a substantial manner".*

On issue No. 4, by a majority decision of five to two, court found that no illegal practice , other offence, was proved to the satisfaction of the Court, to have been Committed in connection with said election, by the 2nd Respondent, Y. K. Museveni, personally or by his agents with his knowledge and consent or approval.' In the result, by a majority decision, it was ordered that the petition be dismissed, 'with no order as to cost'.[186]

4.8.4 Public perceptions of the Electoral Commission

Many sections of society feel that the EC is a biased and incompetent institution unable to conduct a free and fair election in Uganda. According to the Opposition Chief Whip in Parliament, '... the Electoral Commission as presently constituted is incapable of organising free and fair elections in accordance with the law. It is well known even beyond Uganda's borders that it is not independent and has no will to uplift its performance standards. In short, if it is not overhauled or reconstituted, it will not be able to organize credible elections in 2011'.[187]

Many citizens say that they will continue to question the independence of the EC and hold demonstrations until they see it disbanded. Media reports quoting various personalities illustrate perceptions of citizens towards the EC, especially the chairperson of the EC, Eng. Badru Kiggundu. Examples include:

- *Most opposition MPs accused the EC of being 'incompetent and biased' and called on Kiggundu's team to resign.*[188]
- *'Is there any activity that a Commission led by Professor Badru Kiggundu can properly execute? Mismanaging elections, perhaps.*[189]

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[186] *See the case of Col. (Rtd) Dr. Kiiza Besigye vs. Electoral Commisison and Yoweri Kaguta Museveni, Election Petition No. 1 of 2006.*

[187] *Ezati wadri, Kassiano 'we must avoid another doubtful election,' (Parts 2), The Weekly Observer, 19 May 2010.*

[188] *Nalugo Mercy "Extend voter registration exercise, legislators tell EC', Daily monitor, 13 May 2010, P.5.*

- *'Any blood that shall be shed in an attempt to dislodge the [C is blood on the hands of Kiggundu and his team. They have the court judgment that clearly shows that they are incapable.'*[190]

The EC considers the current public perception of 'being partisan' and not credible due to the appointment of commissioners by the incumbent candidate as merely 'negative perception' and 'bias' towards the institution. The EC is of the view that most stakeholders in the electoral processes hold such negative perceptions because they do not know the legal electoral provisions, and as such are not aware that all actions are performed within the confines of the law, including the process of appointing the commissioners. They for example stated that they nominated a presidential candidate, Dr Kizza Besigye (from the opposition, who at that time was in prison) against the advice of the Attorney General, who was of the opinion that a person in prison cannot be nominated as a presidential candidate. This they claimed was a huge attribute of their independence. They, in turn, blamed some people to exercise their civic duties of turning up to register, analyzing the sisters in time to ascertain if any anomalies or omissions existed and report the anomalies to the electoral officers for correction.

Other shortcomings, cited, include the failure to vote and to place representatives at polling stations to ascertain the results of an election; bribing voters through the distribution of essential commodities like sugar and salt after midnight to influence their voting patterns; violence instigated by some parties through the use of militias; and diversion of electoral staff by some political groups during the electoral process through the giving of false information in specific polling stations.

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[189] *Nganda Ssemujju 'Kiggundu's EC is incompetent', The Observer, 12 May 2010.*
[190] *Dr Kiiza Besigye, FDC President.*

This, in the view of the Commission, accounts for such negative misgivings and the failure to accept defeat by some candidates[191]

The chairperson of the Electoral Commission Eng. Badru Kiggundu has asked Ugandans to forgive him for the poor election exercise seen in Kampala and other parts of the country. Kiggundu confirmed that there were a number of election malpractices across the country. There were electoral violence in Kampala, Sironko district, Wakiso and Masaka among other areas. In some areas like in Budadiri a journalist was shot, soldiers beaten and many voters are nursing wounds. In most district outside Buganda region voting started late because election materials arrived there late. Some names of voters including those of presidential and parliamentary candidates were missing on the voters register. Kiggundu says Ugandans should kindly forgive him and the Electoral Commission for the anomalies.

4.9 Conclusion

While the EC has put in place mechanisms to resolve disputes during elections, Courts have also been criticized for not explaining fully the contractions and significance of their judgments relating to electoral petitions, such as the recent presidential petition, where they have cited the phrase, 'failure to substantively affect the outcome' of an election. And yet at the same time ruling that the elections were not free and fair and were not held in accordance with the law governing elections. In order to address the malpractices during and after elections, it is recommended that the EC's legal department be immediately reinforced to expeditiously handle electoral disputes.

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[191] *See the statement of an Interview of an Interview with the Electoral Commission Chairperson and Secretary, 3 March 2010.*

CHAPTER FIVE

5.0 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS OF THE FINDINGS

5.1 INTRODUCTION

The main question leading to the elections in Uganda is whether the EC meets international standards and whether is it capable of organising free and fair elections. For any electoral management body to be credible and effective, sufficient and timely funds must be made available, and there must be personnel and election officials who are impartial and independent.

5.2 SUMMARY

Administering democratic elections requires that the EC be, and be seen to be, impartial and independent of government or other influence. This is a critical area, as the election administration machinery make and implements important decisions that can influence the outcome of an election. The political circumstances of the particular country under consideration need to be taken into account when assessing the legal framework regulating the EC.

Although important improvements could be made to the existing legal framework on electoral processes, the law is for the most part sufficient to ensure a free and fair election, if implemented as stipulated in both the Constitution and other enabling laws. What is required is to ensure compliance with the law by all stakeholders in electoral process. The EC's failure to address the constant harassment, arrests and intimidations which political groups and some individuals are subjected to by the police and Kiboko squads, has severely undermined its credibility in Uganda. The EC as an electoral body must also

address the denial of freedom of expression and speech especially the domination of broadcast media by the government and ruling party. The overall credibility of an electoral process is dependent on all relevant groups, including political parties, government, civil society and the media, being aware of and participating in the debate surrounding the formation of the electoral process.

5.3 CONCLUSION

Uganda's electoral laws do not inhibit the practice of free and fair elections. This is attributable to the fact that most of the laws governing electoral practice are up to date. The main challenge remains that they are largely rhetoric and election practice is at variance with the law. Clearly electoral reforms should go beyond Constitutional and legislative reforms if Uganda is to achieve free and fair elections. In particular, free and fair elections can be achieved where there is favorable political will by the incumbent.[192]

Election Administration, in its preparations, have eventually succumbed to the excessive pressure of administering presidential and direct parliamentary elections, while also administering several stages of nationwide polling for local council one (LC1), local council two (LC2) and for Special Interest Group youth elections. The Electoral Commission did not enjoy widespread trust by failing to organize such elections by violating voter's rights and participation.

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[192] *See for Example the Presidential and Parliamentary Elections Act 2005. These replaced the Presidential and Parliamentary Elections Acts of 2001 respectively. See also, Uganda's Electoral Commission urges Reforms: America Should Follow the Uganda Example. Available on* http://www.velvetrevolution.us/electionstrikeforce/2009/02/ugandas_electoral_commission_u.htm

It is only democratically oriented leaders who believe in free and fair elections that will strive to have them. With growing cynicism, electoral apathy and distrust in the electoral system, electoral reforms will go far in restoring voter confidence in the electoral process.

The 2011 Ugandan general elections showed some improvements over the previous elections held in 2006 and 2001. However, the electoral process was marred by avoidable administrative and logistical failures which led to an unacceptable number of Ugandan citizens being disenfranchised. Furthermore, the power of incumbency was exercised to such an extent as to compromise severely the level playing field between the competing candidates and political parties. Notwithstanding a number of incidents of violence and intimidation, especially on Election Day, the electoral campaign and polling day were generally conducted in a peaceful manner. Restraint in campaign rhetoric contributed to this improved campaign environment. With genuine political commitment by all stakeholders, further progress towards a fully pluralistic and multi-party democracy can be achieved.

5.4 Legal framework

Uganda's legal framework offers a workable and detailed foundation for the conduct of democratic elections by ensuring voters rights of participation, generally in accordance with the national, international, regional and constitutional commitments and obligations. The shortfall legislative call for amendments to level the practical playing field; to deter illegal practices of intimidation, disenfranchisement voters, and shooting and injuring of voters. To enhance public confidence in the Electoral Commission's independence; and to guarantee universal, direct and equal suffrage for all seats of Parliament.

5.5 Electoral System

Equality of the vote is not respected by current constituency delimitation, neither in the normal constituencies where there is a ratio of 30:1 between the constituencies with the greatest and smallest number of registered voters, nor in the districts from which women MPs are elected, where this rises to 56:1. Indirect Special Interest Group elections constitute a breach of equality of vote, particularly since in all but one case there is no clear justification for giving particular advantages to the groups concerned. While positive discrimination for Persons with Disabilities may be justified, in the case of workers and youth these measures are unnecessary; while those for the armed forces are particularly problematic since military MPs are not accountable to a constituency but rather to the Commander-in-Chief. In practice, the various processes for SIG elections are mired in poor practices, exacerbated by the inherent lack of transparency of elections held away from the public.

Given the specific groups granted special representation and the current framework for their election, Special Interest Group elections fail to meet the criteria for justifiable measures to ensure equitable participation and instead constitute a serious weakness in the Ugandan electoral framework.

5.6 RECOMMENDATIONS

5.6.1 Election administration

Amendment of the law to establish independent Electoral Management Bodies that are adequately funded from the Consolidated Fund who would enable voters rights of participation in election has not been fully realized, the problem of lack of trust in the Electoral Commission could be addressed by creating a legal basis for the transparent appointment of Commissioners. One option to consider would be

to establish a joint panel of the Civil Service Commission and the Judicial Service Commission, which would draw up a list of qualified candidates, as is done with judges. Greater consensus could also be achieved by including opposition and civil society voices in the appointment process, rather than only the Presidency and Parliamentary majority. Electoral Commissioners should also enjoy security of tenure. The criteria for nomination and precise terms of reference for Electoral Commissioners and all other electoral officials should be set out in law.

5.6.2 Election system

All Members of Parliament should be elected by direct and universal suffrage, including any quota seats for disadvantaged groups. Consideration should be given to amending the Constitution and the Parliamentary Elections Act with a view to reviewing the Special Interest Groups provided for. The current quotas for youth, workers and the military do not meet criteria of acceptable positive discrimination for disadvantaged groups since the groups concerned do not require particular assistance and in the case of the armed forces, special seats raise serious concerns of independence, accountability and conflict of interest. In addition, the implementation of Special Interest Group elections runs contrary to democratic standards in a number of respects. Seats currently reserved for persons with disabilities should, if maintained, be elected by universal suffrage.

5.6.3 Voter registration

Another measure that would increase public trust in the electoral process is the creation of a new National Voter Register. Public display periods both before and after cleansing which are adequately communicated to the public in both urban and rural areas, and completion of the final assignment of polling stations at least one month before polling day, should, if communicated to the electorate, also

enhance their confidence in future electoral processes. The use of an identity card system or voting document would assist greatly in the polling process.

5.6.4 Media

Creating an enabling environment for the exercise of freedom of expression, association and assembly, a free and independent media as a condition for freedom of speech and equitable access to the media would be improved by the creation of an independent regulatory authority, which could be achieved by merging the Media Council and the Broadcasting Council. The authority's operational budget should be determined by Parliament and allocated from the state budget. The setting out of criteria for nomination to the authority in law would also enhance the credibility of its work. An independent regulatory authority with statutory powers to deal adequately with complaints during election period would create a basis for a more level playing field for media coverage and help to improve voters' access to information. A media monitoring system managed by the authority would also help ensure that Uganda's legal provisions with regard to free access to the media are respected.

5.6.5 Registration

Amending the electoral laws that allow citizens including those living abroad to participate in electoral processes and fully recognizing voter's rights of participation, there should be an amendment to the law to enable the registration of those who turn 18 before Election Day but after the close of the register would ensure full enfranchisement of the electorate. This should be further supported by programmes, initiated by the Electoral Commission, to ensure the registration of all those eligible to vote, including those in institutions such as hospitals, or those held in prison, whether on remand or following conviction.

5.6.6 Funding of political parties

Amending policies and laws that regulate funding of political parties and implementation of public funding of political parties may help to address the trend in monetization that will enable voters rights and participation of the political process, as would the full enforcement of financing regulations established by the Political Parties Organizations' Act.

5.6.7 Electoral regulations

Developing mechanisms to facilitate democratic elections, political transitions and peaceful transfer of power within a specified timeframe between conclusion of elections and assumption of office for the overall electoral process would benefit from clear and detailed procedural regulations for every stage, including voter registration, equal treatment of candidates on the ballot paper, and all elements of polling, counting and tallying. The publication of these significantly before the beginning of each stage in question and ideally not later than the publication of the two-year electoral roadmap, would serve to enhance the confidence of all stakeholders in the process. Such regulations can be issued by the Electoral Commission, relying on its independence as provided for in Article 62 of the Constitution.

5.6.8 Civic education and voter information

A comprehensive and effective programme should ensure that all citizens are informed of all necessary elements of the electoral process, from registration to the precise modalities and location for voting. Unless significant changes are made to the tendering and monitoring process, it is recommended that this crucial task not be contracted out to private companies.

5.6.9 Electoral offences

Banning candidates whom the High Court has found implicated in malpractices, from standing in subsequent elections should effectively deter electoral offences. Disqualification is an administrative, and not a criminal sanction, so that civil standard of proof would apply. A deadline for nomination disputes should also shield the electoral process from belated litigation.

5.6.10 Code of Conduct

Voters rights of participation in election should enforce an agreement on an adequate code of conduct for political parties and organisations are strongly recommended, and is a requirement both of Uganda's constitution and electoral legal framework, Including in the code of conduct commitments on non-violence, prevention of intimidation, fair and equal conditions for campaigning and appropriate behaviour by polling agents, as well as Appropriate sanctions in case of non-compliance with the code, would represent a significant step forward and help ensure that the generally peaceful election of 2016 becomes the standard in ensuring voters rights of participation rather than the exception.

5.6.11 Secrecy of the vote

The proliferation of candidates as Uganda's multi-party system becomes entrenched renders the use of washing basins in open-air polling stations ineffective as a means of ensuring secrecy of vote by voters. Facilities should be provided like other countries, including regionally, are more effective in this regard and merit timely consideration.

5.6.12 Priority to voter intention

Uganda's elections are marked by an unusually high level of invalid ballots, which is at least in part attributable to the legal definition of a valid vote being limited to two particular marks. Greater priority to "clear voter intention" would help address this and ensure that those who have made the effort to vote have their votes counted.

5.6.13 Right to stand for election

Removing the Advanced-Level educational requirement would open the universal right to stand for office to all Ugandans, the majority of whom are presently excluded from elected office, in contravention of Uganda's international commitments.

5.6.14 Domestic election observation

The Legal guarantees regarding the rights of domestic observers to observe the whole electoral process, including district and national tabulation as well as recounts, would further enhance Uganda's democratic development and citizens' confidence in the electoral process. Domestic observers should be assisted by the establishment of clear and objective criteria and application procedures for the accreditation of domestic observation missions.

Encouragement and support to political parties to ensure party agents properly exercise their rights and respect their responsibilities in the electoral process would also serve to ensure improved administration and greater confidence by parties and the electorate in the process.

5.6.15 Parliamentary recounts

Granting the High Court sole competence to order and conduct parliamentary recounts would guarantee procedural integrity and adequate protection of evidence.

5.6.16 Results collection and tallying

Reliable and secure means of transport for those designated to bring results forms and materials to District Tally Centres would provide additional guarantees against possible malpractice. The projection of data entry computer screens would also ensure that all present at such centres can observe the entire process and further enhance transparency.

5.6.17 Public order management Act

The researcher recommends that the public order management act should amended to allow voters exercise their rights in elections process.

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