

**GUARANTEEING THE INDEPENDENCE OF ELECTORAL
MANAGEMENT BODIES IN EAST AFRICA:
A CASE STUDY OF THE ELECTORAL
COMMISSION OF UGANDA**

BY

MWANGI SAM KINYUA

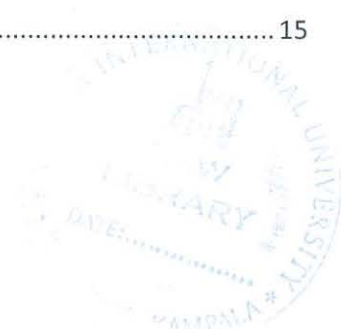
LLB/11115/62/DF

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW IN PARTIAL
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE
DEGREE OF BACHELOR OF LAW OF KAMPALA
INTERNATIONAL UNIVERSITY**

DECEMBER 2010

TABLE OF CONTENT

DECLARATION.....	iv
DEDICATION	v
ACKNOWLEDGMENTS.....	vi
LIST OF ABBREVIATIONS	vii
CHAPTER ONE : INTRODUCTION	1
1.1 BACKGROUND OF THE STUDY	1
1.2 STATEMENT OF THE RESEARCH PROBLEM	3
1.3 JUSTIFICATION FOR THE STUDY	4
1.4 RESEARCH QUESTIONS.....	7
1.5 HYPOTHESIS.....	7
1.6 LIMITATIONS OF THE STUDY	7
1.7 LITERATURE REVIEW	8
1.8 METHODOLOGY.....	9
1.9 OVERVIEW OF THE CHAPTERS.....	9
CHAPTER TWO : THE NOTION OF INDEPENDENCE OF ELECTION MANAGEMENT BODIES.....	10
2.1 Introduction.....	10
2.2 International foundation of election management.....	10
2.3 Regional foundation of election management.....	11
2.4 Defining the concept of independence of EMBs	12
2.5 From whom should EMBs be independent?	13
2.6 Pillars of independence of election management bodies.....	14
2.6.1 Permanency	14
2.6.2 Appointment of commissioners and composition of EMBs.....	14
2.6.3 Conditions of service.....	15



2.6.4 Removal from office.....	16
2.6.5 Hiring and firing of staff	16
2.6.6 Operational autonomy.....	16
2.6.7 Financial autonomy.....	17
2.7 Were election management bodies designed to be independent?	18
2.8 Accountability of election management bodies.....	21
2.9 Justification for the independence of election management bodies.....	22
2.10 Conclusion.....	23
CHAPTER 3: AN APPRAISAL OF THE INDEPENDENCE OF THE.....	25
3.1Historical background.....	25
3.2The legal framework of the ECK.....	28
3.3 Independence of the Electoral Commission	28
3.3.1Appointment of commissioners	29
3.3.2Dismissals from the Electoral Commission.....	30
3.3.3Funding	30
CHAPTER 4: TOWARDS FURTHER STRENGTHENING THE INDEPENDENCE.....	31
4.1 Introduction.....	31
4.2 Some of the challenges affecting the independence of the ECU	31
4.2.1 Lack of adequate resources.....	32
4.2.2 Weak legal framework.....	33
4.2.3 Lack of clear line of accountability	33
4.2.4 Political mistrust	34
4.2.5 Late enactment of enabling laws	34
4.3 Conclusion	34

CHAPTER FIVE 35

5.1 CONCLUSIONS AND RECOMMENDATIONS..... 35

5.2 Conclusions 35

5.3 Recommendations 36

5.3.1 Adequate resource allocation 36

5.3.2 Decentralisation of state power..... 37

5.3.3 Clear and transparent appointment and re-appointment procedures 37

BIBLIOGRAPHY..... 39

DECLARATION

I, MWANGI SAM KINYUA, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Signed this ¹¹13... day Of December 2010


.....

I, **MR. JOSEPH EDMUND KALINAKI**, have read this dissertation and approved it for examination.

Supervisor: **MR. JOSEPH EDMUND KALINAKI**.

Signature: 

Date: ^{13th}13th Dec 2010

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Elections are the most visible feature of democracy because they link the people to the government and bring about political control by the people¹. Although not in themselves a guarantee for democracy, elections are usually considered as one of the key pillars of a working democracy. Some of the functions of elections in the democratization process include the legitimization of the political system, succession of governments and leaders, linking political institutions with the voters and peaceful settlement of conflicts². Elections, therefore, play a crucial role in the democratization process in the world, particularly, in Africa. The foundation for 'election rights' is to be found in article 21 of the Universal Declaration of Human Rights (UDHR). This provision has been reinforced by article 25 of the International Covenant on Civil and Political Rights (ICCPR), which states that: Every citizen shall have the right and opportunity ... (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections. This point was emphasised by the Supreme Court of Canada in the reported case of *Haig v Canada* 105 DLR (4th) 577 (SCC) 613 where the main issue before the Court was whether prisoners could be allowed to vote in elections. In its judgment, the Court discussed the concept of elections in depth and stated, among other things, that the right to vote is the hallmark of democracy since it enables individuals to determine how they want to be governed. See A Barry et al *Politics: An introduction* (2002) 171. There are 3 states in East Africa, which have different electoral systems and processes. This study is, however, limited to the electoral commission of Uganda and thus it might not cover some aspects of independence of electoral bodies in other East African countries. **Article 21(3) of the UDHR states that the 'will of the people shall be the basis of authority of government and this will shall be expressed in periodic and genuine elections which shall be by universal**

¹ This point was emphasized by the Supreme Court of Canada in the reported case of *Haig v Canada* 105 DLR (4th) 577

² M Khabele 'Election and conflict' *Election update 2004 South Africa* The Electoral Institute of Southern Africa 19 (2004)

and acceptability of an elected government by the electorate⁶. Flowing from this discourse is the need for the independence of EMBs in Africa both in theory and practice in order to enhance democracy

1.2 STATEMENT OF THE RESEARCH PROBLEM

Elections have become fundamental features on the African political scene. This has been so particularly since the early 1990s when the phenomenon of competitive politics was introduced on the continent. However, in some instances there have been reports of election malpractices related to the lack of independence of EMBs. Accordingly, one commentator has observed that: “though multiparty elections have become more frequent and regular, it is clear that the quality of these elections and their ability to provide an opportunity to citizens to determine who governs them has been steadily reduced since 1994”⁷. One of the major contributing factors has been the frequent irregularities in the administration of elections designed to favour incumbents.⁸ While it is important to acknowledge that there is no perfect electoral system and that even in the established democracies election irregularities still occur, the situation in Africa is worrying and needs serious reforms if genuine democratic elections are to take place⁹. Of particular concern is the mode of appointment of commissioners, financial autonomy and operational autonomy which have sometimes made EMBs appear to lack the independence needed to achieve their objectives. This has been compounded by the nature of politics in Africa where some leaders seek to entrench themselves in power for life, a phenomenon that Thomson has called the ‘Big Man’

⁶ MC Fombad ‘Election management bodies in Africa: Cameroon’s National Elections Observatory in perspective’ (2003) 3

⁷ MC Fombad ‘Election management bodies in Africa: Cameroon’s National Elections Observatory in perspective’ (2003) 3

⁸ Fombad (in 7 above)

⁹ Pastor has observed that ‘even in advanced countries, democracy is a work in progress; it is nowhere perfect.’ Therefore, even in these countries, election errors such as defective ballots and incomplete and inaccurate voter’s roll still occur. See Pastor ‘A brief history of electoral commissions’ in A Schedler et al (eds) *The self-restraining state: Power and accountability*

syndrome¹⁰. Uganda has established an EMB to manage elections in accordance with the UDHR, the ICCPR and the OAU/AU Declaration of 2002. This institution plays a crucial role in the democratization processes in this country and one of the ways of achieving this goal is by ensuring their independence from the political process. This study proposes to examine the independence of the EMB and propose ways of strengthening it with a view to enhancing the work of democracy in this country.

1.3 JUSTIFICATION FOR THE STUDY

The principle of free and fair elections is premised on the need for an effective management of elections. The process of overseeing elections is thus very important in achieving free and fair elections since this goes to the root of democratic governance. This in turn requires that the bodies responsible for the management of elections be independent from any control particularly the executive. The independence of this body creates a conducive environment for democracy to thrive while at the same time it creates public confidence in the electoral process. *Pastor* has observed that 'even in advanced countries, democracy is a work in progress; it is nowhere perfect.' Therefore, even in this country, election errors such as defective ballots and incomplete and inaccurate voter's roll still occur. See *Pastor 'A brief history of electoral commissions' in A Schedler et al (eds) The self-restraining state: Power and accountability in new democracies (1999)75. A Thomson An introduction to African Politics (2004) 237.* has commented that EMB is responsible for the monitoring of elections on the polling day; it is also the custodian of integrity and legitimacy of a key phase in the democratic process. Africa has experienced and continues to experience problems in the management of elections. Part of the problem lies in the scarcity of resources such as adequate funds, personnel and logistics. However, the major problem in the management of elections in Africa is the lack of independence of EMBs from the grip of executive control. This study is significant as it examines how the independence of the EMB can be strengthened in order to promote democracy in this country. In Uganda President **Yoweri Museveni** and the ruling National Resistance Movement (NRM) came to power in 1986 and instituted the "Movement" system, which denied other political parties the ability to operate

¹⁰WC Dundas (ed) *Lets talk about elections* London (1997) 208.

for almost 20 years¹¹. In 2005, under pressure internally and from the World Bank, the government announced a referendum to allow multiparty democracy. With the support of the NRM, the referendum passed. However, opposition groups had boycotted the referendum because the ruling party at the same time pushed through an amendment to the constitution lifting the two-term limit on the tenure of the president.¹² In 2006 Uganda held its first multiparty elections, with the incumbent Museveni-then in office for 20 years-as the NRM presidential candidate.

Local and international observers have frequently noted that recent elections in Uganda have included considerable violence and electoral manipulation, including murder, bribery, threats, intimidation, and vote rigging¹³. Civil society groups have expressed deep concerns about the role of uniformed and plainclothes armed security and paramilitary forces, patrolling polling stations and creating an atmosphere of intimidation. Bribery was "rampant during the campaign and also on polling day," according to DEMGroup, a consortium of Ugandan civil society organizations

¹¹ see Human Rights Watch, *Hostile to Democracy: The Movement System and Political Repression in Uganda*, (New York: Human Rights Watch 1999), <http://www.hrw.org/legacy/reports/1999/uganda/>.

¹² Human Rights Watch, *Uganda - In Hope and Fear: Uganda's Presidential and Parliamentary Polls*, no. 1, February 2006, <http://www.hrw.org/en/reports/2006/02/14/hope-and-fear>, p. 6.

¹³ European Union Election Observation Mission, "Presidential and Parliamentary Elections," February 23, 2006, http://ec.europa.eu/external_relations/human_rights/election_observation/uganda/final_report_en.pdf (accessed October 25, 2009); Chr. Michelson Institute (CMI), *Uganda's 2006 Presidential and Parliamentary Elections*, (Norway: CMI, 2006); Democracy Monitoring Group, "Final Report on the 2006 Presidential and Parliamentary General Elections in the Republic of Uganda," June 2006 (on file with Human Rights Watch), Foundation for Human Rights Initiative, "Electoral Reforms in Uganda 2008," July-December 2008, Norwegian Resource Bank for Democracy and Human Rights (NORDEM), "Uganda: Presidential, Parliamentary and Local Council Elections 2006," (Norway: NORDEM, 2006); Commonwealth Observer Group, "Uganda Presidential and Parliamentary Elections," February 23, 2006, <http://www.thecommonwealth.org/document/34293/35144/149671/uganda.htm> (accessed October 25, 2009); Advocates Coalition for Development and Environment (ACODE), "Deepening Democracy in Uganda: Legislative and Administrative Reforms Ahead of 2011 Elections," no. 19, 2007, <http://www.acode-u.org/documents/Legislative.pdf> (accessed October 25, 2009). Non-governmental Organization Monitoring Group, "Monitoring the Conduct of Free and Fair Elections in Uganda: Challenges and Experiences of the NEMGroup from 2001," January 2003 (on file with Human Rights Watch).

monitoring the 2006 elections¹⁴. Human Rights Watch and others have documented violence and politically motivated prosecutions of opposition candidates and the selective application of sedition, libel, and incitement to violence laws to quell opposition candidates and members of the media.¹⁵

Elections in both 2001 and 2006, especially those involving prominent candidates, ended in controversy and discord over the integrity of the electoral process and the independence of the National Electoral Commission, which brought the parties to court. In 2006 the main opposition presidential candidate, Dr. Kizza Besigye of the Forum for Democratic Change (FDC), challenged the results of the elections in the Supreme Court by filing an electoral petition. The court found that the elections were riddled with intimidation, violence, voter disenfranchisement, and other irregularities, including inaccuracies in counting and tallying votes¹⁶. Despite these findings, the justices voted 4-3 to uphold the results on the basis that the electoral malpractice did not "substantially affect" the outcome of the election, confirming Museveni's re-election¹⁷. Only one of the crimes alleged was investigated and prosecuted under criminal law.

Since the 2006 elections there have been various demands for electoral reform to address perceived problems with the electoral process. Civil society groups, opposition political parties, and some foreign diplomats have issued comments and numerous detailed proposals for

¹⁴ Democracy Monitoring Group, "Final Report on the 2006 Presidential and Parliamentary General Elections in the Republic of Uganda," June 2006 (on file with Human Rights Watch).

¹⁵ Human Rights Watch, Uganda - In Hope and Fear: Uganda's Presidential and Parliamentary Polls, no. 1, February 2006, <http://www.hrw.org/en/reports/2006/02/14/hope-and-fear>.

¹⁶ Dr. Kizza Besigye v. Yoweri Museveni and Electoral Commission, Supreme Court Petition No. 1 of 2006.

¹⁷ The case and decision were very similar to another filed previously by Besigye against Museveni during the prior elections in 2001. Dr. Kizza Besigye v. Yoweri Museveni and Electoral Commission, Supreme Court Petition No. 1 of 2001.

amending electoral laws to address problems such as the voter register, the independence of the electoral commission, the timing for filing petitions, and other important issues.¹⁸

It is my hope that this study will attempt to make a contribution towards laying a firm foundation for the independence of EMB in Uganda

1.4 RESEARCH QUESTIONS

An attempt will be made to explore and examine the following questions:

1. What pillars are there for the independence of election management bodies?
2. To what extent have the said pillars been adopted in Uganda
3. What reforms should be made to the electoral body to enhance the independence of the electoral commission?

1.5 HYPOTHESIS

The independence of the electoral management body in Uganda (ECU) is limited

1.6 LIMITATIONS OF THE STUDY

This study is not without limitations. The major limitation that has been encountered in the course of this study is the dearth of materials on election management, particularly, the independence of EMBs. The case study of the selected country has also limited the scope of coverage of this study.

¹⁸ Inter-Party Cooperation (Conservative Party, Forum for Democratic Change, Justice Forum, and Uganda People's Congress), "Summary of the Necessary Electoral Reforms in Uganda," April 20, 2009 (on file with Human Rights Watch); Inter-Party Cooperation, Private Members' Bills, September 2009 (on file with Human Rights Watch); People's Progressive Party, "Proposals to improve the electoral system in Uganda," August 2007 (on file with Human Rights Watch); The Citizens Coalition on Electoral Democracy in Uganda, "Briefing Paper on Proposed Electoral Reforms Ahead of the 2011 Elections," August 2009 (on file with Human Rights Watch); Walter Wafula and Dorothy Nakaweesi, "EU Backs Electoral Reforms," The Daily Monitor, July 7, 2009, <http://allafrica.com/stories/200907070003.html> (accessed October 23, 2009).

1.7 LITERATURE REVIEW

There is a wealth of literature on the subject of elections. Most of the available materials deal with the broad principle of free and fair elections within the ambit of human rights law. However, there is by and large a deficit of materials on the management of elections in Africa especially on the independence of EMBs on the continent. WC Dundas (ed) *Lets talk about elections* London (1997) 208 quoted in Lopez-Pintor that “Some of the problems in the administration of elections in Africa occur in voter registration, compilation of voters’ roll, counting of votes and compliance with electoral laws by the political actors.” Similar problems are endemic in other regions of the world.. Hatchard and others have examined the broad concept of free and fair elections. Their book examines, in a comparative context, the concept of constitutionalism and good governance in the Commonwealth countries of eastern and southern Africa. Lopez-Pintor’s book titled ‘electoral management bodies as institutions of governance’ provides the foundation for the study of EMBs.¹⁹The book examines the place of EMBs in a democratizing world discusses the technical aspects of their sustainability and their contribution to the legitimacy of democratic institutions. It further examines the relationship between election management and governance. The book concludes by stating that EMBs are important institutions for democratic building and governance. Mozaffar’s article titled ‘patterns of electoral governance in Africa’s emerging democracies’ offers a good reading on this topic. The article explores the patterns of electoral governance in Africa’s emerging democracies through a systematic examination of the autonomy of EMBs in African countries based on certain independent variables.

¹⁹ Lopez-Pintor Electoral management bodies as institutions of governance (2000).

1.8 METHODOLOGY

The study will employ a non-empirical method of research. Therefore, the study will use scholarly materials such as books, journal articles, law reports and legal instruments. The study has also used largely used Internet sources and the authenticity of the source has also been noted

1.9 OVERVIEW OF THE CHAPTERS

Chapter one: introduces the study and the problem statement that has prompted the study.

Chapter two: analyses the concept of independence of EMBs. It also discusses the justification for their independence.

Chapter three: an appraisal of the independence of the Electoral commission of Uganda

Chapter four: towards further strengthening the independence of the electoral commission of Uganda

Chapter five: conclusions and recommendations

CHAPTER TWO

THE NOTION OF INDEPENDENCE OF ELECTION MANAGEMENT BODIES

2.1 Introduction

This chapter begins with a view of the provisions of international and regional human rights Instruments that provide for election management. This is critical since the international and Regional instruments usually provide the yardstick against which the electoral process in any state can be measured. The chapter also analyzes the concept of independence of EMBs.

2.2 International foundation of election management

There are two major international human rights instruments that provide for 'election' rights: the **UDHR** and the **ICCPR**. However, one of the clear weaknesses of these instruments is their failure to provide in detail, the ingredients of election rights particularly on the management of elections²⁰. This situation arose from the under-development of election rights in these instruments. This weakness notwithstanding, it has not been disputed that elections have to be managed by a body created specifically for that purpose. As Good-Win has observed, election management by an independent and impartial body is one of the key ingredients of free and fair elections, which should be embraced by every nation²¹. Due to the importance of election management in the contemporary world, the ingredients of free and fair elections have been complemented by declarations, general comments and resolutions, which now make it clear that elections need to be managed by an independent and impartial body. Of particular importance in this regard to this topic is General Comment adopted by the United Nations Human Rights

²⁰ These instruments provide for the participation of every citizen in the public affairs of his country, which includes the right to vote and be elected at genuine and periodic elections to be held by secret ballot. These instruments omitted to define terms such as 'genuine' and 'free' elections because they may not have been controverted issues at the relevant times. Articles 21 of the UDHR and 25 of the ICCPR which provide for election rights.

²¹ GS Goodwin-Gill Free and fair elections: International law and practice (1994) Geneva: Inter-Parliamentary Union He identifies other ingredients of free and fair elections as the following: the electoral law and electoral system, constituency delimitation, the right to vote, voter registration, civic education and information, organization of political parties and candidates, respect for civic liberties, media rights and complaints and dispute resolution.

Committee (HRC) on article 25 of the ICCPR.²² Accordingly, the HRC has interpreted article 25 of the ICCPR as requiring an independent electoral authority to be established to supervise the electoral process and to ensure that elections are conducted fairly, impartially and in accordance with established laws which are compatible with the ICCPR.²³ These instruments thus form the international foundation of election management

2.3 Regional foundation of election management

Election rights are also provided for by the three regional human rights systems in the world. Like the UDHR and the ICCPR, these instruments do not provide the ingredients of free and fair elections in detail. Indeed, the wordings of these instruments are identical to those of the UDHR and the ICCPR. However, the provisions of these instruments have been complemented by other instruments such as declarations and resolutions, which have also underscored the importance of election management. For instance, the OAU/AU Declaration of 2002 complements the provisions of the ACHPR on elections. Similarly, the Memorandum of Understanding adopted by the African leaders in 2002 stated, among other things, the establishment by 2003, of independent national electoral commissions or other appropriate bodies where they did not exist to ensure free, fair and transparent elections in all African countries.²⁴ The African Commission on Human and Peoples' Rights also adopted a resolution in 1996 on the electoral process and

²² The HRC is established under article 28 of the ICCPR with the responsibility for handling human rights complaints from state parties and individuals, adoption of general comments on the provisions of the ICCPR and consideration of state reports.

²³ Para 20 General Comment 25: (Article 25 of the ICCPR: Participation in public affairs and the right to vote). (Adopted by the HRC at its 1510th meeting on 12 July 1996. Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb? Open document](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Open+document). (Accessed on 12 September 2006).

²⁴ The Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA Solemn Declaration), Declarations and Decisions adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government (Lomé: AHG/Decl.4 (XXXVI), 12 July 2000); and the CSSDCA Memorandum of Understanding (Durban: OAU, July 2002).

participatory government where it affirmed the importance of elections and called on member states to take necessary measures to preserve and protect the credibility of the electoral process, particularly the management of elections.²⁵ The resolution requires African states to provide the EMBS with the necessary resources and materials for the preparation and holding of free and fair elections.²⁶

2.4 Defining the concept of independence of EMBS

Although there is literature on election management and some international and regional human rights instruments have been adopted on election management, there appears to be no agreed definition for the term 'independence' in relation to EMBS. A simple definition adopted at a regional seminar in Morocco defined it as 'how separate from any party or sitting government the electoral body is.'²⁷ This definition, however, is insufficient in that it does not mention the pillars of independence of EMBS. It is contended that defining the independence of EMBS by mentioning the pillars of their independence is important since they provide the benchmarks upon which their independence can be assessed. White²⁸, defines the term 'independence' as meaning the following "An independent body is one that is outside government, whose members' tenures are governed by appropriate appointment and removal provisions which

²⁵ Resolution on Electoral Process and Participatory Governance, Nineteenth Ordinary Session, Ouagadougou, BurkinaFaso 1996. Available at <http://www.achpr.org/english/_doc_target/documentation.html?resolutions> (Accessed on 5 September 2006).

²⁶ The Resolution, however, did not provide for sanctions for failure by OAU member states to comply with the requirements under it.

²⁷ Definition adopted at the Regional Seminar on Improving Electoral Administration Process and Mastering Mechanisms to Strengthen Democratic Governance in African Countries, 6–8 March 2006, Tangier, Morocco.

²⁸ J White 'Independent Communications Authority of South Africa' in S Woolman et al (eds) *Constitutional law of South Africa* (2005) 24E-5. Chapter nine institutions include the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission. In this writer's considered view, White's definition has the merit of providing standards for evaluating the independence of EMBS.

ensure that members are appropriately qualified, do not serve at the pleasure of the executive and can be removed only on objective grounds relating to job performance, one that is sufficiently well funded by parliament to enable it perform its functions and one that has control over its own functions.”

From the above the concept of the independence of an electoral body implies, first, that such a body is established permanently either by the national constitution or by legislation which provides for its independence from any party in the performance of its functions and exercise of its powers; secondly that the staff of the EMB should be independent of any party on the mode of appointment, removal and their conditions of service; and thirdly that the budget of the EMB should not be determined by the executive. In this sense a truly independent EMB can perform its functions and exercise its powers in an environment where it is free from direction, control and supervision from any quarter.

2.5 From whom should EMBs be independent?

EMB's in my view should be independent from the government and any other party that is interested in the outcome of the elections such as private entities, public officials, politicians and political parties. There are some scholars, however, who are of the view that EMBs should be independent from the government more than any other category of individuals.²⁹ This position appears to be influenced very much by a number of factors such as the arrangement of state apparatus and the fact that the management of elections is usually undertaken by the government or governmental bodies.³⁰

²⁹ A Sawyer 'Governance and democratisation' in A Adebajo & I Rashid (eds) *West Africa's security challenges: Building peace in a troubled region* (2004) 103.

³⁰ Eg, in developed countries such as the United Kingdom and Switzerland elections are still being overseen by government departments.

2.6 Pillars of independence of election management bodies

The pillars of independence of EMBs are the normative standards that set the minimum attributes pertaining to the independence of EMBs. They provide the conditions for the independence of EMBs. For the sake of clarity, a distinction must be made at this point between two types of independence: formal independence and practical independence. Formal independence is based on the law and deals with, *inter alia*, the establishment of EMBs, and the mode of appointment of commissioners and their terms and conditions of service. Practical independence is concerned with the actual practice, that is, the operational independence of EMBs. Regardless of the type of EMB chosen, formal and practical independence must exist in order that an EMB can be regarded as fully independent. The following pillars determine the degree of independence of EMBs.

2.6.1 Permanency

The permanency of an EMB is at the core of its independence, institutional capacity building and sustainability. Permanency is usually provided by the law through the national constitution or legislation. However, the constitutional establishment is preferable since the constitution is the supreme law of the land and is usually difficult to amend.³¹ Establishment by law guarantees the independence of an EMB and at the same time provides it with its constitutional and statutory powers and functions thus insulating it from sudden changes. The establishment of a permanent secretariat is another way of ensuring the permanency of an EMB as this enables it to engage permanent staff.

2.6.2 Appointment of commissioners and composition of EMBs

The mode of appointment of commissioners is crucial in ensuring the independence of an EMB. It is a confidence building exercise and contributes greatly to the image and integrity of the EMB. The mode of appointment must also be clear, transparent and inclusive in order to increase operational independence and effectiveness of the EMB. The participation of the legislature in

³¹ In Costa Rica and Venezuela, taking two examples from outside the African continent for purposes of comparison, it is noted that permanency has been guaranteed by establishing their EMBs as the 'fourth' branch of government with the status of the executive, legislature and judiciary. See Lopez-Pintor(19 above)

the appointment process is important and necessary at all levels. The mode of re-appointment of commissioners must be transparent, clear and inclusive. With regard to the composition, it must be broad based with manageable number of commissioners. This ensures that the people with right qualifications and background credentials are appointed as commissioners.³²

2.6.3 Conditions of service

The provision of satisfactory conditions of service is a prerequisite for the independence of EMBs. Satisfactory conditions of service for commissioners would enable them to perform their duties without fear of prosecution or dismissal. The conditions of service in this respect include the salaries, allowances, term of office and legal immunity. Due to the importance of the conditions of service in determining the independence of an EMB, it is necessary that the law provides for them. A regular review of the conditions of service needs to be conducted by an independent body specifically created for this purpose. This is important since it reduces the executive involvement in the process, which can undermine the independence of the EMB. In this regard, the term of office must not be too short to create uncertainty on the part of the commissioners, nor should it be too long to entrench them in their offices.³³ In addition, as Venter has proposed, the term of office must not coincide with the normal term of an elected government.³⁴ The remuneration of commissioners needs to reinforce integrity, independence and professionalism. Protection of the commissioners from legal action arising from any action taken in good faith in their official capacity is also necessary in ensuring that they act without fear or favour. However, the immunity must not cover cases of corruption or actions taken in bad faith.

³² Sawyer. Individuals of high moral stature can play a crucial role in ensuring the independence of an EMB thus making its processes acceptable to all actors

³³ Currently, the general trend is a renewable five years term. Longer non-renewable terms are a better guarantee of independence than renewable shorter terms. This is because the commissioners should not fear dismissal or non reappointment if they act against the government.

³⁴ D Venter 'Elections and electoral systems in emerging democracies: cases for electoral system re-design in Malawi' a paper presented at the Constitutional Review Conference in Lilongwe 28-31 March 2006.

2.6.4 Removal from office

The critical issues on the removal of commissioners concern the mode of removal and the institution to undertake it. It is important that commissioners enjoy security of tenure of office. In this regard, there needs to be a stringent procedure for the removal of commissioners. A stringent removal procedure may serve to insulate them from arbitrary removal from office and thereby ensure their independence. Presently, removal by way of a tribunal like the ones for judges seems to be the preferred choice.³⁵

2.6.5 Hiring and firing of staff

Who should hire and fire the staff of the EMB? Is one of the questions that new democracies have to grapple with particularly due to the problem of scarce resources? An independent EMB needs to have the power to hire and fire its own staff according to its needs. However, this does not mean that it cannot request the government to provide it with resources to enable it undertake certain activities such as voter registration. Electoral staff and other personnel who are hired by an EMB are likely to owe their allegiance to the EMB and are likely to be more independent than those seconded by the government.

2.6.6 Operational autonomy

The term 'operational autonomy' relates to the daily activities of an EMB such as the planning, supervision and formulation of elections. Operational autonomy is important since it enables the EMB to determine its own activities and agenda. It also enables the EMB to operate without receiving instructions or directions from any quarter.³⁶ Autonomy operates at all stages of the

³⁵ Eg, under article 146 of the Constitution of the Republic of Ghana of 1992, an electoral commissioner can only be removed by the President upon recommendation by a Special Committee established by the Chief Justice for that purpose or on grounds of 'stated misbehaviour or incompetence or inability to perform the functions of his office due to infirmity of the body or mind.'

³⁶ In some African countries, EMBs seem to have a limited role in the election process since government ministries undertake most of the election activities. Eg, in Togo the Ministry of Interior has the responsibility for elections in the country.

electoral process. However, this does not mean that it can operate outside its powers or functions. Similarly, it does not mean that it cannot co-operate with other bodies in the performance of its functions. Co-operation with other bodies is important, but this needs to be done carefully so that it does not impair the EMB's operational independence.

2.6.7 Financial autonomy

The effectiveness of an EMB is adversely affected by the availability of resources especially its financial resources. This is because elections require a lot of financial resources. The requirement for financial autonomy ensures that an EMB, has access to adequate financial resources, to enable it perform its functions effectively. It also means that an EMB has control over its financial resources and determines their use. It is, therefore, important that an EMB enjoys financial autonomy from the government. The independence of an EMB can be affected by the allocation or timing of release of funds to it by the government. One of the ways of ensuring financial autonomy is by enabling it to prepare its own budget, which is then approved by the legislature. Indeed, this point was articulated by the South African Constitutional Court in the reported case of *New National Party v Government of South Africa and others (New National Party case)* when it held, *inter alia*, that: *Financial independence implies that the ability of the Commission to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Rules...It is for Parliament, and not the executive arm of Government to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate.*³⁷ Financial autonomy also allows EMBs to determine their priorities and activities and attempt to achieve them in time without interference from any quarter. It also enables them to raise funds from other sources such as foreign donor agencies. In this sense, the financial independence of EMBs is guaranteed. However, it is worth noting that like any other state agency, the independence of an EMB is not absolute. The independence does not mean that it is completely divorced from the government in its operations. Absolute independence is not possible as this can lead to undesirable consequences. An EMB has to co-operate with other government agencies in order to achieve its objectives, but this should not affect its independence.

³⁷ 1999 5 BCLR 489 (CC).

2.7 Were election management bodies designed to be independent?

Mozaffar and Schedler have observed that EMBs originated from the political struggle and historical experiences in society.³⁸ Lopez-Pintor has also noted that EMBs emerged in the late 18th century when mass elections were introduced in Europe and North America.³⁹ EMBs, he has further asserted, developed within the executive arm of the government because the running of elections was then considered as a public service operation best carried out by the government. Therefore, in many old democracies such as those of Western Europe and North America, EMBs were structured within the government as departments of the Ministries of Home Affairs, Interior and Territorial Administration.⁴⁰ The decolonization process after the Second World War led to the creation of new electoral authorities in the form of electoral commissions in the colonies.⁴¹ However, most of the new electoral bodies were structured within the government. According to Pastor, the increased democratic space and the third wave of democratization that started in the 1970's created an opening for agitation for independent EMBs.⁴² Political actors often questioned the legitimacy of the executive in playing the role of a referee in the competition for power.⁴³ It was during this period that calls intensified in the old democracies aimed at making EMBs independent or creating new ones where none existed. These calls succeeded in some few countries where permanent and independent EMBs were

³⁸ S Mozaffar & A Schedler 'The comparative study of electoral governance – Introduction' (2002) 23 *International Political Science Review*

³⁹ Lopez-Pintor .Electoral management bodies as institutions of governance (2000).

⁴⁰ Pastor (n 9 above)

⁴¹ R Lopez-Pintor 'Opportunity, scope and method of a handbook on structuring electoral management bodies' (2004) Stockholm: International Institute for Democracy and Electoral Assistance

⁴² Pastor 'A brief history of electoral commissions' in A Schedler et al (eds) *The self-restraining state: Power and accountability in new democracies* (1999) 75.

⁴³ The period of the 1970s is significant since according to Huntington, it marked the beginning of the third wave of democratisation, which started in 1974. See Huntington (n 13 above)

established⁴⁴ however, it is important at this point to note that some countries had independent EMBs even before the agitation began in the 1970s.⁴⁵ In Africa, EMBs were established during the colonial period to manage elections. They were established within the formal governmental arrangement.⁴⁶ The independence of African countries led to some changes of the electoral law. One of the major changes related to the status of the EMBs and the security of tenure of office of the election officials. However, with some few exceptions such as Nigeria, the position of EMBs remained within the government.⁴⁷ This position was maintained in many African countries after independence.⁴⁸ However, the introduction of one-party systems in many African states after independence seemed to have greatly affected the position and ability of these bodies to promote free and fair elections.⁴⁹

⁴⁴ Eg, the EMBs of the United States, Australia and New Zealand were established in 1975, 1984 and 1993 respectively. See Lopez-Pintor (n 22 above)

⁴⁵ Independent EMBs were established in Chile, Costa Rica and Uruguay in 1925, 1925 and 1924 respectively. See FE Lehoucq 'Can parties police themselves? Electoral governance and democratisation' 23 *International Political Science Review* (2002) 36.

⁴⁶ S Mozaffar 'Patterns of electoral governance in Africa's emerging democracies' (2002) 23 *International Political Science Review*

⁴⁷ Mozaffar has observed that in Anglophone Africa, the responsibility of managing elections rested with career civilservants who enjoyed security of tenure of office. In Francophone and Lusophone Africa, the responsibility of elections rested with the Ministry of Interior or Territorial Administration. Accordingly, he observed that the EMBs inherited by African countries at independence were not autonomous. See Mozaffar (n 30 above) 89.

⁴⁸ Eg, in Kenya the position of the Supervisor of Elections was retained after independence until 1992 when it was abolished. Information available at <<http://www.eck.or.ke>> (accessed on 1 October 2006).

⁴⁹ A Jinadu 'Matters arising: African elections and the problem of election administration' (1997) 2 *African Journal of Political Science*

The advent of multiparty politics in Africa in the early 1990's led to constitutional changes that established permanent and independent EMBs to manage elections in some African countries.⁵⁰ In countries such as Togo, Cameroon and Tunisia, election administration were entrusted to the Ministries of Interior or Territorial Administration. Yet, in others such as Nigeria and Sierra Leone, the existing EMBs were strengthened. The agitation for more independent EMBs intensified after the first multiparty elections in some African countries.⁵¹ Various reasons were advanced for the electoral outcome in those countries. One of the reasons advanced by independent election observers was the lack of autonomy of some EMBs from their governments which weakened their ability to manage elections effectively and independently.⁵² Accordingly, reports recommended for the electoral reforms in those countries particularly on the independence of EMBs. Indeed, these views were expressed in Africa when the report of a seminar on election administration in Africa was adopted in Accra, Ghana in 1993.⁵³ Some of the recommendations of the Report were as follows:

- i.) A permanent, independent and credible electoral agency should be responsible for organizing and conducting periodic free and fair elections in the African states;
- ii.) The mandate of the electoral agency should be defined in the Constitution and should include the method of conducting elections; voter and other civic education; constituency delimitation;

⁵⁰ Eg, in Kenya, the Electoral Commission of Kenya replaced the Supervisor of Elections in 1990 vide a constitutional amendment number 17 of 1990.

⁵¹ Barkan has observed that failure to obtain democracy at the initial electoral experiences provided the basis for agitation

⁵² Eg, the Commonwealth Report on the 1992 elections in Kenya revealed many irregularities in the management of the elections some of which arose due to the lack of independence of the Electoral Commission of Kenya. For further reading see the Report of the Commonwealth Observer Group, Presidential, Parliamentary and Civic Elections in Kenya, Commonwealth Secretariat, 1993.

⁵³ African Association for Public Administration and Management (AAPAM) (1993) Senior Policy Seminar on Strengthening Electoral Administration in Africa Accra: AAPAM.

registration of voters, parties and candidates; formulation of electoral policies and procedures; and settling disputes in electoral matters;

iii.) The composition of the electoral agency should include a reasonable number of members; they should be non-partisan, enjoy security of tenure, and be appointed by the head of state, subject to approval by parliament;

iv.) The agency should be adequately funded, with all its expenses as a direct charge on the Consolidated Fund and be granted autonomy to establish its own accounting procedures and greater flexibility in procurement procedures than the government bureaucracy; and

v.) Legal provision should be made to allow the electoral authority to mobilize additional staff and other resources during the conduct of elections.

Some of the changes on election management on the continent reflect these recommendations. The new EMBs on the continent increasingly tend to be commissions that are independent and permanent. This trend still continues and calls to make EMBs independent in all respects are still being made throughout the world. One scholar has aptly remarked thus: the winds of reform are leading worldwide towards the creation of electoral authorities in the form of commissions that are permanent and independent of the executive, that include political party representatives, and that are staffed largely by professional civil servants. From the foregoing, it can be concluded that the initial designation of EMBs was not intended to make them independent from the government. Instead, they were expected to function within the existing Governmental apparatus. However, the wave of democratization that started in the 1970s, which intensified after end of the Cold War led to changes that elevated them to independent state institutions.

2.8 Accountability of election management bodies

Can EMBs be independent and accountable? To which institution should they be accountable? These are some of the issues that must be addressed by the law establishing EMBs since the accountability arrangements can affect EMBs' independence. It is important, however, to note that the independence of EMBs does not affect their accountability. Granted with their

independence of EMBs in this chapter, the study in the next chapter now turns to the extent to which these pillars have been adopted in Uganda.

CHAPTER 3: AN APPRAISAL OF THE INDEPENDENCE OF THE ELECTORAL COMMISSION OF UGANDA

- 3.1 The historical background
- 3.2 The legal framework of the ECU
- 3.3 The independence of the ECU
- 3.4 Conclusion

3.1 Historical background

A BRIEF HISTORY OF ELECTIONS IN UGANDA

In the period following Uganda's independence attained in 1962, political, social and economic dynamics started to manifest themselves as citizens developed interest in the country's democracy. However, prior to independence, elections were not much valued. This was due to the fact that the Colonial Government was the one handling the affairs of the country.

Constitutional Conference:

The year 1958 marks a milestone in the history and the development of election management in Uganda. A Constitutional Conference was convened and structures formed to organize and conduct various elections leading to independence in 1962. The first Electoral Commission comprised eminent local elders and traditional leaders. Under this Commission, several elections were conducted, the first one being the Limited African/Uganda Franchise and Representation to the Legislative Council (LEGCO) of 1958. Following the recommendation in the Wild Committee Report, the Colonial Government organized direct elections in Uganda in 1961. Two (2) political parties, namely, the Democratic Party (DP) and the Uganda Peoples Congress (UPC) contested in the election, leading to the formation of the first ever internal self-government, headed by the Chief Minister, H.E. Benedict Kiwanuka (DP). In 1962, the Colonial Government organized elections and DP got the majority in Parliament. However, UPC and Kabaka Yeka (KY) merged to become UPC-KY, became the majority and formed the government, headed by the first Prime Minister, Appolo Milton Obote.

The 1970s

Idi Amin was president of Uganda from 1971 till 1979 and during this period, there were no electoral activities in the country.

Commission for General Elections 1980:

After the 1964 Referendum on the issue of the Lost Counties, Uganda went without any national election for 18 years (1964-1980). Following the overthrow of the Idi Amin regime in 1979, the new government organized indirect elections in December, 1980. On 25th June 1980, the Chairman of the Military Commission, H.E Paulo Muwanga (RIP), established the Electoral Commission to organize and conduct general elections, which were eventually conducted on 10th - 11th December 1980. The Commission for the 1980 General Elections comprised of K.M.S Kikira as Chairperson, and three other members, namely, Comm. Egweu S, Comm. Kera A. Bilali A, and Comm. M. Matovu. Mr. Vincent Sekkono was the Secretary to this Commission.

The Uganda Constitutional Commission (UCC):

After 1980, there were no direct national elections in Uganda for almost 14 years. On 21st December 1988, The National Resistance Council (NRC) enacted Statute No.5 of 1988, which established the Uganda Constitutional Commission to start the process of developing a new Constitution for Uganda. The UCC was composed of:- Hon. Justice Benjamin J. Odoki (Chairperson), Prof. Dan M. Mudoola (Vice C/Person), Mr. Kidembo S. W, Hon. Medi Kaggwa, Hajji Aziz K. Kasujja, Mr. Kateera J., Lt. Col. Kale Kayihura, Dr. Khidu E. Makubuya, Mrs. Mary Maitum, Hon. Miria Matembe, Mr. Charles H. Obwangor, Prof. Phares Mukasa Mutibwa, Mr. Okot A.O, Prof. Otim A., Mr. Rwaheru C., Lt. Col. Sserwanga Lwanga, Prof. E. F. Ssempebwa, Jotham Tumwesigye, Mr. G.P Ufoyuru, Maj. Gen. Mugisha-Muntu, Eric T.S Adriko, and G. L Byekwaso. Rev. Dr. John Mary Waligo served as the Secretary to the Commission.

Commission for Constituent Assembly (CCA):

The Commission for Constituency Assembly (CCA) was established by the Constituent Assembly (CA) Statute No. 6 of 1993, to organize and conduct Constituent Assembly elections. The CCA comprised of Mr. Steven B. Akabway (Chairperson), Vincent F. Musoke- Kibuka (Dep. Commissioner) and Gladys M.K. Nduru (Dep. Commissioner). This Commission organized and conducted the CA elections in March 1994.

The Interim Electoral Commission (IEC):

Following promulgation of the Constitution in October 1995, an Interim Electoral Commission (IEC) was established by the Interim (Provisional) Electoral Commission Statute 3 of 1996 and Parliamentary (Interim Provisions Statute) No. 4 of 1996, for purposes of organizing and conducting the General Elections 1996. The IEC comprised of Steven B. Akabway (Chairperson), Mrs. Flora Nkurukenda (Deputy Chairperson), and five other commissioners, namely; Comm. Charles Owor, Comm. Margaret Sekajja, Comm. Philip Idro, Comm. Syda Bumba, and Comm. Aziz K. Kasujja. The IEC organized and conducted the first ever-direct Presidential and Parliamentary elections.

The Electoral Commission (EC) 1997-2002:

In May 1997, Parliament enacted the Electoral Commission Act (1997), which established a permanent Electoral Commission. The Law provides that the President with the approval of Parliament appoints the Commission, who hold office on full time basis for a period of seven years. Their appointment may be renewed for only one more term.

The first permanent Electoral Commission comprised of Hajji Aziz K. Kasujja (Chairperson), Flora Nkurukenda (Deputy Chairperson), and five other members, namely Comm. Ted Wamusi, Comm. Mary I.D.E. Maitum, Comm. Robert K. Kitariko, Comm. Nassanga H. Miiro, and Comm. Charles D. Owiny. In August 2000, Sr. Margaret Magoba was appointed to the Commission, to replace Comm. Maitum, who had been appointed as a judge of the High Court. Mr. Muwonge Andrew served as Secretary to this Commission. It was during this time that a new staff structure was put in place, with the Secretary as Head of Management. Below the office of the Secretary were two directorates: the Directorate of Elections, and the Directorate of Finance & Administration.

Electoral Commission 2002-todate:

On 18th November 2002, His Excellency the President of Uganda Yoweri Kaguta Museveni appointed a new Commission, which comprised of Eng. Dr. Badru M. Kiggundu (Chairperson), Sr. Margaret Magoba (Deputy Chairperson) and five other members, namely: Comm. Tom W. Buruku, Comm. Stephen D. Ongaria, Comm. Dr. Jenny B. Okello, and Comm. Joseph N. Biribonwa. Mr. Sam Rwakoojo is the Secretary to the Commission. The seventh member, Amb. Dr. Tomasi Sisye Kiryapawo, was sworn in February 20th 2006. The 2006 presidential and

parliamentary elections were the first multi-party elections to be held in Uganda by the commission since 1980 and the third elections since the National Resistance Movement (NRM), or “Movement”, came to power in 1986.⁵⁶

3.2 The legal framework of the ECK

Article 60 of Uganda’s 1995 Constitution creates the EC and outlines requirements for the Commission’s staff. Article 61 of the Constitution and Article 12 of the Electoral Commission Act enumerate the EC’s functions, which include organising, supervising and safeguarding free and fair elections; demarcating constituencies; ascertaining and publishing official election and referendums results; ensuring the necessary security provisions are in place; hearing elections complaints; implementing civic education programmes; and compiling and updating the register of voters. The Commission is composed of a chairperson, deputy-chairperson and five other members, who are appointed by the president with the approval of Parliament⁵⁷. It also has a Secretary who heads the Secretariat, assisted by the Directors of Elections and Finance and Administration. Under the Directorate of Elections are five departments: Legal and Public Relations, Voter Registration, Data Processing, Voter Education and Training, and Election Management. The departments in the Directorate of Finance and Administration are Finance, Administration, Human Resources, and Planning and Research. There are also subordinate district-level electoral offices, which are headed by district registrars. There are other legislative frameworks for the conduct of elections, which include the Presidential Elections Act (2005), the Parliamentary Elections Act (2005), the Political Parties and Organizations Act (2005), the Electoral Commission Act (1997), as well as regulations and guidelines issued by the Electoral Commission,

3.3 Independence of the Electoral Commission

Article 62 of Uganda’s Constitution states that the EC shall be independent subject to the Constitution’s provisions, and ‘shall not be subject to the direction or control of any person or authority’ in the performance of its functions. Another source of heated dispute in the current pre-election period has been over the composition and functioning of Uganda’s Electoral

⁵⁶ *Cyprian Ogwang/Principal Election Officer, Department of Planning and Research- EC*

⁵⁷ Uganda Constitution (1995), See Article 60(1).

Commission (EC), particularly because many allege that the Commission is inefficient and is not independent. The Commission's mandate in the Constitution and in national law provides for its independence. Many respondents felt that the commissioners in particular are not independent due to the fact that they are appointed by a majority party that is putting up its candidates for re-election. Although the process for appointing commissioners is the same as that for many other government officials, including for High Court judges, members of the EC do not enjoy the same security of tenure as judges. Allegations of the Commission's incompetence stem from the complaints filed in the Supreme Court after the 2006 elections – but although the Court found that there were many malpractices and inconsistencies, they declared the results valid and did not declare the EC to be incompetent. One of the most salient sources of the Commission's lack of independence is its inadequate funding. The Commission's budgetary allocations are insufficient to fulfill all of its mandated tasks, and these shortcomings are especially noticed in the failure to adequately address voter harassment and intimidation. In addition, new election laws from 2009 and 2010 have broadened the scope of the Commission's mandate, though these have not been included in the Commission's budget. This lack of financial resources and autonomy critically limits the Commission's efficiency and effectiveness, and also reduces its credibility in the eyes of stakeholders and the general public. Some of the key indicators of an independent EC include; the impartiality of Commission staff and election administrators, a free and fair process of voter registration, the existence of a Code of Conduct for elections, and the extent to which the Commission seeks to ensure that the whole process is free and fair. The importance of the EC's independence is especially implicated in some of the Commission's mandated functions, including the distribution and collection of ballot boxes, registering political parties,⁵⁸ and ensuring that all election officers and candidates comply with the provisions of all electoral laws.

3.3.1 Appointment of commissioners

The commissioners are nominated and appointed by the President, with the approval of Parliament, and the law requires that Commission members must have 'high moral character, proven integrity and must possess considerable experience and demonstrated competence in the conduct of public affairs'. Each Commissioner's term lasts seven years and is only renewable

⁵⁸ The Political Parties and Organisations Act 2005 gives Uganda's Electoral Commission the responsibility of registering political parties.

once. Parliament determines their remuneration.⁵⁹ The nomination processes of all constitutional bodies and the judiciary follow the same procedure, which is appointment by the president, on approval of Parliament. There are instances where Parliament has rejected the president's nominees on various grounds. The independence of the person appointed is thus dependent on the personal integrity and professionalism of the individual, and their ability to resist pressure from all sides.

3.3.2 Dismissals from the Electoral Commission

Perhaps more importantly than the appointments process, electoral commissioners do not enjoy security of tenure as judges do, and are also subject to term limits, so even without a formal process to remove them, they could simply not be reappointed.. The provisions on dismissals of commissioners are provided for under article 60(8) of the Constitution which states that a member of the commission may be removed from office by the President only for inability to perform the functions of his or her office arising out of physical or mental incapacity; misbehaviour or misconduct; or incompetence. Accordingly, for the government to dismiss any of the commissioners, it would require a reason that falls into the above categories to avoid litigation arising out of such dismissals.

3.3.3 Funding

The EC is self-accounting, and its administrative expenses are charged on a Consolidated Fund.⁶⁰ The law guarantees adequate resources and facilities to enable it to perform its functions⁶¹ This in essence means that it should not be subjected to cuts or reductions by the Ministry of Finance. In practice, however, the EC does not enjoy financial autonomy or adequate resources. Like all self-accounting institutions in Uganda, the EC is subject to the Medium Term⁶² Country Self Assessment Report, as reported in the APRM Country Review Report for Uganda, January 2009.

⁵⁹ Uganda Constitution (1995), Article 60.

⁶⁰ A consolidated fund is a framework into which shall be paid all revenues or other monies raised or received for the purpose of, or on behalf of, or in trust for, the government.

⁶¹ Uganda Constitution (1995), Article 66(1).

CHAPTER 4: TOWARDS FURTHER STRENGTHENING THE INDEPENDENCE OF THE ELECTORAL COMMISSION OF UGANDA

4.1 Introduction

4.2 Some of the challenges affecting the independence of the ECU

4.2.1 Lack of adequate resources

4.2.2 Weak legal framework

4.2.3 Lack of clear line of accountability

4.2.4 Political mistrust

4.2.5 Late enactment of enabling laws

4.3 Conclusion

4.1 Introduction

In the previous chapter we examined the independence of the EMB. This chapter considers some of the challenges threatening the independence of the commission and suggests ways of further strengthening and assuring its independence.

4.2 Some of the challenges affecting the independence of the ECU

The management of elections has presented EMBs all over the world with many challenges, and more so in Africa where every election is coupled with election malpractice which is as a result of some problems experienced by the electoral body. For example in 2007 the ECK was rampant with corruption that resulted in a fraud election that resulted in the post election violence experienced in Kenya. These challenges vary from country to country and depend on the historical, economic and political circumstances of every country. Indeed, some scholars have noted that: The core challenge facing many countries in the 21st century is that while they have

⁶² Country Self Assessment Report, as reported in the APRM Country Review Report for Uganda, January 2009, paragraph

created electoral democracies, maintaining the essential conditions for deepening and consolidating the full panoply of democratic institutions remains a work in progress⁶³. The following are some of the challenges facing the commission.

4.2.1 Lack of adequate resources

One of the most salient sources of the Commission's lack of independence is its inadequate funding. The Commission's budgetary allocations are insufficient to fulfill all of its mandated tasks, and these shortcomings are especially noticed in the failure to adequately address voter harassment and intimidation. In addition, new election laws from 2009 and 2010 have broadened the scope of the Commission's mandate, though these have not been included in the Commission's budget. This lack of financial resources and autonomy critically limits the Commission's efficiency and effectiveness, and also reduces its credibility in the eyes of stakeholders and the general public. Financially, while the Constitution requires Parliament to provide the Electoral Commission with adequate funds to perform its functions effectively (Article 66 of the Constitution of Uganda), in reality its funding is controlled by the Ministry of Finance. The Electoral Commission originally requested a budget of US\$ 74 billion to organise the whole series of elections (presidential, Parliamentary, local councils, municipal and sub-county elections). After negotiations, the Ministry of Finance agreed to provide US\$ 64 billion. In addition, the Commission received a further US\$ 5 billion from the donor community in direct and indirect support. This reduction in the amount allocated to the Electoral Commission may have had a negative impact in the performance of a number of its functions, particularly voter education. Further, the timely release of funds proved to be a problem. If the Electoral Commission is to truly enjoy the independence granted to it under the Constitution, then the mechanism for providing it with funding, along with the release of funds, needs to be strengthened.

⁶³ L Leduc et al *Comparing democracies 2: New challenges in the study of elections and voting* (2002) 1,

4.2.2 Weak legal framework

The legal framework provides the foundation of an effective electoral system.⁶⁴ It creates an enabling environment for free and fair elections. It also provides for the establishment of institutions to manage elections and provides them with functions and powers. Where the legal framework is weak, then it would seem to be the case that the electoral system cannot function effectively. The discussion in the previous chapter showed that the ECU lacks adequate legal safeguards to guarantee its independence. For instance, the law does not provide for transparent and inclusive appointment and re-appointment procedures. It also fails to provide for the financial independence and nowhere is accountability mechanisms provided for the ECU. The legal regime in the country also fails to provide a guarantee for government funding of the commission. The result is the lack of legal obligation on the government to allocate adequate financial resources to the commission.

4.2.3 Lack of clear line of accountability

Accountability of an EMB is one of the ways of securing its independence from the political process, hence they should be provided clearly by the law. The mode of accountability adopted needs to ensure the independence of an EMB. In this regard, it is important that EMB be made accountable to parliament and not to the executive. The Ugandan law, however, seems to lack clear accountability arrangements. For instance, the law is silent on the mode of accountability and the institution to which the ECU is accountable. This situation does not augur well for its independence. Electoral democracy implies the conduct of competitive elections where parties and candidates compete for political power. An EMB as the referee in this competition can be affected by political mistrust between the competing parties and candidates. This is especially the case where some decisions made by the EMB are interpreted to mean party position. The weak legal framework is also a source of political mistrust, particularly, where it seems to favour one political side.

⁶⁴ The electoral legal framework includes the constitution, statutes, regulations, rules and codes of conduct that provide for

4.2.4 Political mistrust

Electoral democracy implies the conduct of competitive elections where parties and candidates compete for political power. An EMB as the referee in this competition can be affected by political mistrust between the competing parties and candidates. This is especially the case where some decisions made by the EMB are interpreted to mean party position. The weak legal framework is also a source of political mistrust, particularly, where it seems to favour one political side. The ECU has been accused many times by political actors for advancing the political interests of the opponents.

4.2.5 Late enactment of enabling laws

Late enactment and amendments of the laws greatly hamper the electoral process in that the elections are organized hurriedly and often limiting periods for the successful conduct of the various stages of the electoral process. For example, the Presidential Elections Act, 2000, was passed on 12th December, 2000 leaving hardly three months within which to prepare for the Presidential Election scheduled for March 2001. Furthermore, the Local Governments Act, 1997, was amended by Amendment Act 13/2001 and Amendment Act 17/2001 in June and November, 2001 leaving very little time within which to execute the planned electoral process.

4.3 Conclusion

The chapter has examined some of the challenges that threaten the independence of ECU. Our examination showed that legal, political, economic and administrative challenges still threaten their independence. However, the challenges are not insurmountable and can be overcome by taking measures aimed at strengthening its independence.

CHAPTER FIVE

5.1 CONCLUSIONS AND RECOMMENDATIONS

5.2 Conclusions

The importance of elections in a representative democracy cannot be gainsaid. Through elections, citizens are able to participate in the governance of their countries. Leaders depend on elections for legitimacy. Due to this importance, elections have been recognised at the international, regional, subregional and national levels. The centrality of elections in contemporary world underscores the need for election management, which is a crucial aspect of the electoral process. The creation of EMBs to manage elections stems from this centrality. Due to the nature of activities undertaken by EMBs, they need to be independent from the government and other political actors. Their independence, as Mozaffar has noted, is likely to create confidence in the electoral process and increase their effectiveness.⁶⁵ In order to achieve this, the legal and institutional framework must provide for their independence, as discussed in chapter two of this study. If their independence is jealously guarded, EMBs can contribute to institutional development which is necessary for democratic governance and consolidation particularly in the new democracies.⁶⁶ Discussion and analysis of the independence of EMB of Uganda in this study has demonstrated that strong legal safeguards are necessary for its independence. However, serious challenges that need legal, political, administrative and economic solutions are still present. As Uganda prepares to participate in the 2011 general election's the independence of its EMB will be of paramount importance to ensure a free and fair election. The main question leading up to the elections in February 2011 is whether the EC is capable of organizing 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. 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 makes 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

⁶⁵ Mozaffar(46 above)

⁶⁶ See Pastor (42 above)

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 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 Recommendations

5.3.1 Adequate resource allocation

Since the management of elections requires a lot of resources, the allocation of adequate resources is paramount in the operations of the two commissions under consideration. Resources in this regard would include financial and human resources. The allocation of resources needs to take into account continuous electoral activities such as voter registration and voter education. It also needs to enable the electoral bodies to appoint and train their staff independently.¹⁵⁰ In this regard, the following measures should be adopted to strengthen the financial independence of the EMB, the EMB need to have independent budget which is different from the budget of the governments. The approval and release of funds should be done by parliament. However, before the allocation is made, the EMB should be able to defend its budgets before the relevant parliamentary committee. In this sense, the financial independence of the EMB would be enhanced and it would also be shielded from undue political interference. Secondly, adequate financial allocation can be enhanced by providing for a minimum allocation of funds by the government. This can be done through a legal provision that puts an obligation on the governments to provide a certain percentage of the commissions' budgets. The legal provision is important since it makes it obligatory to provide minimum funding and at the same time it is enforceable. The economic constraints and the political culture in many African countries make the legal guarantee relevant and important. It is my view that the adoption of these legal measures can further strengthen the financial independence of ECU

9. Internet sources

- African Commission on Human and Peoples' Rights 'Resolutions of the African Commission'
<http://www.achpr.org/english/_doc_target/documentation.html?resolutions>
- African Human Security Initiative 'African commitments to democracy in theory and in practice: A review of eight NEPAD countries'
<<http://www.africanreview.org/forum/docs>>
- African Union 'Documents and Declarations' <http://www.african-union.org/root/au/Documents/Decisions_Declarations>
- Fair Election International 'US Election Observation Report '2004 US Election: An international perspective' <<http://www.fairelection.us>>
- Human Sciences Research Council 'Electoral politics in South Africa: Assessing the first democratic decade' <<http://www.hsrcpress.ac.za>>
- International Institute for Democracy and Electoral Assistance 'Code of conduct for the ethical and professional administration of elections' <<http://www.idea.int>>
- West African Civil Society Forum 'Togo presidential elections: WACSOE Election Observation Report' <<http://www.wacsoe.org/Document/English/REPORT/TOGO/Final/election/observation/Report/pdf>>