

# **Towards Reforming Uganda's Electoral Commission; *critical areas and reform options***

*=The CCEDU working paper series=*

*December, 2013*



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**Acronym**

|          |   |
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| AU       | African Union   |
| CCEDU    | Citizens' Coalition for Electoral Democracy in Uganda                                   |
| CENI     | Independent National Electoral Commission   |
| CERA     | Citizens' Electoral Reform Agenda   |
| CEW-IT   | Citizens Election Watch – IT  |
| COMESA   | Common Market for Eastern and Southern Africa   |
| CNDD-FDD | Conseil National pour la Défense de la Démocratie et Forces de Défense de la Démocratie |
| DemGroup | Democracy Monitoring Group  |
| DPP      | Director of Public Prosecution  |
| EAC      | East African Community  |
| EC       | Electoral Commission of Uganda  |
| EMB      | Election Management Body/ies  |
| EU       | European Union  |
| IEBC     | Independent Elections and Boundaries Commission   |
| IEC      | Independent Electoral Commission of South Africa  |
| ICT      | Information and Communication Technology  |
| IGAD     | Intergovernmental Authority on Development  |
| IEC      | Interim Electoral Commission  |
| MTEF     | Medium Term Expenditure Framework   |
| NEC      | National Election Commission  |
| ZEC      | Zimbabwe Electoral Commission   |

## 1.0. Introduction

Free and fair elections are the hallmark of a well functioning democracy, and the foundation of a legitimate and stable government. The general election system including the model of election management body, nature of electoral laws, levels of civic consciousness, manner in which candidates raise and spend funds during election campaigns all have a significant bearing on the kind of elections a society is bound to have and broadly affect the democratic operating environment.

Uganda has had five general elections since independence in 1962<sup>1</sup>. Each of the elections has been a learning experience, revealing areas that require strengthening in Uganda's electoral system. Budgeting and funding of election activities; voter and civic education; party registration and financing; electoral disputes resolution; electoral boundary demarcation; and election management body institutional strengthening have consistently come out as key areas that call for review in light of the electoral dynamics, not just in Uganda but in many other democratic nations<sup>2</sup>.

Various stakeholders including political parties, civil society groups, parliamentary committees, select government offices, international and domestic election observers have since 2006 proposed a number of improvements in Uganda's electoral system – some fundamental, and others more technical. Prior to the 2011 elections, there were amendments to: the Presidential Elections Act, 2005; the Parliamentary Elections Act, 2005; the Electoral Commission Act, Cap 243; the Political Parties and Organisations Act, 2005; the National Women Council Act, Cap 318 and the National Youth Council Act, Cap 319.

The amendments mainly touched on the administrative side of elections. For instance, the time limit of twelve months for which one is supposed to consult in preparation for his or her nomination as a presidential candidate was removed; a provision that provides for the declaration of a candidate unopposed where other candidates in the race withdraw from the election was inserted; the amendments prohibited candidates from using government resources for campaign purposes and prescribed a penalty; the amendments also prohibited the creation of special polling stations for the army and other security personnel; members of the Internal Security Organisation and External Security Organisation were barred from being appointed as election constables; the requirement of seven days within which the returning officer is expected to compile and submit a report to the commission was repealed; fundraising, donations and similar activities by candidates, their agents and political parties were banned during campaign periods. A new inclusion was the requirement that a candidate's nomination papers be endorsed and sealed by the party or organisation that is sponsoring him or her; and a provision for a period of two weeks before the polling day within which the commission is supposed to have transmitted the voters

<sup>1</sup> December 1980 National Assembly Elections; 1996 General Elections; 2001 General Elections; 2006 General Elections; 2011 General Elections

<sup>2</sup> See annexes 1, 2, 3, and 4 for country experiences

register containing photographs of the voters to be used on the polling day to political party and organisations was made.

Although these changes were a step in the right direction, they remained limited and the major impending issues still remain. There is urgent and ardent need make further reviews to fill the existing gaps and deficiencies that still characterise some of the electoral laws and practices in Uganda. This effort requires both legislative and constitutional action to bring about the required changes.

While improving the integrity of elections requires reforms in many areas, the Electoral Commission, as the cornerstone of the electoral process, requires specific and priority attention. As we approach the 2016 General elections, there is a growing consensus on the urgent need to reconstitute the Electoral Commission, secure its independence and provide it with increased powers in such a manner that shall address the trust deficit Ugandans have towards the electoral process.

The widely held views among the public and stakeholders with regard to the questionable independence and credibility of the Electoral Commission presents undesirable ramifications including continued disengagement of voters from electoral processes, search for undemocratic alternatives; and potential for rejection of election results by losers with prospect of violence. All these point to the crucial need to remedy the enlarging the trust deficit between the electorate and electoral processes in Uganda. It is critical that Uganda learns from experiences elsewhere in Africa and aligns itself to the best practices on the continent.

This paper provides a recap of the key issues pertaining to Uganda's Electoral Commission that call for reform. It proposes legislative and constitutional reform options that must be urgently considered in the interest of strengthening the independence and credibility of the EC. The appointment of the commissioners, composition of the Commission, qualifications of commissioners, term of office, tenure, conditions of service, and funding of the Commission represent some of the critical areas that must be re-examined to ensure EC's independence and credibility. The powers of the Commission must be strengthened and the appellation of the Commission must reflect its mission/mandate. The proposals outlined herein are based on Uganda's own electoral experiences also as enunciated in several election related court rulings<sup>3</sup>, election observation reports<sup>4</sup>, the Citizens' Electoral Reform Agenda (CERA) as well as regional and continental best practices (*see annex 1, 2, 3 and 4*).

<sup>3</sup> Rtd.Col.Dr.Kizza Besigye v Electoral Commission, Yoweri Kaguta Museveni (Election Petition No.1 Of 2006)

<sup>4</sup> The 2011 General Election Observation Reports by: the European Union (EU), African Union (AU), Commonwealth, Citizens Election Watch – IT (CEW-IT), Democracy Monitoring Group (DemGroup), Citizens' Coalition for Electoral Democracy in Uganda (CCEDU), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Intergovernmental Authority on Development (IGAD).

It is hoped that this paper will stimulate a national conversation on the necessary changes required to restore confidence of all stakeholders in the Electoral Commission and the electoral process in general.

## 2.0. Background:

The promulgation of the 1995 Constitution of Uganda was followed by the establishment of the Interim Electoral Commission Statute 3 of 1996. This statute was the basis for the appointment of the seven-member Commission<sup>5</sup> that presided over the 9<sup>th</sup> May, 1996 general elections. This Commission was in 1997 transformed into a permanent Electoral Commission with new members appointed in accordance with the 1995 constitution of Uganda. This Commission consisted of a chairperson – Hajji Aziz Kasujja, a deputy chairperson and five other members who were appointed by the President. The Commission organized the 1997/1998 local council elections, the June 2000 referendum on the choice of political system, the 2001 presidential and parliamentary general elections and the second 2001/2002 Local Council Elections. Following significant public outcry over the integrity of the 2001 general elections, the Kasujja Commission was retired in ‘public interest’ and a new commission appointed in 2002 with Hajji Badru Kiggundu as the Chair. Since 2002, a few changes have been made in the composition of the Commission including retirement of the Deputy Chairperson Sister Margaret Magoba, and the appointment of two new commissioners. The current seven-member Commission was re-appointed in 2009.

There seems to be wide agreement on the need to have an election management body that fits into the modus operandi or aspirations of a multi-party political dispensation. The manner of appointment prescribed in the 1995 Constitution gives the President the power to appoint the commission and the President too reserves the power to fire it without recourse to any other body. This has been widely cited as a reason for the Electoral commissions “weakness” in presiding over electoral processes especially when it comes to bringing to book electoral offenders aligned with the ruling party the NRM. The Commission has often given ammunition to critics of its independence by interpreting its constitutional mandate in a narrow manner leaving out the broader issues of ensuring a fair process by enforcing equal access to state media, regulating campaign finances, and prosecution of electoral offenders. And because the current EC was introduced through the efforts of one single party, there is a vast perception as well as evidence to show that the body’s autonomy and impartiality are questionable. Due to such widespread perception, the body has over time enjoyed declining confidence and trust from sections of the electorate, and members of political parties from across the political divide. The Afrobarometer (Round 5 Uganda Survey Results) 2012 noted that trust in the Electoral Commission is low across partisan and demographic divides.

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<sup>5</sup> Interim Electoral Commission (IEC)

Perceptions of the Electoral Commission's independence are not assisted by the several court ruling in which the EC's capacity to administer elections has been challenged on the basis of inability to act independent of influence or control. In the *Dr. Kizza Besigye vs President Museveni* case of 2006, court ruled that the EC did not comply with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections. And because of this non-compliance to the set electoral laws, there was disenfranchisement of voters; the principle of free and fair elections was compromised by bribery and intimidation; and the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting and vote stuffing. Today, out of the fourteen by-elections conducted and organised since 2011 to date, nine have been occasioned by administrative irregularities involving or occasioned by the Electoral Commission while only five have been caused by deaths of the office holders<sup>6</sup>. In addition, a number of politicians are beginning to make statements to the effect that it is not possible to have fair elections under the present electoral architecture. For example the former president of the Forum for Democratic Change (FDC) Dr. Kizza Besigye is quoted in the November 12th, 2013, *The Daily Monitor* newspaper to have stated that "contesting for the Presidency under the current Electoral Commission would be a ritual without any political significance". All this points to a serious need to address some of these issues if Uganda is to have a semblance of peaceful elections.

### 3.0. Reforming the EC: critical areas to review

The changes orchestrated by the multi-party dispensation as well as the track record of the institution of the EC make the review of the body inevitable. In order to ensure the independence of the Election Commission and to keep it insulated from external pulls and pressures the body must be comprehensively reviewed if its image and credibility are to be redeemed.

The reform of the EC must, at both the legislative and constitutional level, lay strategic emphasis on the following interconnected features:

1. The appointment process of the commissioners;
2. Composition of the Commission;
3. Qualifications of commissioners;
4. Commissioners' term of office;
5. Commissioners' length of tenure;

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<sup>6</sup>The Electoral Commission unduly nominating candidates who have presented false documentation such as academic and professional credentials; and committing other glaring administrative oversights – also, see *Kasibante Moses v Katongole Singh Marwaha & Another*, 2011. This could be interpreted as evidence of incompetence.

6. Commissioners' conditions of service;
7. Funding of the Commission;
8. The powers of the Commission; and
9. The appellation of the Commission – which should reflect the Commission's mission/mandate.

The above features are mutually dependent and addressing one or a few of them may not necessarily deliver an independent and credible Electoral Commission as elaborated below:

### ***3.1. The Appointment of the EC Commissioners:***

Commissioners must be hired through a transparent, public appointment process that enlists wider stakeholder consultation and a more inclusive approval mechanism that instills public confidence in the capacity of the commissioners and their ability to operate autonomously and professionally. This kind of process should be able to fulfill principles of a merit-based selection dependent on a competitive application process.

The current Ugandan experience according to the Constitution, Article 60 (1), is that, all seven (7) Commissioners are appointed by the President with the approval of Parliament. Such a process which vests appointing powers majorly in the hands of President, risks undermining the impartiality of the Commission. This appointment process does not safeguard the commissioners from any potential influence from the incumbent authorities who many times have a direct interest in the result of an election.

It is critical that laws relating to the appointment of commissioners inherently carry safety valves against any possible manipulation of the Commission by a single appointing authority. In Kenya for instance, the recruitment process is handled by a specialized Selection Panel. The Panel is formed by a total of seven representatives drawn from the offices of the President, Prime Minister, Judicial Service Commission, the Anti-Corruption Advisory Board and the Association of Professional Services of East Africa. Nominees to this panel are vetted by the National Assembly before they take on their responsibilities<sup>7</sup>. Once the National Assembly has approved the nominees, they will then constitute themselves into a Selection Panel which will from then onward manage the selection process of the Commissioners to the IEBC. In accordance with the law, the Selection Panel invites applications from qualified candidates from the public from which it shortlists individuals to be interviewed. Shortlisted individuals undergo a public interview process from which three individuals are selected for the position of chairperson, and thirteen for the Commissioners' positions. The names of selected candidates are then forwarded

<sup>7</sup> The appointment process, responsibilities and duties of the Selection Panel that interviews the IEBC Commissioners is well articulated in the Independent Electoral and Boundaries Commission Act No. 9 of 2011.

to the President. The President then chooses one name out of the three candidates nominated for the position of Chairperson and eight names from the pool of thirteen names proposed for commissioner appointment. The President forwards the nine names to Parliament for vetting and approval or dis-approval. But as an interested stakeholder in elections, it may not even be necessary to refer the names of the successful candidates to the President; the Select Committee can resolve the process and forward the final exact names of successful candidates to Parliament for vetting and approval or dis-approval.

Such a recruitment procedure is not only participatory but also dispels any ‘would be’ claims of biasness, and favoritism by the appointing authority. Beyond identifying a professional team, this process strengthens the credibility and legitimacy of the Commissioners and portends well with Public’s trust in the institution of the EMB.

Uganda must therefore review the currently set procedure of appointing Commissioners with a view of establishing a professional and independent electoral commission. The current appointment process for Commissioners to the EC has strong characteristics of a government or a quasi-government EMB. Whereas government or quasi-government election management bodies may have technical competencies, they are reflective of hegemonic tendencies and are susceptible to control or influence by government or incumbent establishments.

*The Electoral Commission Act, Chapter 140 of the Laws of Uganda must be amended to provide for a detailed process of identifying and selecting persons who may be recommended for appointment as members of the Commission. The identification of the Commissioners of the EC must therefore be public, openly competitive, merit-based, and handled by a competent team or body. The Selection Team or body must undertake to invite applications, interview candidates, set and supervise aptitude tests, and seek information from candidates’ referees before declaring any candidate successful under the first stage. Parliament should perform the crucial role of vetting candidates who have successfully interviewed for the Commissioner positions. Names of the successfully vetted candidates should then be forwarded to the President for subsequent appointment. Such a proposed elaborate appointment process can withstand scrutiny and be publicly defensible. It would also inherently safeguard the EC’s institutional independence and autonomy, especially from the executive branch of government.*

### **3.2. Composition of the EC:**

Emerging and semi-democracies like Uganda need to adopt institutionally independent and professional Electoral Commissions able to act independently of political parties which many times have vested interests in electoral processes and political contestations. Because the current Commission in Uganda was appointed under a single party - Movement system of governance, it is very hard to de-link it from the seemingly popular belief that it is a ‘Movement’ EC. The body’s relationship with the Ministry of Justice and Constitutional Affairs at policy level further

makes it pass as a governmental EMB. The choice of type or model of Electoral Commission has a direct impact on public perceptions around electoral integrity<sup>8</sup>.

Kenya recently adopted an expert type IEBC which maintains only professionals<sup>9</sup> who are not seen to represent any political side and are chosen for their integrity and skills. Having had a stint of a political party based EMB in 1980 and a seemingly governmental prototype of the current EC, Uganda now needs neither politicians nor civil servants but professionals whose appointment based on the candidates' merits.

*Uganda must adopt an expert and independent EC with professional commissioners and technical staff who are able to manage election affairs more efficiently and impartially. The composition of the EC must therefore reflect the diverse of skills and social demographics<sup>10</sup> (skills including: electoral, legal, communication, corporate management knowledge) necessary to ensure that an Electoral Commission functions effectively and appropriately to navigate the complex task of impartiality in managing electoral processes.*

Party based, governmental or hybrid Electoral Commissions such as the National Electoral Commission of Rwanda, the Electoral Commission of Tanzania, or even the Electoral Commission of Ghana will always attract questions in respect of their independence and ability to act outside influence than expert Commissions such as Kenya, South Africa and Sierra Leon.

### **3.3. Qualifications of Commissioners:**

It is essential to the effectiveness of an electoral commission that qualified candidates obtain office. Many times and in most countries, the public is unaware of the qualifications of the Commissioners appointed, because the commissioners-designation process often is not conducted in public view. In Uganda specifically, there are benchmarks/pointers to the credentials that a Commissioner should hold but there are no specific qualifications in regard to

<sup>8</sup> There are three distinct types of Election Management Bodies (EMBs): an expert EMB<sup>8</sup>, multi-party EMB<sup>8</sup> and a hybrid<sup>8</sup> of both experts and members from political parties. These three types correspond with three popular models of EMBs; the independent model<sup>8</sup>, governmental model<sup>8</sup> and the mixed model<sup>8</sup> of EMBs.

<sup>9</sup> A person is qualified for appointment as a member of the IEBC Kenya if such person has proven relevant experience in any of the following fields: electoral matters; management; finance; governance; public administration; and law.

<sup>10</sup> A well composed EMB must adhere to gender considerations and should be seen to represent the social diversities of the country. The Zimbabwe Electoral Commission (ZEC) for instance is made up of seven (7) Commissioners out of these, five (5) of them are female<sup>10</sup>. Although there is currently no scientific evidence to link representation of women on the Commission to the efficiency and/or credibility of Commission, we cannot underestimate the fact that those Commissions with fair representation of both male and female are prone to being socially acceptable than those that are that have unbalanced gender representation. In Kenya on the other hand, it is clear in the Constitution that the composition of a national body like the IEBC must reflect the diversity and cultures of the peoples of Kenya.

citizenship, age, field of expertise, age, educational and professional credentials. The public will have greater confidence in the election process if they know that Commissioners were screened by independent screening panels and found to possess the qualities necessary for effective management of election affairs. More so, elections have become highly specialised and have since drawn a lot of public interest than never before. Having specific qualifications helps to erase any perceptions of bias in the appointment process, but also eases the work of the recruitment/appointments body in respect to definite qualifications required of a commissioner.

Kenya attempts to provide specific qualifications for Commissioners. Beyond the Kenyan Constitution providing that the person to hold the Chair of the IEBC should be qualified to hold the office of a Supreme Court judge, the IEBC Act, 2011 defines attendant qualifications for one to be a Commissioner<sup>11</sup>. The Ugandan law loosely provides for Commissioners to be persons of high moral character, proven integrity and who possess considerable experience and demonstrated competence in the conduct of public affairs. Even Africa's democratic icon – Ghana, vaguely requires that Commissioners should be persons who are qualified to be elected as members of Parliament. Other countries like South Africa have narrowly viewed elections as a function that seeks to resolve political conflict through different legal mechanisms and therefore only members of the legal fraternity are fit to be appointed as Commissioners.

*The Electoral Commission Act, Cap 140 must categorically lay out ascertainable quantitative and qualitative qualifications in respect of age, citizenship, academic credentials, professional background, work experience, and issues of political orientation. The qualification criterion should also require that one is a registered voter and possess strong knowledge of electoral issues of the country. Qualitative qualifications should interrogate a person's integrity and moral standing. An applicant for the position of Commissioner at the Electoral Commission of Uganda must for instance possess the following:*

- *Be a citizen of Uganda and must have continuously lived in Uganda for at least 10 years;*
- *Be twenty-five years and above but not more than fifty five;*
- *Be enrolled as a voter on the National Voters Register;*
- *Must hold a degree from a recognised university in an associated field such as electoral matters, management, finance, governance, political science, public administration, business management, and/or law;*
- *Should possess at least five (5) years or more of progressively responsible work experience;*
- *Should demonstrate strong management and coordinating skills including direct supervision of professional and support staff; and*
- *Should demonstrate familiarity with the political landscape of Uganda and the East African region.*

<sup>11</sup> According to the IEBC Act, 2011, a person qualified for appointment as a member of the IEBC should be a citizen of Kenya; holds a degree from a recognised University; has proven experience in any of the following fields: electoral matters, management, finance, governance, public administration and law.

Given the sensitivity of electoral matters, the Electoral Commission Act, cap 140 must provide clear qualification requirements to guarantee that persons appointed have the necessary experience, qualifications and independence to execute their duty. This will inherently address the question of perception of bias or partiality by those appointed as Commissioners and aptly deal with the professional demands of the Commission

### 3.4. *Term of Office*

Whereas Uganda's seven-year term is one of the longest in the East African region, it is anticipated that such an extended single length of tenure can encourage the maintenance of the Electoral Commission policies as well as motivate the introduction of long-term policies rather than those that are merely politically expedient.

In Uganda just like in many other countries where the law provides for re-appointment of commissioners<sup>12</sup>, there is indicative evidence that such Commissioners tend to view the potential re-appointment as an incentive to make politically convenient decisions that will ultimately provide them with a safety net of a re-appointment by the appointing authority.

*The table provides a comparative overview of the lengths of tenure and term of office for Commissioners in the East African EMBs:*

- **Burundi:** *Members of the Independent National Electoral Commission (CENI<sup>13</sup>) have three year terms which are renewable without restriction. Comparatively, Burundi maintains the most liberal terms of office for its Commissioners;*
- **Rwanda:** *Commissioners hold office for eight-years with potential of renewal. This is one of the longest and most flexible (renewable) compared to other countries in the region;*
- **Uganda:** *Commissioners hold office for a term of seven years which can be renewed once;*
- **Kenya:** *Members of the IEBC are legible to one term of six years; and*
- **Tanzania:** *Members of the National Electoral Commission are appointed to a single term of five years.*

In light of the potential dangers associated with short renewable terms of office in the management of election affairs, it is therefore important for Uganda to maintain a relatively lengthier timeframe of appointment – seven years, but entrench a legal caveat against non-renewal of appointment after the expiration of the Commissioner's term of office.

*Article 60 of the Constitution must therefore be amended to ensure that a member of the Commission holds office for seven years and is not eligible for reappointment.*

<sup>12</sup> Uganda and Burundi (in the case of the East African region)

<sup>13</sup> Commission Electorale Nationale Indépendante

### 3.5. *Security of Tenure:*

Security of tenure for the EC Commissioners must be guaranteed. It must be enshrined that a Commissioner cannot be dismissed from the service for causes other than those provided by law and only after due process is accorded them.

According to article 60 (8) of the Uganda Constitution, a member of the Commission may be removed from office by the President for inability to perform the functions of his or her office arising out of physical or mental incapacity; misbehaviour or misconduct; or incompetence. Such a provision leaves the powers of terminating a Commissioner's services at the sole hands of the President. While it categorises grounds for dismissal of a Commissioner, there is no provision for a due process to be followed.

On the contrast, article 251 of the Constitution of the Republic of Kenya lays down a robust procedure that includes: step 1) the person desiring the removal of the Commissioner petitioning the National Assembly; 2) the National Assembly considering the petition grounds and deciding to refer the matter to the President; 3) the President appointing an Independent tribunal to expeditiously investigate the matter, report and make recommendations; 4) the President acting on the recommendations of the tribunal with in thirty days from the day he/she receives the tribunal report<sup>14</sup>. The Kenyan law therefore insulates the Commissioners from both illegal acts of dismissal and illegal dismissal without due process. Likewise in Ghana, once appointed, members of the Electoral Commission cannot be dismissed except on grounds of infirmity or insanity after a certification by an independent medical board.

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<sup>14</sup> Article 251 of the Constitution of the Republic of Kenya reads as follows: (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—

- (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
  - (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
  - (c) physical or mental incapacity to perform the functions of office;
  - (d) incompetence; or
  - (e) bankruptcy.
- (2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.
- (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.
- (4) On receiving a petition under clause (3), the President—
- (a) may suspend the member or office holder pending the outcome of the complaint; and
  - (b) shall appoint a tribunal in accordance with clause (5).
- (5) The tribunal shall consist of—
- (a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;
  - (b) at least two persons who are qualified to be appointed as High Court judges; and
  - (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.
- (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
- (7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.

Such guarantees safeguard members from possibilities of any undue removal from office by the executive or any other stakeholders that could have direct interest in electoral affairs. Where Commissioners are appointed and can easily be dismissed by the head of the executive (President, as it is in most countries), they are very susceptible to political pressure. In such a framework, the Commissioners' ability to take independent decisions that could have a negative interpretation on the executive, or the legislature may be very limited.

*Article 60 of the Constitution must therefore be amended to provide for a well laid out procedure to dismiss a member of the Commission. Where the removal of a Commissioner is based on incompetence or misconduct, it should be investigated and recommended by a tribunal. And where the removal is based on health grounds, a medical board must give a detailed report that clearly provides proof of inability to dispense commissioner duties prior to consideration of dismissal. In addition, the law should explicitly provide for punishment of appointing authorities who interfere with the work of the Commissioners.*

Such a procedure will enhance the security of tenure of the members of the Commission and the independence of the Electoral Commission.

### **3.6. Conditions of service:**

In line with international best practices, Uganda needs to urgently establish an independent body that determines remuneration and privileges of public servants, including Commissioners of the Electoral Commission.

Currently, the Constitution of Uganda gives powers to Parliament to determine the emoluments of the Commissioners. Such a provision is subject to potential manipulation; Parliament can decide to reduce the emoluments of the Commissioners if they are perceived to be making decisions unpopular with the legislature. In other countries such as Ghana, the conditions of service of Commissioners are benchmarked to those of the Judges of the High Court. In South Africa, the conditions of service of the Commissioners are determined by the President after consultation with the Commission on Remuneration of Representatives. In Kenya for instance, conditions of service of members of the IEBC are determined by an independent body, the Salaries and Remuneration Commission<sup>15</sup>.

<sup>15</sup>The Salaries and Remuneration Commission is a Kenya government Commission established under the Salaries & Remuneration Commission Act, 2011. The Commission's role is primarily inquire into and determine the salaries and remuneration to be paid out of public funds to State officers and other public officers. The independence is guaranteed in the Constitution of Kenya.

*Government must establish a Salaries and Remunerations Commission to determine and harmonise the salaries of state officers in the context of fairness across the board. It is this Constitutional body that should deliberate on an acceptable and workable formulae for the salaries of all public office holders. Public Office Holders are those working under both the National and local governments, those in Commissions and Independent Offices and all those working in State organs.*

Creating an independent body to determine the Commissioners' remuneration and emoluments will assure Commissioners of their benefits and salaries during their term of office, but also protect them from any undue influence that could come in form of legislators setting the Commissioners' salary structure.

### **3.7. Funding of the Electoral Commission:**

The existing electoral law needs to be amended with a view of safeguarding the Electoral Commission's budget from unnecessary revisions. The new amendment must also offer the EC more structural leverage in determining its priorities and adequate budget.

Although article 66 of the Constitution grants a self-accounting status to the Electoral Commission of Uganda, its budget is subject to Parliamentary review and approval. While Government has prioritized the financing of elections and generally provided adequate resources, the Medium Term Expenditure Framework (MTEF) under which the EC is funded has not made the funding process any better; it provides for quarterly disbursements of funds and sets specific (conservative) expenditure ceilings. The present legislative arrangement offers limited protection to the EC as a priority institution and its budget against possible cuts. The MTEF on the other hand, has been less successful at ensuring that budget allocations translate reliably into actual expenditures due to the late disbursements of funds.

Within the current framework, Parliament can revise the administrative expenses of the Commission including salaries, allowances, pensions and other emoluments of members of the Commission. Such a funding model has for a long time raised credibility-threatening perceptions that the Commission's activities are being controlled by the legislature. In other jurisdictions the Electoral Commission's funds are protected against any possible undue modifications by the legislature or even the executive. In Ghana for instance, the legislature has no power to alter or reject any part of the Electoral Commission's proposed budget. Its funding is a separate line item in the national budget, released directly to the Commission by the Treasury. In Nigeria and the Seychelles some parts of the Electoral Commission's budget cannot be altered by the executive or the legislature. Article 66 of the Constitution of Uganda must therefore be reviewed with a view of entrenching a clause that protects parts of the Commission's budget against any possible revisions by Parliament. Drastic budgetary revisions by Parliament have previously affected the Commission's ability to properly deliver on its Constitutional mandate. For the period 2013/14 for example, the Electoral Commission of Uganda had proposed a wage bill of UgShs.

65,436,000,000. However only UgShs. 7,362,000,000 was passed by Parliament<sup>16</sup>. Costs to general elections, voter education, and voter registration should be considered for placement under a protected category. The nature of work of the EC (elections) makes it prudent to exempt the Commission from the MTEF funding plan (quarterly basis with restrictive budgetary ceilings).

The Commission must be afforded an adequate opportunity to report and defend its budget estimates directly before Parliament or its relevant committees without necessarily having to report through the Ministry of Justice and Constitutional Affairs as is the current practice<sup>17</sup>. It is for Parliament, and not the Executive arm of Government, to ensure sufficient funding to enable the Commission to carry out its constitutional mandate.

It is an earnest belief that the new model will further promote the independence of action by the Commission vis-à-vis other organs of government such as the executive.

### **3.8. Powers of the EC:**

Provisions granting the EC power to manage and regulate aspects of elections such as security, candidates/political parties' coverage in the media, conduct, use of money/resources in campaigns need to be reviewed with a view of strengthening them. As they are now, the provisions are implied, generic and could be interpreted to be of an auxiliary nature<sup>18</sup>.

Article 61 of the Constitution that mandates the EC to “ensure that regular, free and fair elections are held”. However, this article remains too inexplicit and silent on the powers which the EC should invoke to fulfil this function and thus guarantee free and fair elections. The same could be construed from the Electoral Commission Act, cap 140, that grants powers to the Commission to regulate critical electoral processes such as candidates' campaign activities. Because the powers of the EC are not of a specific nature, there have been various unwarranted instances where the Commission has abdicated its powers over issues that are critical to ‘ensure that regular, free and fair elections are held’. Despite its broad constitutional authority, the EC has entirely deferred to the Media and Broadcasting Councils (in respect to the regulation of media during elections); and the Uganda Police Force (in regard to election security matters).

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<sup>16</sup> Report of the Committee on Legal and Parliamentary Affairs on the Ministerial Policy Statement and Budget Estimates for the Financial Year 2013/14; pages 11 – 16

<sup>17</sup> Currently, EC annual budget estimates are contained in the Ministry of Justice and Constitutional Affairs Ministerial policy statement

<sup>18</sup> Part II, 12 (1)(f) of the Electoral Commission Act, 1997 grants powers to the EC to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with the EC Act or any other law.

*Because the EC has narrowly interpreted its mandate to the organization of elections, which is specified in law, while refraining from taking action on the electoral environment as mentioned as one of its functions in the Constitution, it is important that the EC should be granted more specific legal powers in the following areas which touch directly on the electoral environment:*

- 1 Control/ monitoring of campaign spending;
- 2 Regulation of media during campaigns;
- 3 Management of electoral security;
- 4 Enforcement of the political parties and organisation's code of conduct; and
- 5 Resolution of electoral disputes.

*The manner in which the listed areas are managed could have a bearing on whether an election is conceded as free and/ or fair.*

The Kenyan IEBC Act, 2011 is on the other hand more explicit and provides express authority to the Commission. For example the Act, inter alia, gives IEBC powers to order the arrest and prosecution of Cabinet Ministers, their assistants and other government officials who use official vehicles for their campaigns and impound such vehicles/ resources. It also grants powers to the IEBC to order the arrest, prosecution and or punishment of a person who breaks electoral laws. In Uganda, prosecution of electoral malpractices/offences requires the consent of the Director of Public Prosecution (DPP). Such a framework limits the EC's capacity to prevail on electoral offenders in a timely manner. The Constitution must therefore be amended to confer powers of prosecution on authorities (Electoral Commission) other than the Director of Public Prosecutions.

*The Electoral Commission Act Cap 140 must consistently be reviewed to grant the Commission powers to order arrest, investigate and prosecute electoral offences by candidates, political parties or their agents. Such powers can be dispensed within the framework of a standing Election Administration Tribunal which should be created and mandated to hear, determine and report on complaints arising from decisions of the commission relating to: the demarcation of constituencies; registration of voters; the nomination of candidates for elections; the campaign period; polling; and post polling activities.*

*The electoral law must also expressly empower the Commission with the powers to determine the monetary campaign spending limits in respect of presidential, parliamentary or local government elections as well as monitor the campaign expenses of political parties and candidates.*

In conclusion, the electoral law must define the Commission's investigative and sanctioning powers in specific terms. The actions and duties which the EC is empowered to perform must also be drafted in definitive, exact and plain manner.

### 3.9. *Appellation:*

It is critical that the independence of the Electoral Commission is explicitly recognised in its name. The current name “Electoral Commission” does not convey the body as an independent, impartial and fair referee that can freely preside over elections and referenda. The appellation of the Commission as it is now also diminishes citizens’ confidence that the Commission is an independent ‘adjudicator in electoral/political competitions. It reflects a technocratic vision which is contradicted by some of its tasks as enumerated in the Electoral Commission Act, Cap, 140.

*Article 60 of the Constitution should therefore be amended to rename and reconstitute the Electoral Commission as the “Independent Electoral Commission”. This amendment is consistent with article 62 of the Constitution that obligates the Commission to uphold “independence” in the performance of its functions.*

It is critical to point out however, that without adopting all the recommendations highlighted above, the name change would be meaningless and even misleading. The appellation alone does not guarantee the independence of the Commission.

Beyond the designation of the Commission, the real autonomy of the Commission must be found in its relationship with government which should not be able to overrule the decisions of the Commission.

### 4.0. **Conclusion:**

The reform of Uganda’s EC should be looked at in the broader framework of overhauling the entire electoral process. To deliver a democratic electoral system (which is an aspiration of many Ugandans), other critical reforms such as: the reinstatement of presidential term limits, instituting mechanisms to guarantee a clean, accurate and credible national voters register; provisions to counter gerrymandering; managing the illicit use of money during campaigns; review of special interest representation in Parliament and other local government councils must be addressed.

In order to realise the gains that may come along with the proposed modifications, electoral reforms must be undertaken within a context of a Constitutional review process that facilitates a national political transition. A constitutional review process will inadvertently allow for the re-examination and reform of other sectors such as security, and judiciary that (in the context of Uganda) seem to have historically gratuitous influence over the conduct and verdict of elections in Uganda.

Beyond the legislative tier of reforms, Uganda ought to inevitably invest heavily and strategically in public civic education as a support measure to sustainable good electoral practices. Civic education must integrate cognitive moral information which speaks to the prominence of valuing things like democracy, justice, peace alongside socialising values such as integrity, trust, honesty, confidence which have over the years had a far-reaching impact on the nature of elections Uganda has had.

**Annex 1*****The Tanzania experience:***

The proposed draft Constitution<sup>19</sup> for Tanzania (2013) is poised to re-examine the state of the Union between Tanganyika and Zanzibar<sup>20</sup>. The people of Tanzania are optimistic that the process is bound to resolve the fifty year strains in respect to the relationship between Tanganyika and Zanzibar. Tanzanians are optimistic that this process will strengthen the confederacy union between mainland and Zanzibar. Firstly and most importantly, this process is bound to permanently draw clear parameters and allay the longstanding historical grumblings between the sovereign mainland and sovereign Zanzibar.

Secondly, Tanzania has undertaken extensive review of its electoral system. Tanzania has for many decades operated an electoral structure that was constructed under a single party system. The President has always held the power to appoint the Chairperson, the Vice-Chairperson and five other commissioners (a total of 7 commissioners) to the Commission; in accordance with article 74 of the 1977 Constitution of the United Republic of Tanzania<sup>21</sup>. Although the criterion made it incumbent upon the President to appoint judges of the High Court or the Court of Appeal of Tanzania<sup>22</sup>, there weren't any stringent checks and balances to guarantee non-subjectivity in the appointment process. The new Constitution on the other hand proposes comprehensive and holistic electoral reforms as opposed to the piecemeal reviews that the Tanzanian government has undertaken over the last years.

Within the context of the new draft Constitution, a Tanzanian citizen who aspires to become member of the electoral body (both Commissioners and senior technical staff) will be required to file their applications to the Appointing Committee which will be chaired by the Chief Justice.

<sup>19</sup> The Constitutional review process in Tanzania started in 2012. The Constitutional Review Commission under the headship of Judge Joseph SindiWarioba introduced a draft copy of the 240 Article document to the public on 3rd June, 2013. It is expected to come into effect before Tanzania's next general election in 2015

<sup>20</sup> The Republic of Tanganyika and the People's Republic of Zanzibar entered into union agreement in 1964 to form a new sovereign state of the United Republic of Tanzania. The Articles of the Union was ratified by Tanganyika's Parliament and the Zanzibar Revolutionary Council on 26 April, 1964. The Articles of the Union declared the formation of the United Republic in Section 4 as follows: "The Republic of Tanganyika and the Peoples' Republic of Zanzibar shall be united in one Sovereign Republic to form the Republic of Tanganyika and Zanzibar"

<sup>21</sup> Article 74 (2) of the 1977 Constitution of the United Republic of Tanzania: "The President shall appoint the Vice-Chairman of the Electoral Commission on the basis of the principle that where the Chairman hails from one part of the Union, the Vice-Chairman shall be a person who hails from the other part of the Union".

<sup>22</sup> Article 74 (1) of the 1977 Constitution of the United Republic of Tanzania: "a Chairman who shall be a Judge of the High Court or a Justice of the Court of Appeal, who shall be a person with qualifications to be an advocate and has held those qualifications for a period of not less than fifteen years".

The Committee made up of six (6) members including: the Speaker of the Union Parliament, speakers from the Tanzania Mainland Parliament and the Zanzibar Parliament as well as the Chair of the Human Rights Commission will scrutinize applications, interview candidates, select names of qualifying candidates and forward the names to the President for appointment. The appointments of candidates will be dependent on their being successfully vetted by Parliament.

The electoral laws are also being amended to secure sustainable funding for the National Election Commission (NEC) to resolve the funding issues that the Commission has previously faced. It is a wide belief that because the funding of the Commission has previously relied on the will of the government, such a financing mechanism could easily interfere with both the Commission's capacity to dispense of its duties in a timely manner but also render the it susceptible to bureaucratic manipulation. The proposed framework has also reviewed the Election Expenses Act with a view of constricting the use of money in clandestine ways to influence voters during elections.

The draft constitution has revisited the concept of representation in view of gender considerations. The special seats for women in Parliament are to be abolished. Each electoral district will have to vote for both a male and female representative. This in essence will make Tanzania one of the first African countries to adopt the 50-50 representation of women in Parliament.

Finally, the new framework also provides for the use of the biometric electoral system. Attendant laws have been proposed to guarantee a smooth transition from a manual voting system to digital voting. Tanzania's NEC is optimistic that the new system will guarantee voting security and boost confidence in the accuracy of the election results.

Electoral reforms in Tanzania reflect a total overhaul in the electoral system that was majorly a construct of the 1977 one-party system Constitution from which Tanzania has now moved away. The reforms mirror Tanzania's commitment to construct a democratic system based on present-day good political practices.

**Annex 2*****The Kenyan experience:***

The reform of the Kenyan electoral system was a prominent feature of the 2010 Kenyan Constitution. This was prompted by the 2007/8 electoral backlash that revealed the urgent need to redeem the independence, credibility and capacity of the Kenyan electoral management body to manage and deliver; credible, free and fair elections that will earn the confidence of the electorate. Electoral reforms in the 2010 Kenyan constitution responded to the lack of any substantial electoral law to govern polls as well as the previously inexistent legal framework for the appointment of electoral commissioners, which had given lee way to Presidents to personally appoint the electoral management body commissioners. The reforms were undertaken in a highly politically divisive environment in which electoral discourse was founded along ethnic lines.

The new constitutional framework reviewed the appointment process of the Commissioners and entrenched a competitive, merit-based open recruitment procedure for all commissioners of the Independent Elections and Boundaries Commission (IEBC)<sup>23</sup>. The recruitment process is handled by a highly specialised selection panel<sup>24</sup> which invites applications from qualified individuals (clear qualifications outlined), conducts public interviews, shortlists three names for the post of Chairperson of the Commission and thirteen for the Commissioners which it recommends to the President. The President selects a chairperson and eight Commissioners from the list. The nine Commissioners are thereafter presented to Parliament for subsequent vetting and approval. Beyond the competitive appointment process, the Constitution guarantees tenure for the Commissioners<sup>25</sup> and the Commission is not subject to direction or control from any other government or non-government organ<sup>26</sup>.

<sup>23</sup> The First Schedule (s.5(2)) of the IEBC Act, 2011 spells out the appointment of the Commissioners as follows: that the positions be advertised in the Gazette, two papers of national circulation, and the Public Service Commission website; and that interviews of shortlisted applicants be conducted in public.

<sup>24</sup> According to the First Schedule (s.5(2)) of the IEBC Act, 2011, the Selection Panel shall comprise of seven persons, who will be nominated as follows: two persons, being one man and one woman, nominated by the President; two persons, being one man and one woman, nominated by the Prime Minister; one person nominated by the Judicial Service Commission; one person nominated by the Kenya Anti-Corruption Advisory Board; and one person nominated by the Association of Professional Societies of East Africa.

<sup>25</sup> IEBC Act, 2011, Part II Section 7 (1): Members of the Commission shall be appointed for a single term of six years and should not be eligible for re-appointment.

<sup>26</sup> IEBC Act, 2011, Part II Section 26: Except as provided in the Constitution, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders.

In the bid to strengthen equitable representation, the new constitution also introduced a system of “population quota” in the delimitation of boundaries. Population quota means the number obtained by dividing the population by the number of constituencies. This reform introduced a significant representational shift, from representation based on geographical expanse to representation based on population. Under this system, constituencies are expected to have fairly the same number of residents. Previously some constituencies with as high as 100,000 residents were entitled to one electable representative same as those with residents as few as 4,000. In tandem with this, Kenya provided a window for its citizens in the diaspora to vote. The March 2013 elections saw diaspora voting piloted in the East African countries.

In addition, the new Constitution also made the process of boundary delimitation participatory and accountable. For the first time, the Commission is required to consult all interested parties in reviewing the boundaries of electoral units.

While the previous constitutional dispensation limited platforms on which people could contest for elective offices, the new constitution for the first time since 1982 recognises Independent candidates in the electoral process.

The new Constitution also seeks to enhance the independent administration of elections and ensure fair resolution of electoral disputes. Article 86 requires the IEBC to ensure that voting during elections adheres to the principles of simplicity, accuracy, verifiability, security, accountability, and transparency. It also mandates the commission to ensure that votes are “counted, tabulated and the results announced promptly by the presiding officer at each polling station,” and that “the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.” Further, it requires the commission to establish “appropriate structures and mechanisms,” including keeping election materials safe, to eliminate electoral malpractices.

In general, an analysis of the reforms in the Kenyan electoral system points to two key conclusions:

- *The Constitutional provisions are intended to deliver integrity, transparency and accountability in electoral processes. Similarly, these changes are anticipated to spur a system that can consistently pronounce genuine election results that represent the will of the people.*
- *The provisions commit to managing the ethnic tensions that have become a perennial feature of national elections in Kenya. The electoral system has previously been used as an instrument of inclusion and exclusion in the sharing of national resources, and its reform is a step in making elections less fractious.*

### Annex 3

#### ***The Rwanda experience:***

From 2003 when Rwanda adopted its post-genocide Constitution, it has made attempts to gradually construct an electoral law that promotes representation of various social and political groups in Parliament. The Constitution mandates that one-third of seats in Parliament be held by women – and this has been upheld in all the subsequent elections. Rwanda maintains around 61% elected women parliamentarians – which is currently the highest in the world<sup>27</sup>. Recent Electoral Amendments include:

- *Making Voter registration a civil responsibility rather than mandatory as it was for many years; and*
- *The adoption of use of Information and Communication Technology (ICT) in electoral service delivery*

Rwanda has installed an electronic system at the headquarters and upcountry field offices and uploaded the voters register on to the internet to ease access for voters and convenience in updating<sup>28</sup>.

While Rwanda has undertaken several reforms all aimed at broadening inclusivity in representation, the 2010 Presidential and the 2013 Parliamentary elections revealed new electoral deficits most of which have a bearing on the transparency, credibility and integrity of the electoral process. One critical reform proposal flagged by many of the poll watchers of the recently concluded Parliamentary elections was the urgent need to review the configuration of the Rwandan election management structures with a view of leveraging from pluralism of opinions and multi-stakeholder consensus on electoral processes<sup>29</sup>. Subsequent reforms are likely to increase transparency of the tallying and transmission of the results to the national tallying centre, strengthen continuous voter education and encourage free responsible journalism around electoral matters.

It is anticipated that the on-going piecemeal electoral reforms in Rwanda are bound to loosen the tight political control that has previously been applied to the entire electoral process. The review

<sup>27</sup> The June 4<sup>th</sup> 2003 Constitution of the Republic of Rwanda provides for a minimum 30 percent women in “all decision-making bodies” in government. In the 2013 Parliamentary elections, women got 51 of the 80 seats in Parliament. This represents 64 per cent of the seats in the Chamber of Deputies.

<sup>28</sup><http://www.nec.gov.rw/>

<sup>29</sup> Commonwealth report on the August 09, 2010 Rwanda presidential polls; *the report called for “the reform of the National Electoral Commission (NEC) and the Media High Council such that a level playing field is ensured in future elections”.*

of election management structures including the national electoral commission may serve to diffuse the long-standing perception or reality of the EMB being closely linked to the RPF ruling establishment. Within the context of the reforms, a significant number of election stakeholders are also mounting pressure on government to ensure that recruitment of NEC staff, both nationally and locally, is open and transparent, without interference from the authorities, especially the security services<sup>30</sup>.

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<sup>30</sup> The Social Democratic Party is championing campaigns calling for impartiality in the recruitment of the Rwanda NEC staff.

## *Annex 4*

### ***The Burundi experience:***

Burundi's next general election is scheduled for 2015. This will be the third multi-party election since the country got out of an eight year civil war that ended in 2005. Two years to the election, political parties are advocating for electoral reforms. Notable reform proposals include: changing the process appointment of the National Independent Electoral Commission (CENI) commissioners. Currently, the post-transition 2005 Constitution of Burundi gives powers of appointment to the President. Parties across the political divide are advocating for a competitive recruitment process for the commissioners. The parties are also rooting for the loosening of restrictions on political party fundraising. Under the current legal regime, foreign funding for political parties is restricted and yet state funding for political parties is only limited to subsidizing campaign and election related expenses<sup>31</sup>.

Electoral reforms in Burundi are being discussed in the context of lack of an independent justice system, weak oversight institutions, a stalled transitional justice agenda and growing corruption. More so, the integration of Burundi in the East African Community (EAC) also inevitably prompts broader legal reviews. It is highly anticipated that debate on electoral reform will trigger a whole new discussion on Constitutional review. While the ruling Conseil National pour la Défense de la Démocratie et Forces de Défense de la Démocratie (CNDD-FDD) has reiterated its commitment to democratic consolidation, it remains apprehensive over championing holistic electoral or constitutional reforms which it fears could ultimately challenge its political hegemony.

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<sup>31</sup> Article 83 of the 2005 Constitution of the Republic of Burundi prohibits foreign funding for political parties.