

# **BEYOND THE NAME: ASSESSING THE INDEPENDENCE OF UGANDA’S NEW ELECTORAL COMMISSION.**

“What's in a name, that which we call a rose, by any other name would smell as sweet.” – William Shakespeare

*By Susan Alupo & Arnold Kwesiga*

## **I. Introduction**

The disputed electoral processes and results that precipitated the National Resistance Army-led guerrilla war of 1980 continue to serve as a major reference point for causes of crisis and instability in Uganda. Though there are other factors responsible for the country’s long years of unrest and dictatorial regimes that need to be seriously interrogated to prepare Uganda for a peaceful transition of power, the importance of popular trust and respect for the electoral body cannot be overstated. A totally respected and independent electoral body that has the capacity to shape the process and receipt of election results by the citizenry should be every leader’s priority. It is premised on the position that ‘free and fair elections are the hallmark of a well functioning democracy, and the foundation of a legitimate and stable government.’<sup>1</sup>

Uganda’s Electoral Commission (EC) is a Constitutional body—established and empowered by Article 60 of the 1995 Constitution, with a specific mandate to ensure that regular, free and fair elections are held and to ascertain, publish and declare in writing under its seal the results of the elections and referenda. It is also tasked with cleaning up the voters register and the delineation of constituencies. A key aspect expected of the Commission is neutrality and impartiality in the conduct of elections. In the performance of its duties, the EC is expected to be an independent body—not answerable to any other organ of the state. This principle is well pronounced in Article 62, which states that,

Subject to the provisions of this Constitution, the Commission shall be independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority.

Therefore the EC’s powers are derived from the Constitution and not from any other organ be it the Legislature, Executive or the Judiciary. It’s from this undertaking that the independence of the EC is a core mandate which cannot be overemphasized. It is a matter that has to be

---

<sup>1</sup> CCEDU, “Towards Reforming Uganda’s Electoral Commission: Critical Areas and Reform Options,” December 2013, accessed at [www.ccedu.org.ug/publications/other-publications](http://www.ccedu.org.ug/publications/other-publications).

embedded beyond the nomenclature of the body, and in the appointment of the commissioners, their composition and in the practice of its roles. Hence, fundamental principles enshrined in free and fair elections are dependent and evident in how the masses perceive and respect the electoral body—which is central to general stability in the country.

## **II. Demanding for Electoral Reforms**

The push for an independent EC by Uganda’s CSOs and the opposition has been a preamble to every general election. Following the same trend, the Inter- Party Organization for Dialogue (IPOD)<sup>2</sup> in early 2015, tabled before Parliament “43 Electoral and Constitutional Reform proposals, which [sought] to improve the conduct of the next general elections in 2016.”<sup>3</sup> In the same spirit, opposition and civil society groups “launched a ‘Citizens for Reforms Now’ campaign [intended] to pressure parliament to institute electoral reforms ahead of next year’s general election.”<sup>4</sup> A purely independent electoral commission is key in organising totally free and fair elections; therefore, these reform initiatives should be considered constructively and critically.

Among the key demands for electoral reforms is the constituting of an independent electoral commission, exclusion of the army in the electoral process and a new voters' register. They are demanding that the government amend the election laws to allow a judicial body to appoint electoral commission officials to guarantee their independence.<sup>5</sup> Currently, the Constitution provides that the commission chairman and other top officials are appointed by the president, a task that has triggered claims that the EC ends up being filled with inefficient officials—as long as they can dance to the tune of he who pays the piper.

---

<sup>2</sup> The Interparty Organization for Dialogue (IPOD) is an inclusive interparty dialogue forum whose membership is comprised of all the registered political parties with at least one seat in the Parliament of the Republic of Uganda. accessed at <http://www.ipoduganda.org/index.php/about-ipod/about-us>

<sup>3</sup> Parliament of the Republic of Uganda, ‘Parties Propose 43 Electoral Reforms,’ March 2, 2015, accessed at <http://www.parliament.go.ug/new/index.php/about-parliament/parliamentary-news/549-parties-propose-43-electoral-reforms>.

<sup>4</sup> Peter Clotey, Uganda Opposition Groups Demand Electoral Reforms, VOA, May 1, 2015, accessed at <http://www.voanews.com/content/uganda-opposition-groups-demand-electoral-reforms/2745188.html>.

<sup>5</sup> Solomon Arinietwe, ‘Legislators Reject Government 2016 Electoral Reforms,’ Daily Monitor, May 13, 2015, accessed at <http://www.monitor.co.ug/News/National/Legislators-reject-government-2016-electoral-reforms/-/688334/2714462/-/1t4xooz/-/index.html>.

The response triggered by these demands, however, was the NRM ruling government coming up with its own proposals for reform, which included a change of name of the electoral body, but also retained the president's powers to appoint members of the Commission. These proposals were viewed by most legislators from the opposition as merely 'cosmetic.'<sup>6</sup> Similarly, the Committee on Legal and Parliamentary Affairs argued that "the government proposal to amend Clause 1(Article 60) and change the name of the Electoral Commission to the Independent Electoral Commission (IEC) does not guarantee the much-needed neutrality of the electoral body."<sup>7</sup>

The government should work with the other proponents of the reforms to ensure that all constitutional and other legal amendments are arrived at by consensus and are not merely cosmetic—if they are to advance democratic values and respect for the EC and any resultant electoral processes. It is only through this undertaking, that elections will become more meaningful and attract more registered voters to participate in the process for better and legitimate governance.

### **III. The Constitutional (Amendment) Bill 2015**

The object of the Bill was to among others, amend the Constitution to change the name of the Electoral Commission to the Independent Electoral Commission and to prescribe a procedure for the removal of commissioners similar to that prescribed for the removal of judicial officers. Whereas the second matter is commendable as it provides for security of tenure—an important factor in ensuring independence of the EC, change of name doesn't not necessarily translate in independence of the body. It was therefore 'cosmetic' for the Executive to discard all the laid out demands for electoral reforms and highlight the change of name as testament of their will to ensure independence of the EC. The resultant outcries from the opposition groups concerning their rejected demands, received no further attention.

On August 11, 2015, Parliament passed the bill, and as has become the norm, the leader of opposition with some opposition MPs stormed out of Parliament. The leader of opposition argued that they in the opposition could not be part of the debate that did not want to listen to

---

<sup>6</sup> *Id*

<sup>7</sup> *Id*

the minority views. They therefore chose to leave.<sup>8</sup> Anyone who is conversant with Uganda's legislative processes knows that in the current multiparty dispensation with one dominant party, the ruling party's numerical dominance has resulted in the passage of legislation being a formality. It was therefore not surprising that in all the opposition proposals to reform the Electoral Commission, the Executive chose to propose a change of name, merely adding the word 'Independent' as a testament of their will to ensure an independent electoral commission. But borrowing from William Shakespeare in his famous Romeo and Juliet play; "*What's in a name? that which we call a rose, by any other name would smell as sweet.*"<sup>9</sup> This quote is often referenced as said by Juliet in reference to Romeo, that just because Romeo carried the Montague name, which was a rival house, did not make him a different person in character. Therefore the name of the commission does not change its character. Of what importance is the mere change of name from the Electoral Commission to the Independent Electoral Commission? What ensures independence of the Commission? Is it the name or the nature of appointment and composition of the commission? It is pertinent to note that an inefficient, partisan corrupt incompetent electoral commission does not miraculously become effective and independent by the mere change of name.

#### **IV. The Opposition MPs Arguments**

The call for reforms has often revolved around changing the appointment authority of the Commissioners. The rationale for emphasising the importance of the appointing authority over the tenure and qualifications of the commissioners has been simply conflict of interest. The appointing authority, who in this case is the president is also seeking re-election hence the very commissioners he appoints preside over an election in which he is contesting. In legal principles, the importance of 'Justice must not only be done, but must also be seen to be done' cannot be overstated. It is one of the tenets that informs the principle that a man cannot be a judge in his own cause. In the current system, it is believed that the president with powers to appoint and dismiss commissioners makes it suspect that the same body can act independent of the president in particular and the executive in general. It is suspect that the EC can act contrary to their appointing authority—more so when they know that the same authority can

---

<sup>8</sup> Jacky Kemigisa, 'Parliament Passes the constitutional amendment bill supported by most of the opposition,' Parliament Watch Uganda, August 11, 2015, accessed at <http://parliamentwatch.ug/parliament-passes-the-constitutional-amendment-bill-supported-by-most-of-the-opposition/>.

<sup>9</sup> William Shakespeare, Romeo and Juliet, Act 2; Scene 2.

institute their dismissal. It is on this basis, that opposition MPs have argued that “the proposed [Government] reforms fall far short of the threshold required to ensure a free and fair election next year.”<sup>10</sup> Shadow Attorney General Abdu Katuntu and Shadow Justice and Constitutional Affairs minister Medard Ssegona argued that leaving the president with powers to appoint and dismiss EC commissioners, left him with enough legroom to influence the workings of the electoral body.<sup>11</sup> Hon Katuntu expounded that

Just giving it [EC] a name does not make it independent. What people of Uganda are yearning for is an EC which is independent, where we all have faith and submit ourselves without doubt that they will conduct free and fair elections. But to have one of the players, one of the candidates competing to be given the sole responsibility of appointing the EC does not render this commission independent.

In the same spirit, Hon. Ssegona wondered how one would want to strengthen the commission in a multi-party dispensation, but “still have a president who is member of a political party and whose party is supervised by the Commission, have powers to dismiss.” He concluded that that would be merely a “name without the tenets of independence.”<sup>12</sup>

Similarly, Hon Mathias Mpuga, noted that the proposed government reforms “[fell] short of people’s expectations and failed to capture the reforms that can give the country a free, fair and credible election.”<sup>13</sup> He argued that the opposition wanted “a restructuring of the electoral commission by changing its appointment process, composition and strengthening its independence.” The government needs to appreciate the importance of an independent EC in any democratic process. Over the years, the involvement of the army and other partisan groups that use violence such as the Kakooza Mutale-led mobs and the Kiboko squad into electoral malpractices should be a clear indication of failure to ensure free and fair elections. This is a point that has been highlighted by the Supreme Court in the two presidential election petitions of 2001 and 2006. The Court noted that the EC had failed to administer free and fair elections. Therefore, independence of the EC is not only “a question of theory, or laws being in place but also a matter of practical application of required standards.”<sup>14</sup> Elections in Uganda are often

---

<sup>10</sup> Legislators Reject Government 2016 Electoral Reforms, *Supra* note 4.

<sup>11</sup> *Id*

<sup>12</sup> *Id*

<sup>13</sup> Clottey, Uganda Opposition Groups Demand Electoral Reforms, *Supra* Note 3.

<sup>14</sup> Legislators Reject Government 2016 Electoral Reforms, *Supra* note 4.

marred by accusations and counter accusations and numerous electoral petitions which clog down the judiciary after every election.

## V. Different Modes of appointing Electoral Management Bodies (EMB)

Ensuring regular, free and fair elections is one of the canons of democracy, and this being as such, the million dollar question is always; Who can deliver this? It is for this reason that provisions for the establishment of Electoral Management bodies (EMBs) in Constitutions and other legislations have over the years been subject to criticism either in public or through constitutional petitions. The International Institute for Democracy and Electoral Assistance (IDEA)<sup>15</sup> and its partners generally discern three categories of EMBs normally employed in the world today;<sup>16</sup>

- i) **The Governmental EMB Model** – where the elections are organized and managed by the executive branch of government, usually through a ministry;
- ii) **The Mixed EMB Model** – where usually two EMBs share the responsibility between them, on the one hand one governmental component which organizes the elections and one independent EMB structure that oversees and monitors them. The Mixed Model is used in France, Japan, Spain and many former French colonies, especially in West Africa, for example Mali and Senegal.
- iii) **The Independent EMB Model** - which uses an EMB structure with institutions that are independent and autonomous from the government to organize and manage elections. Under this model, an EMB is not accountable to a government ministry or department but may be accountable to the legislature, the judiciary, or the head of state.

The International IDEA's 2014 survey of electoral management in 217 countries and territories worldwide showed that 63 per cent followed the Independent Model, 23 per cent the Governmental Model and 12 per cent the Mixed Model (the remaining 2 per cent corresponds to countries that do not hold national-level elections).<sup>17</sup>

---

<sup>15</sup> The International Institute for Democracy and Electoral Assistance (IDEA) is an intergovernmental organization that provides knowledge to democracy builders, policy development and analysis, and supports democratic reforms around the world.

<sup>16</sup> Electoral Management, accessed at <http://aceproject.org/ace-en/topics/em/ema/ema02/default>

<sup>17</sup> *Id.*

Looking at the case of Kenya, their 2010 Constitution established the Independent Electoral and Boundaries Commission (IEBC).<sup>18</sup> Unlike Uganda's case where one could ably argue that the addition of the word "Independence" to the title of the commission was merely an issue semantics, Kenya's IEBC has since stood up to its name.

The mode of appointments of the IEBC was transparent pursuant to the First schedule of the IEBC Act 2011<sup>19</sup> The process of appointing the Commissioners starts with a vigorous processes of nominating a Selection Panel through multi stakeholder efforts. It is the selection panel that then embarks on the process of appointing the IEBC starting with a call for applications, to short listing, public interviewing and finally forwarding nominees for Chairperson and Members of the commission, to the president. The president upon nomination of one as Chairperson and eight as members forwards these nominees to the National Assembly for vetting and approval.<sup>20</sup>

In contrast to this change that was not only about the name but also the appointment procedure of the commission, in Uganda's case, the only visible change as per the Electoral Commission (Amendment) Act 2015 was the change of name to include the word "independent".<sup>21</sup>

## **VI. What's the Way Forward?**

With the 2016 general elections drawing closer, it is impractical to still demand some of the reforms, unless the elections will be postponed. A new composition of the EC at this time cannot realistically get them ready to conduct a free and fair election in less than a year. Nevertheless, this discussion cannot be final. The government needs to seriously cooperate with the opposition and CSOs to ensure that the EC is constituted in a manner that ensures its independence. One key area that demands reform is its appointing authority and the credentials of the commissioners—ensuring that they are professional and answerable to no single organ of state. Learning from the country's precarious past surrounding disputed elections, it is important that the general public have confidence in the EC. As mentioned above, public

---

<sup>18</sup> See Part 2 of the Kenya Constitution 2010, Article 88.

<sup>19</sup> The Independent Electoral and Boundaries Commission Act 2011

<sup>20</sup> *Ibid*, First Schedule on Procedure for appointment of chairperson and members of the commission.

<sup>21</sup> Clause one of the Constitutional Amendment Bill 2015, renames the "Electoral Commission" into the "Independent Electoral Commission". The rest of the amendments are on matters of technicalities hence they do not in any way change the credibility and approval rating of the commission.

confidence in the electoral commission can only be attained if both the appointing procedure and authority are publically accepted and the security of tenure legally entrenched.

The 1995 Constitution was intended to bring new beginnings in the country. It was more widely consulted to ensure that the post-colonial years of political instability, widespread human rights abuses and lawlessness, were critically addressed in the supreme law. It was established to ensure a new political dispensation espousing democracy principles, separation of powers, protection and respect for fundamental human rights and freedoms, and respect for rule of law. Judging from previous elections where violence and lawlessness dominated the elections and triggered massive militarisation of the exercise, it is important that those gaps are critically analysed and addressed to ensure free and fair elections. Any act on the part of the Executive to interfere with the independence of the Election Commission should categorically be discouraged.

At the conclusion of the 2011 general election, the EU Electoral Observation Mission fell short of describing that election as free and fair. The observers cited electoral reform as one of the key recommendations needed to address the ills in the process. Emmanuel Gyezaho notes that “it is, therefore, a missed opportunity that the last four years have not addressed some of these recommendations.”<sup>22</sup> Therefore with hindsight of past experiences, the effectiveness of the EC cannot be detached from public opinion concerning its ability to act independently and conduct free and fair elections. It is therefore imperative that appointing the members of the EC not be viewed as a political role intended to put certain members leaning towards one political party. It should be a role left to independent bodies and not the Executive alone.

As noted above, there are different models for appointing electoral bodies. Over the world, it has been evident that Executive appointment of the EC is a common practice and one that has worked with minimal short comings. However, the case for Uganda cannot be detached from the general government involved in most sectors and authorities, therefrom influencing and interfering their continuous independence and non-partisan performance of their duties. So in

---

<sup>22</sup> Emmanuel Gyezaho, EU press and information officer, <http://www.theeastafrican.co.ke/news/Electoral-reforms-Uganda-European-Union/-/2558/2745358/-/7xxpt7/-/index.html>.

order to streamline a well-functioning EC, government interferences in its operations must be greatly minimised as it is only on this affront that free and fair elections can be conducted.

Promises from the EC of having free and fair elections come 2016 cannot be taken at face value. The EC Spokesperson Jotham Taremwa, has noted that “an election is about a registration that is publicly verifiable and that when carrying out the registration, [the EC] captured bio-data, fingerprints, pictures and digital signatures and, therefore, there would not be multiple voting.” To the EC, this is what will ensure free and fair elections. Whereas this is commendable, it cannot solely be relied on to protect the vote. Ensuring free and fair elections must be holistic—including addressing intimidation, bribery and the nature of environment under which the elections are carried out. Where people’s votes are bought or voters are intimidated to vote for a certain candidate, one cannot pretend that it was a free and fair election. The concept of ‘free and fair’ should be personally entrenched and verifiable, bordering on individual choice with no undue influence or duress. It is only then that one can certainly assert that the elections were free and fair.

## **VII. Recommendations**

1. All electoral commissioners must be persons qualified to be appointed as judges of the High Court.
2. The Commissioners must not have been overtly involved in politics of any nature, or having leanings towards a particular political party.
3. Without watering down the importance of security of tenure, the proposed procedure for removal of members of the Commission is commendable but quite not effective without addressing the mode of appointment. The proposal should be retained and strengthened by changing the powers of appointment from the president to the Judicial Service Commission or any other body or authority set up for the purpose.
4. Interviewing and constituting of Commissioners should be done in the public to promote respect and trust for any commissioners appointed. This would ensure transparency and enhance independence of the electoral body.
5. The EC Commissioners should be appointed to a non renewable term of seven years to ensure that they undertake their functions without due regard to reappointment which in many cases influences ‘politically correct’ decisions in the hope of earning some points from would be appointing authorities.

In conclusion, two of the previous three presidential elections have ended up being challenged before the Supreme Court, with a majority of the Justices of the Supreme Court agreeing that

there had been irregularities and rigging of elections but that the vote rigging and other electoral irregularities were not substantial enough to affect the outcome. The fairness of an election is not only on paper. One key issue that continues to be a matter of concern within the electoral processes, is that of perceived interference in the processes by the Executive and its military machinery. The heavy deployment and reliance on the military around contested areas during elections has become more prevalent at every election. This even as noted by the Supreme Court, affects the fairness of the election. Whereas the change of name is commendable—as it may shout a constant reminder to the commissioners, a corrupt, incompetent partisan electoral commission doesn't miraculously become independent by mere change of name. The independence of the EC is not cut out in the nomenclature; it must be viewed in its appointments, composition and practical impartial handling of electoral processes, right from aspirants' consultations, candidates' nominations and holding of campaigns. No one side should be seen to be favoured and having more ground to meet the electorate than all other candidates. It is only through this operational oversight, that one can with certainty assert that the elections were free and fair.

---