

The Competence of the Electoral Commission to Conduct Free and Fair Elections in Tanzania: A Legal Analysis

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Abstract

The credibility of election being termed as free and fair election cannot be examined without examining the competence and independence of the Electoral Commission with mandates of conducting the elections. In Tanzania, Electoral Commission of Tanzania vested with mandates of conducting elections is constitutionally and statutorily described to be an independent body with the mandates of carrying out its functions without adhering to directives from any person. Nonetheless, the analysis in this study reveals that the Electoral Commission of Tanzania's set-up is unlikely to run elections and produce a government that reflects the will of Tanzanian voters. This is so because the said Electoral Commission is not independent of the ruling party, in particular the influence of the incumbent President. The incumbent President's legal mandates in interfering with the Commission's functioning give the ruling party an advantage over other political parties during elections. The incumbent President is more likely to dictate election results than the Electoral Commission. These create an unfair playground for other participating parties during elections. It is also revealed that the courts in Tanzania lack jurisdiction to deal with petitions against presidential results once declared by the Electoral Commission. As such, the independence and impartiality of the Electoral Commission to run free and fair elections remain a serious legal concern for the supporters of the effective functioning of democracy. Lastly, this paper concludes that the Electoral Commission of Tanzania is not competent, impartial and independent to run credible, free and fair election in the country. Thus, this calls for serious legal reform to establish an electoral body capable of conducting free and fair elections in the country.

Keywords: competence, independence, electoral commission, free and fair election, Tanzania

1. Introduction

Conducting free and fair elections is fundamental to ensure the quality of a country's governance in any democratic society.¹ The right to free and fair elections is a significant factor in forging national unity.² Failure of an electoral body to guarantee the will of the people, which is the basis of the authority of government, is among the causes of the political crisis in many states before, during, or after elections of which every state wishes to avoid. In any democratic society, conducting free and fair elections allows citizens to decide who has to hold a formal political office in the country.³ It is undeniable fact that free and fair elections help to establish a democratic and just government.⁴ Similarly, the electoral process in a multiparty state requires creating a fair and competitive system for all participating political parties.⁵ Without a credible, competent, independent and impartial Electoral Commission, achieving a free and fair election is impossible. It is against the above

¹ <https://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/supporting-free-and-fair-elections>. Accessed on 18 August 2021.

² Ongoya, Z. Elisha and Willis E. Otiemo, (2012). A Handbook on Kenya's Electoral Laws and System Highlights of the Electoral Laws and System Established by and the Constitution Of Kenya 2010 And Other Statutes, Electoral Institute for Sustainable Democracy in Africa (EISA). p.1.

³ Daniel Chigudu., (2016). A Critical Review on the Determinants of a Free, Fair and Credible Election, International Relations and Diplomacy, Vol. 4, No. 8, 508-518. p.1. available at <https://www.davidpublisher.org/Public/uploads/Contribute/57ee38632faf0.pdf> (accessed on 22/3/2021)

⁴ Abdurashid Solijonov., (2016). Electoral Justice Regulations around the World: Key findings from International IDEA's global research on electoral dispute-resolution systems, International Institute for Democracy and Electoral Assistance. p.8.

⁵ Emily Beaulieu., (2012). Interregional Organizations and Election Integrity: Resolving Conflict and Promoting Democracy, International Institute for Democracy and Electoral Assistance.p.5

background; therefore, that this article examines the competence and independence of the current Electoral Commission to guarantee free and fair elections in Tanzania. The first part gives introduction which is followed by the discussion on conceptual framework for free and fair election. The third part covers the analysis of the establishment of Electoral Commission of Tanzania and its independence. The fourth part gives the conclusion

2. Conceptual Framework for Free and Fair Elections

This part examines key concepts regarding free and fair elections.

2.1 Free and Fair Election

To understand whether the Commission can conduct free and fair elections, it is crucial first to grasp what constitutes a free and fair election. The election is said to be free, where all adult citizens enjoy the right to register and vote and establish and join parties and can campaign freely within the country.⁶ On the other hand, election fairness is measured in terms of equal treatment among the participating political parties during the election.⁷ Every person eligible to vote should be able to exercise their right with others equally.⁸ Also, free and fair elections require an independent judiciary capable of resolving election disputes in place. The need to ensure the security of votes from the point of printing, distribution, and ballot boxes is also inevitable.⁹ The candidate must be able to be represented by a supporter or an agent to scrutinise the process, like confirming that the ballot boxes are empty before they are sealed for the day.¹⁰ Likewise, counting votes must be conducted without being prone to alteration or adding votes to the ballot boxes.¹¹ In Tanzania, each polling station transfer results electronically to a designated national Centre. With this current system of transferring results to a national Centre in Tanzania, it is possible for hackers to hack the process. This article argues that the counting of votes should occur at the polling station rather than centrally. Similarly, the public should have access to the results in polling station before they are transferred to a national counting vote centre for the purpose of fraud or alteration of total votes in particular the presidential results. The counted results should be placed publicly at the polling station.

Similarly, when speaking of free and fair election, it is important that the voters must be free from intimidation and undue influence.¹² From this premise, this article submits that holding elections periodically is not by itself an indication of the quality of democracy in a country but the elections must be manned by a competent, independent, and impartial Electoral Commission.

The right of the citizens to participate in elections is part and parcel of fundamental elements of free and fair elections. Free and fair elections require the Electoral Commission to ensure several guarantees, including ensuring that people have the right to vote, the registration of voters takes place on an equal basis for all eligible, and freedom to stand as a candidate in the election, freedom to campaign freely, access to media, counting votes accurately, as well as having the complaints resolved by an impartial and independent institution timely.¹³ In Tanzania, the right to participation is enshrined in Article 21 of the Constitution of the United Republic of Tanzania, 1977¹⁴ which implicitly includes the obligation of the Government to create an equal environment for exercising voters' right to vote and be voted at genuine periodic free elections.¹⁵

2.2 Electoral System

The kind of electoral system employed in a country matters a lot in determining who is chosen in an election.¹⁶ The electoral system is among the key factors determining outcomes inasmuch the person elected in one system

⁶ Sylvia Bishop and Anke Hoeffler., (2016). Free and fair elections: A new database, Journal of Peace Research, Sage Publications, Ltd, Vol. 53. p.609.

⁷ Sylvia Bishop and Anke Hoeffler., (2016). Free and fair elections: A new database, Journal of Peace Research, Sage Publications, Ltd, Vol. 53. p.609.

⁸ Declaration on Criteria for Free and Fair Elections *adopted by the Inter-Parliamentary Council at its 154th session (Paris, 26 March 1994)*

⁹ Marian Sawer., (2001). Elections; Full, Free & Fai, Federation Press, 2001.p.150

¹⁰ Ibid, Marian Sawer., (2001). p. 153.

¹¹ Ibid, Marian Sawer., (2001). p.150.

¹² Ibid, Marian Sawer., (2001). p.151

¹³ Sylvia Bishop and Anke Hoeffler. (2016). Free and Fair Elections: A new database, Journal of Peace Research, Sage Publications, Ltd, Vol. 53. p.609.

¹⁴ Article 21 (1) of the URT Constitution, 1977.

¹⁵ Article 25(b) of the ICCPR and Article 21 of the Universal Declaration of Human Rights (UDHR), 1948

¹⁶ Andrew Reeve, Alan Ware, (1991). Electoral Systems_ A Theoretical and Comparative Introduction-Routledge. p.7

may not be elected under another system.¹⁷ The electoral system is defined as the set of rules that determining how votes in any given election are conducted as well as determine the seats in the representative assembly or other elected institution, including a presidency where one is elected.¹⁸ These rules allow citizens' votes to determine the selection of political leaders to lead the government. Through the democratic election, the citizens control political power, thereby holding politicians accountable for their policies and actions.¹⁹ There are several electoral systems which include a plurality system, majoritarian system, and proportional systems. The plurality system is applicable in Great Britain, the United States and India. Majoritarian systems are found in France and Australia for legislative elections and in about half of the countries with directly elected chief executives. In Tanzania, only one President who ought to have majority support against the rival is awarded the contested seat. The candidate wins an election by obtaining just more votes than other opponents. However, Tanzanian electoral system is based on both relative majority system and proportional system. The majority electoral system is a system where one voter votes for only one candidate and the successful candidate gets the highest votes. This uses a system which is based on the majority principle by which the results must produce a single absolute winner and absolute losers. This system, which allows 'first past the post' is known as the relative majority system.²⁰ Under this system, the successful candidate must obtain the highest votes compared to his competitor. Similarly, another system used in distribution of the special seat members of parliament and ward councilors' in Tanzania is a proportional representation. The proportional representation creates multiple partial winners compared to majority rule.²¹ Therefore, the electoral system in Tanzania is a mixed system because it is divided into majoritarian and proportional representation systems. In this case, looking at the nature of the electoral management body which uses the identified electoral system is essential.

2.3 Electoral Management Body

The electoral management body is a legal entity established to manage and regulate the conduct of elections in the country.²² In Tanzania, the NEC is mandated to receive and validate the nominations of electoral participants nominated by the political parties, conduct polling, count votes, tabulate votes, and determine who is eligible to vote.²³ The electoral management body is legally mandated to enforce the rule of the game in the election process.²⁴ Thus, the electoral management body is fundamentally a very important institution in advancing or leading to the decline of democracy in the country. The study on electoral management bodies has identified three models of electoral management bodies based on institutional arrangement, implementation, formal accountability, powers, composition, the term of office and budget.²⁵ These are: -

2.3.1 The Governmental Model Electoral Management Body

Under this model, the elections are organised and managed by the government's executive branch, mainly through a ministry. The Electoral Management Body is governed by the minister or civil servants and is answerable to a cabinet minister. This has no 'members'. Similarly, the budget used is within the mandate of the government ministry. This has been applied in some states like Denmark, Singapore, Switzerland, the U.K., and the United States.

2.3.2 The Independent Model Electoral Management Body

Norm Kelly argues that electoral management bodies should be independent of the government of the day and any partisan political connections to conduct free and fair elections.²⁶ The term 'independence' is often used interchangeably with terms 'neutrality', 'non-partisanship', and 'impartiality' in respect of established an electoral body.²⁷ This means that an electoral authority may be established as an independent body, but exhibit

¹⁷ Andrew Reeve, Alan Ware, (1991). *Electoral Systems_ A Theoretical and Comparative Introduction*-Routledge. p.7.

¹⁸ Erik S. Herron, Robert Pekkanen, Matthew Soberg Shugart., (2018). *The Oxford Handbook of Electoral Systems*, Oxford University Press, p. 3.

¹⁹ Robert Blackburn (auth.) (1995). *The Electoral System in Britain*-Palgrave Macmillan UK.p.2.

²⁰ Bradley, A.W and Ewing, K.D., (2007). *The Constitutional and Administrative Law, fourteenth edition*, Pearson Longman, London.p.172.

²¹ Josep M. Colomer (eds.) (2004). *The Handbook of Electoral System Choice*-Palgrave Macmillan UK, p.11.

²² Sarah Bibler, Vasu Mohan and Katie Ryan., (2014). *Gender Equality & Election Management Bodies: A Best Practices Guide*, International Foundation for Electoral Systems. p. 13.

²³ <https://aceproject.org/ace-en/topics/em/ema/ema01>. accessed on 8/7/2021

²⁴ Erik S. Herron *et al.*, (2018). *The Oxford Handbook of Electoral Systems*, Oxford University Press. p. 3.

²⁵ Makulilo, Alexander B., Ntaganda, Eugene., (2016). *Election Management Bodies in East Africa*, African Minds, 27. p. 2.

²⁶ Norm Kelly., (2007). *The Independence of Electoral Management Bodies: the Australian Experience*. p.18.

²⁷ *Ibid*, Norm Kelly., (2007). p.20.

bias through partisan actions.²⁸ The electoral management body can manage its own budget without being subjected to a government ministry. However, it has been indicated that if the autonomy of the electoral management body is legally established, the electoral may face some legal challenges like an unclear mandate, financial constraints, and limited independence, which results in the executive continuing to play crucial roles in the management of the election.²⁹ This is relevant to Tanzania as the elections are conducted and managed by an institution that is declared to be independent of any person or the government. It is submitted that the electoral management body should be accountable to the legislature or the judiciary. The Electoral Commission also needs to enjoy a high level of financial autonomy from the government.

2.3.3 The Mixed Model

This model involves two dual structures of the electoral management body. Under this model, elections are organized by the government with the level of oversight provided by an independent electoral management body. The Mixed Model is used in France, Japan, Spain, Mali and Senegal. The electoral management body is responsible for supervising, tabulating, transmitting, and verifying the implementation of electoral events in the country. As mentioned above, in Tanzania, the Electoral Commission is constitutionally established to deal with constituency delimitation, voter registration, elections conduct and results' publication.³⁰

3. Establishment of Electoral Commission of Tanzania

Tanzania is a sovereign state,³¹ which was formed as a union state of two independent states, Tanganyika and Zanzibar, on 26 April 1964.³² Under Article 3 (1) of the Constitution of the United Republic of Tanzania, 1977 (hereafter referred to as the URT Constitution, 1977), the United Republic of Tanzania is a democratic, secular and socialist state adhering to multiparty democracy.³³ The government derives its authority from the people's will as expressed through elections conducted every five years in Tanzania. In Tanzania, the government is supposed to derive its legitimacy from the people's will through periodic elections.³⁴ So, the legitimacy of the government comes from the will of the people governed through free and fair elections.³⁵ From independence to the 1990s, a Commission conducted the presidential, parliamentary and councillors' elections under the chairmanship of the Speaker of the National Assembly.³⁶ However, the Government of Tanzania established the Commission on 8 August 1990.³⁷ This was motivated by the re-introduction of the multiparty system, which led the structure of the Electoral Commission to change and entrench the same in the Constitution. It is very important to note that a weak electoral commission can create political instability and divide society upon failure to properly manage elections. Thus, this calls for one to understand what it takes for the Electoral Commission to be a credible, independent, and impartial Commission as follows:

3.1 The Composition of the Electoral Commission

By nature of the functions of the Electoral Commission, its composition should enhance public confidence. With this demand, the Electoral Commission's members must be appointed based on high integrity, transparency and defined qualifications. The appointed members should observe a high level of impartiality and independence.

In Tanzania, the Electoral Commission is established in the Constitution of the United Republic of Tanzania, 1977. It is argued that for assurance of independence of the electoral commission, the powers to appoint commissioners should be delegated to a non-partisan body like the legislature.³⁸ However, the Electoral Commission of Tanzania comprises members directly appointed by the President of the United Republic of Tanzania.³⁹ The Chairman and Vice Chairman constitutionally started to be appointed by the President of the United Republic of Tanzania from among the persons who qualify to be Justices of Appeal or Judge of the High

²⁸ Ibid, Norm Kelly., (2007). p.20.

²⁹ Makulilo, Alexander. B. *et al.*, Ntaganda, Eugene. (2016). Election Management Bodies in East Africa, African Minds. p. 6.

³⁰ Article 74(6), (7) of the URT Constitution, 1977.

³¹ Ibid, Article 1 of the URT Constitution, 1977.

³² Ibid, Article 2 (1) of the URT Constitution, 1977.

³³ Ibid, Article 8 (1) of the URT Constitution, 1977.

³⁴ Ibid, Article 8(1)(a) of the URT Constitution, 1977.

³⁵ Sylvia Bishop and Anke Hoeffler., (2016). Free and fair elections: A new database, Journal of Peace Research, Sage Publications, Ltd, Vol. 53. p.609.

³⁶ [https://www.nec.go.tz/uploads/documents/sw/1514894460-8 NEC%20chairman%20LESOTHO%20SPEECH.pdf](https://www.nec.go.tz/uploads/documents/sw/1514894460-8%20NEC%20chairman%20LESOTHO%20SPEECH.pdf) (accessed 21/9/2021).

³⁷ Article 74(1) of the Constitution of the United Republic of Tanzania, 1977

³⁸ Norm Kelly., (2007). The Independence of Electoral Management Bodies: the Australian Experience.

³⁹ Article 74 of the URT Constitution, 1977.

Court or persons who qualify to be advocates.⁴⁰ These are appointed from the list of people with such qualifications for less than fifteen years.⁴¹ The President also enjoys wide powers to appoint other members, including one member from the Tanganyika Law Society,⁴² and four (4) other members with adequate experience in conducting or supervising parliamentary elections.⁴³ This article argues that the qualifications of those four other commissioners appointed to the electoral commission are unclear, which makes the President appoint them based on the qualifications that seem to the President to be necessary.⁴⁴

The appointment of the Chairman and Vice Chairman takes into account the fact that the United Republic of Tanzania is a union state. So if the Chairman is from Mainland Tanzania, the Vice-chairman must be appointed from Zanzibar.⁴⁵ The law disqualifies any person holding the position of the minister, deputy minister, Member of Parliament, and councillor, from being eligible for appointment as a member of the Commission.⁴⁶ However, any person possessing citizenship of another country, a person of unsound mind, a person sentenced to death, a person who has been convicted and sentenced to imprisonment for an offence involving dishonesty or for contravening the law concerning ethics of public leaders, are disqualified from being appointed to the position of the commissioners.⁴⁷ Understandably, it should be submitted here that the law should be revised to impose the condition that a person approached in connection for possible appointment as the commissioner of the Commission be required to disclose any circumstances likely to give justifiable doubts in respect of his independence or impartiality.

The Electoral Commission of Tanzania is also managed by the director, who the President also appoints from among senior civil servants recommended by the Commission⁴⁸ to serve as the secretary and Chief Executive of the Commission.⁴⁹ Despite the fact that the President appoints members of the Commission, the Commission has the power to appoint the Regional Election Coordinator⁵⁰ from among the public officers.⁵¹ The Regional Election Coordinator coordinates information, the availability of materials, and other resources for efficiently conducting elections within that region.⁵² Further, the Commission appoints returning officers responsible for conducting, coordinating, and supervising elections in constituencies.⁵³ Even though the persons concerned with the conduct of elections are prohibited from joining and being affiliated with any political party,⁵⁴ however, the legal challenge to the principle of a free and fair election is visible under Section 7 (1) of the National Election Act, 1992, which expressly provides that every City Director, Municipal Director, Town Director and District Executive Director are the NEC's Returning Officers.⁵⁵ The majority of the so-called Returning Officers are appointed again by the President based on the partisanship of the ruling party as a matter of practice in the country. This affirmatively affects the proper functioning of the Commission to work as an independent and impartial institution. The returning officer appointed by the Commission may also appoint another person to assist in the conduct of the election in the constituency⁵⁶ from among those persons holding public office.⁵⁷

Among the functions of the Returning Officer is to prepare and submit to the Commission the partial results of the presidential election in the constituency before the NEC can announce such results.⁵⁸ The Returning Officer

⁴⁰ Ibid, Article 74 (1) (a) of the URT Constitution, 1977.

⁴¹ Ibid, Article 74 (1) (a) of the URT Constitution, 1977.

⁴² Ibid, Article 74 (1) (b) of the URT Constitution, 1977.

⁴³ Section 4 (d) of the National Election Act, [Cap 343 R.E 2010].

⁴⁴ Ibid, Section 4 (d) of the National Election Act, [Cap 343 R.E 2010].

⁴⁵ Article 74 (2) of the URT Constitution, 1977.

⁴⁶ Ibid, Article 74 (3) of the URT Constitution, 1977.

⁴⁷ Ibid, Article 67 (2) of the URT Constitution, 1977.

⁴⁸ Section 6 (1) of the National Elections Act, [Cap 343 R.E 2010].

⁴⁹ Ibid, Section 4 (4) of the National Elections Act, [Cap 343 R.E 2010].

⁵⁰ Ibid, Section 8 (1) of the National Elections Act, [Cap 343 R.E 2010] read with Rule 10 (1) of the National Elections [Presidential and Parliamentary Elections] Regulations 2015

⁵¹ Rule 10 of the National Elections [Presidential and Parliamentary Elections] Regulations 2015

⁵² Section 8 (1) of the National Elections Act, [Cap 343 R.E 2010].

⁵³ Ibid, Section 7 (1) of the National Elections Act, [Cap 343 R.E 2010].

⁵⁴ Article 74 (4) of the URT Constitution, 1977.

⁵⁵ The National Elections Act, [Cap 343 R.E. 2010.

⁵⁶ Section 7 (4) of the National Elections Act, [Cap 343 R.E 2010].

⁵⁷ Ibid, Section 7 of the National Elections Act, [Cap 343 R.E 2010].

⁵⁸ Ibid, Section 35F (2) of the National Elections Act, [Cap 343 R.E 2010].

is responsible for declaring the winner of parliamentary and councillors in the election in a particular constituency.⁵⁹ This raises the question of the need for the Electoral Commission of Tanzania to be allowed to employ enough permanent persons to serve as returning officers of the Commission. It is submitted here that the appointment and employment of the members should focus on defined qualifications to be guided by the laws governing employment in the public service. The appointed members should be the people who can prove in their mind and appearance high level of impartiality and independence. The process of employing and appointing members of the Commission should be more transparent and on merit.

This article further argues that the appointment of the members of the electoral commission of Tanzania should be confirmed by a neutral and impartial body like Parliament before assuming the office in order to maintain transparency, impartiality, and independence of the Electoral Commission in Tanzania. The Electoral Commission should be composed of non-political affiliated persons. In the same line of argument, the chairperson of the Commission needs to be appointed from among the persons with high integrity and who are yet to retire but should be confirmed by the Parliament.

3.2 Independence of the Electoral Commission of Tanzania

As mentioned above, the independent model of the electoral management body means that the electoral body is independent of the government and the political parties.⁶⁰ In the case of *Magill v. Porter*,⁶¹ Lord Hope of Craighead, had this to say that 'there is a close relationship between the concept of independence and that of impartiality.' Tanzania has adopted the independent model by which the law provides that the Commission is independent in terms of its functions from the government.⁶² Article 74 (11) of the URT Constitution, 1977, set the NEC free from the interference of the Government in respect of its operations by categorically providing that the Electoral Commission is not obliged to comply with or work based on any orders or directions of any person or any Government Department or the views of any Political Party in conducting its activities.⁶³ Legally speaking the Electoral Commission is bestowed with the duty to ensure that the will of the majority of voters is respected and freely expressed.⁶⁴ Some scholars argue that the constitutional and statutory guarantees of independence do not always produce the intended results.⁶⁵ The problem with the independence model of the electoral management body is not its independence by the provision of the law, but to what extent such Commission can guarantee impartiality, transparency as well as ensuring integrity which altogether is the prerequisite of the independence of an electoral body.⁶⁶

Even though the Constitution deems the Commission to be independent, the President of the United Republic of Tanzania enjoys enormous powers, which somehow affect the commission to independently execute its operations. For instance, the President of the United Republic of Tanzania having powers to appoint top members of the Electoral Commission raises the question as to the extent to which security of tenure to such members is guaranteed. It is from this premise that one may argue that the appointment of members of the Electoral Commission is more likely to favour those persons who abide to the culture of partisanship, which negatively affects the Commission's credibility, independence and impartiality. When discussing the competence and independence of the Electoral Commission, it is important to consider how members are appointed. This assertion was supported in the case of *Findlay v United Kingdom*,⁶⁷ when the European Court said:

"The Court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

The President of the United Republic of Tanzania could easily remove the chairperson and other members of the Commission from the office for any reason considered by him as a justifiable ground.⁶⁸ This is very dangerous

⁵⁹ Ibid, Section 81 of the National Elections Act, [Cap 343 R.E 2010].

⁶⁰ Bradley, A. W and Ewing, K. D., (2007). *The Constitutional and Administrative Law*, fourteenth edition, Pearson Longman, London.p.172.

⁶¹ [2001] UKHL 67 at paragraph 88.

⁶² Makulilo, Alexander B., Ntaganda, Eugene., (2016). *Election Management Bodies in East Africa*, African Minds, 27. p.2.

⁶³ Article 74 (11) of the URT Constitution, 1977.

⁶⁴ Article 74 (7) of the URT Constitution, 1977.

⁶⁵ Makulilo, Alexander B., Ntaganda, Eugene. *Election Management Bodies in East Africa*, African Minds, 27 February 2016. p.2.

⁶⁶ Ibid, Makulilo, Alexander B., Ntaganda, Eugene. (2016). p.2.

⁶⁷ (1997) 24 EHRR 221, 244, para 73

⁶⁸ Article 74 (4) (b) of the URT Constitution, 1977.

as far as the competence, impartiality and independence of the Electoral Commission of Tanzania vested with powers to conduct elections is concerned. Thus, the security of tenure for the commissioners remains illusory as they are placed to work with the commission at the pleasure and mercy of the President. This area needs improvement if the aim is to secure democratic free and fair elections in the country. It is submitted by this article that the law must be revised to secure the security of the tenure of the members of the Electoral Commission of Tanzania.⁶⁹ Once the chairman of the commissioner is appointed, he or she should be granted the status of a judge of the High Court of Tanzania to the extent that he or she ceases to hold the office upon attaining the average retirement age of 60. This calls for a mandatory law that will require a person before qualifying to be appointed, then he or she should still be public service.

If the need to remove him from his position arises, the President should be required to follow the same procedure of removing the judges of the High Court from office. The ground for removing other Members of the Commission should strictly be on statutory grounds to avoid what happened in the 2015 General Elections when the President of Tanzania by then, Jakaya Mrisho Kikwete, decided to remove some members of the Commission during the campaign and appointed new members in the mid of the election process, which created suspicions among key election players including political parties. Borrowing a leaf from the U.K., all commissioners must be non-partisan to any political party. Likewise, in Kenya, commissioners are appointed based on a competitive process, approved by the legislative assembly, and guaranteed their tenure security.⁷⁰

Therefore, this article concludes on the basis of the above weakness that the current Electoral Commission does not enjoy genuine independence from the government particularly the president who carries political interest of his political party. It is the right time for the powers of the President to be controlled in line with the removal and appointment of the members of the Electoral Commission of Tanzania. Again, it is proposed that other members of the Commission apart from the Chairman and vice chairman should be recruited through an open advertisement process to allow competent persons to apply directly to the Electoral Commission of Tanzania to be considered for an appointment while maintaining impartiality and independence of the Commission. The Parliament should be mandated to ensure that there are adequate resources and facilities in support of the functioning of the Electoral Commission.

3.3 The Functions of the Electoral Commission

Theoretically, the Electoral Commission is an independent body established by the Constitution of the United Republic of Tanzania, 1977. The Commission's statutory responsibilities are established under Article 74 (6) of the Constitution of the United Republic of Tanzania, 1977 and the political parties Act, 1992. In discharging its functions, the Electoral Commission must strive toward achieving integrity and public confidence in promoting democracy in Tanzania. The election must be run fairly by a credible institution. The independence of the Commission also has to be manifested in the discharge of its functions under the law.

3.3.1 Supervision and Coordination of the Registration of Voters

The Commission is mandated to register and supervise the registration of voters in Tanzania for the smooth running of the country's presidential, Parliamentary and Councillors elections. This is a continuous process monitored and conducted by the Commission, including updating the permanently established register of voters in Tanzania.⁷¹ Article 5 (3) (a) of the Constitution of the United Republic of Tanzania, 1977, requires establishing a permanent voters' register and prescribing the procedure for its amendment or updating information contained in that register. The Commission has established the Permanent National Voter's Register of voters for the United Republic of Tanzania.⁷² The Commission is the custodian of the register.⁷³

A person is entitled to vote on polling day upon being registered by the Commission.⁷⁴ He cannot be allowed to vote if he is not registered with the Commission per the procedures laid down by the law. A person to vote in Tanzania must have been registered as a citizen of Tanzania.⁷⁵ For a person to be registered as a voter such

⁶⁹ Inge Amundsen., (2013). Institutions of checks and balances: The Election Commission of Angola.

<https://www.cmi.no/publications/file/4890-institutions-of-checks-and-balances.pdf> (accessed on 10/9/2020)

⁷⁰ Makulilo, Alexander B., et al., (2016). Election Management Bodies in East Africa, African Minds.p.8.

⁷¹ Section 12 (2) of the National Election Act, [Cap 343 R.E 2010].

⁷² Ibid, Section 12 (1) of the National Election Act, [Cap 343 R.E 2010].

⁷³ Ibid, Section 12 (5) of the National Election Act, [Cap 343 R.E 2010].

⁷⁴ Ibid, Section 10 (1) of the National Election Act, [Cap 343 R.E 2010].

⁷⁵ Article 5 (1) of the URT Constitution, 1977.

person must be a person of the age of majority; meaning must be 18 years of age and above.⁷⁶ This must be a person of sound mind and not have been detained under a criminal conviction.⁷⁷ However, it must be noted that a person may be disqualified as a voter if he is under a declaration of allegiances to some other countries other than Tanzania,⁷⁸ or he is under a death sentence.⁷⁹

In Tanzania, people who cannot read or write also qualify for registration as voters. This means that the right to vote is not the same as the right to be voted to hold office as a Member of Parliament and councillor. For a person to be voted for such a position, one must have attained the age of 21 years during the election⁸⁰ and for a person to stand as a presidential candidate for election in Tanzania, one must be 40 or above.⁸¹ He must be able to write and speak the Swahili language. If the age of majority legally recognised is 18 and above, it is the right time that the age should be lowered from 21 to 18 years old. This will give the young people a desire to be active in participating in public affairs. A person at the age of 18 years is treated as a person of majority age ready to take responsibility independently as defined legally.⁸²

A person 18 years old should be free to exercise his voting rights concurrently with the right to be voted for to hold public office. This would increase young people's participation rate in a country like Tanzania, where they are the majority in public affairs like elections. What is needed is the quality of civic education in school.⁸³ If accepted, reducing the age from 21 to 18 would cement other rights reserved for all persons with the age of majority. Therefore, if the age is lowered from 21 to 18, that would likely increase the representation of young politicians in elected public positions in the country. It would also widen the chance for young people to express their right to freedom of expression, thereby increasing voter turnout during the general elections with a desire to manage their future. This area calls for the law to be revised to remedy the situation.

3.3.2 Supervision and Coordination of the Voters' Education

The General Election, which involves the election of the President, members of the Parliament and local government election, is supervised by the Commission. The Commission is responsible for providing voters' education and managing persons involved in providing voter education in the country.⁸⁴ The Commission is responsible for ensuring that voters receive relevant education without being misled to promote free and fair elections in the country.⁸⁵ The Commission prohibits the publication or broadcast of false and misleading statements. ⁸⁶It is an offence to publish false statements or influence voters.

3.3.3 Issuance of Guidance before an Election

The Commission publishes guidance before elections⁸⁷ to be observed by the election observers in Tanzania.⁸⁸ These guidelines contain a significant volume of materials directed at the need for effective election planning and other areas not addressed by electoral law. Since the guidance attempts to account for legal duties and best practices comprehensively, it is voluminous but has the benefit of being in one place. In practice, many electoral administrators use the Electoral Commission's guidance to determine their obligations. In consultation with the Government of the United Republic of Tanzania and Political Parties, the Commission prepared the National Elections Regulations 2015.⁸⁹ The Regulations stipulate the criteria for demarcation of a constituency within districts ⁹⁰ and ward as the case may be.⁹¹

⁷⁶ Ibid, Article 5 (1) of the URT Constitution, 1977. The Child Act, 2009.

⁷⁷ Section 11 (1) (b) of the National Election Act, [Cap 343 R.E 2010].

⁷⁸ Ibid, Section 11 (1) (a) of the National Election Act, [Cap 343 R.E 2010].

⁷⁹ Ibid, Section 11 (1) (c) of the National Election Act, [Cap 343 R.E 2010].

⁸⁰ Ibid, Section 10A (a) of the Political Parties Act, 1992 [R.E 2015].

⁸¹ Article 39 (1) (b) of the URT Constitution, 1977.

⁸² Article 1 of the Convention on the Rights of the Child, 1989.

⁸³ Jan Eichhorn and Johannes Bergh., (2020). Lowering the Voting Age to 16; Learning from Real Experiences Worldwide, Palgrave Macmillan, Switzerland.p.3.

⁸⁴ Rule 3 (1) of the National Elections (Presidential and Parliamentary) Regulations, 2015.

⁸⁵ Section 4C of the National Elections Act, [Cap 343 R.E 2010].

⁸⁶ Ibid, Section 91A of the Nation Elections Act, [Cap 343 R.E 2010].

⁸⁷ Ibid, Section 124 (1) of the National Elections Act, [Cap 343 R.E 2010].

⁸⁸ Rule 24 of the National Elections [Presidential and Parliamentary Elections] Regulations 2015.

⁸⁹ The National Elections [Presidential and Parliamentary Elections] Regulations 2015.

⁹⁰ Rule 8 of the National Elections [Presidential and Parliamentary Elections] Regulations 2015.

⁹¹ Rule 7 (1) of the National Elections [Presidential and Parliamentary Elections] Regulations 2015.

3.3.4 Demarcation of Constituencies

The Commission has the power to review the demarcation of the country into constituencies from the time at least after every ten years.⁹² When the Commission demarcates constituencies, it considers the existing pattern of human settlement as well as the economic status of the constituency.⁹³ The Commission also considers the availability of the means of communication and the geographical conditions of the area intended for demarcation into constituencies.⁹⁴ The Commission may make alterations to the constituencies by increasing them or deleting some of them.⁹⁵ The powers of the Commission to review the demarcation of the country into constituencies are not subject to judicial review in Tanzania.⁹⁶ However, before the Commission can divide one constituency into several constituencies, must obtain the consent of the President.⁹⁷ This subjects the Commission again to the directives of the President. As the position stands now, the Commission is not compelled to justify its decision to demarcate the constituencies.

Therefore, the increased number of constituencies also affects those small political parties because of the cost of running the elections. Thus, given the enormous costs involved, few manage to file candidates in all constituencies. Generally, the ruling party has been winning gold medals by default but not in fair elections. Therefore, given this scenario, an urgent re-examination of our system is needed to promote democracy.⁹⁸ It is also submitted here that too much subjecting the Commission's powers to the President undermines its capacity, integrity, and independence to run free and fair elections.

3.4 Financing the Electoral Commission

The competency of the Electoral Commission to run free and fair election is also determined on the basis of financial control.⁹⁹ In Tanzania, all the expenses incurred by the Electoral Commission are paid out from the Consolidated Fund.¹⁰⁰ The government of Tanzania wholly finances the Commission's activities in corroboration with the International Development Partners.¹⁰¹ However, one of the problems facing the Electoral Commission in carrying out its functions is inadequacy in funding.¹⁰² Accordingly, it is unnecessarily leading to delays in accomplishing several activities, including registration of voters because of an insufficient number of BVR kits.¹⁰³ Other challenges linked to funding include a lack of adequate voting education to voters and timely updating the Permanent National Voters' Register.¹⁰⁴ As a result of these challenges, there has been low voter turnout in Tanzania.¹⁰⁵ With this in mind, the current Electoral Commission is incapable of adequately delivering quality elections, which is needed to enhance democracy through free and fair elections in Tanzania.

4. Conclusion

From the above analysis, it can be concluded that the Electoral Commission of Tanzania in its current set-up

⁹² Article 75 (1) of the URT Constitution, 1977.

⁹³ See Rule 9, read with Schedule 3 of the National Elections [Presidential and Parliamentary Elections] Regulations 2015.

⁹⁴ Article 75 (3) of the URT Constitution, 1977.

⁹⁵ *Ibid*, Article 75 (4) of the URT Constitution, 1977.

⁹⁶ *Ibid*, Article 75 (6) of the URT Constitution, 1977.

⁹⁷ *Ibid*, Article 75 (2) of the URT Constitution, 1977.

⁹⁸ *Ibid*, Article 25 of the International Covenant on Civil and Political Rights (ICCPR), United Nations Human Rights Commission, General Comment No. 25, paragraph 21: "...The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."

⁹⁹ Tinenenji Banda, O'Brien Kaaba, Marja Hinfelaar, and Muna Ndulo., (2020). *Democracy and Electoral Politics in Zambia*, BRILL, 2. p.181.

¹⁰⁰ Section 122 of the National Elections [Cap 343 R.E 2010].

¹⁰¹ The Report of the National Electoral Commission on the 2015 Presidential, Parliamentary and Councillors' Elections, p. 11.

¹⁰² See, NEC; Brief Remarks by the Former Chairman of the National Electoral Commission of Tanzania Honourable (Rtd) Justice of the Court of Appeal, Damian Z. Lubuva, in a Meeting between NEC and Members of the Independent Electoral Commission of Lesotho 22 APRIL, 2015. Available <http://www.nec.go.tz/uploads/speeches/1430568966NEC%20chairman%20LESOTHO%20SPEECH.docx>. (Accessed on 2 October 2016).

¹⁰³ The Report of the National Electoral Commission on the 2015 Presidential, Parliamentary and Councillors' Elections, page. 41.

¹⁰⁴ The Commission under Section 15(5) of the National Elections Act, [Cap. 343 R.E. 2010] is required to update the PNVR twice between two consecutive General Elections.

¹⁰⁵ See, NEC; Brief Remarks by the Former Chairman of the National Electoral Commission of Tanzania Honourable (Rtd) Justice of the Court of Appeal, Damian Z. Lubuva, in a Meeting between NEC and Members of the Independent Electoral Commission of Lesotho 22 APRIL, 2015. Available at <http://www.nec.go.tz/uploads/speeches/1430568966NEC%20chairman%20LESOTHO%20SPEECH.docx>. (Accessed 15/7/2021).

cannot competently deliver quality, genuinely free and fair elections. The Electoral Commission is like an extension of the ruling party because of the influence of the incumbent President. The incumbent President's legal mandates in interfering with the Electoral Commission's functioning give the ruling party an advantage over other political parties during elections. This is likely to allow the election results to be dictated by the ruling party. This creates an unfair playground for other participating political parties during elections. Thus, the current Electoral Commission is prone to partiality and interferences from the ruling party.

Similarly, it is established in this article that there is a lack of security of tenure for members of the Commission; procedures of appointing and removing the members of the Electoral Commission do not guarantee due process. It is, therefore, strongly recommended that to enhance the competence, impartiality and independence of the Electoral Commission in promoting democracy in the country, first, the Electoral Commission should not be accountable to the President. Second, the Electoral Commission should adopt an independent process for selecting its members. Third, the appointment of the Chairman and vice-chairman should be subject to confirmation by the majority votes of the members of the parliament. And the chairman and vice-chairman should be persons have not yet retired from the public service and upon appointment should serve the position until they reach the retirement age of 60 years. Fourth, any person who happens to hold the position in any political party should be disqualified from being appointed to any position of the Electoral Commission. Fifth, the presidential results declared by the Electoral Commission should be made open to be challenged in the Court of law. All these weaknesses fundamentally call for the relevant laws governing the establishment and functioning of the Electoral Commission to be amended to allow the Commission to adequately deliver quality, free and fair elections, which are needed to enhance democracy in Tanzania.

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