

**AN ASSESSMENT OF THE LEVEL OF INDEPENDENCE OF ELECTORAL  
MANAGEMENT BODIES AND THEIR EFFECTS ON DEMOCRATISATION IN AFRICA:  
THE CASE OF GHANA AND THE DEMOCRATIC REPUBLIC OF CONGO**

By

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## Declaration

I, Gabie Tshamalamala Carmel, do hereby declare that **“AN ASSESSMENT OF THE LEVEL OF INDEPENDENCE OF ELECTORAL MANAGEMENT BODIES AND THEIR EFFECTS ON DEMOCRATISATION IN AFRICA: THE CASE OF GHANA AND THE DEMOCRATIC REPUBLIC OF CONGO”** is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources that I have used or quoted have been indicated by means of complete references.

Signature:.....

Date:.....

Dedicated to my late sisters Fallone Gabie Assoumpta and Matondo Gabie whose memories will never fade. Gone too soon.

May their souls rest in peace.

## ABSTRACT

The basic problem in this study is to determine whether the electoral management body (EMB) in the Democratic Republic of Congo (DRC) is sufficiently independent and whether it complies with most of the criteria of an ideal independent EMB in order to conduct free and fair elections in the promotion of democracy in the DRC. However, an ideal type of an independent EMB is not easily realizable but Ghana's electoral commission (EC) is widely regarded as a model of an independent EMB in Africa. Therefore, this study uses the EC as a workable ideal type of independent EMB that informs this study in assessing the Independent National Electoral Commission (CENI)'s level of independence. The study discovered that while the formal legal framework guarantee the independence of the CENI, it lacks practical independence due to certain factors which include the mode of appointment and composition of the body, the unstable security of tenure of its members, the negative influence of the judiciary, executive and the parliament over the functioning of the CENI, and the lack of adequate funding. The study argues that the composition of the CENI has to be depoliticized; its members should enjoy a strong security of tenure and the issue of political parties funding should be effective and handled by the CENI in order to enhance political competitiveness in the electoral process. An adequate funding should be timely realized so that the CENI carries out its work with autonomy. The judiciary, the parliament and the executive should support the growth of democracy in the DRC by allowing the CENI to work without the interference of any quarter.

KEY WORDS: Electoral Management Bodies, Democratic Republic of Congo, Independent Electoral Commission, Ghana, Independence, Democratisation, free and fair elections.

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## List of acronyms and abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
ACE	Administration and Cost of Elections
APRM	African Peer Review Mechanism
AU	African Union
BBC	British Broadcasting Corporation
CEI	Commission Electorale Indépendante (Independent Electoral Commission)
CENA	Autonomous National Electoral Commission
CENCO	Conference Episcopale Nationale du Congo (National Episcopal Conference of Congo)
CENI	Commission Electorale Nationale Indépendante (Independent Electoral National Commission)
CEO	Chief Electoral Officer
CNE	Comissão Nacional de Eleições (Mozambique electoral commission)
CSAC	Conseil Supérieur de l'Audio-visuel et Communication (Superior Council of Audiovisual and Communication)
DRC	Democratic Republic of Congo
EA	Election Administration
EC	Electoral Commission (Ghana)

ECA	Electoral Commission Act
ECI	Electoral Commission of India
ECI	Eastern Congo Initiative
ECOWAS	Economic Community of West African States
ECZ	Electoral Commission of Zambia
EISA	Electoral Institute of Southern African
ELECAM	Election Cameroon
EMB	Electoral Management Body
EU	European Union
EUEOM	European Union Election Observation Mission
HAM	High authority of the Media
GIA	Global and Inclusive Agreement (Pretoria agreement)
ICCPR	International Covenant on Civil and Political Rights
ICD	Inter-Congolese Dialogue
IEBC	Independent Electoral and Boundaries Commission
IEC	Independent Electoral Commission
IMF	International Monetary Fund
INEC	Independent National Electoral Commission
MEC	Malawi Electoral Commission
MLC	Mouvement de Libération du Congo (Movement for the liberation of the Congo)

MONUC	Mission d'organisation des Nations Unies au Congo (United Nations Organization Mission in the Democratic Republic of the Congo)
MONUSCO	Mission de l'Organisation des Nations unies pour la stabilisation en République démocratique du Congo (The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo)
NEC	National Electoral Commission
NDC	National Democratic Congress
NGO	Non-Governmental Organisation
NIEC	National Independent Electoral Commission
NPP	New Patriotic Party
PPRD	Parti du Peuple pour la Reconstruction et la Démocratie (People's Party for Reconstruction and Democracy)
RCD	Rassemblement Congolais pour la Démocratie
RTNC	Radio Television Nationale Congolaise (Congolese national broadcaster)
SADC	Southern African Development Community
SMS	Short Message Service
STAE	Secretariado Técnico da Administração Eleitoral (The Technical Secretariat for Administration of Elections)
TMG	Transition Monitoring Group (Nigeria)
UDHR	Universal Declaration of Human Rights

UDPS	Union pour la Démocratie et le Progress Social (Union for Democracy and social Progress)
USAID	United States Agency for International Development
UN	United Nations

# CHAPTER ONE: INTRODUCTION

## 1.1. Background to the study

The fight for independence and liberation in Africa was focused on allowing the citizens of the various colonized states the right to choose their own leaders - simply stated the right to vote which had been denied to them. After independence, however, many African states experienced electoral manipulation and control of the electoral process by the ruling party under the one party system and unchallenged dictatorships that dominated the continent until the mid-1990s. The economic crisis in the late 1980's and early 1990's resulted in the call for multipartism and electoral reforms ushering in a new era of democratic rule on the continent. The call for multipartism in Africa thus brought to the fore the issue of elections. These elections have given many Africans, who for a long time were under oppressive dictatorships, the opportunity to elect leaders that represent the needs of the African citizens and prioritize development goals and move towards democracy on the continent through the holding of free and fair elections. Thus, elections are inseparable from democracy, becoming, according to Ardan (2007:153), "a democratic rite". Elections, therefore, play a crucial role in the democratisation process in the world, particularly in Africa, as Maphunye (2009:4) assumes that "elections are an embodiment of the 'general will' and, therefore, play a critical role in a country's democratisation".

Although "elections cannot be the sole barometer for measuring the tempo of democracy, especially in Africa" (Maphunye 2013:2), and are not in themselves a guarantee for sustainable democratic transition and consolidation, they are the foundation of the social contract that embodies the relationship between the ruler and the subject, and by which the elected leaders acquire the legitimacy to govern as granted to them by the electors. It is, perhaps, with this in mind that Michael Bratton writes that while "elections do not, in and of themselves, constitute a consolidated democracy", they "remain fundamental, not only for installing democratic governments, but as a requisite for broader democratic consolidation" (Bratton 1998:51).

For democracy to take hold in the continent, through free and fair elections based on party competition, one needs to have an independent electoral commission that is sufficiently autonomous to supervise the elections. For many countries in Africa this has become the main challenge resulting in disputed elections and open conflict and post-electoral violence. Effective management of electoral processes needs institutions that are inclusive, sustainable, fair, and independent– which includes especially electoral management bodies or EMBs as they are referred to, that have the legitimacy to enforce rules and assure fairness and integrity with the cooperation of political parties and voters.

It is therefore important to study and analyse the constitutions and operations of the electoral management bodies in Africa and the extent to which they are independent from the influence of any quarter, as Lopez-Pintor (2000:64) observes, “EMBs are important institutions for democracy-building”, therefore they need to be perceived and seen independent from any other quarter involved in the electoral process.

## 1.2. Background to election management in the Democratic Republic of Congo

The earlier attempt at the democratic process in the Democratic Republic of Congo (DRC<sup>1</sup> hereinafter) in the early 1960's was short lived and completely replaced by the dictatorship of President Mobutu Sese Seko, who came to power in a military coup in 1965, and who ruled until 1997. Following the civil war that saw Uganda and Rwanda invade the DRC (the Zaire) and which came to be known as the First Congo War, Mobutu was overthrown and replaced by Laurent-Desire Kabila. The coming to power of Kabila did not usher in democracy nor did it end the civil war. The war only came to an end with the signing of the comprehensive agreement by all stakeholders of the DRC in Pretoria in the year 2002. This led to the formation of the transitional government led by Joseph Kabila, who had risen to the Presidency on 26 January 2001 after the assassination of his father Laurent Kabila; The drafting of the transitional constitution from 2001 to 2003 by more than 300 delegates representing the government, ex-rebels, the political opposition and the civil society made provisions of an Independent Electoral Commission (CEI – *Commission Electorale Indepedente*) then tasked to organize elections, with the assistance of United Nations (UN) and the African Union (AU). It was only in 2006 that the DRC witnessed its first elections of the Third Republic after decades of authoritarian rule and it is argued that “despite shortcomings in the electoral process, the complexity of the electoral laws and the intricacy of the electoral systems, the 2006 elections in the DRC were relatively peaceful” (Mangu and Budeli 2008: 112).

The CEI was dissolved by the new constitution of 18 February 2006 since it was a transitional institution and replaced by the Independent National Electoral Commission, known by the

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<sup>1</sup> The naming of the Democratic Republic of Congo has changed throughout the country's history. King Leopold II of Belgium formally acquired rights to the Congo territory at the Berlin Conference in 1885 and made the land his private property, naming it the Congo Free State (État Indépendant du Congo). The Free State was transformed into an orthodox colony, the Belgian Congo (Congo Belge), in 1908. Congo gained its independence in 1960, as the Republic of the Congo, and changed its name to Democratic Republic of the Congo in 1964. The president, Joseph-Désiré Mobutu, changed the country's name to Zaire in 1971 (and changed his name to Mobutu Sese Seko). Upon overthrowing Mobutu in 1997, Laurent Desire Kabila changed the name back to Democratic Republic of the Congo. The country often is called Congo-Kinshasa, to distinguish it from the former French Congo (Republic of the Congo, Congo-Brazzaville).



French acronym the CENI<sup>2</sup> (*Commission Electorale Nationale Indépendante*) in March 2011. The test for the Independent CENI's (called to replace the CEI) ability to independently manage elections came in the elections of 2011. These were the first elections of the post conflict period in which the government of the DRC, rather than the international community, drove the process, providing most of the funds and managing the technical and logistical aspects of the balloting.

Thus, for both the Congolese<sup>3</sup> government and the international community, the stakes were high. While it was expected that these elections would reflect a significant improvement over those in 2006, both the Congolese government and its international partners failed to live up to these promises and expectations. Unfortunately, those elections were marred by numerous irregularities, that the outcome was described by most election observer missions as "lacking credibility" (Dizolele and Kambale 2012) and were considered invalid by many scholars of democracy due to the lack of independence of the electoral commissioners (Mavungu 2013).

This failure by the CENI to conduct free and fair elections in 2011 has been in part attributed to the manner in which the chairperson and commissioners were appointed; the financial dependence of the CENI vis-à-vis the Government; a weak judicial system; the influence of the international community on the functioning of the CENI; the direct and indirect interference by the government; the lack of necessary capacity in terms of available funds and personnel. The integrity of the CENI has thus continued to be questioned by stakeholders, the main assertion being that the CENI is not independent in the conduct of its mandate. The postponement of the presidential election from November 2016 to December 2018 due to lack of funds has further put in doubt the CENI's independence.

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<sup>2</sup> There is an English abbreviation INEC which is however seldom used in the literature; "the CENI" is often referred to as just 'CENI' and this study uses "the CENI" since in French it is "la CENI" and in official documents in English of the Commission it is referred to as "the CENI".

<sup>3</sup> The term Congolese can refer to either or both of the Congos (Brazzaville and Kinshasa). In this study, the term 'Congolese' refers to the DRC unless otherwise stated.

In order to understand the above failures, this study seeks to place the CENI in its broad political context by looking at its creation, evolution and mandate and at the various factors that impact on its operations. This would help one to understand its sub-optimal management of the 2011 elections.

It is worth noting from the start that this is a case study of the CENI, however, Ghana's Electoral Commission (EC) is used as a model that informs this study in assessing the level of independence of the CENI since the EC is widely accepted as being a model of an independent EMB. Ghana's democracy has been hailed by scholars, practitioners, and the international community in recent years as a shining example in the West African subregion as a result of the country's record of organizing seven successive elections with minimal or no violence. Analysts of Ghana's democracy assert that the confidence of the citizenry in the democratic process largely stems from their positive perception about the EC, which tends to make all political actors accept the results of elections (Kerr 2012; Ransford 2015; Shola 2013; Debrah 2011; Gyimah-boadi 2012; Ayee 1998). Ghanaians expressed strong 'faith in elections as a means to represent the true voice of the people in government'. They also expressed the greatest confidence in the effectiveness of their votes (AfroBarometer 2006:2). The most distinguishing factor for the EC's success were largely, but not exclusively, "the making of the electoral process transparent, fostering agreement on the rules of the game and asserting its independence in relation to the performance of its mandates" (Debrah 2011:25)

### **1.3. Statement of the problem**

The independence of an electoral commission is a prerequisite for holding free and fair elections in order to enhance democracy in a state. Thus, the basic problem in this study is to determine whether the electoral management body in the DRC is sufficiently independent and autonomous; also whether it complies with most of the criteria of an ideal independent EMB in order to conduct free and fair elections of which the integrity is undisputed in the promotion of

democracy in the DRC. However, an ideal type of an independent EMB is not easily realizable but Ghana's electoral commission (EC) is regarded to a certain extent as being able to conduct free and fair elections in an independent manner. Therefore, this study uses the EC as a workable ideal type of independent EMB to assess the CENI's level of independence and capabilities.

#### **1.4. Research Questions**

The following research questions are central to this study:

- What are the characteristics of an independent EMB and what are the indicators for determining the degree of independence of EMBs?
- What is the role of independent EMBs in democratisation in general and Africa in particular?
- To what extent do the EMBs of Ghana and the DRC reflect the characteristics of an independent EMB?
- What are the factors that limit the CENI's independence; what lessons can be learnt from the electoral commission of Ghana?
- Lastly, how can the CENI be strengthened in its functions of conducting free and fair elections?

#### **1.5. Objectives**

The objectives of this study are the following:

The first objective is to determine the characteristics of an ideal independent EMB.

The second objective is to analyze the role of independent EMBs and their impact on democratisation in Africa.

The third objective is to assess the level of independence of the CENI and EC with regard to the characteristics of an ideal independent EMB.

The fourth objective is to identify the factors and weaknesses that limit the practical independence of the CENI.

And the fifth objective is to propose a way forward in order to strengthen the independence of the CENI.

## **1.6. Operational definitions of terms**

In order to understand the research outlined in this chapter, it is important to provide clarity on the key concepts which are used as meaning the following:

### **Electoral Management Body (EMB)**

For the purpose of this study, an EMB refers to an institution entrusted with the management of the elements that relate to the conduct of elections and referendum. These elements include *inter alia* (Wall, Ellis, Ayoub, Dundas, Rukambe, and Staino, 2006; Ace 2017): to determine the eligibility of citizens to vote; to receive and validate the nominations of electoral participants (for elections, political parties and/or candidates); to conduct polling; to count the votes; and to tabulate the votes.

### **Independent and autonomous EMB**

An independent EMB refers to an electoral commission that is institutionally independent and autonomous from the executive branch of government; its members are outside the executive. It has and manages its own budget, and is not accountable to a government ministry or

department. It may be accountable to the legislature, the judiciary or the head of state (Ace 2017).

Some scholars refer to de jure and de facto independence. But it is also important to mention that some make a distinction between autonomy and independence – although it is not always precisely clear on what basis the distinction is made and it is essentially two sides of the same coin. Some regard independence as being politically independent free from any interference from the authorities. Autonomy is then regarded as the extent to which the EMB is able to perform its duties and functions on its own. However in this study the term autonomy is regarded as a particular manifestation of independence.

### **Electoral Process**

In this study, the electoral process connotes “a series of stages, mechanisms and processes designed to maintain the integrity of an election and to ensure that elections are free and fair” (Ochoche 1997: 23). The electoral process has three stages, that is: pre-electoral period (preparation of the election), electoral period (Election Day), and post-electoral period.

### **Democratisation**

A basic definition is that democratisation is a process in which a transition is made from an authoritarian or non-democratic regime to a democratic regime. According to Rackner, Rocha and Fritz (2007) democratisation has three phases: First, the liberalization phase, when the previous authoritarian regime opens up or crumbles; second, a transition phase, often culminating when the first competitive elections are held; and third, the consolidation phase, when democratic practices are expected to become more firmly established and accepted by most relevant actors (Rackner *et al.* 2007). Ndue (2005:2-4) asserts that in its minimalist/formalist definition or delineation, “democratisation has the criteria of regular electoral competitions, usually in a multiparty political system and thus governmental succession by constitutional, electoral procedures, guaranteed in the rule of law”. On the other hand, the maximalist “socio-economic” delineation of democratisation includes “the criteria

such as redistributive socio-economic reforms, broadened popular participation, social justice and human rights” (Qadir, Clapham and Gills 1993:416).

### **Electoral Integrity**

In this study, the term “electoral integrity” refers to “any election that is based on the democratic principles of universal suffrage and political equality as reflected in international standards and agreements, and is professional, impartial, and transparent in its preparation and administration throughout the electoral cycle” (Norris 2013; Annan, Kofi, Zedillo, Ahtisaari, Albright, Arbour, Helgesen, & Wirajuda 2012)

### **Free and Fair elections**

This study makes use of Mogopodi’s understanding (2006:70) of free and fair election who notes that “the concept of free and fair elections implies freedom of movement, speech, assembly and association; freedom from fear in connection with elections; and unimpeded candidate registration. Fairness includes a transparent electoral process, the absence of discrimination against political parties, and no obstacle to voter registration”.

## **1.7. Rationale**

This study gives an insight into the importance of the independence of EMBs in the management of electoral processes in Africa, and by extension its impact on democratisation. As the International Institute for Democracy and Electoral Assistance (IDEA 2006) has noticed, successfully “administering democratic elections requires that EMBs be, and be seen to be, impartial and independent of government or other influence.” Some scholars have even argued that independent electoral commissions are key to ensuring democratic consolidation and legitimacy, with Lehoucq (2002:3) going so far as to argue that in early twentieth century in Latin America the independence of electoral bodies was “one of the central institutional developments that made democratisation stick in some places, but not in others”.

It is for this reason that this study assesses the level of independence of the CENI by using the successful model of Ghana's electoral commission, to make propositions for strengthening the CENI, by removing all current interferences, structurally, administratively, legally and financially and to comply with the requirements of free and fair election, in order to be able to cope with the tasks ahead as the CENI prepares itself for the holding of 2018 general elections. I selected Ghana which has had a successful electoral system and national electoral body from which the DRC can draw some good practices in order to improve the DRC's situation. The electoral commission of Ghana is widely regarded as a model of an independent EMB in Africa. It may be even more appropriate to describe it as a "fiercely independent EMB".

Moreover, the DRC and Ghana have a point in common: both countries have been under the dictatorship regime which ended in 1992 for Ghana and 1997 for the DRC. This study pays particular attention to the way Ghana's EC has become a shining example of electoral democracy in Africa after a short period of time by managing seven consecutive elections in Ghana which can be applied in the DRC's CENI.

## **1.8. Theoretical framework**

This study makes use of two theories, namely the new institutionalism theory and theory of democratic transition. New institutionalism theory analyses the CENI as an organisation. The theory of democratic transition focuses on the effect of elections on regime change. It helps to analyze the importance of free and fair elections in a state and how it affects democratic transition of power.

### **1.8.1. New Institutionalism Theory**

This study is built upon the theory of New Institutionalism, which emanated from well-established Western democracies. The theory gained prominence in the 1980s following the renaissance of, and the significant role that institutions occupied in social, political and economic reform (Bell 2015).

Both new and old institutional theories deal with institutions and they provide a complex and rich view of institutions. In old and new institutionalism, the independence of institutions is sometimes undermined by external pressures, such as the executive, other times with the structure of the institution itself. In certain situations, these pressures lead the institution to be guided by legitimated elements, from common operating procedures to professional certification and state requirement, which regularly have the effect of directing focus away from task performance (Lynne 1987).

March and Olsen (1984) are the advocates of the New Institutionalism Theory, and they defined the theory as “meaning a general approach to the study of political institutions, a set of theoretical ideas and hypotheses concerning the relations between institutional characteristics and political agency, performance and change”. On the other hand, Cole (2015) argues that the New Institutionalism theory focuses on the way in which institutions embody values and power relationship. This is confirmed by Lowndes (2001:42) who notes that “New Institutionalists focus on the way in which institutions embody values and power relationships, and they study not just the impact of institutions upon behaviour, but interactions between individuals and institutions”.

The theory has four sub-fields, namely: the Normative Institutionalism; Rationale Choice theory; Historical Institutionalism; and Empirical Institutionalism (March and Olsen 1984). Normative Institutionalism theory, sometimes seen as the “original” New Institutionalism, asserts that people’s behaviours are affected by rules, norms and value system that characterize sound institutional framework and manage the works of the institutions (March and Olsen 1984). The Rationale Choice Theory contrasts with normative institutionalism and is based on the rationality of individual actors (Bell 2015). This approach gives attention on the critical role individuals occupy in an institution. Ljiljana (2004) posits that in a given institutional setting, individual utility maximization is the overriding objective. March and Olsen (1984) explain Rationale Choice Theory as involving individuals who are calculating and motivated by the quest of maximization of individual gains. Historical Institutionalism promotes the entrenchment of institutions which surpasses individual choices and desires. This version of



institutionalism argues that "history matters". The principal notion of historical institutionalism is sound rules (normative institutionalism) and individuals' desires and aims are directed not towards maximization of benefits (rational choice) but are aimed at the wellbeing of the institution. Empirical institutionalism pays attention to the fact of whether institutions in fact matter. For instance, empirical institutionalism deals with the question of whether presidential or parliamentary system is a better system or not.

Therefore, this study makes use of historical institutionalism as a unifying framework to explain the consequences of CENI's lack of independence and how it affects the democratisation process in the DRC. The reason why historical institutionalism informs this study is that historical institutionalism has been used to explain various accounts of institutional change in comparative politics (Kerr 2013) and features prominently in the evolving research on electoral management reform (Mozaffar 2002; Gazibo 2006).

The application of Historical Institutionalism is relevant to the independence of EMBs as argued Gazibo (2006). In their core nature, elections are very emotive and involve contestations between and among political parties that contest an election (Lopez Pintor 2000). The major role that elections play in a democracy demand an impartial, professional and credible electoral management body, not only to secure a credible and transparent process, but also to ensure that all the stakeholders in elections have total confidence in the EMB. With few exceptions, the management of the electoral process and the way EMBs carry out their works in Africa has inspired very little confidence on their capacity to manage over highly contested and polarized elections.

In the DRC in particular, the CENI displayed serious institutional weaknesses in 2006 and 2011 that had an impact on both the electoral process and the result thereof. Thus, New Institutionalism can provide a framework upon which the CENI can be transformed into credible and professional institution.

New Institutionalism theory is not without limitations especially in Africa. Kadima (2006) asserts that the theory originated from well-established Western states that have entrenched strong democratic cultures and functional institutions spreading over decades. Most Western states, particularly France and the United States of America (USA) promulgated liberal constitutions that have given the foundation upon which socio, political and economic progress are modeled spreading over hundreds of years. Whereas, democratic consolidation in most African states is still work in progress (Matlosa et al. 2010).

### **1.8.2. Theory of democratic transition (Transitional Theory)**

Transitional theory (Grugel, 2002: 56-63) sees institutions as having a key role to play in the formation of democracy. It also focuses on the function of institutions, constitutions, and electoral systems in a country's democratisation process. This theory argues that successful democratic transitions rely upon agreements between the elites and the abdicating ruler. The transition to democracy presumes that ultimately political power is conferred by the will of the people through the holding of a free and fair election (*Wall et al. 2006*).

Emanating from this understanding, one can argue that supporters of transitional theory will regard institutions (EMBs) and procedures (bureaucracy) as prerequisite for a successful democratization process. Promoting democracy prior to, during and at the end of the elections, is what prompts the utilization of transitional theory. Not only elections are a process but they can also contribute to changing a political system in a country, thus serving as a causal factor in democratisation.

The DRC has been under dictatorship for more than four decades and under a transitional government from 2001 to 2006. The 2006 elections have helped the DRC to move toward a more democratic state given that the elections are one of the indicators of democracy in both scholarship and policy. Some of the arguments put forward in the transitional theory are consistent with the fact that some degree of electoral competition may precede a full democratization (Dahl 1971). For instance, inspired by the political histories of Sweden and

England, Dahl (1971:36) asserts that the path most likely to produce a stable transition toward democracy is one in which "...the rules, the practices, and the culture of competitive politics developed first among a small elite, and the critical transition from nonparty politics to party competition also occurred initially within the restricted group."

Building on Dahl's understanding of democracy, Schmitter and Karl (1991), introduced a more comprehensive view of democracy. In their work titled "what democracy is and is not?" they note that democracy is not viewed from a single set of unique institutions, but there are rather several forms of democracy. Schmitter and Karl (1991) added on Dahl's seven prerequisites of democracy two more to the list. The first prerequisite is the capacity of the electoral officials to exercise their powers without having to be under any quarter's control. Democracy can be in jeopardy if the executive controls the decision making of the EMB. The second condition is "the electoral management must be self-governing; it must be able to act independently of constraints imposed by some other overarching political control" (Merloe 2008:20). This addition has brought an interesting element, which is the independence of electoral management bodies. This independence has not always existed in the non-democratic world because EMBs are influenced by external factors.

However, Chacon (2009) argues that this theory shortfalls to recognize that any ruling elite would like to preserve its interest across time not only under dictatorship but also under democracy. In the transitional theory, an authoritarian regime can introduce a system of fraudulent elections anticipating a democratic opposition in the future (Chacon 2009). In the DRC the president Kabila has organised the 2006 and 2011 elections. If the 2006 election were relatively free and fair, the 2011 elections were characterized by an immense fraud and the fact that the incumbent president Kabila was reelected by direct popular vote, made him confident that his authority was unlimited.

This theory is relevant with this study as it shows how the EC has helped Ghana to transit from a dictatorship regime to one of the most consolidated democracies in Africa through the elections, which can serve to the DRC as an example.

## **1.9. Methodology**

This study is basically a case study of the CENI and its handling of the 2006 and 2011 elections in the DRC. One needs to understand the broad socio-economic and political context in which it operates.

Creswell (2013) and Patton (2002) argue that in case study research, the accent is put on providing an in-depth investigation of the phenomenon under examination. Creswell (2013) asserts that case studies provide researchers an avenue to use specific cases, defined within certain parameters (bounding), to provide detailed investigation and a deep understanding of an ongoing phenomenon (Creswell 2013) while Leedy and Ormrod (2013) note that case studies allow the use of different methods, techniques and sources to investigate a phenomenon in depth.

The study employs an explanatory case study which will help to assess the independence of the CENI by making use of the Ghana's EC model. Yung (2001) argues that the explanatory research attempts to determine why it is that way or how it came to be. The explanatory research usually concerns itself with cause-effect relationships. The advantage of using a case study is that it gives a possibility to investigate a phenomenon over time to monitor changes (Swanborn 2010).

It is noteworthy that elections are a process or continuous cycle involving pre, during and post-electoral phases. More precisely, the case study allows for tracing of how the CENI has managed the 2011 electoral process and what were the factors that influenced and affected the independence of the CENI to successfully conduct elections in 2011. Lastly, the fact that

case study allows for the use of all available data, including the quantitative data, is an additional advantage. This allows the researcher to refer to existing data generated by different surveys conducted and also for the use of official election results from previous polling, to contextualize current findings.

The choice of Ghana as a case study is motivated by the maturity of its democracy. Ghana is considered to be one of Africa's most mature democracies and has become a reference in Africa in terms of electoral democracy. Therefore, the electoral commission of Ghana is regarded as a sharp contrast to the standard in the sub-region; the holding of seven consecutive elections that have been considered relatively free and fair by both by local and international observers have cemented the electoral commission's image as an impartial referee in Ghana's elections. The impartiality of a country's electoral body plays an important role in the promotion of democracy; particularly in developing countries (Ransford Osafo-Danso 2015). Analysts of Ghana's democracy point out that the confidence of the citizenry in the democratisation process mainly stems from their positive perception about the electoral commission of Ghana (Kerr 2013).

The international community and domestic stakeholders have commended the electoral commission of Ghana for its exemplary commitment to be and a fully independent and impartial EMB and its commitment to the promotion of democracy by holding free and fair elections in Ghana (Debrah 2011; Gyimah-Boadi 2012). Furthermore, Ghana is one of the five countries in Sub-Saharan Africa where the elections are deemed to be free and fair, along with Cape Verde, Botswana, Mauritius and South Africa (Economist Intelligence Unit 2010). Huntington (1991:267) claimed that "a democracy can only be considered stable if the party in power at the beginning of the democratic process loses a fair election and hands over power peacefully". This is important because the losers' acceptance of election results is an important component of democratic legitimacy. It presupposes that both voters and candidates believe that election administrators have complied substantially with the electoral rules (Lindberg 2006; Rakner & Svasand 2002). Ghana has organised seven consecutive general elections

resulting in three overturns of political power between the country's two main parties, the National Democratic Congress (NDC) and the New Patriotic Party (NPP) in 2001, 2009 and 2017. This is one of the main reasons that motivated the choice of Ghana. Even though it is in the sub-region of the Economic Community of West African States (ECOWAS) that has been dominated by a notorious history of military rules in politics, Ghana was one of the first countries in ECOWAS along with the Republic of Benin to join the movement of electoral reforms that swept the continent in the late 1980s and early 1990s. It is for the above reasons that Ghana was chosen as a case study.

The reason to choose the DRC as a case study could not be more obvious. At the time of writing this thesis the DRC is in the midst of an electoral crisis and has been selected because of its troubled history with democracy in general and elections in particular.

#### **1.10. Data collection**

This study makes use of the document analysis to address the issue of data gathering under the case study as outlined above. Bowen (2009) argues that document analysis is a process for evaluating or studying data, both printed and electronic documents (computer-based and Internet-transmitted) material. Like other methods of analysis in qualitative research, document analysis involves an examination and an interpretation of data in order to elicit meaning, gain understanding, and develop empirical knowledge (Corbin and Strauss 2008).

On the one hand, it has been more than two decades since the beginning of the fourth republic in Ghana, and this thesis argues that there were sufficient data produced for the duration of this period. There were official documents as well as documents in the form of publications, internet sources, and other documents relating to the electoral management in Ghana. This study makes us content analysis to these documentary sources by looking for themes and patterns from the various data. Creswell (2013) and Singleton and Straits (2005) give four central sources of data for qualitative case study, which are: archival sources, mass media,

public documents, and private or personal documents. This study reviewed such data that were relevant to Ghana's electoral commission.

On the other hand, the DRC' electoral commission has a young story of election management and has managed only two general elections since the return to democratic rule (2006 and 2011), there is hardly literature on the independence of CENI. Therefore, the study examines the CENI's independence by looking at the DRC constitution of 2006 and the electoral laws.

In examining the factors that have influenced CENI's independence, the study relies heavily here on the few existing secondary data contained in observer mission reports, books, articles (both in French and English), published and unpublished documents including official media interview, Internet sources and YouTube videos.

### **1.11. Data analysis**

The research utilized the qualitative content analysis method to analyse the findings. Krippendorff (1980:103) and Leedy and Ormrod (2005:142) concur in their definition of content analysis that it is a detailed and systematic examination of the contents of a particular body of material for the purpose of identifying patterns, themes or biases. Content analysis which may also be defined as a systematic analysis of the content of a text (e.g., who says what, to whom, why, and to what extent and with what effect) in a quantitative or qualitative manner.

Content analysis is used when there are many texts to analyze (e.g., newspaper stories, financial reports, blog postings, online reviews, etc.), the researcher begins by sampling a selected set of texts from the population of texts for analysis. This process is not random, but instead, texts that have more pertinent content should be chosen selectively.

The researcher therefore transformed collected data into meaningful form taking into account original research questions. For example, it was possible to establish, through the analysis of

data collected, some common characteristics of the independence of the electoral management body in order to conclude whether the CENI was independent. This mode was found appropriate because it could reveal the cause/s of the problem being studied in the research work.

For youtube videos and press interviews, the study applies sentiment analysis which is a type of content analysis – a technique used to capture people’s opinion or attitude toward an object, person, or phenomenon. watching YouTube videos about a political candidate posted online and classifying each video as positive, negative, or neutral is an example of such an analysis.

### **1.12. Delimitation of study**

This study focuses only on the independence of the EMBs and their role in the democratisation process within a state. This is a case study on the CENI in the DRC; it is not possible therefore to generalize the findings to all the EMBs in Africa. The study however provides insights into problems that beset the EMBs and the election management in Africa. This study is not looking at other factors promoting democracy such as political culture, international pressure or economic development. It however focuses on EMBs and their ability to conduct free and fair elections. The case study of the selected two states has also limited the scope of coverage of this study.

### **1.13. Chapter outline**

The research is organized into seven (7) chapters. In addition to Chapter 1, in which the study is introduced and outlined, there are six chapters in which various aspects of the study receive attention.



Chapter 2: Literature Review: this chapter reviews the literature which is relevant to the current study. The chapter focuses mainly on the issue of independence of EMBs as developed by scholars around the globe.

Chapter 3: Independent EMBs and their characteristics: the study focuses on the importance and characteristics of independent EMBs. By looking at various examples worldwide the focus would be on identifying possible ideal types. This chapter also elaborates the roles and functions of EMBs, and the EMBs difficulties related to strengthening democracy in Africa.

Chapter 4: An assessment of the EMBs of Ghana and the DRC: The chapter analyzes the legal framework that established the EC and the CENI, their tenures, structures, mandates, compositions and the rules they have designed to ensure credible management of the elections.

Chapter 5: Factors that limit the practical independence of the CENI: This Chapter looks also at the current political situation in the DRC and assesses the challenges that lie on its road to democracy.

Chapter 6: Way forward: This chapter proposes a way forward to strengthen the independence of the CENI in the DRC

Chapter 7 summarizes the findings of the research and draws conclusions

## **CHAPTER TWO: REVIEW OF THE RELATED LITERATURE**

### **2.1. Introduction**

The literature review focuses broadly on five major issues. First, it deals with the legal framework and the call by continental and regional bodies to have proper management of elections in order to minimize election related conflicts and violence. The second part deals with the issues of free and fair elections. Third, it highlights the election management problems in Africa which are limited in many instances to the operations of the EMBs. The fourth part examines the issue of the characteristics of independent EMBs and their importance to democratisation, and finally it focuses on problems that beset the electoral commissions in the DRC and Ghana. This provides the broad context in which the CENI is to be analyzed.

### **2.2. Legal framework governing setting norms and standards for elections**

Effective electoral institutions and a sound legal framework are indispensable to ensuring that a state upholds its international obligations, including but not limited to conducting periodic genuine elections that accurately reflect the will of the people for democratic elections (ICCPR Art 25b, UDHR Art 21). This section focuses on the legal framework in which the electoral process is held in Africa such as: the Universal Declaration of Human Rights; the African Union (AU) Declaration on the Principles Governing Democratic Elections in Africa; African Charter on Democracy, Elections and Governance; The Economic Community of West African States (ECOWAS) Supplementary Protocol on Democracy and Good Governance; And the Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections whose principal objective is to promote the holding and observation of democratic elections based on the shared values and principles of democracy, the rule of law and respect for human rights enshrined in the SADC Treaty. The latter 2 are included since Ghana is part of ECOWAS and the DRC of SADC.

## **Universal Declaration of Human Rights (UDHR)**

Adopted in 1948 by the General Assembly of the United Nations, the Universal Declaration of Human Rights (UDHR) is often referred to as the principal universal legal instrument. By adopting this Declaration, the right of citizens to take part in electoral and political processes in their states became entrenched as a fundamental human right. The UDHR and other international treaties promote shared fundamental values– most importantly, rights related to political participation and voting.

Article 21(1) of the UDHR clearly stipulates that “everyone has the right to take part in the government of his state, directly or through freely chosen representatives”.

Article 21 (3) further states that “the will of the people shall be the basis of the authority of government; this will of the people shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”. These articles of the UDHR set out the universally accepted principles of democratic elections.

## **African Union (AU) Declaration on the Principles Governing Democratic Elections in Africa**

adopted in Durban in 2002. This AU instrument reaffirms the universal principles of democratic elections as required in the UDHR; it also asserts the obligations of AU Member States in the consolidation of democracy through the establishment of relevant institutions and the creation of a context conducive to democracy. The fourth part of the Declaration reaffirms the rights and obligation of citizens in democratic elections. Its fifth part provides in broad terms the role of the AU in election observation in its Member States, and the concluding part of the Declaration stipulates the mandate and role of the AU in the implementation of the Declaration. However, “its status as a legally non-binding instrument leaves it as mere statement of common aspiration” (Alemu 2007:21).

## **African Charter on Democracy, Elections and Governance (ACDEG)**

The African Charter on Democracy, Elections and Governance (ACDEG) was adopted in January 2007 and entered into force in February 2012. The Charter is presently being adopted and ratified by the AU's Member States. The Charter enjoins Member States to establish and strengthen impartial and independent electoral commissions in Africa in order to conduct a transparent electoral process. Mozaffar (2002:23) notes that electoral management bodies (EMBs) are the "...principal instruments for organizing credible election processes, linking voters and governments in order to secure procedural legitimacy for the substantive uncertainty inherent in competitive elections". Their institutional effectiveness depends mainly, although not solely on their independence from the executive (Art 85). This theoretical understanding is also reproduced in the different regional commitments, as confirmed in the ACDEG.

As a result, the fact that the Charter obliges states to establish and strengthen independent electoral management bodies (Art 17.1) is critical in addressing challenges encountered by EMBs during recent elections in Africa. Murphy (1994:25) asserts that the establishment of impartial, independent and competent EMBs "generally has the responsibility to ensure conditions conducive to free and fair elections and for all matters involving the electoral process". For this reason, states parties are obliged to provide these institutions with sufficient funds to perform their assigned missions professionally and effectively as stipulated in the charter (Art 15.4).

Alemu (2007) states that the assessment of the provisions of the Charter in tackling key electoral challenges reveals its severe deficiency at practical as well as application levels. The efficiency of the Charter is downgraded given that it fails to make a modest effort to tackle the continuing problems encountered in elections management. Alemu argues that the ambiguous and inadequate enforcement mechanism makes it a toothless lion. In fact, the author raises the question if the charter adds anything on existing instruments (Alemu 2007).

### **The ECOWAS Supplementary Protocol on Democracy and Good Governance (2001).**

This covers key recommendations relating to the accession to political power and the holding of elections in the West Africa, where Ghana is situated. This document has binding status on the states parties concerning democracy and good governance. In particular, it maintains that the change of government must take place through genuine, free, fair and periodic elections (Art 1b). In addition, it supports zero tolerance for power obtained or maintained by unconstitutional means.

Specially on elections, Articles 2, 4, 6, 7, 8, 9 and 10 call for conducting of elections as per electoral laws, prohibition of substantial amendment of electoral laws, the establishment of independent electoral management bodies, the arrangement of reliable and transparent voter registrations, the announcement of results in a transparent manner, establishment of adequate complaint mechanisms, the full collaboration with civil society in the provision of voter education, the need for conceding to defeat according to guidelines and lastly the prohibition of acts of intimidation or harassment against defeated candidates or their supporters by all election stakeholders.

All things considered, it is the best instrument that is binding and provides reasonably necessary framework in tackling the electoral challenges, though of sub-regional application.

### **Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections.**

The treaty that establishes the SADC promotes human rights, democracy and the rule of law as the guiding principles for the actions of its members (Article 4, SADC establishing Treaty, 1992). The SADC Principles and Guidelines Governing Democratic Elections were adopted in 2004 and revised in 2015.

This sub-regional instrument recognizes political participation as a fundamental right. The principal objective of the SADC Principles and Guidelines Governing Democratic Elections is to

promote the holding and observation of democratic elections based on the shared values and principles of democracy, the rule of law and respect for human rights enshrined in the SADC Treaty. It stipulates the principles for the conducting of democratic elections in the SADC region; the mandate of SADC Election Observation Missions; guidelines for election observation; code of conduct for SADC observers; rights and responsibilities of observers; and the responsibilities of SADC Member States holding elections.

In paragraph 2, 4 and 7, the SADC Principles and Guidelines Governing Democratic Elections stipulate that there needs to be an environment conducive to free, fair and transparent elections. In particular, there needs to be freedom of association and political tolerance, the judiciary must be independent, Member States must safeguard the human and civil liberties of all their citizens during electoral processes, these liberties include freedom of movement, assembly, association and expression. Elections must be held at regular intervals as provided for in the state's constitution. The dates of elections must be announced timeously, which probably means that there needs to be time for parties to campaign, for candidates to seek nomination and for administrative arrangements for conducting the election to be put in place.

With relation to EMBs in the management of the electoral process, states parties must establish impartial, all-inclusive, competent and accountable electoral bodies staffed by qualified personnel. Adequate resources must be applied to enable democratic elections to be held.

Matlosa (2004) states that theoretically, the SADC Principles and Guidelines Governing Democratic Elections suffer some sort of schizophrenia. He points to the fact that this instrument is "more of an electoral observation guideline than a document on election management principles"; even though SADC leaders have a tendency to consider it as an election principles document. This instrument "deals more with the issue of electoral observation rather than election management". Matlosa asserts that practically, the right naming for this instrument should be "SADC Principles and Guidelines for Observation of Elections" (Matlosa 2004:20).

### 2.3. Free and Fair election

The term 'free and fair' "becomes an important catchphrase to designate the principles of democratic election and to measure the success of an election" (Yusof and Abdul 2014:1). Generally this term embraces the prerequisite that an election must be genuine, transparent, and periodic, as indicated in the 'Declaration on Criteria for Free and Fair Elections' by the Inter-Parliamentary Council (IPC): "In any country the authority of the government can only originate from the will of the people as expressed in transparent, genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage" (Goodwin-Gill, 2006: viii)

In addition to the fact that the term 'free' and 'fair' do not have any easily verifiable meaning and is often being used in a way that is based on personal opinions, it has been recognized as the simplest way to clarify complex and so much debated principles of democratic elections.

Bishop and Hoeffler (2016) base their understanding of free and fair elections on IPC declaration and argue that Freeness implies that all adult citizens must have the right to register and vote including the freedom to found and join political parties and campaign freely inside the state. Fairness connotes the equal treatment of political parties involved in the electoral process. Bishop and Hoeffler's (2016) survey of election reports suggests that electoral observation missions centered their attention to the following requirements in assessing the level of freeness and fairness of the electoral process. These requirements include the right to vote, the registration of voters, the freedom to stand as a candidate in the election, and the freedom to campaign freely and have access to the media. They also measured more clearly how the freeness and the fairness of elections can be threatened by analyzing numerous reports of electoral observation missions. Based on this analysis Bishop and Hoeffler (2016) produced a list of ten dimensions of electoral conduct which include: legal framework; electoral management bodies; electoral rights; voter register; ballot access; campaign process; media access; voting process; role of officials; counting of votes.

Yusof and Abdul (2014) argue that generally, “free and fair elections” denotes periodic, non-violent, genuine, transparent, competitive elections that comply with the principle of democracy, human rights as well as natural justice. They argue that a free election implies that all adult citizens should enjoy all their fundamental rights. These rights include among others, freedom of expression, association, movement and assembly, freedom from intimidation and violence. They further point out that fair election guarantees the impartial treatment of candidates and parties under the law and by the authorities. It also requires a level “playing field” in enforcement election-related law, access to state facilities and media. Under this principle, there should be a clear separation between the state and political parties, and public facilities and resources should not be used unfairly to the benefit of one party. Fair election also protects all citizens’ rights to universal and equal suffrage and rights to vote by secret ballot (Yusof and Abdul 2014).

Osei-Hwedie and David Sebudubudu (2005) note that free and fair applies to the whole electoral cycle, starting at the end of one election and runs through the beginning of the next election: from the electoral planning and implementation through the announcement of the election date, voter registration and compilation of the voters’ rolls, nomination of candidates, electoral campaign, voting operations on the Election Day, the vote count, the announcement and verification of results. This suggests that in order to hold free and fair elections, a number of conditions have to be fulfilled. These conditions, according to Geisler (1993), include the right of the electorate, candidates and parties to participate, the right to freedom of expression and information, the right to a secret ballot, and the right of the winning candidate and party to assume power. In practice, these conditions require that there should not be any problem with voter registration and compilation of voters’ rolls and nomination of candidates, free from intimidation and violence, and no buying of votes, tampering with ballot papers or switching or meddling with ballot boxes (Geisler 1993).



Elklit and Svensson (1997:34), in turn indicate that the freedom aspect should consist of elements relating to citizens' opportunity to vote without intimidation or restrictions of any sort. Therefore, freedom mainly deals with the "rules of the game". They further state that freedom should be given priority because it is a prerequisite for the consolidation of democracy through elections. "Without rules granting formal political freedoms, the issue of the fair application of rules is worthless, and the issue of resources, irrelevant".

The above review of the literature on free and fair election can be summarized as follows: free election means that all adult citizens must have the freedom to exercise their rights relating to the elections. These include the right to be registered as a voter, the right to vote or not to vote and the right to cast their vote in a secret ballot for the candidate of their own choice without fear or retribution. Fair election refers mainly to the playing field which must be leveled so that all registered political parties contest the elections, campaign and rally without violence, discrimination or intimidation. Fair election also refers to the announcement of results which should reflect the truth and the will of the people who vote.

#### **2.4. Literature on the features of EMBs in Africa**

A number of studies have focused on highlighting the numerous challenges that the EMBs faced in some African states, which has led to the questions of credibility of the electoral process on the continent (Hatchard; Ndulo, and Slinn Hatchard 2004, Alemu 2007, Debrah 2011, Fuh 2010).

Hatchard *et al.* (2004) noted the lack independence of EMBs from the government in some African states. They based their study on some international electoral observer missions which highlighted perceived failures by electoral commissions in African states and they underlined the need to develop basic operational principles. Including a suitable appointment process for electoral officials is one such area. In most African states, electoral officials are appointed by

the President (sometimes in the advice of the parliament or the Judiciary). Yet any appointment process by the president of the state or the executive is troubling since he/she has a direct interest in the outcome of the election and the impartiality of the electoral officials may be compromised. They confirmed this assertion during the General Election of 1992 in Kenya. They found out that a number of complaints from opposition parties and other interested groups were filed before the Commonwealth Observer Group about the performance of the Electoral Commission and its perceived lack of independence and impartiality (Hatchard *et al* 2004).

They further propose that the electoral commission should be placed under the auspices of an independent Human Rights Commission or the electoral commission should include nominees of major political parties and relevant civil society organisations. A fixed security of tenure for electoral commissioners is also essential as it allows them to gain experience and work with more autonomy. In the meantime, providing on-going training for all electoral commissioners together with constant scrutiny of the electoral management body by political parties, civil society organisations and the media is essential.

Alemu (2007) conducted a survey in three African states, namely: Nigeria (2007), Uganda (2006) and Ethiopia (2005) to identify issues relating to the mismanagement of the electoral process in these states. His discussion highlighted five main challenges common in the electoral process in these three states: manipulation of electoral processes and the outcome of elections, lack of independent and impartial electoral management bodies and democratic institutions, the use and abuse of state resources and the media in electoral campaigns by the governing party, non-respect of basic human rights and civic engagements, as well as lack independent and impartial body dealing with complaints and dispute resolution.

Alemu argues that elections which were held in Ethiopia in 2005, Uganda in 2006 and Nigeria in 2007 have been affected with these five key challenges and therefore fell short of the requirements of free and fair elections. As a result, those elections were marred by

irregularities; the opposition parties suffered violence and intimidation and refused to accept officially declared results.

In Nigeria, Moveh (2011) asserts that it is widely accepted that the structure of the Independent National Electoral Commission (INEC) has over the years become the center of attention at which elections are compromised. Basing his study from interviews conducted amongst INEC commissioners, staff, representatives of political parties and over 50 civil society organizations and human rights groups involved in election observation in Nigeria within the period of the year 2009 to 2011, Moveh's article shows how the organizational structure of Nigeria's electoral commission compromises the electoral management process and the promotion of democracy in Nigeria. The author notes that in Nigeria since independence, the electoral management process has always resulted in controversy and post electoral violence arising mostly in part from the perceived lack of independence of INEC vis-à-vis to respective governing military or civilian regimes. He noticed two key problems in the structure of INEC which compromises its independence and thus impacts on the electoral process and the consolidation of democracy in Nigeria. These are the mode of appointment of electoral commissioners and the funding of INEC.

Concerning the mode of appointing electoral commissioners, section 154.1 of the 1999 constitution of Nigeria empowers the head of the state to appoint the president (chairperson) and members of the electoral body subject to the confirmation by the senate. Moveh's findings revealed that former President Olusegun Obasanjo appointed members of the People's Democratic Party, his political party, as commissioners. They served in the INEC's board during the conduct of the 2003, 2007 and 2011 Presidential elections. (Moveh 2011:182). Regarding the funding, two key issues have hindered the independence of the INEC: "the approval of election expenditure and the method of disbursement of approved funds on a timely basis" (Moveh 2011:182). He asserts that although the salaries and allowances of INEC's members are charged directly on the consolidated funds, election budget in Nigeria is not. This creates serious challenges for the management of the electoral process in Nigeria. Moveh argues that

INEC has to line up at the ministry of finance for its funds and the fulfillment of its duties has mainly been dependent on the goodwill of the government which makes decisions about INEC's funding (Moveh 2011:182).

The author concludes by advising that “establishing the structural independence of INEC; particularly in the area of appointment of commissioners and funding is therefore a basic requirement for guaranteeing the independence of the election administration process and the sustainability of democracy” (Moveh 2011:184).

Sebudubudu and Maripe (2013) argue that Botswana has held eleven consecutive multiparty elections since the pre-independence elections in 1965, confirming that it is a sovereign state in which elections are core to assuming political office. Those elections have been conducted without or with minor violence and have led scholars to describe the country as the embodiment of democracy, particularly in comparison to what has happened elsewhere in Africa. However, Botswana's Independent Electoral Commission (IEC) does not have full authority over election matters; for example, it does not determine the date of the elections (Sebudubudu and Maripe 2013). Instead, a Writ of Elections for parliamentary elections is issued by the president and one for local elections by the minister of local government. This makes the president and minister, both of whom are politicians, “players and referees in a game in whose outcome they have a clear interest”, thus compromising the principle of fairness (Sebudubudu and Maripe 2013).

The review of the literature on elections in Africa shows that there is nothing more urgent than the holding of peaceful, free, transparent and inclusive elections in a state. Despite the difficulties, the fact that competitive elections are no longer rare in Africa is a positive development.

## 2.5. Issue of independence of EMBs in Africa

This section tackles the issue of independence of EMBs in Africa. It reviews the works which determine the different characteristics of an EMB's independence.

Mozaffar's study (2002:91) focuses on classifying EMBs according to their degree of independence. These are: non-autonomous EMBs located within government office (e.g. Minister of interior); semi-autonomous EMBs (under this model the electoral process is managed by both the government and an autonomous institution established especially for that purpose) and the third is autonomous EMBs, referred to as an independent electoral commissions, where the electoral process is managed by an independent institution without the involvement of the government.

According to Makulilo (2009:436) the view expressed by Mozaffar has four omissions. First, Mozaffar only emphasizes the importance of the formal independence at the expense of behavioural independence. In so doing it takes it for granted that once the structure of an EMB is designed and installed, it automatically functions to achieve its goal. Second, Mozaffar argues that bureaucracy is always partisan and in favour of the governing party. This should be put in context. Makulilo shows that in countries where democracy is well entrenched, bureaucracy is highly trusted and has in most cases managed elections without complaints regarding the integrity of the EMB. In countries where democracy is still immature, a different scenario has occurred. Makulilo (2009) makes use of Zambia during Kenneth Kaunda, Malawi during Kamuzu Banda and Kenya during Daniel Arap Moi, the ruling parties did not win the elections; he goes on to ask: can this be attributed to the bureaucracy acting against these regimes? Or were the EMBs in those countries autonomous and independent? The above view is too simple to offer responses to the posed questions. Third, the classification does not focus on specific attributes of independence apart from just locating EMBs either within or outside the bureaucratic structure of the government. In so doing, it does take for granted that the only enemy of

independence of EMBs is bureaucracy. Fourth, independence is a black-and-white question—that is, either you have or you do not have it. It is illogical to think of independence in terms of degree (Makulilo 2009:436).

Aaken (2009) separates EMB independence into institutional, personnel, financial and functional independence. Institutional independence refers mainly to the legal form taken by the agency. Legal independence allows an EMB to sue and to be sued. Usually, if the body is legally independent from the government, it excludes the right of instructions by the ministry. Personal independence refers to the way the highest members of the body are appointed, their status and whether and under what circumstances they can be removed. Financial independence refers to the ability of own accounts (usually in combination with legal independence), as well as the question of who decides on the budget. Functional independence embraces the question if the agency is able to set and specify its own goals (in the economic sphere).

Fuh (2010) in his study, “Election management in Cameroon” argues that for elections to be free and fair, EMBs must have both formal (institutional independence) and substantive (practical independence). Formal independence is based on the law creating the EMB (legal instruments) and deals with such aspects as the appointment of members of election commissions, their terms and conditions of office, funding of the EMB and the legal creation of the EMB itself. Substantive independence on the other hand refers to the practical or actual application of the independence conferred on the EMB by legislative texts. An EMB must be seen as ‘exercising’ or ‘living’ its independence and not merely possessing it (Fuh 2010:14). EMBs that are perceived to be biased often have difficulties in persuading stakeholders to accept the outcome of elections.

Fuh continues and argues that formal and substantive independence must co-exist in order for an EMB to be considered independent. Furthermore, he argues that provisions regarding the mode of appointment, removal and terms of service of members of the EMB must be clearly

established in legislation and insulated from government control. It is generally accepted that entrenching the creation of an EMB in the constitution is one of the best ways of safeguarding its independence. Constitutional entrenchment of an EMB is very important because the constitution is the supreme law of the land and cannot be altered through ordinary legislative procedures. Operational independence of the EMB must equally be ensured as a safeguard for its independence. This means that in the exercise of its functions, the EMB must not be under the control, influence or direction of any arm government, political party or organized group, and this must be clarified in the law creating the EMB (Fuh 2010).

Okello's (2006) study titled 'guaranteeing the independence of election management bodies in Africa: a study of the electoral commissions of Kenya and South Africa' has made an important and illuminating contribution in this area. This study proceeds from the premise that independent EMBs are necessary and important in the democratisation process in Kenya and South Africa. He points out that part of the problem that EMBS face in Africa lies in the scarcity of resources such as adequate funds, personnel and logistics. However, "the major problem in the management of elections in Africa is the lack of independence of EMBs from the shackles of executive control" (Okello 2006:15). He argues that the appointment and the removal procedures of electoral commissioners, the financial independence, accountability, permanency, conditions of service and the operational independence constitute the pillars of independence of any electoral management body around the world, regardless of the type of EMB chosen.

Sesa (2014) elaborates the following core pillars which determine the degree of independence of EMBs: permanency, financial autonomy, appointment of commissioners and composition of EMBs, and operational and administrative autonomy. He argues that an ideal independent electoral body must first be established permanently, either by the national constitution or by legislation, which provides for its powers. Establishment by law guarantees the independence of an EMB and, at the same time, provides it with its constitutional and statutory powers and functions, thus insulating it from sudden changes. Financial autonomy implies the ability of the

EMB to have access to funds reasonably required, to enable the commission to discharge the functions it is obliged to perform, as stipulated and outlined under the constitution and the electoral commission act (Sesa 2014).

Furthermore, he notes that the mode of appointment of commissioners is crucial in ensuring the independence of an EMB. It is a confidence building exercise and contributes greatly to the image and integrity of the EMB. He proposes that the mode of appointment must be provided by the law, and it must be clear, transparent and inclusive in order to increase operational independence and effectiveness of the EMB. Concerning the operational and administrative autonomy, Sesa notes that the term 'operational autonomy' relates to the daily activities of an EMB such as the planning, supervision and formulation of elections. The author cautions that operational autonomy is important, since it enables the EMB to determine its own activities and agenda. It also enables the EMB to operate without receiving instructions or directions from any quarter. The views expressed by Sesa (2014) are critical in assessing the CENI independence in the DRC.

In order to achieve EMB independence in Africa, regional standards were set in 2003. The Independent Electoral Commission of South Africa, in collaboration with the African Union Commission and the African Association of Electoral Authorities convened the Conference on Elections, Democracy and Governance in Africa from 7 to 10 April 2003. One of the agenda items was in regard to independent EMBs. The following principles regarding the independence of EMBs were adopted by member states of Africa:

- The independence of EMBs should be secured constitutionally, and their budget should be voted directly by the legislative bodies responsible for allocation of budgets.
- The selection and appointment procedures for commissioners should be determined by parliament and should be transparent, inclusive and sensitive to gender equality and the representation of diverse groups.
- EMBs must independently appoint their secretariat.
- EMBs should conduct themselves with integrity, independence, transparency and impartiality.



- EMBs should have formal structure in various sub-regional bodies and within the African Union through which they can interface with political principals.
- The African Union in consultation with EMBs should work towards the adoption of common standard norms for the management of elections in Africa.
- Each election management body should structure a process that allows for public scrutiny of all processes and ensures accountability to the broader body politic.

Makulilo (2009:4) points out that from the conference it can be summarised that the minimum attributes for independence of EMBs should include: fiscal independence; durable tenure of office for commissioners that is protected by the constitution; an independent structure that is free from the government of the day or any political party; impartiality; an inclusive appointment procedure for the members of the body after consultation with various stakeholders; professional competence of its staff; transparency in decision-making processes; and capacity to make and enforce decisions by the body.

Based on the views expressed by Mozaffar (2002), Makulilo (2009), Aaken (2009) Sesa (2014), Okello (2006) and Fuh (2010) the independence of an EMB should refer to five things: decisional independence to decide freely, institutional independence to perform its functions without undue interference from the government, adequate resources, it must be staffed with individuals who are competent and have skills to manage elections and a system of accountability.

## **2.6. Election management body in Ghana (EC)**

In Ghana, Shola (2013) indicates that Ghana's electoral commission (EC) and, by logical extension, democratic, success story has largely been associated with the independence-enhancing institutional design and leadership of the EC, which has been acclaimed both locally and internationally for its credible electoral management over the years. Shola (2013) argues

that the EC is generally regarded as having contributed to the high level of internal democracy that has become a feature of civil society organisations in Ghana, where ‘the EC is increasingly called upon to organize, supervise and validate the election of their directing organs’. For this reason, ‘the EC helps institutionalize democratic procedures and contributes to the legitimacy and validity of a significant segment of Ghanaian civil society’ (Shola 2013). A number of factors help explain the credible performance of the EC and its rising profile at home and abroad in successive elections before 2012.

Firstly, Shola (2013:42) observes that it has been noted that the commission has always demonstrated a ‘willingness to engage actively in confidence-building, the development of a transparent management style, where party grievances were addressed before they became serious allegations against the EC’. Secondly, the commission has also been said to have taken the opposition’s complaints about the 1992 elections into consideration in subsequent elections. Moreover, the EC also has a relatively independent source of funding because it prepares its own budget, which is subject only to the approval of Parliament. More importantly, the relative independence of the EC, which has aided its professional performance, relates to the fact that the chairman and two deputies have the same terms and conditions of service as justices of the Court of Appeal, which means they cannot be removed arbitrarily (Shola 2013).

In the same vein Gyimah-Boadi (2012) argues that there is high public confidence in the EC. Most Ghanaians and political parties perceive the Ghana Electoral Commission as being completely independent and less susceptible to political manipulations and interferences. They are satisfied with the EC’s independence because: “it is guaranteed by law”. Sufficient safeguards exist in the law to secure operational, financial and institutional autonomy of the EC and it is insulated from executive or governmental controls, Checks and balances are worked out into the appointment process of members of the EC to ensure that they are completely nonpartisan. Members of the EC enjoy security of tenure and have the same conditions of service as justices of the superior courts. He points out that the general opinion is that the EC’s staff is professionally competent and is adaptive to changing circumstances.

Hounkpe and Fall (2010:23-25) notice that several factors contribute to guaranteeing the independence of the electoral commission of Ghana, even if it can be further improved. In the first category of factors, they note those relating to the influence of other institutions on the commission; the legal framework of elections provides it with a strong basis.

Law No. 451 of July 6, 1993 establishing the electoral commission is clear on the latter's independence from any person of any authority (Article 3). Several provisions of the law establishing the commission help ensure the effectiveness of its independence. Those legal provisions assign almost all tasks regarding the preparation, organization and practical control of the electoral process to the commission, reducing the possibility of sudden interference from other institutions; and the same provisions allow freedom of choice of means (e.g. appointment of persons deemed necessary for the proper organization of the election process, regulation where necessary with penalties for their crimes, etc.) at the discretion of the commission, also reducing the possibility of interference from other players in the process, for example in selecting necessary human resources for the conduct of an election (Hounkpe and Fall 2010). They further argue that all the elements mentioned under the legal framework for elections in Ghana help reduce the risk that the state's election commission is found under the negative influence of other actors. In addition, there are other additional provisions to secure the independence of the commission's members.

The latter category includes the following aspects: The origin and the procedure for selecting members of the committee, which will be discussed in detail in the following chapters. The measures taken to that effect in the electoral legislation of Ghana reduce the risk that members of the commission be sensitive to the needs and interests of other actors in the electoral process, especially those authorities who have proposed and / or appointed them. Hounkpe and Fall (2010) conclude that although the electoral commission of Ghana provides some positive examples regarding its independence, it is not an ideal model. It is still possible to improve conditions so as to increase its independence.

Electoral Institute of Southern African (EISA 2012) states that the Electoral Commission of Ghana has been in existence since 1992 elections. Most of the stakeholders point out that the credibility enjoyed by the EC, is in part due to its long existence and experience acquired over time. The reputation of the chairman of the commission and the courage demonstrated in applying the law impartially has also contributed to the confidence the Ghanaians have in the ability of the EC to discharge its function. The EC is widely seen as a buffer zone between the various political protagonists.

Furthermore, the African Peer Review Mechanism (APRM) states review report of Ghana (2009) also notes that the independence of the EC is constitutionally guaranteed. Four successful post-transition competitive multi-party elections were held in 1996, 2000, 2004 and 2008 respectively. The result has been democratic and orderly transfer of power from one party to another and from one President to another.

## **2.7. The CENI and the management of 2011 elections**

Studies on elections management in the DRC include; Githaiga 2012, Mavungu (2014), Dizolele (2011, 2012), Tumba (2014). All these studies in addition to other relevant works were reviewed and contributed to enriching this study.

The Eastern Congo Initiative's Final Report (ECI 2012) on the 2011 presidential elections in the DRC sheds light on the readiness of the CENI to manage the 2011 electoral processes in the DRC. It argues that the massive challenges that hindered the preparations for the 2011 presidential and legislative elections became apparent in mid-2010. In August 2010 the independent electoral commission (CEI), recognizing the need to move forward with election preparations, introduced an ambitious electoral calendar. However, these efforts were halted shortly thereafter when the Congolese government decided to dismantle the independent electoral commission and replace it with a new independent national electoral commission

(CENI). The new CENI became operational in February 2011, just nine months before the vote. The CENI therefore had nine months to achieve what had taken its predecessor [CEI] eighteen months in 2006. The new commission was headed by Pastor Daniel Ngoy Mulunda-Nyanga, a member of the People's Party for Reconstruction and Democracy (PPRD) and "a blood relative of the incumbent president Joseph Kabila" (ECI 2012). Accordingly, Mavungu (2013) argues that the pastor, who comes from Joseph Kabila's Katanga province, is believed to be one of "the co-founders of the president's party and is reported to have been a member of Kabila's campaign team during the 2006 electoral process".

Furthermore, the ECI report asserts that one month prior to the establishment of the CENI, the Congolese Parliament approved Kabila's proposals to amend the constitution. The new constitution significantly changed the previous electoral process, which included the option for a runoff if no candidate received more than 50 percent of the votes; instead, the change instituted a single round of voting granting victory to the candidate with the most votes. This system greatly favors an incumbent facing a fractured opposition, exactly the situation leading into the 2011 elections.

Dizolele and Gambino (2011) argue that "this change, along with the silence of the international actors, appeared to dramatically increase skepticism among the Congolese elite over prospects for a genuinely democratic election." The ECI report notes that the 2011 elections were obviously a dilemma: to respect the constitutional deadline and organize botched elections. In conclusion, the report reveals two key reasons of the CENI's failure to manage the 2011 elections: firstly the CENI neglected key preparatory steps for the implementation of credible elections. The electoral calendar was overly ambitious and did not provide adequate time for preparation; secondly the pre-electoral phase was characterized by the use of excessive violence by security forces across the state. The loss of human life and the ill-treatment of civilians during an electoral campaign are not acceptable.

Mavungu's article on the Democratic Republic of Congo (DRC), focuses on the issue of the disputed 2011 elections, a subject of intense debate among political parties, voters, observers, media and political analysts both in the DRC and globally.

The article shows that the 2011 elections were not only administratively chaotic, fraud and violence were deliberately introduced in order to ensure that the incumbent president, Joseph Kabila, stayed in power and members of his majority party would dominate the National Assembly.

Mavungu (2014) argues that the elections were expected to be a significant improvement on those of 2006 but that they were tarnished by grave irregularities and criticised by most observers as lacking credibility. Mavungu notices that from the start the CENI lacked transparency and did little to build trust among political parties and candidates beyond a few briefings of parties about the evolution of the electoral process. It also failed to defuse accusations of electoral fraud made long before the poll date.

Mavungu further argues that, given the nature and extent of electoral fraud, the 2011 elections were a tragedy which cannot be put down to technical and accidental factors. He noted that the National Episcopal Conference, arguably the DRC's most influential institution, had deployed some 6 000 observers in polling stations around the state. These observers were trained to observe elections and communicate with their coordination centre in Kinshasa using the short message service (SMS). Immediately after the voting, government ordered telecommunications companies to interrupt their SMS services throughout the national territory, a move interpreted as deliberate obstruction of independent communication of the true results. Furthermore, he adds, there was a systematic and state-sponsored plan to rig the elections in favour of the incumbent president and party, using illegitimate and excessive violence to terrorise any protesters who challenged the fraud.

Mavungu's contention that 'the democratic project in the Congo has experienced a dramatic reversal' is a sad reminder that it might take the DRC a very long time to proceed along the path to democratisation using elections as one of the tools if such blatantly fraudulent practices as those outlined in his article are tolerated in future elections. This analysis suggests that the

democratisation process in the Congo is at great risk. The current legitimacy crisis may open the way for a relapse into armed contestation for political power.

According to Githaiga (2012), the second post-conflict election in the DRC took place in a context of significant challenges and was marred by allegations of electoral fraud and mismanagement. The pre-electoral climate was characterized by lack of confidence among elections stakeholders, persistent insecurity in parts of the state, and pervasive socioeconomic adversity. He points out that other aspects of controversy plaguing the work of the CENI were allegations of a lack of transparency and insufficient readiness for the elections. Following allegations of discrepancies in the voter register ranging from double registration to the registration of minors and militia members, the opposition launched public demonstrations demanding transparency, resulting in the CENI agreeing to an audit of the electoral register (Githaiga 2012:4).

Additionally, Githaiga (2012:6) alleges that polling day was not without incidents. He claims that voters burnt down several polling stations in Kananga (Kasai Occidental province) and destroyed electoral materials in Lubumbashi (Katanga province) due to suspicions of fraud; gunmen in Lubumbashi opened fire at a polling station, killing three people; and other gunmen raided election material that was being delivered. Githaiga (2012:6-7) asserts that observers also highlighted other irregularities like voter intimidation by security forces, ballot stuffing, undelivered ballot papers and voters being turned away at polling stations. At the close of the polls, the vote counting for the presidential race began in the wake of rising controversy over limited access to compilation centers. This led to mounting suspicions of electoral fraud.

Tumba (2014) points to the negative perceptions on the 2011 elections that basically arose from the delay in the establishment and nomination of CENI members (leadership), patronage in the nomination process of CENI members (leadership), poor performance of the CENI, and electoral malpractices. The political environment during the 2011 electoral processes was not fully conducive to credible elections. The eastern region of the DRC was under the occupation of a rebel movement popularly known as the March 23 Movement. In Kinshasa as well as other

cities, the 2011 electoral processes were characterized by a growing feeling of insecurity regarding some members of the ruling party and opposition. He further noticed that the political climate before the 2011 elections was not peaceful because the political actors suspected each other of cheating in the elections. The lack of organizational and functional expertise within the CENI adversely affected the transparency and the credibility of the electoral processes. The study found that integrity, credibility, impartiality, independence, professional performance, trust and confidence were the weak links in the management of the 2011 electoral processes in the DRC.

Dizolele and Kambale (2012:111-147) observe that with regard to the 2011 elections in the DRC, the poor election management and lack of expertise and skill among some election commissioners led to serious irregularities, including the loss of results from nearly two thousand polling stations in Kinshasa, as well as incredibly high voter turnouts, which exceeded 100% in the Katanga province. In the same vein, Jeuneafrique (2011) notes that when CENI chairman Daniel Ngoy Mulunda, a long-time Kabila friend and supporter, finally declared Kabila the winner three days after the announcement was scheduled, the Carter Center's election-monitoring mission issued an unequivocal statement charging that the official results lacked credibility. Etienne Tshisekedi, Kabila's main contender and the runner-up objected to the official result, calling Mulunda's statement a "provocation of the people" and instructed the army to stop obeying Kabila (Jeuneafrique 2011), and went so far by proclaiming himself president-elect. Speaking at a press conference, Kinshasa's Archbishop, Cardinal Laurent Monsengwo, told journalists that the Electoral Commission's results represented neither truth nor justice. He stressed that the announced results posed a serious credibility problem for the election (Dizolele and Kambale 2012). The presidential camp responded to allegations of fraud by saying that, although there had been irregularities they were not sufficiently severe to have given Tshisekedi a higher number of votes than Kabila (AETA 2011).

In support of this claim, Dizolele and Kambale (2012) point out that the presidential camp published a number of simulations, purporting to show that, even if all the votes from



‘questionable’ districts were given to Tshisekedi he would have 1 641 013 fewer than Kabila and maintained that all candidates had received high levels of support where expected.

## **2.8. Conclusion**

Three important things emerge from the literature. First, is the call by regional and international legal instruments to establish independent EMBs. Second, is the importance of the independence of EMBs in managing free and fair elections in order to enhance democracy in a state, with reference to Africa. Third, is the failure of the CENI in the DRC to manage the 2011 elections. Against the background of this, the current study seeks to analyze the CENI’s level of independence and its ability to conduct the electoral process in the DRC, by assessing its organizational and functional structure and whether the structure as designed confers to the CENI the ability to manage the electoral process independently, by using Ghana’s electoral commission as the ideal type of independent EMB within an African context. The following chapter deals with the notion of EMBs and their claim of being independent. It further gives the importance of EMBs on democratisation and it analyses the configurations of EMBs in Africa and the challenges they are facing in managing the electoral process.

## **CHAPTER THREE: ELECTORAL MANAGEMENT BODIES AND THEIR CHARACTERISTICS**

### **3.1. Introduction**

Since the Third Wave of democratization, which according to Samuel Huntington began in 1974 with Portugal's Carnation Revolution, election management has become a salient issue both in developing and developed states. Many African states have taken steps toward institutionalizing and consolidating democracy, including holding regular elections. As a result, many attempts are being made, regardless of the level of development of a state, to improve electoral management. Competitive elections have thus become regular occurrences across the continent. In states like Ghana, Botswana, and the Republic of South Africa, successful elections have turned into events that promote social cohesion and inclusion, and have enhanced prospects for greater economic growth. On the other hand, in countries that lack strong democratic institutions, like Cote d'Ivoire, the Democratic of Congo (DRC), Burundi and Zimbabwe, elections have become the main cause of instability and violent conflict and have further polarized political discourse.

Electoral Management Bodies (EMBs) in Africa continue to face challenges with managing elections democratically. The management of these election processes, mechanisms, and institutions has been critical to democratic progress in part because of the high stakes and especially in the winner-takes-all approach to elections. Elections often have been a trigger for violence and general insecurity in some countries. EMBs that are independent and impartial are therefore crucial in Africa's democratisation process. It is therefore important to study and analyse the constitutions and operations of the electoral management bodies in Africa. This will help us understand the multiple challenges they face in managing elections.

This chapter discusses and analysis the concept of EMB and the various models of EMBs around the world. Of special interest in this chapter is the independence of EMBs. The issue of the

independence of EMBs and the characteristics of ideal types thereof are discussed by using practical examples around the world. This chapter also examines the roles and functions of EMBs, and certain challenges that electoral management bodies in Africa experience in carrying out their missions.

### **3.2. The Concept of EMBs**

An Electoral Management Body is a public state institution designed to manage the holding of elections in a free and fair manner. According to the Administration and Cost of Elections (ACE Project 2017), EMBs possess five essential elements and core functions: (1) determining who is eligible to vote; (2) determining political parties and/or candidates eligible to contest an election; (3) organizing and conducting polling; (4) counting votes; and (5) aggregating votes. If these functions are allocated to different institutions, then all those institutions are regarded as EMBs. An EMB may be an institution that performs exclusively election related functions, or it may be responsible for such functions in addition to other non-electoral functions – depending on the type of EMB. These five essential elements are regarded as defining characteristics of an EMB. In addition to these core functions, EMBs around the world may also fulfill functions such as voter registration, boundary delimitation, procurement of electoral materials, voter education, oversight of campaign financing, media monitoring and electoral dispute resolution, which will be discussed in this chapter. These functions may differ from state to state. However, organisations and institutions that perform these additional functions without performing at least some of the core functions are not considered to be EMBs. Thus, to be considered an EMB, an institution should be responsible for at least some of the core functions mentioned above.

### 3.3. Different model of EMBs

Electoral Management Bodies (EMBs) are organised in different ways in different states.

Globally there are different models of EMBs. Pastor (1999), Harris (1998) and Garber (1994) provide a broad understanding based on five models:

- An election office within the government;
- An election office within a government ministry but supervised by a judicial body;
- An independent election commission composed of experts and directly accountable to Parliament;
- A multi-party election commission composed of representatives of the political parties; and
- A non-partisan electoral commission composed of distinguished individuals from a list proposed by the President and legislature, reduced by a veto of the political parties, and selected by a group of judges for a ten-year term.

Their classification is based on the composition of the commission.

However, several scholars such as Wall *et al.* (2006), Klein (1995) and the Ace Project have identified three basic models of setting up EMBs: the independent, the governmental and the mixed or semi-independent models.

The **Independent Model** of electoral management, according to Wall *et al.* (2006:7-8) exists in those countries where elections are organized and managed by an EMB which is institutionally independent and autonomous from the executive branch of government, and which has and manages its own budget. Under the Independent Model, an EMB is not accountable to a government ministry or department. Wall *et al.* (2006:7-8) mention that it may be accountable to the legislature, the judiciary, or the head of state. Again, there may be more than one independent institution that may be responsible for the core functions of an EMB.

EMBs under the Independent model may enjoy varying degrees of financial autonomy and accountability, as well as varying levels of performance accountability. They are composed of members who are outside the executive while in EMB office. Many new and emerging

democracies have chosen the Independent Model of electoral management. Examples of EMBs under the Independent Model include Ghana, Uruguay, Australia, Burkina Faso, Canada, Estonia, Georgia, Indonesia, Thailand, Liberia, Mauritius, Nigeria, Poland, Bosnia and Herzegovina, South Africa and Armenia.

Independent EMBs are often preferred because they are not directly linked to government and are thus perceived to be least likely to be manipulated by government. That is why Goodwin-Gill wrote: “at a practical administrative and oversight level, the institution of an independent Electoral Commission is now widely adopted as an important step in building traditions of independence and impartiality, and the confidence of the electorate and parties alike” (Goodwin-Gill 2006:120). One of the disadvantages of this model is that the EMB may be isolated from political and electoral framework policy makers. It may also not have sufficient political influence to acquire sufficient or timely funding.

The **Governmental EMB** is one where elections are organized by the executive branch of a country’s government, typically the Ministry of Interior or local authorities, and run primarily by Ministers or civil servants and their budget falls within a government ministry and/or under local authorities (Wall *et al.* 2006). This model is utilized in the United States and much of Western European Countries.

Under this model, Wall *et al.* (2006) observe that credibility may be compromised by perceptions of being aligned with the current government or subject to political influence. It is subject to internal decisions of government departments or local authorities on funding allocations and electoral policies. This model has also some advantages because it benefits from the available pool of bureaucratically experienced staff. It is well placed to cooperate with other government departments in providing electoral services (Wall *et al.* 2006).

Under the **Mixed Model** of EMB, Wall *et al.* (2006:7-8) state that elections are organized by the component governmental EMB, with some level of oversight provided by the component independent EMB. The Mixed Model is used in France, Japan, Spain and many former French colonies, especially in West Africa, for example Mali, Senegal and Togo (Wall *et al.* 2006:7-8).

From the above it is clear that EMBs may take on a variety of forms. Whether elections are conducted by an independent body, a ministry of government or by a mixed election administration system, the EMB must be perceived as “being neutral for the stabilization of a democratic regime, which is at the centre of liberal democratic theory” (Moveh 2011:170). Unfortunately, the election administration system in many new democracies has generated a lot of controversy – arising from the level of independence of EMB’s, their professionalism and the acceptability of the elections they conduct.

As implied in the discussion above, the independence of EMBs is crucial in elections and for this reason the Independent Model of EMBs is usually the preferred model and the model of choice in this study. However, to fully understand the role of EMBs in this regard it is important to look at the independence of EMBs in more details. This will form the basis of the analysis of the independence of the electoral commission of Ghana and the DRC in the next chapter.

### **3.4. Independence and Autonomy**

With regard to EMBs, the terms ‘independence and autonomy’ are often used interchangeably in the literature. For example, in article 15.2 of the African Charter on Democracy, Election and Governance (ACDEG 2007/2012), it is stipulated that “States Parties shall ensure that the independence of or autonomy of public institutions that promote and support democracy is guaranteed by the constitution”. However, as mentioned in chapters 1 and 2 other scholars do make a distinction between independence and autonomy and often measure independence in terms of the EMBs autonomy in a variety of areas, such as the degree of financial and administrative autonomy. As stated, independence is the state of not being dependent on another. Thus, independence focuses on the idea of being a separate entity not subject to the rules and influence of others. Regarding EMBs this especially implies being independent from the executive. Autonomy, in turn, focuses on the power to make decisions. Therefore, institutions may be independent, but their success largely depends on their ability to be

autonomous. This study makes use of the term independence. Autonomy would be regarded as a particular manifestation of independence.

The principle of independence, however, has a subtle meaning and needs to be carefully understood. It has two distinct subject matters. Joo-Cheong (2013) posits that the first is independence in decision-making – ‘independence to’ (freedom to) make decisions according to the judgment of the electoral commission. The second is independence in relationships ‘independence from’ (freedom from) other institutions and political actors, in particular those being regulated (e.g. political parties and candidates) and the government of the day. Both areas have structural and behavioural dimensions. The structural dimension concerns the formal separation of the electoral management body from the executive branch of government through legal provisions, while behavioural independence connotes ‘a normative independence of decision and action that is expected of all models of EMBs (electoral management bodies) in that they do not bend to governmental, political or other partisan influences on their decisions’ (ACE 2017). This section therefore focuses on the structural independence of EMBs.

### **3.5. Characteristics of independent EMBs**

As the benchmarks for free and fair elections, as well as the integrity of elections increase, the need for EMBs to supervise the elections becomes increasingly important. EMBs have become the foundations of democratization in many states around the world, particularly in Africa. Their composition, operation and activities are of public interest. EMBs must ensure integrity, legitimacy and credibility of electoral processes, and must be independent. The latter is perhaps one of the “most important criteria that are often employed to gauge the credibility and level of confidence that an electoral institution inspires in the electorate” (Fuh 2010:30).

An EMB must be independent from all parties or stakeholders who have an interest in the outcome of elections especially the government and political parties, as Goodwin-Gill observes (2006:120) “in a free and fair election, an independent and impartially administered electoral

process is essential". An independent election management body can, in other words, "be decisive for guaranteeing that the election procedure is democratic and for establishing public trust in democratic procedures" (Okello 2006:13). According to Pastor (1999) independence is nevertheless more important in transitional democratic countries because they often lack technical expertise required for the complexities of electoral management.

In this section, the study outlines the important characteristics of independent EMBs, which include: the institutional independence, functional or operational independence, financial independence, accountability of the EMB, status and terms of office of electoral commissioners.

### **3.5.1 Institutional independence**

Institutional independence is often seen to be at the forefront for defining independence. It refers mainly to the legal form taken by the EMB, that is *de jure* independence. Institutional independence means that an EMB has a secure legal status which is established by the constitution or established by law, and this legal provision explicitly provides for and guarantees its institutional independence and autonomy from the executive branch of government (SADC Principles and Guidelines Governing Democratic Elections, 2015, Ace 2017, Okello 2006, Pottie 2001, Lindberg 2006, Wall at al. 2006, Pastor 1999, Dundas 1997).

Dundas (1997:18) notes that the simplest way to promote independence of decision and action in an EMB is to create a legal framework that embeds EMB independence, as provided in the constitutions and principal EMB laws of many countries, while Okello (2006) confirms that establishment by law guarantees the independence of an EMB and at the same time provides it with its constitutional and statutory powers and functions thus insulating it from sudden changes.



If the EMB is legally an independent body from the government, it excludes the right of instructions by the government. This is also in the spirit of the African Charter on Democracy, Election and Governance (ACDEG 2007/2012), in its article 15.2, it stipulates that “State parties shall ensure that the independence of or autonomy of [the said public] institutions [that promote and support democracy] is guaranteed by the constitution”. In Section A 1 b) of the ‘principles and guidelines on the independence of election management bodies (EMBs) in the SADC region’ (2007), it is noted that “the Constitution and other legal and policy frameworks governing the EMB shall clearly stipulate its independence and institutional autonomy in the performance of its mandate”.

The fact that an EMB’s independence is guaranteed by the constitution is of critical importance. Electoral laws embedded within the constitution are harder to modify for incumbent or party benefit. It is therefore expected that “elections will be perceived cleaner if some part of electoral law is contained within the constitution” (Aaken 2007:8). Thus the Constitution needs to clearly provide the framework for the EMB’s functions, capacity and substantive independence.

An example of an EMB that is institutionally independent is South Africa’s electoral commission. The Electoral Commission of South Africa (often referred to as the Independent Electoral Commission or IEC) is South Africa’s electoral management body, an independent organisation established under chapter nine of the Constitution of the Republic of South Africa, 1996. It conducts elections for the National Assembly, provincial legislatures and municipal councils. The IEC is known for its institutional independence in decision-making as the government does not influence its leadership, making it more independent in carrying out its electoral duties. A former chair of the IEC, Brigalia Bam (2015:80) has rightly observed that “the IEC is an independent organ of the state and enjoys maximum autonomy and freedom from any interference from any quarters, be it the executive or even political parties”. The Constitution of South Africa 1996 (Articles 190–191) and Chapter 2, Section 3(1-2) of the Electoral Commission Act 51/1996, (ECA) establish the IEC as an independent and permanent body to support and strengthen constitutional democracy in South Africa.

The independence of the IEC is guaranteed by Section 181 of the Constitution. It lists the Electoral Commission as one of six state institutions that strengthen constitutional democracy, and specifies that these institutions are independent, and subject only to the Constitution and the law. They must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. This obliges the government and any other actor to refrain from interference. Where “interference is suspected, the IEC has recourse to the courts” (Ndletyana 2015:181). The constitutional protection is complemented by the ECA, as amended, which provides for more safeguards for the IEC’s independence. While it remains accountable to parliament it has sole discretion over its expenditure. This allows the IEC to discharge its duties with impartiality, separate from government. In this regard, Schulz-Herzenberg (2016) notes that the IEC is widely regarded as an efficient and independent body and a trusted national institution with a credible public reputation.

### **3.5.2. Functional/operational independence**

Functional independence defines the competences of an EMB; it relates to the daily activities of an EMB. Functional independence embraces the question whether the EMB is able and competent to set and specify its own goals (Wall *et al.* 2006). Aaken (2007:6) notes that those competences can be defined as rule-making, rule-application and rule-adjudication competences and may thus vary broadly. Some of these include the EMB’s ability to take decisions on the passive right to vote, that is those that are eligible for election; its competence to demarcate electoral districts. or other laws regulating an election.

Wall *et al.* (2006) define as their core or essential tasks the determination who is eligible to vote; receiving and validating the nominations of electoral participants (for elections, political parties and/or candidates); conducting polling; counting and tabulating the votes. Additionally, EMBs may have other tasks allocated such as the conduct of voter registration, boundary delimitation, voter education and information, media monitoring and electoral dispute resolution. If an independent EMB has a “broad scope of functions, fewer opportunities exist

for the government to influence electoral processes”, cautions Aaken (2009:313) who hypothesizes that the “more tasks which involve potential conflict of interests of legislators or government are outsourced to an EMB, the fairer the electoral process will be”.

### **Hiring and Firing of staff**

Operational independence also entails the hiring and firing of EMB’s staff. Electoral management involves specialized knowledge and skills, and, therefore, the freedom to recruit, appoint and classify personnel can be important to maintaining both the independence and the effectiveness of electoral authorities (Ace 2017). To be perceived totally independent, an EMB needs to have the power to hire and fire its own staff according to its needs.

The Election Commission of India (ECI) provides examples of the practicalities involved in functional and operational independence of an EMB. India is the largest democracy in the World and the management of its election deserves some attention. The modern Indian nation state came into existence in the 15th of August 1947. Since 1951 free and fair elections have been held at regular intervals as per the principles enshrined in the Constitution, Electoral Laws and System.

In the performance of its functions, the Election Commission of India is “insulated from executive interference” (Election Commission of India 2014). It is the Commission which decides the election schedules for the conduct of elections, whether general elections or bye-elections. Thomas and Gibson highlight that it is the Commission which decides on the location of polling stations, assignment of voters to the polling stations, location of counting centres, arrangements to be made in and around polling stations and counting centres and all allied matters (Thomas and Gibson 2014).

Many of the powers and functions of the ECI are referred to in the Representation of the People Act, 1950. This legislation describes its authority to oversee the preparation of electoral rolls and appoint chief electoral officers for each state, district election officers for each district

in a state and electoral registration officers. The responsibility for delimiting electoral boundaries is vested with a separate Delimitation Commission. The ECI is represented on, and provides support to, this body (Ace 2017).

The Representation of the People Act, 1950 further defined the ECI's powers by laying out somewhat more detailed provisions for conducting elections. These powers gave the ECI some important tools for administering elections, including the authority to select election dates, appoint additional election officers (such as returning officers and observers), use voting machines and publish election results (Ace 2017). In 1989, the Act was amended to give the ECI additional responsibility for registering political parties and candidate nominations and monitoring political contributions and election expenses (Ace 2017).

According to Patidar and Jha (2006:192), the ECI is widely recognized by experts as a model of independence. The Indian Constitution established it to be independent and autonomous, well-resourced and beyond the reach of government. McMillan also notes, "although highly political in terms of its actions, the Election Commission has developed and maintained a public reputation as an independent institution which has given it the authority to intervene and regulate the conduct of elections" (2012:187). McMillan asserts that the ECI's reputation has been acquired, in part, from the frequent need to interpret both the broad provisions of the Constitution and the antiquated legislative prescription governing electoral matters (McMillan 2012).

### **3.5.3. Financial independence**

One of the critical indicators of EMBs' independence is that the EMB must receive adequate funding as is reasonably required to carry out its constitutional mandate efficiently. Financial independence refers to the ability to own accounts (usually in combination with legal independence), as well as the question of who decides on the budget (Aaken 2007; Wall et al. 2006; Ace 2017).

There are several minimum requirements regarding the financial independence of an EMB. First, it is essential that the law should establish the independent electoral commission's adequate, secure, and independent financial status. Second, to be totally independent, the EMB should first develop its own budget to be funded under the national budget through an independent/separate allocation. Such budget shall be approved by the Legislature (Ace Project 2017). Third, the EMB should enjoy discretionary power over the disbursement of its allocated funds and procurement of goods and services (Ace 2017). Fourth, the government should be responsible for financing the EMB to enable it to discharge its functions efficiently and effectively. In addition to the government funding, Okello (2006) notes that EMBs may acquire or access funds from other sources such as donations and grants from within and outside the country and they have the possibility of accepting funds also from international organizations or NGOs – a possibility making them more independent from the incumbent government. However, receiving external funds are not without problems. It might create the impression that it is being manipulated by foreign agendas.

Aaken (2009:317) is of the opinion that budgets determined by legislatures produce fairer elections because parliaments are generally more representative than executives. Klassen (2013:6) cautions that if the budget of an EMB is decided by the government and not by parliament, "that makes it easier to push EMBs in the desired direction with a predictable result on its de facto independence". However, "if the budget of the EMB is determined by parliament, the higher the probability that the election will be fair" (Klassen 2013:7). Nevertheless, Klassen (2013:7) further argues that if one party controls a majority of seats in the legislature, EMB budgets could remain vulnerable to partisanship. Therefore, an EMB budget determined by both the legislature and executive would establish a check and balance to ensure greater budget impartiality, as Klassen puts it "Elections will be perceived cleaner if (a) the EMB budget is determined by both an executive component and legislative component, and (b) EMB expenditures are controlled by an independent body". The argument by Klassen is open to debate. Usually a dominant party will control both Parliament and the executive.

The electoral body should not only be adequately funded but also be able to manage its finances in an autonomous and a cost-effective manner, with due attention to staff development and the introduction of modern methods of resource management (López-Pintor 2000:105). Basically, the funds of EMBs are broken into three categories (Wall et al. 2006:175):

**a. Core cost (or indirect cost):** This refers to those costs that are routinely associated with implementing an electoral process in a stable electoral environment.

**b. Diffuse cost (or indirect cost):** This refers to those costs for electoral related services that cannot be disentangled from the general budget of agencies that assist with the implementation of an electoral process; and

**c. Integrity cost:** This refers to those costs over and above the core costs that are necessary to provide safety, integrity, political neutrality and a level playing field for an electoral process. Integrity costs are often largely sponsored by the donor community; and may not be included in EMB budgets, even though they cover functions within the EMB's mandate.

The Independent Electoral and Boundaries Commission of Kenya (IEBC/Kenya), provides information on the financial independence of an EMB. Article 88 of the Constitution of Kenya of 2010 institutes the Independent Electoral Boundaries Commission (IEBC) as the institution in charge of conducting and supervising elections and referenda in Kenya. Other mandates of the Commission include the delimitation of constituency and ward boundaries, voter education, the registration of voters and updating the voters roll, the regulation of candidate nomination by political parties, dispute resolution arising from nominations and regulation of campaign finance among others (The Constitution of Kenya 2010). For all these functions it requires the necessary funding.

According to the IEBC Act NO.9 of 2011, the commission has the following sources of funding (IEBC Act, section 17):

- Monies allocated by Parliament in the annual budget for purposes of the IEBC;
- Grants, gifts, donations or other endowments given to the IEBC; and

- Funds that may accrue to the IEBC in the performance of its functions under any written law.

Section 18 of the Act establishes the Independent Electoral and Boundaries Commission Fund which “shall be administered by the Commission Secretary”. The funds to be paid into the fund include salaries, “allowances and other remuneration of employees of the Commission, and any other operational and other expenses incurred by the Commission in the performance of its functions.” Section 19 of the IEBC Act provides that, the “administrative and other expenses of the Commission, including the salaries, allowances, gratuities and pensions of the members and employees of the Commission shall be a charge on the Consolidated Fund”. Section 20 states that “the members and employees of the Commission shall be paid such remuneration or allowances as the Salaries and Remuneration Commission shall determine”.

Before the commencement of each financial year, the secretary of the IEBC prepares budget estimates in order to be submitted to the treasury for review. The Treasury then presents the IEBC’s budget for necessary consideration and approval to the National Assembly. The National Assembly may approve the budget with or without alterations (IEBC act section 21). Final budget-making authority lies in the National Assembly, which is in turn guided by the country’s revenues and other fiscal constraints (Makulilo et al. 2015). Once approved, the money is paid into a specialized fund in which all commission funds are held. This consolidated fund is managed by the secretary of the commission in accordance with all the laws and regulations relating to public financial management. From this fund, all operational and other expenses incurred by the commission in the performance of its functions shall be paid. According to Makulilo et al. (2015:109) donors have also continued “to support critical activities and to bridge funding shortfalls in priority areas, such as voter education, technical assistance and change management”.

Shumbana (undated) notes that “charging the IEBC’s entire election expenses to the consolidated fund has improved the commission’s financial independence”, while Odhiambo (2016:58-59) posits that the objective of this was to insulate elections budgeting from partisan

debate in parliament or cabinet as a means to reinforce the independence of the Commission. In the European Union Electoral Follow-up mission (EU EFM 2016:6) in Kenya, it has been noted that at least 75% of Kenyans perceiving the 2017 general elections as "free, fair and credible" and the IEBC as an independent, impartial and efficient EMB.

#### **3.5.4. Accountability of the EMB**

Although an Electoral Management Body is supposed to be free from any form of control, it is however accountable for the use of its funds and the way it carries out of its mandate. However, what is important regarding its independence is how and to whom it is accountable. According to Okello (2006), accountability of EMBs is necessary to ensure that they carry out their functions effectively and to ensure that public funds allocated to them be put to the use for which they are intended. The laws establishing EMBs should address the issue of EMBs' accountability since who an EMB is accountable to is very important in maintaining its independence, integrity and public confidence in its impartiality.

According to Wall *et al.* (2006) it is generally accepted as a matter of best practice that EMBs submit their activity reports to parliament for scrutiny and should equally make their reports available to the public as a matter of transparency. Wall *et al.* are backed by Joo-Cheong (2013) who asserts that it is through parliamentary accountability that an EMB's independence is ultimately secured. However, reporting to the executive or government raises the possibility of taking instructions that will help secure the election for the ruling party (Klassen 2013). Norm (2012:44) has also observed that reporting to the government can provide the political parties in government with the advantage of having earlier access to information on sensitive issues, thereby allowing the government to prepare its response prior to the public release of information. Therefore, the legislature is a larger and usually more politically diverse body and reporting to it thus "minimizes chances for instructions that unfairly advantage the party in power" (Aaken 2009:312).



An example of arrangements regarding accountability that ensures independence is the electoral commission of Canada, known as “Elections Canada”, which has an international reputation as an independent and impartial EMB. The Chief Electoral Officer of Canada reports directly to Parliament rather than to a minister of the Crown and communicates with Cabinet through the Government House Leader (Thomas and Gibson 2014). These reporting relationships are meant to emphasize that Elections Canada’s primary accountability relationship is with Parliament, not with the prime minister and Cabinet or with the central agencies that serve the political executive of government. Within 90 days of an election, the Chief Electoral Officer is required to report on electoral administration; he can also submit a separate report that includes recommendations for changes to the Canada Elections Act (Canada Elections Act 2000). He also reports to Parliament each year on his budget and expenditures, although he is the only officer that is not obligated by law to submit an annual report to Parliament (Thomas and Gibson 2014).

By and large, Canadians have a high degree of faith in their electoral agency. A 2011 survey of Canadians revealed that 77.6 percent had “a great deal” or “quite a lot” of confidence in Elections Canada, and 82.6 percent indicated they were either “very satisfied” or “fairly satisfied” with the way it runs federal elections (Canadian Election Study 2011).

### **3.5.5. Status and terms of office of electoral commissioners**

This implies the way the members of the electoral management bodies are appointed, their status and whether and under what circumstances they can be removed. It is referred to sometimes as “personal independence” (Klassen 2013, Aaken 2007). It includes the appointment, tenure and removal of commissioners.

#### ***Appointment***

The independence of an electoral management body is closely related to the method of appointment of its highest members (e.g. Chief Executive Officer, his deputies, the secretary of

the commission...). Some scholars have argued that the autonomy of an electoral commission is positively associated with the number of institutions and political actors involved in the appointment process (Kerr 2013, Birch 2008, Hartlyn et al. 2008).

If the ruling party is in charge of or influences the appointment processes, it might be difficult to ensure the independence and impartiality of commissioners. EMBs' members must be selected in a transparent manner in order to ensure the confidence of the public and the political parties alike, and thus guarantee their independence. Therefore, to ensure the EMB's independence, the mode of appointment of commissioners must be provided by the law (Norm 2012, Okello 2006, Wall et al. 2006). As a matter of best practices, the EMB should consist of members who are not politically.

There are usually three modes of appointment:

- a. Appointment by the head of state

Some EMBs' commissioners are officially appointed by the head of State (e.g. Benin, Cote d'Ivoire, Mali, Burkina Faso, Niger...).

This mode of appointment is controversial and has been the source of concerns in some African states. Appointment by the head of state, without reference to other parties, leaves such appointees open to claims of bias and partisanship. For example, in Botswana, the head of state appoints the Chief Executive Officer of the Independent Electoral Commission (IEC), who is the chairperson of the Commission in terms of Section 66 of the Constitution (Constitution of the Republic of Botswana 1996, as amended in 2006). Monageng (2015:9) argues that the procedure for the appointment of the IEC Chief Executive Officer "has been met with suspicion by opposition parties, with some seeing a certain continuity with pre-IEC days". This suspicion emanates from the fact that even with the creation of the IEC, it is still the President who appoints the Secretary of the IEC, and not the IEC itself. Mogopodi (2006:77) also notes that the present arrangement, by which the Chief Executive Officer of the IEC is appointed by the president, goes against the spirit and intent of a transparent and neutral body. Political parties, as the main stakeholders, continue to question this method and argue that the Chief Executive

Officer should be appointed by the commission in order to ensure that he or she is accountable to it (Mogopedi 2006).

b. Appointment by the legislature

Appointment by the legislature is the process by which members of Electoral Management Bodies (EMBs) are selected by the parliament. Some examples of the appointment of members of EMBs by the legislature include Cape Verde electoral commission, Togo and Guinea Bissau.

For example, members of the Togo electoral commission (CENI) “are appointed by the national assembly for a renewable one-year term, but remain in office until the appointment of a new commission” (Article 19 *Code electoral* 2007). This process is more transparent since involving the “legislature, including opposition parties, in the appointment process can help to provide some degree of multiparty support in the process” (Wall et al. 2006:95). Aaken (2007:17) posits that the appointment by the legislature “will significantly lower the probability of the EMB being misused” in the electoral process in comparison to appointment by the head of state. Furthermore, appointment by the parliament is generally more transparent than by the executive and may require public debate, which can be seen as a barrier for the appointment of individuals who are likely to be too loyal to the ruling party.

c. Appointment by members of the judiciary.

In some states around the globe, members of the EMBs are judges and appointed the highest magistrates of the state. In Costa Rica, the electoral commission is headed by three titular Magistrates and six substitutes, appointed by the Supreme Court of Justice by the votes of no less than two-thirds of the total of its members Art 100 of Costa Rica’s Constitution of 1949). They must meet equal conditions and they will be subject to the same responsibilities as the Magistrates that integrate the Court (Art 100 of Costa Rica’s Constitution of 1949). Lopez-Pintor points to the fact that appointment by a body of judges is expected to lead to a high degree of independence from the executive. It will lead to comparatively more independence than

appointment by the executive or the legislature, if the judiciary is independent (Lopez-Pintor 2000).

### ***Tenure and removal of commissioners***

In order to execute their mandate effectively, electoral commissioners need to have security in tenure of office, guaranteed by law and a commissioner can only be removed by a court conviction, in other words, that they cannot be removed arbitrarily or dismissed by executive decision. Preferably, they should also have a fixed term of office since the length of a commissioner's tenure can have significant impacts on his or her independence and ability to act without fear or favour (Aaken 2007, Klassen 2013). Klassen (2013) notes that if a commissioner lacks long-term security, then his or her actions could be in a real or perceived sense, related to a desire for reappointment. Aaken (2009) advises that life-long tenure will increase the independence of the (head of the) EMB, which should increase the probability of a fair election. This is the case with Ghana's electoral commission "where no duration is assigned to the mandate of the members of the commission who remain on duty until retirement. The only limitations are in respect of age and moral standing" (Hounkpe and Fall 2010:36).

Removal process of commissioners is another important indicator in assessing the level of independence of an EMB. If commissioners can be dismissed from their position at the will of executive, the incentive to resist political pressure will be reduced. Klassen (2013) points out that protection against arbitral removal and immunity from prosecution will enhance the personal independence of the (head of the) EMB and lead to a higher likelihood of fair elections.

The commissioners in Tanzania, for example, are appointed for five years. However, the President can remove any commissioner without consulting anybody. Article 74 (5) of the constitution states that "the president can remove a member of the National Electoral Commission (NEC) for inability to perform the functions of the office or for misbehavior". This

may likely make the members to be loyal to the president, the factor that may undermine NEC's independence and impartiality (Makulilo 2009: 11).

Chaligha (1997: 34) wrote:

[T]o remove any doubts about lack of autonomy caused by this section of the Constitution, it is important for the government to delete this section from the constitution. Once a NEC member has been appointed, the president should not have powers to remove him from office. Either the parliament should be given the authority to investigate his misconduct and if proven to be true, only the parliament should have authority to terminate his membership. Alternatively, the president should appoint a panel of respected Judges of the High Court or the Court of Appeal, to investigate any misconduct by a NEC member, and if proven, the panel should make appropriate recommendations, based on which the president can decide whether to terminate his NEC membership. In this way the NEC will be able to command more respect and autonomy.

### **3.6. Roles and functions of EMBs in supporting democracy**

The duties of an Electoral Management Body according to Wall at al. (2006), Ace (2017), Pastor (1999), Harris (1998) and Garber (1994) include the following among others:

- management of all elections as may be provided for by the constitution or laws of the country;
- registration of political parties in accordance with the provisions of the constitution or laws of the country;
- monitoring and supervision of the activities of political parties including their finances;
- arrangement of annual examination and auditing of funds and accounts of political parties and publishing of a report on such examination and audit for public information;
- preparation, maintenance and revision of voters register for the purpose of any election under the constitution or laws of the country;
- monitoring of political campaigns and provision of rules and regulations which shall govern the political parties;
- ensuring that all its agents which include permanent and ad hoc staff subscribe to the oath of office prescribed by law;
- delegation of its powers to any of its agents, representatives, or officers; and

- execution of such other functions as may be conferred upon it by the constitution or laws of the country.

This section analyses important roles that an independent EMB plays in a country's democratisation process. These include its role in elections and referendums; it must ensure that the outcome is free and fair; its role in boundary delimitation, civic and voter education; updating the voter's roll as well as its role as the regulator of political party finances.

### **3.6.2. Ensuring that the outcome is free and fair**

The process by which the votes of the people are gathered and counted is critical to the government's claims of legitimacy, and to the continued faith of the people in their government. To enhance democracy in a state, an EMB has the obligation to ensure the elections are held in a free and fair environment that will guarantee a credible outcome. To ensure that the outcome is free and fair, an EMB should:

- secure the integrity of the electoral process
- provide mechanisms for fair competition
- guarantee measure for the secrecy of the votes

Such measures increase public confidence in the electoral process. Hans (2012) argues that it is important that every individual who is eligible have the opportunity to vote, but it is equally important that the votes of such eligible voters are not stolen or diluted by fraudulent or bogus votes cast by ineligible or imaginary voters.

### **3.6.3. Boundary delimitation**

According to Ace project (2017) the term "boundary delimitation" usually refers to the process of drawing electoral district boundaries. It can also be used to denote the process of drawing voting areas for the purposes of assigning voters to polling places (Ace 2017). Boundary delimitation covers the boundary setting process associated with voting areas needed for the purposes of assigning voters to polling places. These boundaries need to be adjusted

periodically due to spatial demographic shifts over time and thus remain relevant to even the most established democracies (Ace project 2017). The Ace project (2017) notes that if electoral boundaries are not periodically adjusted, population inequities develop across districts.

In some countries across the world, boundary delimitation is under EMBs' duties. These include among others Indonesia, Uganda, Kenya, Nigeria, and Costa Rica. It is important to note that more than one institution can be considered as party of an EMB in a state. In some states such as South Africa the IEC is also responsible for boundary demarcation but many states have a separate independent demarcation board or commission. Demarcation is often politically influenced and may result in gerrymandering. That is why Wall et al. (2006:65) assert that boundary delimitation is a politically divisive issue, and leaves an EMB open to attack by those who perceive the results as not serving their interests. Thus, by manipulating boundaries certain political parties may be advantaged. As a result, some scholars on election management maintain that boundary delimitation is best handled by an institution other than an electoral commission, since this practice can easily lead to the imposition of electoral district boundaries that are favourable to the current majority party in the legislature, thus institutionalizing a hold on power (Wall et al. 2006). This situation may damage the EMB's image and credibility. Thus, for free and fair elections, as well as the integrity of the elections it is important that demarcation be done in a very professional and unbiased way.

In the United States, for example, legislators are usually responsible for drawing electoral district lines (Ace 2017).

#### **3.6.4. Civic and voter education**

An EMB has, in the process of supporting democracy in a state, "the responsibility of formulating and implementing civic education programs relating to elections" (Stenberg 2007:8). Voter education is an important element in developing an environment within which free and fair elections may take place, and according to Merloe (2006:65) the goals of voter education is "to ensure that the electorate is sufficiently informed about voter registration,

voting choices and voting procedures to provide a genuine opportunity for exercising the right to vote and to make an informed choice among electoral contestants”. This is especially critical when it comes to a state with a high percentage of illiteracy and with several local Languages. Voter education gives literacy and confidence that the electoral process is appropriate and effective in selecting a government and promoting policies that will benefit each and every individual citizen (Ace 2017). The Carter Center (2011) posits that adequate voter education fosters greater participation in the electoral process by citizens. Full participation of electors is necessary for representative government, and voter education is especially important in contexts where citizens have not received civic education in school (Carter Center 2011).

During the voter education, an EMB make sure that voters fully comprehend how to cast their vote which can be disqualified for being incorrectly marked, or they can face another issue that limits or eliminates their capacity to vote. Basic voter education can secure a peaceful voting environment if it touches every part of the state. If eligible citizens are not well-informed and motivated to vote, then elected leaders and institutions may lack public confidence.

### **3.6.5. Maintaining the voter’s roll**

The voter’s roll is linked with the register of voters. It is necessary that voter registers be updated before the day of elections and are made available in polling stations to verify the eligibility of voters requesting a ballot.

Updating the voter’s roll is important since it gives to eligible voters a genuine opportunity to exercise the right to vote, prevent ineligible people from voting and block multiple voting since the incorrect registration of voters makes it easier to manipulate the voting process Bishop and Hoeffler (2016). Other benefits of updating the voter’s roll include:

- assist new eligible voters to register,
- allow already registered voters who have changed the address since they registered to update their details and to re-register in correct electoral register,



- and allow registered voters whose address details are not on the voters' roll to provide this information.

### **3.6.6. Regulator of political party finances**

EMBs work to make sure people understand the rules around political party finance. Alongside this work, they also take action when the rules are broken and publish information on political finance. In Kenya, candidates and political parties have to report all financial contributions they receive to the EMB and provide an audited report of their expenditures during election campaigns (Ace 2017). The legal framework for elections must include campaign finance requirements for candidates since “the lack of applicable campaign finance legislation and regulation undermines equality of opportunity and transparency in the election process” (EU EFM 2016:44). Thus, the EMB must ensure that campaign spending limits are adhered to.

### **3.7. Factors affecting the independence of an EMB.**

While EMBs play a central role in the democratic project of Africa, it is widely acknowledged that the structural character of some EMBs (for example Nigeria, Kenya, Cote d'Ivoire, Democratic Republic of Congo) “have over the years become the focal points at which elections are compromised” (Moveh 2011:171).

In Africa whatever their level of independence, EMBs face similar challenges. They face challenges in financial availability; they have also confronted challenges in the demarcation of constituencies, lack of impartiality, politicization of electoral commissions, uneven electoral playing fields, conflict management and resolution, use and abuse of incumbency, and effective voter education. In one way or another, it has to rely on the government, parliament and other political forces.

This section identifies some of the key challenges that hinder fairness of elections in Africa:

### **3.7.2. Appointment by the head of state: Heads of some EMBs are presidential appointees**

There is the problem of political interference in the work of EMBs in Africa, either real or perceived. In many instances, the Chairs of the Electoral Commissions in Africa are appointed by the head of the state so there is always the suspicion that the Chairperson is in league with the ruling government to rig the election and their impartiality is compromised. This is the case of East Africa where Makulio et al. (2015) have raised concerns over the overweening influence of presidents in the appointment of commissioners. In Tanzania and Burundi, for example, while election commissions can claim that their constitutions legally protect their independence and autonomy, there are low selection thresholds for the President to use as the appointing authority.

In Nigeria, for example, the Head of State is vested with power to appoint electoral commissioners subject to the confirmation by the senate under Section 154 (1) of the 1999 constitution of Nigeria. Moveh (2011) argues that former President Olusegun Obasanjo appointed members of his political party as commissioners; who served in the electoral commission during the conduct of the 2003, 2007 and even to the 2011 Presidential elections. While INEC is presented and labeled as an “independent body” it has in reality been constituted as an extension of the executive. The personal observation of the study by Moveh corroborates this fact. For example, he observed in all the INEC offices visited across Nigeria that the official vehicles of INEC; including the Toyota land cruiser jeeps of the commissioners were tagged “Presidency” (Moveh 2011:182). Ijim-Agbor (2007:92) has also observed that Part of the explanation for election mismanagement in Nigeria is the fact that the INEC chair and other officials are appointed by the president and endorsed by the ruling party which is often in control of the national assembly. “For them to survive they have to operate as partner of the incumbent regime”. Against this backdrop, the Electoral Review Committee, which has the mandate “to examine the entire electoral process with a view to raise the quality and standard of our general elections and thereby deepen our democracy”<sup>4</sup>, proposed that the National

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<sup>4</sup> Report of the Electoral Committee Vol 1 Main Report (2008:ii)

Judicial Council play a part in the appointment of members of the country's Independent National Electoral Commission (Jinadu 2014).

The election Cameroon (ELECAM) is composed of twelve members appointed for a four years renewable term of office (Section 8(2) of the ELECAM law). The chairperson and vice-chairperson as well as all the other members of the ELECAM and the Director General his deputy are appointed by the President of the Republic after consultation with political parties represented in parliament as well as civil society organizations (Secs 8(1) (3) & 20 of the ELECAM law). Fuh has observed that such consultations are however non-binding on the president which implies that the appointment of ELECAM members and its key officials is technically the exclusive preserve of the President of the Republic. Fuh (2010) cautions that this manner of appointment is very arbitrary, restrictive, devoid of any iota of transparency and involves no input whatsoever from other organs of government. This mode of appointment saps ELECAM of any credibility and only helps to reinforce negative public perceptions about its independence and impartiality.

The constitution of Tanzania provides for the unilateral character of the appointment and dismissal of the members of the National Electoral Commission (NEC) by the President of the United Republic (Makulio 2009). Makulio notes that the president (the chairperson of the ruling party), who singly appoints the commissioners of the National Electoral Commission (NEC), whose tenure is at his/her pleasure, may have either direct or indirect influence over the NEC to favour his/her party (Makulio 2009). That is why the 2015 Commonwealth Observer Group recommended in its report that the appointment of NEC members should be more consultative and should not be the sole prerogative of the President, in order to enhance the independence and credibility of the institution.

Many studies have confirmed that the NEC is not independent and is still considered as mouthpiece of the government with Makulio (2009) observing that in the 2005 general elections, for example, the former president, Benjamin William Mkapa, was reported by the

*Nasahaon* 15 June 2005 to say that ‘In my capacity as the *Chama Cha Mapinduzi*<sup>5</sup> President, I will not allow any break-down of democracy under my administration. I will make use of the state apparatus to make sure that CCM wins a landslide victory’ (translated in Makulilo 2009:441). Makulilo cautions that if the president’s statement is an order, and the chain of command principle is observed, there is no way the NEC, as one of these state apparatuses, can avoid implementing the president’s wishes either openly or secretly. It can generally be learnt therefore that the constitutional clauses that purport to declare the NEC to be an independent department do not offer and protect such independence in a practical sense. However, Norman and Senguji (2002) argued that, there is no point to look at the appointment criteria as a weakness of the National Electoral Commission since it is a worldwide phenomenon. They further added that even the presence of judiciary is dependent on the appointing authority, in this regard the president who is also the Chairman of the Ruling Chama Cha Mapinduzi.

This mode of appointing EMBs members impacts on their functioning because these members are likely to act faithfully to the presidents who appointed them. Therefore, the electoral process will be in jeopardy given that the EMBs commissioners will lack impartiality and independence in the running of these elections. Therefore, the appointment process needs to be done by an independent body as Dundas (1997) has argued that “members of the body must be appointed in such a way as to ensure the confidence of the public and the political parties alike”.

### **3.7.3. Politicization of electoral commissions**

Another and major constraint on the functioning of an independent and impartial electoral administration in Africa is the politicization of the electoral administration, where the EMBs are composed of political parties’ representatives.

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<sup>5</sup>Chama Cha Mapinduzi is the supreme state party in Tanzania as recognized by the Constitution of the Revolutionary Government of Zanzibar of 1984

In the Republic of Benin, under the pretext of ensuring the transparency and impartiality of the electoral commission (CENA), the law allows it to be highly politicized. Highly politicized means that almost all the members of the commission are appointed by political parties. According to the Act N° 2007-25 of November 17th 2007, relating to the general regulations for elections in the Republic of Benin, political actors appoint 16-17 members of the CENA. Hounkpe and Fall (2010:145) assert that the high level of politicization of the CENA and its branches is “an important cause of difficulty in the management of elections in Benin, if not the main source of challenges and with the most disastrous consequences”.

The high politicization over the CENA was meant to allow transparency in its composition by involving political parties to participate in the administration of the electoral process. However, Hounkpe and Fall (2010) note that today, it is obvious that the results are still far from this goal, and this is still a euphemism. On the contrary, the consequences of the extreme politicization of the CENA on the electoral process in general are multiple. Hounkpe and Fall (2010) mention for example:

- The transformation of the CENA into an instrument of partisan fight where finally each political group employs its representatives to misuse, sometimes with success, the electoral process for opportunist and strategic purposes;
- Gradual but constant loss of the credibility of the CENA among the population in general and even among the political actors themselves;
- Permanent tension within the CENA which is a handicap for its normal functioning, thus affecting its efficiency;
- The transformation of the CENA into an instrument of periodic satisfaction of political clients (this explains partially the high rate of renewal noticed from one ANEC to the other);

- Gradual but constant degradation in the quality of elections held in Benin

The major constraint on the functioning of an independent and impartial electoral administration in Mozambique according to the Ace (2017) Project is the politicization of the electoral administration. The political party representation in the election commissions and the political appointees within the Technical Secretariat for Administration of Elections (Secretariado Técnico da Administração Eleitoral, STAE) are intended to increase the opposition's trust in the electoral process but, as political representation is based on shares of parliamentary seats, the ruling party, Frelimo, still dominates by virtue of its majority in the Parliament. While party-based EMB membership can have the advantage that each party polices the actions of all the others, the Mozambique experience shows its limitations when one party retains a majority over a substantial period of time. In addition, as the Mozambique electoral commission (Comissão Nacional de Eleições CNE) is only composed of members of political parties that have representation in the national Parliament, the two main parties dominate the decision-making process to the detriment of emerging parties (Ace 2017).

The political party-based system in the composition of the EMBs in Africa has meant in practice that commissioners are often more inclined to act in the interest of their party than as impartial upholders of the electoral laws and this model presents problems if the legislature is dominated by one party or coalition. That is why, Lehoucq (2002:36) has pointed out that, there is a need to “depoliticize” the electoral governance, while Wall et al. (2006:89) note that “Depoliticization of EMBs may be more appropriate as confidence in the electoral process grows.

#### **3.7.4. Budgetary constraints: Funding for EMBs is inadequate**

The funding of the electoral process and of EMBs is another issue that requires attention. In Africa, it is sorry to note that the majority of the electoral commissions are confronted with

financial problems, which may limit their independence and subjugate them to the incumbent regime.

According to the provisions of Law No. 2012/001 of 19 April relating to the Electoral Code in Cameroon, “Elections Cameroon” is an independent body responsible for the organization, management and supervision of all election and referendum operations (Section 4.1). The Director General of ELECAM is tasked with preparing the draft budget of the commission and must be approved by the electoral board (Section 33.1). The Chairperson of the Electoral Board is responsible to forward the draft budgets to Government for concerted consideration and tabling before Parliament for adoption as part of the Finance Law (Section 33.2) In essence therefore, Fuh (2010) argues ELECAM cannot elaborate its own budget independently and it is the government that has the final say on what to submit to parliament as ELECAM’s budget. He is sorry to notice this state of affairs since the government at any given time, can decide to starve the institution of funds. This would inevitably have the effect of rendering the body ineffective given that election management requires huge financial resources (Fuh 2010).

Ntaganda (2015:42-50) points out that election management in Burundi faces serious budgetary constraints. One of its most worrisome aspects relates to delays in the disbursement of funds meant for the National Independent Electoral commission (NIEC). For example, just some few months before the Election Day, Abdellaoui (2010) asserted that the government was not able to secure approximately USD 21 million of a total budget of USD 52.8 million that the electoral process was expected to cost. This assertion was backed by Ntaganda (2015) who noted that the NIEC did not receive its operational budget for the 2010 electoral cycle until several months after its establishment. He continues and argues that the disbursement commenced only seven months before the elections, and even then, it was too late to enable it to effectively plan the recruitment of support staff or purchase equipment and furniture for offices provided by the state.

In the same vein, Maganga (2016) posits that although the Electoral Commission of Malawi's (MEC) budget gets approved by parliament, it is not guaranteed timely funding by the treasury. The MEC has to beg funds from the treasury to be able to fund its activities. As one commissioner indicated in Maganga's study, sometimes they have to seek the president's intervention to obtain funding. This situation places the commission in an awkward position, and could easily be influenced by the executive. Maganga (2016) notes that if the MEC is not funded on time, it is not able to implement important activities or follow up on issues raised by international and local election observers. Further, when the MEC is not funded as required by law, it could give the impression that government is deliberately withholding resources as a form of rigging (Maganga 2016).

The Independent National Electoral Commission in Nigeria is facing similar problems. Generally, the nation's electoral bodies have been poorly funded, the funding problem has been determined first and foremost by the state of the economy, the interest of the state, and those of its ruling class, and on the realities of what is at stake (power), and its associated benefits (Electoral Reform Committee 2008:99).

It is the executive that determines INEC's funding and how the funds are dispersed. This constrains both the independence and functionality of the institution. Nyam (2015) points out that some of the weaknesses of INEC are connected to the disbursement of funds. These affect the registration process and the printing of ballot papers and related matters. Moveh (2011) asserts that the INEC is independent in name, yet political parties and candidates have provided part of the logistics for the administration of elections with a view to influencing the outcome of the process in their favour. This was noticeable during "the 2002 and 2006 voter registration exercise where parties, governors and local government chairmen provided generators for powering the computers used for registration and accommodation for electoral officers" (Moveh 2011:179).



The financial challenges have continued to affect the performance of INEC as noted by its chairman in 2010 in preparation for the 2011 elections:

...we met a budget on ground and you are aware that the 2011 appropriations were reduced. That budget cut also affected us because while we were requesting for 74 billion Naira for the direct data capture machines and other logistics our capital budget was reduced by eight billion. That money was meant to address some of the infrastructural decay in our state and local government offices which are in a state of disrepair....we will be making a representation to the government on this so that we will reduce to the barest minimum the dependence of our staff on governors and local government chairmen for some logistics because we found out that some of them (INEC' staff) make themselves available to be used by going to the governors and local government chairmen to request one favour or the other (Daily trust 31<sup>st</sup> August, 2010 quoted by Nyam (2015:100)).

Nyam (2015:101) cautions: "Given the state of the funding for INEC and its closeness to the incumbent president and party, it has been impossible for it to exercise its independence. This has remained a conditioning factor for electoral violence in Nigeria. Its actions have also been triggering factors for violence".

In his study conducted in 2011, Mwaba has noted that one of the key weaknesses that the Electoral Commission of Zambia (ECZ) was then facing, before the current legislation, was to do with funding. He argued that the electoral statutes did not specify categorically how the commission and the running of elections should be funded. This has resulted in the commission being funded directly by the Ministry of Finance, like any other Ministry or state department. This mode of funding renders severe difficulties for the commission to execute its functions properly and timely. However, the current electoral commission bill of 2016 as tackled this issue and the ECZ is funded directly through the parliament (At 14.1.a. the electoral commission of Zambia Bill 2016).

### **3.7.5. The use and abuse of incumbency: Behaviour of the ruling party incumbents renders the election unfair – (mis)use of state resources**

It is worth noting that in most countries around the world the governing party tends to have a slight advantage in winning the elections. However, in Africa the ruling party uses this advantage to rig elections as the case in Uganda 2016, the Democratic Republic of Congo 2011, and Zimbabwe 2013 among others. This situation is one of the greatest challenges to the consolidation of democracy in Africa. Ibrahim (2014) observes that almost one third of African countries have undergone experiences in which incumbents have engaged in the abuse of the powers of incumbency to extend their tenure beyond two terms in flagrant disregard to the earlier commitment they had made in the African Union.

In a conference proceedings report of the Electoral Institute of Southern Africa (EISA 2010), it was agreed that the abuse of state resources through incumbency includes campaign financing, partisan electoral redistricting, discriminatory media visibility and disparity in available funding. EISA (2010) observes that owing to the dominant party system, incumbents may also deploy the machinery of the state (for example, state buildings, vehicles, and communications infrastructure) for electoral campaigns. This rings true during the electoral process when incumbent regimes want to retain power by rigging elections through the overt manipulation of the electoral commission. The use and abuse of incumbency has been proved to be one of the causes of unequal electoral playing field and may create biased competition between political parties contesting elections.

Governments and governing parties in Nigeria have since colonial times abused the power of incumbency to secure unfair advantage for favoured candidates and candidates of governing parties (Nyam 2015). This has been confirmed by Ibrahim (2014) who posits that the character of Nigerian politics since 1999 has been characterized by massive corruption and the abuse of the powers of incumbency by successive administrations. This has taken various forms in the

country's electoral administration history. Fall et al. (2012) note that one principal form that the abuse of the power of incumbency has historically assumed in the country, is the use of state power and resources and of traditional authority, including the civil service, police and state security agencies, and to a lesser extent the courts, to harass political opponents in the period leading to and after election day. Such abuse of the power of incumbency reached its nadir in the 2003 and 2007 general elections, not only reviving sad memories of the disintegrative consequences for the country of the crass and unabashed partisan deployment of such authority between 1962 and 1966, but also assuming the more novel form of the unholy coalescence of state power and the financial clout of corporate Nigeria to create an unfair electoral advantage for governing parties and their candidates particularly for presidential and gubernatorial elections (Fall et al. 2012).

Kenya was under an unchallenged dictatorship regime of Arap Moi between 1978 and 2002. The first democratic election came in 2002 during which Mwai Kibaki was the winner of the presidential election. Those elections were relatively deemed free and fair. Five years later (in 2007), Kenya held another poll. The outcome of the elections led to violence and loss of lives because those elections were marred by fraud and contained important misuses of incumbency by the Kibaki regime.

Opposition leader Raila Odinga was allegedly having a sizeable lead during the electoral process (Ibrahim 2014). Ibrahim noted that at the alleged behest of Kibaki, the Electoral Commission of Kenya had cancelled its count of votes only to resume later with results showing Kibaki to be in the lead. It is worth remembering that Kibaki had independently appointed nine commissioners of the electoral commission just ten months before the general elections of December 2007 opposing the inter-parliamentary parties group agreement that obliged talk with opposition parties preceding such appointments. Ibrahim (2014) confirms that the chairman of the electoral commission said that there was strong pressure from the dominant party for him to act in their best interests.

In Sierra Leone, Fall et al. (2012) have also observed that all elections in the country since the country's independence have been dogged by accusations of the abuse of state resources by incumbents. In the 1996 elections there were widespread reports of diversion of state resources to the campaign activities of the junta supporter, the National Unity Party. Similar abuses of state resources were reported for the 2002 and 2007 general elections and the 2004 and 2008 local government elections (Fall et al. 2012).

### **3.8. The way forward: A need for electoral reform in Africa**

In her book, Brigalia Bam (2015:54) wrote:

*“The electoral systems that we use on the continent (Africa), in our country (South Africa) and in developing democracies are systems we have copied from other countries and from the countries that had colonized us”.*

This statement implies the need and importance of electoral reforms in Africa so that Electoral Management Bodies (EMBs) can contribute to the realization of democracy. The institutionalization of EMBs in Africa was a step forward in consolidation democracy; however these institutions are still weak and are influenced by the government's decision. Thus, they must be reformed in order to allow them to function fearlessly and independently. Such independence means that the electoral administration does not bend to government, political or other partisan interests (Ace 2017). Reforming EMBs in Africa can bring back public confidence thereby enhancing credibility of an EMB. International IDEA's handbook on electoral management design (2014) divides electoral reforms into three categories:

- Political
- Administrative
- Legal

The Ace project (2017) refers to political reform as changes that take place in the political environment within which an EMB operates, such as giving it more autonomy or creating a

more effective and transparent framework for its funding and accountability. Administrative electoral reform involves changes that are related more to the day-to-day work of an EMB, such as the introduction of new strategies, policies and structures. Finally, legal electoral reform refers broadly to changes to the constitution, electoral laws and rules and regulations (Ace 2017).

Reform should focus on strengthening the personal independence of the members of electoral commissions (Appointment and removal). It is recommended that the process of selecting candidates be open and transparent, and that the criteria for selection be based on high levels of professional competence and integrity (Makulio at al. 2015). Governments should embrace comprehensive reforms that separate the ruling parties from the state to ensure free and fair elections.

### **3.9. Conclusion**

In this chapter the focus has been on the notion of electoral management body, and the focus was on the independent model of EMB. This study argues that the ideal independent EMB should be structurally entrenched in the country's Constitution and other electoral laws. Its structure must be separated from government ministries and free from their influence. Moreover, these laws should not be easily amended by the ruling party. The appointment process of EMB's members should involve groups other than the ruling party and must obtain the legislative approval. This study recommends the appointment of independent, impartial, skilled and professional individuals, which has to be imbedded in the country's constitution. Members of the EMB should be appointed for life tenure to guarantee their personal independence. Their removal from office should only be for grounds that go against the legislation in force, following an appropriate investigation and due process of the law. EMBs should have the autonomous to hire its staff following a transparent process which ensures neutral and well-trained personnel are hired. They should also have the autonomy to discipline its staff. Concerning its finances, a consistent funding should be timely made available so that the carry out their functions autonomously. To make it clearer, the country's Constitution

should set a percentage of the national budget to avoid a late release of funds. An EMB should only be accountable to the Parliament. Reporting directly to parliament is a democracy-building procedure since this provides a transparent process that is accessible to all political stakeholders at the same time.

This chapter has further discussed the importance of EMBs in supporting democracy in Africa and the challenges they meet in carrying out their missions. The EMB has the duty to support a well-run election and referendum, to ensure that the outcome of the elections is free and fair. The EMB also plays a pivotal role in a country's democratisation by setting the boundary delimitation, providing civic and voter education, updating the voter's roll and by regulating funding of political parties in an independent manner.

The chapter has identified some key constraints that hinder the practical independence of EMBs in Africa. It is stated that the faulty appointment process of EMBs' commissioners, which in some instances is unilaterally done by the head of states without referring to the parliament (Nigeria, Cameroon, Tanzania...), has a negative influence on the work of the EMBs since there is always the suspicion that such appointees are in league with the ruling government to rig the election and their impartiality is compromised. The second challenge that EMBs face in Africa is the politicization of electoral commissions. This mode of composition has hindered the independence of EMBs in Africa because the representatives of political parties in the EMBs will act faithfully and try to pay back to their political parties, thus undermining the impartiality and the independence of the commission. This chapter has noticed that the Funding for EMBs in Africa is inadequate. This is the case of Zambia, Burundi, Nigeria, the DRC... The use of abuse of the incumbency is also another dimension of the challenges that electoral commissions in Africa encounter in carrying out their works. Finally, in this chapter a way forward has been proposed. It is stated that Africa needs an electoral reform which should cover political, administrative and legal electoral reform. The next chapter assesses the formal independence of the CENI and the EC with relation to the characteristics of independence of EMBs as enumerated above.

## **CHAPTER FOUR: ASSESSMENT OF THE INDEPENDENCE OF THE CENI AND THE EC**

### **4.1. Introduction**

It is worth noting that an electoral management body (EMB) is one of the most important institutions in a country's democratisation process. For electoral management bodies to realize their missions, they need to function according to appropriate principles. Thus, the EMB needs to be formally (structural independence) and fearlessly (behavioural independence) independent in order to ensure public confidence in the electoral process. As noted in the previous chapter, there are two ways in which electoral observers, scholars and electoral stakeholders can assess the independence of an EMB. Firstly, they examine EMB's structure (formal rules that stipulate the organization and function of EMBs). Secondly, they assess the performance of an EMB (the implementation of these rules and procedures in practice).

This chapter assesses the formal independence of the EC and the CENI with regard to their respective national laws which establish them. The practical independence or independence of action is examined in the following chapter.

### **4.2. Ghana**

Ghana in West Africa gained independence from Britain in 1957. Ghana witnessed four military regimes and three constitutional democracies since independence (Crawford 2009). With an estimated population of about 25 million, Ghana's current democracy is generally regarded as prosperous and consolidating (Abdulai & Crawford 2010). Since the establishment of the Fourth Republic in 1993, the ruling party regularly alternated between the two major political parties.

The National Democratic Congress won the elections in 1992, 1996, 2008 and 2012.<sup>6</sup> The New patriotic Party in turn won the elections in 2000, 2004 and 2016.

The easiness by which power has been handed over, with defeated governments and their supporters accepting the outcome of elections, is one of the most significant indicators of Ghana's democratic maturity. The essentially untroubled transfer of power on three occasions over the last 15 years indicates that the nation has, by and large, confidence in its electoral institutions. Ghana met "three turnover rules" when it peacefully transferred political power in 2001, 2009 and 2016 (Abdulai & Crawford 2010) and has recorded seven elections in unbroken order - 1992, 1996, 2000, 2004, 2008, 2012 and 2016 (Abdulai & Crawford 2010; Gyimah-Boadi 2010).

#### **4.2.1. The electoral Commission of Ghana**

The Electoral Commission of Ghana (EC) is a body established by the 1992 Constitution and charged with the responsibility of organising elections. The EC is the exclusive institution of state mandated by law to manage electoral processes. Since the rebirth of democracy in 1992, the EC has managed seven successive general elections which are considered to be peaceful, credible, free and fair by most observers of electoral democracy. The primary goal of the EC as enshrined in the constitution is the organization of free and fair national and subnational elections in Ghana as part of the country's democratic practices (Electoral Commission of Ghana 2014).

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<sup>6</sup> The military government came to an end in January 1993 after elections were held in late 1992.



#### **4.2.2. Ghana's electoral system**

Ghana's electoral system should be understood within the context of internal legislation that provide the foundation for the electoral process, as well as various international treaties that it has ratified.

Ghana's Constitution enshrines key international obligations, including political rights such as the rights to associate freely with a political party, to vote by secret ballot, to participate in public affairs, and to hold elected office (1992 Constitution of Ghana, Articles 49(1), 55). The constitution establishes additional human rights, which must necessarily be respected if an electoral process is to be a clear reflection of the will of the people. These include freedom of opinion and expression, freedom of assembly, and freedom of movement (1992 Constitution of Ghana, Article 40(d)). These constitutionally protected political rights are reflected in the 1996 Ghanaian Public Elections Regulations, the 1995 Registration Regulations, and the 2000 Political Parties Law, among others. These election regulations are generally in line with international obligations and provide a strong foundation for democratic elections.

In addition to the above, Ghana has ratified several international treaties, including the UN International Covenant on Civil and Political Rights, the UN International Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Political Rights of Women, and the UN Convention against Corruption. Furthermore, Ghana has ratified a number of important regional treaties, including the African Charter on Human and People's Rights and the African Union Convention on Preventing and Combating Corruption. Ghana is also a signatory to the Universal Declaration of Human Rights; the African Charter on Democracy, Elections, and Governance; and the Declaration of Principles on Freedom of Expression in Africa. It also adopted the Economic Community of West African States Protocol on Democracy and Good Governance as well as the Protocol on the Fight against Corruption.

Ghana's electoral system is defined in the Ghana Constitution as a presidential republic with a single-house legislature consisting of 230 members<sup>7</sup>. Election to the office of president requires a winning candidate to receive more than 50 percent of the electorate's vote (1992 Constitution of Ghana, Article 63(3)). In cases where no candidate receives a majority, the constitution, in Articles 63(4) and 63(5) requires a runoff election between the two candidates receiving the most votes in the first round of elections. Ghana uses a ticket-based system for the office of vice president, with vice presidential candidates elected if their presidential running mate receives the necessary votes (1992 Constitution of Ghana, Article 59(4)). In contrast, parliamentary elections are conducted on the basis of a plurality system, with a candidate declared the winner if he or she earns more votes than any other candidate. For both presidential and parliamentary candidates, the term of office is four years, with presidential candidates limited to two terms in office per the Ghana Constitution, Article 66(2). For referenda, at least 35 percent of the electorate must participate, and of the valid votes cast, at least 70 percent must vote in favor of the issue (The Carter Center 2008).

The following are the basic characteristics of the Ghanaian electoral process (Electoral Commission of Ghana 2008):

- Universal adult suffrage
- Yearly registration of voters
- Voluntary participation in registration and voting
- Where you register is where you vote
- General elections (presidential, parliamentary, and local level elections)
- Partisan politics at the national level only
- National and local level elections alternate at two year intervals
- Secret ballot
- Use of Identity Card issued by the Electoral Commission to establish voter's identity and to prevent impersonation.
- Presidential and parliamentary elections held on the same day

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<sup>7</sup> Article 93 of the Ghana Constitution requires that the legislature be composed of no fewer than 140 members. After the 2000 elections, the number of members in this body was raised from 200 to 230.

- First-past-the-post at the parliamentary level and absolute majority at the presidential level
- Run-off, if no winner emerges in the first round of a presidential election
- Use of indelible ink (electoral stain) to prevent multiple voting
- No minimum voter turnout required at public elections
- An Electoral Commission as a corporate entity with the capacity to acquire and own property and to sue and be sued
- Political parties as corporate bodies

There have been several calls in Ghana by some political parties and civil society organisations to adopt the proportional representation form of electoral system. They argue that the proportional representation form of electoral system has the advantages of promoting representativeness, embracing diversity, reducing electoral tensions, strengthening the independence of legislators and finally enhancing democracy. This call has been necessitated by the deep-seated and sharp division inherent in the winner-takes-all or First-past-the-post voting system. For instance, the People National Congress (PNC) has called for the adoption of the proportional representation as an alternative for the winner-takes-all-system. The party describes the winner-takes-all system as a “hijack of the governance system” (Brenya et al. 2015). The Party further claims that the current electoral system in Ghana makes it difficult to harness ideas of all Ghanaians for national development (Bokpe and Darkwah, 2015). As a result of several of these concerns raised against the winner-takes-all electoral system, there is an ongoing debate among social commentators and political pundits on the need to revise Ghana’s electoral system. Many of these commentators have called for the replacement of the winner-takes-all electoral system with proportional representation system.

#### ***4.2.2.1. Legal framework and mandate of Ghana’s Electoral Commission***

When the former Electoral Commission of Ghana declared the incumbent military leader, Jerry John Rawlings, as the winner of presidential election in 1992 amidst widespread allegations of fraud, the opposition rejected the outcome and threatened to boycott elections until reforms were carried out (Gyimah-Boadi 2012). Rawlings remained in the presidency, but “the need to

address opposition demands and reduce political conflict was evident” (Gyimah-Boadi 1999:112). This was the backdrop to electoral reforms in Ghana.

After reforms, the new Constitution of 1992 and the Election Commission Act of 1993 instituted an independent Electoral Commission (EC). These are two fundamental laws that relate to the creation and functioning of the EC. Chapter Seven the 1992 Constitution of the Republic of Ghana gives provisions on the composition, structure, mandate, tenure and independence of the Commission. Powers and missions of the EC include (Article 45 of the 1992 constitution of Ghana):

- To compile the register of voters and revise it at such periods as may be determined by law;
- To demarcate the electoral boundaries for national and local government elections;
- to conduct and supervise all public elections and referenda;
- to educate the people on the electoral process and its purpose;
- to undertake programmes for the expansion of the registration of voters; and
- to perform such other functions as may be prescribed by law.

According to the Article 46 (Constitution of Ghana), the Electoral Commission “is and independent body and is not subject to the direction or control of any authority in performing its functions”. As a result, the formal independence of the EC is legally established.

In addition to these, other functions of the commission include:

- to draw boundary delimitations (Article 47 of the 1992 Constitution)
- to undertake the preparation of voter identity cards and to store properly election material (Article 2 of the Electoral Commission Act of 1993).
- to Register political parties (Article 55 (6) of the 1992 Constitution)
- to set the date for a presidential election (Article 63 (2) of the 1992 Constitution)
- to make regulations for and supervise the election of the regional representatives of the Council of State (Article 89 (1) of the 1992 Constitution)

- to hold referendum in connection with a bill to amend an entrenched provision of the Constitution (Article 290 (4) of the 1992 Constitution).

#### **4.2.2.2.     *Structure of the Electoral Commission of Ghana***

The Electoral Commission of Ghana is constituted of a three-tier structure consisting of the Head Office, Regional Offices and District Offices. The Head Office of the Electoral Commission of Ghana is located in the country's capital city Accra, although according to the electoral commission act 1993 "the Commission shall meet at such times and such places as the Chairman shall determine but shall meet at least once in every two months" (Art 6.1). At the regional Offices, a director assisted by at least one deputy regional director, heads a regional office of the Commission who reports to the Commission through the Head Office Directors (Asante 2012). A District Electoral Officer (DEO) reports directly to his or her Regional Director, and heads a District Office of the Commission (Asante 2012).

#### **4.2.2.3.     *Composition and Appointment of commissioners***

Article 43 (1) of the 1992 Constitution states that "there shall be an Electoral Commission which shall consist of

- (a) A Chairman
- (b) Two Deputy Chairmen
- (c) Four other Members."

Thus, the EC is constituted of seven members who are appointed by the Head of state acting on the advice of the Council of State (Art 70.2 1992 Constitution). Among the seven members, three of them are permanent members of the commission and work on full time basis and "the four others are only brought on board from time to time".

The seven (7) members of the Commission collectively constitute the policy-making and management body of the organization and exercise general supervision over the activities of its

staff. Section 7 of the Electoral Commission Act, 1993 (Act 451) empowers the Commission to appoint such Committees as it considers necessary for the discharge of its functions. Such committees may include persons who are not members of the Commission but must be chaired by a member of the Commission. The decisions of such committees are not binding on the Commission.

According to Article 44 of the 1992 Constitution and Section 4 of Act 451 which establishes the Electoral Commission, the Chairman of the Commission, his two deputies and four other members who have responsibility for the day-to-day administration of the Electoral Commission and implementing policy directives of the Commission as a whole, shall be appointed by the President on the advice of the Council of State (art 70 (2) of the Constitution).

#### **4.2.2.4. *Security of tenure and removal***

On terms and conditions of service, Hounkpe and Fall (2010) argue that the Constitution of Ghana equated the position of the Chairman of the Commission to a Justice of the Court of Appeal and the two Deputy Commissioners to that of Justices of the High Courts who enjoy security of tenure of office in the sense that they can only be removed from office for misbehavior or incompetence or on ground of inability to perform their functions arising from infirmity of body or mind (Art 44 Constitution of Ghana 1992). The chairman and the two vice-chairmen function in their posts until the official age of retirement provided for judges of the category in which they are respectively classified, unless they want to leave voluntarily or they become unavailable (death or prolonged absence) (Hounkpe and Fall 2010). For example, Kwadwo Afari-Gyan, the former EC's chairperson served from 1993 and retired in 2015 (70 years old).

However, the removal of the chairperson Mrs. Charlotte Osei and her two deputies, Amadu Sulley and Georgina Opoku Amankwaa from office in 2018 for misbehaviour and incompetence<sup>8</sup> has put in doubt the credibility of the removal process in Ghana. Many political trends in Ghana said that the removal of Mrs. Osei is political motivated despite the fact that the constitutional provisions and procedures were duly followed under Articles 146(4) and 149 of the 1992 Constitution.

#### **4.2.2.5.     *Financial independence of the EC***

The EC prepares its own budget which is drawn from the Consolidated Fund, but the Government and Parliament are responsible for its approval (Constitution 1992, 54). The Commission is expected to keep proper books of account and proper records which are audited by the Auditor in General (Electoral Commission Act of 1993, 11). The electoral commission presents a budget proposal to the government authorities and it implements it according to the available resources and based on the needs of the other government agencies (Hounkpe and Fall 2010). For example in 2016, the EC explained that a budget of GHc1.139 billion (256,497,573.52USD ) for the elections was agreed and approved by the Ministry of Finance upon the recommendations and with the involvement of the Special Budget Committee of Parliament, before the 2016 Budget was presented to Parliament (Electoral Commission of Ghana 2016).

#### **4.2.2.6.     *Accountability of the EC***

The EC is neither accountable to the head of the state nor the parliament. However, the books and accounts of the Commission are audited annually by the Auditor-General or by an auditor appointed by him (Electoral commission of Ghana 2016).

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<sup>8</sup> <https://www.myjoyonline.com/politics/2018/june-28th/breaking-news.php> [Accessed August 12, 2018]

#### **4.2.2.7.     *Hiring and firing staff***

The Commission has the power to hire and fire staff and is not under any obligation to accept staff from any quarters, apart from the Accountant Generals Office and the Supply & Stores Department under the Ministry of Finance (Electoral Commission of Ghana 2016). The Commission shall appoint such officers and other employees as it may require for the effective implementation of its functions. The appointment of officers and other employees of the Commission shall be made by the Commission acting in consultation with the Public Services Commission (Electoral commission of Ghana 2016). The commission however employs temporary staff during elections to work in the polling stations. In the past the commission used to recruit staff from the civil service, but due to the reforms in this sector, the commission now recruits competitively from all qualified Ghanaians. EISA (2012) notes that in Ghana, by and large, the stakeholders express confidence in the manner in which the commission recruits its staff.

#### **4.2.2.8.     *Public perception***

Adu-Gyamfi (2014:7) notes that the independence of the electoral commission is guaranteed by the Ghanaian constitution. He interviewed 2000 Ghanaians, all the respondents' perception was sought to establish truly if Election Commission is independent through its activities and functions from 1992 presidential and Parliamentary Elections. All respondents (100%) said that the Electoral Commission is truly independent in spite of the challenges they face currently. Respondents said that the Electoral Commission of Ghana manages its own budget and work independently from government and other bodies' interference and there is a constitutional provision for the appointment and condition of service for the chairman and the two deputies. The respondents said they have the confidence in Ghana's Electoral Commission and Ghana's electoral processes (Adu-Gyamfi 2014).



#### **4.2.3. Conclusion**

In a very large extend, the Ghana electoral commission is independent from any quarter. From the above exposition, it is abundantly clear that not only has the Constitution mandated the Commission to promulgate rules and regulations on electoral processes, but also that the Commission has a secured tenure of office for its members who enjoy a greater amount of independence of government's control. The law makes the appointment of the EC's members almost irrevocable. Hence once appointed, members of the EC cannot be dismissed except on grounds of infirmity or insanity after a certification by an independent medical board (Constitution of Ghana 1992) and they serve until they retire.

The law also secures the EC's independence by aligning the conditions of services of its members to the justices of the superior court. The rationale is to project the EC in the image of the courts that have established tradition of independence and immunity from political controls (Gyimah-Boadi 2012).

In the view of Gyimah-Boadi (2003), the existence of these bodies of laws and explicit rules and regulations relating to its functions provided the Electoral Commission a measure of insulation and put the body in a stronger position lawfully to resist undue external pressures and interferences in its work as well as provide a guide for the defense of its actions.

### **4.3. Democratic Republic of Congo (DRC)**

#### **4.3.1. Political History of the 2006 and 2011 elections in the DRC**

In January 16, 2001 President Laurent Désiré Kabila was murdered in his official residence in Kinshasa and was immediately replaced by his son Joseph Kabila.

To lay the foundations for the construction of a democratic state of law in the Congo, mediated by the international community, the new Head of State Joseph Kabila facilitated the work of the

inter-Congolese political negotiations in Sun City in South Africa (2001-2003). From these historical bases emerged the legal instruments that governed the transition period (2003-2006).

During the inter-Congolese dialogue in Sun City 350 delegates representing the government, ex-rebels, the political opposition and the civil society, adopted the Global and Inclusive Accord (AGI). The transitional constitution was adopted in April 2003. These two legal instruments draw the lines of a political transition process that would lead to general elections in 2006. Four vice presidents were appointed: Jean-Pierre Bemba of the Mouvement de Libération du Congo (MLC), Azarias Ruberwa from Rassemblement Congolais pour la Démocratie (RCD), Abdulaye Yerodia (Parti Présidentiel) and Z'ahadi Ngoma (Political opposition). Together with the president, they formed the "presidential space" (Espace Présidentiel).

From the Global and Inclusive Agreement, and the new constitution was born and an electoral body tasked with the management of 2006 general elections in the DRC. After more than four decades of structural kleptocracy at all levels of the state, civil war, degradation of state structures, and the destruction of the social and economic life, the elections represented a possibility for the country to establish a new rule of law.

#### **4.3.2. *Commission Electorale Indépendante* (CEI Independent Electoral Commission) and the 2006 Elections**

The constitution and the electoral law gave the Independent Electoral Commission (CEI) an essential role to play in order to guarantee and control the impartiality and the neutrality of the organization of elections in line with international standards and national legislation. This body was tasked with identifying and registering voters, and with organising the 2005 constitutional referendum. It also prepared and organised the presidential, parliamentary and provincial elections of 2006 and the Senate elections of 2007. The Global and Inclusive Agreement of 17 December 2002 and the Constitution of Transition of 04 April 2003 established the Independent Electoral Commission as an institution supporting democracy with "legal personality" and

"enjoying the independence of action in relation to other institutions of the Republic "(Article 156 of the Transitional Constitution). This independence is further theoretically reinforced by the fact that only the delegates of the component "*Forces Vives*" (civil society organizations) can preside over institutions supporting democracy (Article 157).

The composition and functioning of the CEI was governed by Law No 04/009 of 5 June 2004, and the work of the commission is further defined by Law No 04/028 of 24 December 2004.

The CEI was in charge of:

- Identification and enrolment of voters
- Establishment of voter lists
- Establishment of candidates' lists
- Organisation of the ballot
- The counting and the compilation
- The publication of the provisional results

The structure of the CEI at national level consisted of 21 members designated according to a quota agreed upon by all signatories of the Inter-Congolese Dialogue (ICD). Three members were drawn from each component (ex-government, the political opposition, the *Rassemblement Congolais pour la Démocratie* and the *Mouvement pour la Libération du Congo*) and two from the remaining entities that were parties to the ICD. The appointment of these had to take into account women's representation. At least one representative from each component and entity must be a woman. According to articles 8 and 11 of Law No 04/009 of 5 June 2004, the tenure of the current CEI expires with the formal end of the transition.

The CEI had three main organs, namely:

- The Plenary Assembly, which was the policy-making and monitoring body made up of the CEI Bureau plus 13 additional members.
- The Bureau, which was the decision-making and management body composed of eight members.

- Specialized committees, established on an ad hoc basis, each chaired by a member of the CEI Office, except for the president who assumed their overall coordination. There were seven commissions, respectively responsible for matters related to: civic and voter education; voter registration and candidate nomination; logistics and operations; electoral training; legal issues and election-related disputes; polling and compilation of results; and information, communications and public relations.

In terms of its composition, apart from the CEI's president who was a cleric appointed by the civil society, the four vice-presidents were drawn from the different political, military and social groupings which participated in the ICD. As for gender representation, three women were part of the eight members CEI Bureau, and 11 out of the 21 members of the plenary assembly were women.

The CEI's Bureau comprised eight members, namely:

- President: Reverend Appollinaire Muholangu Malumalu (civil society);
- First vice-president: Marie Rose Mika Ebenga (*Rassemblement Congolais pour la Démocratie* RCD);
- Second vice-president: Norbert Basengezi Katintima (*Mouvement pour la Libération du Congo* MLC);
- Third vice-president: Crispin Kankonde (People's Party for Reconstruction and Democracy PPRD);
- Rapporteur: Dieudonné Mirimo Mulongo (Mai Mai);
- First deputy rapporteur: Carole Kabanga Koy (political opposition);
- Second deputy rapporteur: Charles Kabangu Tshibitshibi (*Rassemblement Congolais pour la Démocratie-National* RCD/N); and
- Third deputy rapporteur: Marie-Rose Kambere Kavira (*RCD-Kisangani/Mouvement de Libération* RCD/KML).

For these elections, the CEI had 11 provincial offices each comprising eight members, and established 64 liaison offices at local level throughout the country.

The CEI was financially independent and had its own budget, financed from abroad, with the United Nations (UN) and the European Union EU as main contributors. The international community donated \$640 million to fund the elections and deployed the world's largest UN peacekeeping operation, the United Nations Mission in Congo (MONUC), to help the stability of the election.

The European Union Election Observation Mission (EUEOM), in their statement of 1 November 2006, confirmed that the elections had been held in calm and peaceful circumstances, in spite of some serious incidents, especially in Ituri and the province of Equateur (in Stenberg 2007:3):

These elections bring forward a democratically elected president for the first time in forty years. They also constitute the first step on the way to establish independent institutions both on a national and a provincial level, and later the selection of senators and provincial governors. The judicial framework for the elections satisfies the fundamental standards for democratic elections, in spite of flaws, particularly with regards to the financing of the political parties and the organisation and independence of the power of justice. The CEI showed their competence in organizing complex elections in a country with little or no infrastructure. The CEI was supported by important international organizations, such as the Appui au processus électoral au Congo (APEC) and the electoral division of the MONUC. The clarifications issued by the CEI in Kinshasa were meant to amend the situation for the local CEIs, but the delays in publication had the result that the precisions were applied differently in different parts of the country. The pre-election period before the last round of elections was marked by a seemingly non-existing election campaign. The presidential candidates were absent and the political climate was poisoned. A large number of violent incidents and political unrest made it difficult for the candidates to pursue a campaign, particularly in those parts of the country where the opponent was strong.

Although constantly retaining a fundamental skepticism against the rival camp, the two opponents a little late signed an agreement, moved by the MONUC, pointing to the importance of calmness, respect for the preparatory work of the CEI, and to the guarantee of the constitutional rights of the future loser.

The major audiovisual media of the country concentrated exclusively on the presidential candidates, and did not hesitate to transmit messages of hate and violence in their effort to support their own candidate. Despite their status as a national broadcaster, the Radio Television Nationale Congolaise (The national broadcaster RTNC) systematically violated their obligation of equal access to the media for both candidates. The equal covering of the

Radio Okapi (supported by MONUC) and a number of independent community radios contributed however to a more equal situation.

The High authority of the Medias (HAM) gradually managed to show strength and certain equality towards violations from private radio stations. Towards the RTNC they rested very timid. On Election Day, the EUEOM noted distinct improvements in the organisation of the elections from the first round to the second, particularly as regards the electoral agents' management of voting procedures and the counting process. Due to better planning, the collection of the election material after the election went smoother.

Some EU observers noted, however, unequal application of CEI regulations, surely caused by the late publication of these decisions. This was particularly visible in the question of special electoral lists, which opened up the possibilities of voting for people who did not have their name on the ordinary electoral list.

The presence of observers and party witnesses in the compilation Centres in the weeks after Election Day was crucial for the transparency of the process.

From the above, even though the 2006 elections were deemed free, fair and credible by many regional and international observers, the opposition suspected that the CEI had engaged in electoral malpractices and took its case to the DRC Supreme Court. The court upheld the 2006 election results, clearing the way for Joseph Kabila to become the first president-elect of the DRC.

#### **4.3.3. The Independent Electoral Commission (CENI)**

##### **4.3.3.1. *Replacing the CEI with CENI***

In its article 211, the constitution of the DRC (2006) entrusts to the CENI the mission of ensuring the regularity of the electoral and referendum process. Despite the fact that the CEI was dissolved by the constitution of 18 February 2006 as it was a transitional institution, the idea of replacing the CEI with the CENI was based, according to the Congolese legislature, on the experience gained by the CEI. With regards to the 2006 elections, the CEI has had to cope with considerable technical problems posed by the registration of voters and the organization of polls in a vast country where the means of communication are still insufficient. It was therefore important to preserve this achievement by improving the system in some areas the CEI had shown weaknesses. The new CENI thus partially takes over the configuration of the CEI; but the

Congolese legislature amended the CENI in the interests of greater efficiency, particularly with regards to the composition of the CENI and the status of its members.

However, this name change can also explain many things. Knowing that the 2006 elections which the CEI organized were entirely financed by the international community (80%), the name (Independent Electoral Commission) implied a stranglehold of the international community on the electoral process, as Napoleon Bonaparte once said "...the hand that gives is above the hand that takes. Money has no motherland; financiers are without patriotism and without decency; their sole object is gain" (Broers and Hicks 2012:230). Foreign support, despite its beneficence, creates a dependency that threatens long-term sustainability. This fact can be reinforced by this excerpt taken from the interview of the former President of the CENI in response to a question about the partnership between the CENI and the international community. He says indeed that (Echos des elections 2011:46):

"The fact that the aid of the international community is reduced means that the Congolese people take things in hand. The international community helped the CEI to organize the first elections and today we have the needed experience. We have an elected government that must decide on the CENI's budget. If the CENI continues to depend on outside, that means it does not have the maturity to organize the elections."

Pastor Ngoy Mulunda, former CENI chairperson

Therefore, when it comes to the CENI, the naming wanted to mark an appropriation of the national destiny by the Congolese people themselves.

#### **4.3.3.2.     *Legal Framework and Mandate of the CENI***

Article 211 of the Constitution of 2005 establishes an Independent National Electoral Commission with legal personality. The law n 10/013 of 28 July 2010 governing the establishment and functioning of the CENI (CENI Law of 2010 hereinafter) stipulates that the CENI is an independent institution, endowed with legal personality (Article 2); this

independence is exercised in particular with regard to other institutions of the Republic, however, it benefits from their collaboration (Article 7); it is impartial and neutral in the exercise of its mission; it enjoys the administrative and financial autonomy which guarantees its independence and neutrality (Article 6).

Therefore theoretically, the constitution and the CENI law of 2010 establish the CENI as an independent institution.

The CENI is charged with the organization of the electoral process, in particular the registration of voters, the maintenance of the electoral roll, voting operations, the counting of votes and any referendum. It ensures the regularity of the electoral and referendum process (Article 211 of the Constitution). The CENI law of 2010 further empowers the CENI to (Article 9):

- organize and manage pre-electoral, electoral and referendum operations, including the identification and registration of voters, the establishment and publication of electoral lists, the vote, the counting, the centralization and the announcement of provisional results (election-related activities);
- transmit the provisional results to the competent court for the proclamation of the final results;
- pass contracts relating to pre-electoral, electoral and referendum operations in accordance with the legislation in force;
- contribute to the development of the legal framework for the electoral and referendum process;
- develop budget forecasts and calendar for the organization of electoral and referendum processes;
- popularize in French and in national languages the laws relating to the electoral and referendum process;
- Coordinate the campaign of civic education of the population in electoral matters, notably by the realization of a program of information and sensitization of the voters in French and in national languages;



- provide training for provincial and local officials responsible for the preparation and organization of the electoral and referendum votes;
- develop and disseminate a code of good conduct and rules of electoral ethics;
- divide the electoral districts in proportion to the updated demographic data;
- determine and publish the number and location of the polling and counting stations and the local centers for the compilation of results by electoral district;
- ensure the regularity of election and referendum campaigns;
- review and publish the lists of candidates; and
- accredit witnesses, national and international observers.

#### **4.3.3.3. *Composition and Appointment of commissioners***

On the composition and appointment of the CENI members, the Constitution of the DRC remains silent. However, it broadly states that “An organic law establishes the organization and the operation of the Independent National Electoral Commission”. The new Organic Law No 13/012 of 19 April 2013 (The CENI law of 2013 hereinafter) amending and supplementing the CENI law of 2010<sup>9</sup> stipulates that the CENI shall be composed of thirteen members appointed by the political forces of the National Assembly on the basis of six delegates including two women by the Majority, four including one woman by the political opposition, and the Civil Society is represented by three delegates from respectively:

- Religious denominations
- women's rights organizations
- civic and electoral education organization

The members of the CENI are chosen among independent personalities recognized for their competence, moral integrity, prohibition and intellectual honesty. The nomination of the members of the CENI is validated by the national assembly.

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<sup>9</sup> This New organic Law of 19 April 2013 only amends the articles 10, 14, 24, 25, 26, 34, 35, 36, 37, 38, 39, 40, 48, 50 and 51 of the organic law n 10/013 of 28 July 2010

The quality of member of the CENI is incompatible with the functions listed in article 17 of the CENI law of 2010. For example, the mandate of the CENI's members is incompatible with:

- Membership of government;
- Magistrate, member of the Constitutional Court or of the court of auditors;
- Member of another institution supporting democracy...

To be a member of the CENI, the candidate must:

- Be a Congolese national;
- Be at least thirty years of age;
- Be physically and mentally fit, have no criminal record, and be a holder of a certificate of good standing;
- Hold at least a bachelor's degree or an equivalent degree, or provide evidence of at least ten years of professional experience in a field relevant to the CENI; and
- Enjoy full civil and political rights.

From these Articles above, it can be noted that the CENI is a multi-party election commission composed of representatives of the political parties based on Pastor (1999) classification of EMBs, which will be discussed in the following chapter.

#### **4.3.3.4.     *Tenure and removal of commissioners***

The CENI members have a non-renewable 6-year term. At the end of their mandate, the CENI members remain in office until the effective installation of new members (Article 13 of CENI law of 2010).

The mandate of a member of the CENI ends by:

- The expiration of the term
- Death
- Resignation

- Definitive impediment
- Permanent incapacity
- Non justified absence at more than a quarter of sessions during a trimester
- Acceptance of an incompatible function
- Irrevocable to a sentence of principal penal servitude for intentional offense

It is not clear who decides on permanent incapacity, quarter of sessions and incompatible function. The definitive impediment is established by the Constitutional Court at the request of the CENI's president after the opinion of the plenary assembly (Art 14 of CENI law of 2013). In the case of vacations, the replacement is done in accordance with the procedure which presided over the designation of the member concerned. The replacement is for the remaining period of the term (Art 15 of CENI Law of 2010). In fulfilling their mission, the members of the CENI do not seek or receive instructions from any external authority and they enjoy total independence from the political forces that have designated them (Art 22 CENI law of 2010). In this regard, the theoretical personal independence of CENI's members is guaranteed by the Law.

#### **4.3.3.5.     *Accountability***

The CENI presents an annual report to the national assembly at its March session and at the end of each electoral or referendum process (Art 22 CENI law of 2010) and the National Assembly exercises its power of control over the CENI as recognized in Article 100 of the Constitution which stipulates: "Without prejudice to the other provisions of this Constitution, Parliament votes the laws. It controls the Government, the public companies as well as the public establishments and services".

#### **4.3.3.6.     *Financial Independence of the CENI***

CENI's resources come from:

- the state budget;

- donations and legacies;
- assistance and support from bilateral, multilateral and other funders.

The CENI draws up its budget in accordance with financial legislation. It thereafter passes it onto the government for incorporation into the state budget. The CENI budget includes the budget for pre-electoral, electoral and referendum operations. It is part of the State's subsidiary budget (Art 44 CENI law of 2010). The CENI can also, through the government, endeavor to obtain from bilateral, multilateral partners and other donors, the assistance and necessary support for the organization and the good progress of the electoral and referendum processes, in compliance with relevant legislation.

Thus, the CENI is a very powerful organ, with a wide mandate. It also has a secure legal status as it is ensured by a constitutional provision and also established by a separate law, which furthermore explicitly guarantees its legal and institutional independence from the executive branch of government.

#### **4.4. Conclusion**

This chapter has examined the independence of the CENI (DRC) and EC (GHANA). The laws that establish the CENI and EC have revealed that both EMBs are legally independent and guaranteed in the DRC and Ghana Constitutions. The important indicators of independence of the EC are the mode of appointment and the security of tenure of its members, which allow them to have a fearless independence. The CENI makes use of political party representation in its composition which doesn't guarantee its personal independence. Structural safeguards like the establishment of a statutory electoral body, budgetary independence, significant tenure and freedom from direction, "are vital to providing a regulatory environment conducive to behavioural independence" (Joo-Cheong 2013:83) but they cannot, however, guarantee behavioural independence. Formal provisions alone do not secure independent behaviour. The next chapter examines the behavioural independence of the CENI and the factors that hinder this independence.

## **CHAPTER FIVE:**

### **FACTORS LIMITING THE INDEPENDENCE OF THE CENI**

#### **5.1. Introduction**

Elklit and Svensson (1997:34) note that “although criteria for declaring an election free and fair have been developed in various contexts, translating such theoretical concepts into a comprehensive list of factors to consider has proved difficult”. One approach, as they argue, is to study various aspects of the process (e.g., the Electoral Management Body configuration, the electoral system, the voter registration system...) and then assess whether conditions within each area promote or hamper the freedom and fairness of the election. Hence, the management of the electoral process can be considered as the process of arriving at free and fair elections. Maphunye (2009:8) argues that there “can never be free, fair and credible elections without effective and efficient elections management” but effective management is only possible if “the EMB has independence, measured basically in terms of its structure, composition, funding and capability” (Elklit and Reynolds 2000:87).

The Electoral Knowledge Network (ACE 2017) identifies two types of independence, namely: structural independence (or institutional independence) and behavioural independence. The previous chapter has analyzed structural independence, in which the electoral management body (EMB) is separated from the governing party and the Executive and is found in the country’s constitution and electoral laws. Behavioural independence, which is expected of all type of EMBs (independent, government and mixed EMBs), deals with the day-to-day activities of EMBs and they do not bend to governmental, political or other partisan influences on their decisions (Ace 2017). Norm (2012) goes on to point out that while the two concepts of independence are linked, structural independence does not provide any assurance that an EMB will act as a fearlessly independent institution. Birch’s (2008) findings on election management show that citizens living in countries with independent EMBs are more likely to consider

elections as illegitimate. Birch's findings contradict the existing empirical and theoretical literature that associates autonomous EMBS with a greater likelihood of free and fair elections (Wall et al. 2006, Pastor 1999, Kerr 2012). Birch attributes these counter intuitive results to the fact that formal legal independence might not reflect the actual independence of the institution. Mozaffar and Schedler (2002:15) further remarked that formally independent institutions may be "intimidated, colonized, or neutralized in practice by government authorities", whereas others may be "acting independently despite their formal subordination". As a result, it takes more than the presence of the term "independent" in the name of an electoral commission to inspire confidence in an EMB.

Beyond the legal and / or formal provisions, which are in themselves necessary but not sufficient, that guarantee the Independent National Electoral Commission (CENI)'s independence, it is important to examine the factors that limit this independence and impartiality. Thus, structural independence may be accompanied by genuine independence of action, which is very important for public perception.

This Chapter pays particular attention on the configuration and the behavioural independence of the DRC's electoral commission (CENI) as a factor which can enhance free and fair election in the DRC, as expressed in the view of Godwin-Gill (1994:82), "in a free and fair election, an independent and impartially administered electoral process is essential for building confidence and trust in the system".

## **5.2. The independence of the CENI in practice**

The Democratic Republic of Congo' (DRC) tryst with democracy has been a very short lived one. It is only in 2003 that DRC was endowed with an electoral institution, which is still facing many challenges to its way to becoming a fully independent institution. Some of the main constraints to their operation include limited independence, unclear mandates and inadequate resources. Controversies have arisen with respect to the appointment procedures and tenure of members

of the EMB, which undermines the legitimacy and credibility of the electoral process (Mavungu 2013, Tumba 2014, Mangu 2012, Dizolele and Kambale 2012).

Firstly, to illustrate this statement in 2016, in addition to the problems of updating the electoral roll, “the lack of funding was one of the major reasons for the postponement of the elections” (CENI 2015). This means that if the government does not fund the CENI as stated in the Article 44 of the law 10/013 of 28 July 2010 governing the establishment and function of the CENI, despite its formal independence, the CENI cannot be able to organize the elections. The CENI therefore depends on the goodwill of the government to fund its activities.

Secondly, on Saturday, July 11, 2015, the Deputy Prime Minister and Minister of Interior announced the electoral calendar of governors of new provinces scheduled between July 27 and July 31, 2015 (Radiookapi 2015). However, Article 9 of the law n 10/013 of 28 July 2010 governing the establishment and functioning of the CENI and Article 211 of the constitution of the DRC empowers exclusively the CENI the prerogative of elaborating and publishing the electoral calendar. The fact that a minister elaborates and publishes an electoral calendar [which violates the electoral laws] in place of the CENI is an obvious sign that the CENI does not have independence of action.

While the legal provisions theoretically guarantee the independence of the CENI, many other legal provisions limit the practical scope of this independence. These legal provisions betray the will and determination of political actors in general and the legislature in particular to keep the CENI under control. These are mainly the provisions relating to the composition of the CENI and the mode of appointment of its members, their security of tenure, the financial independence, the public funding of political parties, a weak rule of law, a strong presidency, the attitude of the DRC parliament in destabilizing the CENI by modifying its laws according to the interests of the parliamentary majority, and the weight of the international community on the functioning of the DRC’s institutions.

### 5.2.1. The composition and mode of appointment of CENI members

According to Aaken (2007:8) the appointment process for electoral commissions is “one of the crucial factors of independence of an EMB” that political parties and civil society organisations (CSOs) regularly use to measure the overall autonomy of the institution and its ability to make independent decisions from the executive influence.

From the Independent Electoral Commission (CEI) to the CENI (called to replace the CEI), the DRC's young electoral history remains dominated by the political party representativeness in the electoral administration, a multi-party based electoral commission which comprises a “mixture of political party nominees” (Wall *et al.* 2006:88).

The CEI was made up of 21 members with 3 members per political party and 2 per belligerent group which had participated in the Inter-Congolese Dialogue in Sun City, South Africa (Article 7 of Law No 04/009 of 5 June 2004 governing the establishment of the CEI). Moreover, the seven committees of the CEI were each chaired by the representatives of the political party. According to Lomandja (2015), this distribution offered the guarantee of the political control of each stakeholder in the Inter-Congolese Dialogue over the CEI.

More worrisome, the organic law n 10/013 of 28 July 2010 governing the establishment and function of the CENI (CENI Law of 2010) carries again the seeds of political representativeness in its composition. Its drafting has deeply divided the two Houses of Parliament on the criteria of its composition. The final version of the law is one that favoured a composition based on partisan representativeness. The CENI law of 2010 in its Article 12 asserts: "The members of the CENI are chosen from the independent personalities recognized for their competence, moral integrity, probity and intellectual honesty ". Meanwhile, article 10 of the same law stipulates that "the CENI is composed of seven members, four of whom are appointed by the majority and three by the opposition to the National Assembly". Theoretically therefore, the independent personalities which the Article 12 mentions are designated by the majority and the opposition. In fact, instead of independent personalities, majority and opposition have instead appointed their own members or politically cronies.



Ngoma-Binda and Otemikongo (2010) have described this politicization of the CEI and the CENI as follows:

"It thus appears clearly from this composition that the CEI was not independent, that is to say, emancipated from any partisan representation. It was placed under political control, even though this control was supposed to be balanced, its members have been appointed to represent the various political trends that had signed the Global and Inclusive Agreement. In order to ensure that the political control over the CEI was effective, each member of the Bureau chaired one of the seven Special Committees of the CEI. The CENI law aggravates this politicization of the electoral management body. This new institution, which will take over from the CEI, will now be managed by a single body, the Bureau, composed of seven members, four of whom will be appointed by the majority parties and three by the opposition parties in the National Assembly. This politicization and the consequent marginalization of the civil society radically violate the clauses of the Global and Inclusive Agreement which entrusted to the civil society the presidency of the CEI".

The rule of political representation is again to be found in the composition of the new CENI law of 2012 amending and completing the CENI law of 2010 in its Article 10. It stipulates: "The CENI is composed of thirteen members designated by the political forces of the National Assembly as per six delegates including two women by the majority and four delegates including one woman by the political opposition. The Civil Society is represented by three delegates from respectively: religious denominations, women's rights organizations, civic and electoral education organization ".

In this article appears the imprecise notion of "delegates", the length of the article does not facilitate interpretation. Since civil society is represented in the new CENI by three delegates, it could also be understood that the other ten members are respective delegates of majority and opposition. Therefore, not only members of the CENI are appointed by the political forces of the National Assembly, but these members are delegates of their political parties. To support this statement, one informant in Tumba's study (2014:77) said:

*"The members of the CENI were selected according to the law on the establishment of the CENI, but they acted irresponsibly. Each member attempted to pay back his sponsor (political party) and this way of doing things seriously undermined the credibility of the elections. You know*

*what, the political parties represented within the CENI appointed some of their political members as voting officers.”*

Tumba (2014) cites the Carter Center’s final report on the 2011 elections in the DRC which revealed “that the partisan nomination of the CENI leaders, along with the absence of civil society representation, allowed a politicization of its decisions by the majority and opposition political party representatives. This did not permit the CENI to sufficiently fulfill its mandate of independence” (Carter Center 2011:67). And the International Crisis Group (2018) also confirmed this hypothesis by arguing that the Union for Democracy and Social Progress (UDPS) has announced “to replace its current representative in the CENI whom UDPS leaders do not trust to act in their interests.

These views were also shared by Githaiga (2012) and Kgalalelo (2016). Githaiga (2012:4) pointed out that the composition of the CENI was contentious, with claims that “it was biased towards the party in power”. The CENI leadership was constituted by nominations from the majority party (four members) and opposition groups (three members); while Kgalalelo (2016:74) also acknowledged that the CENI consisted of “four members appointed by the majority coalition and three members representing the opposition parties”. The absence of the civil society representatives in the top leadership of the CENI, coupled with the fact that the electoral body had not much changed from its predecessor, opened “the CENI to allegations of biasness, incompetence and lack of transparency, and ensured that its operations during the 2011 elections were shrouded in controversy” (Kgalalelo).

McLean and McMillan (2009:156) define an EMB as “a non-partisan body which determines election procedures and district boundaries and oversees the conduct of elections.” From McLean and McMillan’s understanding, an EMB must be an apolitical body. Thus, its neutrality must “not be faulted by any ground by the major electoral stakeholders”; any time the opposite is the case, “the election it conducts will lose credibility” (Olaniyi 2017:18).

Maphunye (2010:8) makes use of a sports metaphor, to illustrate that “the relevance of election management for any EMB therefore might mean the presence of an impartial referee

who equally uses credible and transparent methods in dealing with the players of a sports team, in this case the political parties and voters”. Being players in the game, Maphunye’s statement implies that a political party (political player) cannot be at the same time a referee and player in a game as it is the actual case in the DRC.

Although the Congolese legal framework guarantees the formal independence of the CENI, this independence is however limited by the mode of appointment of CENI’s members which can be referred to as “a political representation”. This goes against all principles of credibility and impartiality associated with free and fair election. Wall *et al.* (2006) note that political party-based appointments often imply that EMB members are serving on the EMB as political party representatives or agents. They further caution that a political party-based EMB can imperil or cripple decision making, especially in situations where political parties’ critical interests are at stake. Multiparty-based EMBs also tend to generate dissatisfaction, especially among minority parties which might be excluded from the EMB either because they are not represented in the legislature or because they did not participate in the negotiation that led to the initial appointments of EMB members (Wall *et al.* 2006).

In Ghana, the Electoral Commission (EC) is an independent body with independent members who do not have any affiliation with any political party. Article 70(2) of the 1992 Constitution provides that “the President shall act on the advice of the Council of State to appoint electoral commissioners.” Mensah (2015) asserts that this Article means that the Council of State will put in place a mechanism to search for, vet and nominate a candidate for the President to appoint. Among its duties, it must develop the detailed criteria of suitability for Commissioners; it must shortlist candidates, vet them and eventually determine who amongst the various contestants, should be recommended to be a Commissioner (Mensah 2015). Kwaku (2014) asserts that the Council could do so in a variety of ways. First, it could work through a committee of the Council. Essentially, this becomes a Search Committee tasked to identify a short list of qualified persons for the Council to choose from. Second, the Council is permitted to commission experts and other consultants to advise it. It could do so here. Third, the Council could advertise the position or call on citizens, political parties, NGOs, etc. to nominate candidates either to the

Council at large or to the Search Committee. Finally, the Council could use a least approach: choose someone from within the EC, probably from the other members or a respected senior staff (Kwaku 2014). Gyimah-Boadi (2012) observes that this process ensures that credible persons are appointed and checks against possible attempt to recruit straw men and women.

The important fact to draw from Article 70(2) is that not only it makes it mandatory for the head of state to nominate whomever the Council recommends but this Article also prevents the head of state from guiding the Council in making its choice with impartiality and independence. The justification that the head of state only has a perfunctory role in the appointment process of EC's members lies in the fact that the EC is, "in essence the political referee of the quadrennial political games and it is flawed constitutional design for the President, a key political player, to have an active role in the EC's appointment" (Kwaku 2014). This, in Kwaku's opinion, is also "the reason why the Parliament is excluded from this appointment process". He argues that it would have been irrational to confer to the President a key role in the appointment process and exclude the Parliament; hence the opposition parties, from the process (Kwaku 2014). Mensah notes that a purposive elucidation of Article 70(2) will also support the assumption that the head of state's power to appoint the Chairperson and Members of the EC is only ministerial. Those who framed the Constitution of Ghana were keenly mindful of the impropriety inherent in allowing the head of state, a political player, to play a critical role in selecting the political referee.

The politicization over the CENI has jeopardized and affected the outcome of the elections and the smooth running of the electoral process in the DRC since this mode of composition of EMBs is only successful in very a few states around the world. Besides having political party-based EMBs, these states have many things in common, including an "active civil society, a vibrant and free press, a competitive political landscape and a widely shared respect for the rule of law. Rarely do violent protests precede or follow the proclamation of election results" (Essoungou 2011). None of these factors are currently present in the DRC.

The best example is Uruguay, which has one of the few party-based electoral administrations with a tradition of independence from the executive. Out of its nine members, five are considered neutral, as they are elected by a two-thirds vote by a General Assembly of senators and deputies of both houses of Parliament; the other four are representatives of political parties, directly elected at the Assembly by the two parties with the greatest number of votes (Lopez-Pintor 2000). On the contrary in the DRC among the thirteen members that compose the CENI, only three members come from the CSOs and the remaining ten are politically affiliated.

### **5.2.2. Security of tenure**

Whatever the model of EMBs (Independent, government or mixed EMB), one of the key questions which must be considered is that of the length of tenure of EMB's members. Hounkpe and Fall (2010) argue that the conditions that relate to the tenures of EMBs' members have a link with some aspects of the impact that the EMB can make to the administration of the electoral process. These aspects may, for example, affect the independence of members of the EMB since it is recognised that "the less time one person remains on a post, the more sensitive one is to the concerns of those who owe the appointment and finally its renewal" (Aaken 2007:8).

The way in which members of the CENI are unstable from their position, despite constitutional and legal guarantees for their removal only through due process, endangers the necessary continuity of election administration in the DRC. No CEI/CENI chairperson has worked until the expiration of the six years term as stipulate in the DRC electoral laws (e.g. Article 13 of CENI law of 2010). They have either been illegally dismissed or resigned themselves. Abbot Appollinaire Malu Malu headed the CEI only from 2003 to 2006, he was dismissed and the commission was reconstituted (Article 156 of the Transitional Constitution) before the expiration of their tenure despite the fact that the 2006 elections were deemed relatively free and fair. Pastor Ngoy Mulunda then headed the new CENI from February 2011 to 2013 and resigned because of the allegations of fraud and treachery raised by local and international observation missions on the

conduct of the November 2011 general election in the country. Abbot Appollinaire Malu Malu came back in charge of the CENI from June 2013 to October 2015 and later resigned “due to a brain hemorrhage” (Berwouts 2016) and was replaced by the relatively unknown Corneille Nangaa. Although Nangaa is considered technically competent in electoral matters, it remains to be seen whether he possesses sufficient personal courage and political conviction to guarantee the commission’s independence in the face of significant pressure.

It is thus difficult for the CENI in such a situation to accumulate experiences and draw lessons for improving the electoral process. According to Klassen (2013:8) the length of a commissioner’s tenure can have significant impacts on his or her independence and ability to act without fear or favour. Hounkpe and Fall (2010) point out that it will be very difficult for an EMB whose members are regularly changed or is itself reinstalled each electoral term to consolidate. They note that It will be difficult to win the respect of citizens and key stakeholders involved in the electoral process, to leverage the experience of the practical management of elections and finally to enjoy the level of legitimacy necessary to carry out its delicate mission (Hounkpe and Fall 2010).

In Ghana the chairman and the two vice-chairmen function in their posts until the official age of retirement unless they want to leave voluntarily or they become unavailable. The consequence of the conditions granted to Ghanaian electoral commissioners over the duration of their mandates and that of the commission are quite obvious. Hounkpe and Fall (2010) argue that one should expect, and experience in managing elections in the country has helped Ghana, to see the commissioners more independent from those who selected them and / or politicians than their counterparts of the ad hoc electoral commissions. One should also expect that the Ghanaian commissioners enjoy greater authority and have more responsibilities than those of the other electoral commissions as the renewal of mandates does not depend on political power (Hounkpe and Fall 2010).

### 5.2.3. The financial dependence of the CENI vis-à-vis the Government

Another point that considerably limits the independence of action of the CENI is the financing of the electoral process. In addition to the fact that the CENI has formal independence in managing its budget and “holding elections are extremely expensive everywhere around the globe” (IFES 1995, Wall *et al.* 2006), one can notice that the CENI suffers from a lack financial availability and largely depends on the goodwill of the Congolese government to finance the elections. Thus, the financing of the elections have become an effective means of delaying the elections in the DRC.

The 2006 elections were fully funded by the international community. This might not have been the best option, but the socio-economic and financial situation of the country did not allow the DRC to fund its own elections. This assistance was coordinated by the United Nations Organisation Mission in Congo (MONUC), which established multilateral management committees that operated at the political, technical and financial levels. With regard to financial support for the electoral process the international community established a ‘basket fund’, managed by the United Nations Development Programme (UNDP), which served as a joint structure for the mobilisation, coordination and management of the financial resources and the provision of technical expertise to the CEI for programming activities (Kadima *et al.* 2008:24). In 2011, the Congolese government financed 60 % of the election budget. The international community (40%) managed the funds of donors without referring to the Bureau of the CENI (Mavungu 2013, Mangu 2012, Carter Center 2011). Thus, during 2006 and 2011 electoral processes the CEI/CENI did not independently manage its financial resources.

Wall *at al.* (2006:176) observe that EMBs under the Independent Model are more likely to have sole responsibility for electoral functions, and thus have a higher level of readily identifiable direct costs, and a lower level of diffuse costs than EMBs under the Governmental Model or the Mixed Model. While for many independent EMBs, “funding is a separate line item in the national budget, released directly to the EMB by the treasury” (Wall *at al.* 2006:177); this is not the case in the DRC situation.

The disbursement of funds to the CENI has also been found faulty and has not always been released timely. To illustrate this fact, the presidential election was supposed to be held in November 2016, but the CENI said that vote was postponed until December 2018 due to a lack of funds and logistical obstacles (CENI 2015). The government's financial commitment towards the CENI has not been without consequences for the activities of the institution. The funds are allocated in small tranches, which, at times, leads to a lack of compliance with the planned schedule of activities, and has in turn negatively influenced the electoral process (Hengelela *et al.* 2016). It appears that the government, by failing to make funds available on time, is responsible for the CENI's difficulties in implementing its planned activities within its own timeframes. Against this backdrop, it should be noted that the CENI lacks the necessary financial support for carrying out its mandate.

In Ghana, the EC has, over the years, been looking for internally and externally generated funds to run its operations. Efforts by the government, the EC and donors partners to bridge the funding gap of the commission, particularly in an election year, have been an easy task and have not generated any major controversy. An easy task, because the EC independently prepares its own budget which is drawn from the consolidated fund. But the government and parliament are responsible for its approval (Constitution 1992, 54).

#### **5.2.4. Political Party funding**

Political Parties remain the most important institutions in every democracy. They are the vehicles through which the ideals of multi-party democracy are achieved. The strategic role that parties play in any democratic nation means that funding their activities cannot be discounted. Nam-Katoti *et al.* (2011) posit that state funding of political parties is quite uncommon in Africa and ruling parties take advantage of incumbency, making the playing field more uneven.



If there is an obscure point in elections in the DRC, is the issue of political party funding. To this day, it is difficult to unravel this mystery. Law 08/005 on Public Finance for Political Parties was adopted on June 10, 2008 but the law has never been implemented. Political parties are not funded by the DRC state, which means that only political parties with sufficient financial means are able to contest every election. Similarly in South Africa, Maphunye (2009) has noted that the funding of political parties also remains one of the recurring political controversies often raised by smaller political parties that usually receive either minimal or no funding, which often means that they will not be able to mount serious public campaigns during the pre-election period.

This state of affairs distorts political competitiveness and violates the principle of equality between candidates. Lack of electoral competitiveness is considered to be one of the electoral malpractices according to Kerr (2013), and remains a potential weapon in the hands of the government since political parties funding is not included in the CENI's mandate, which would have been better suited to handle this issue given its status as an independent institution, as in Ghana or in South Africa where "Public funding for political parties is managed by the IEC" (Independent Electoral Commission) (Maphunye 2009:10).

The executive power has been accused in 2006 and 2011 elections of making use of political corruption (Mavungu 2013, Tumba 2014, the Carter Center 2011). Political corruption is understood as the "wrongful use and abuse of power, whether of public or private origin, for political party or personal gain by breaching the rule of law" (Nam-Katoti et al. 2011). Political corruption takes various forms, ranging from buying votes and the use of illegal funds to selling votes and the abuse of state resources. Tumba (2014:83) has noted that in the 2011 elections, the incumbent president made use of public resources to finance his political party electoral campaign.

Furthermore, the political parties funding law 08/005 has shown weaknesses which deserve to be reviewed. Firstly, under this law, there is no obligation for parties to make available their total budget, expenses, and sources of funding for the campaign period or in general.

To illustrate this fact, a representative of the main opposition political party during the 2011 elections, *l'union pour la democracie et le progress social* (UDPS Union for Democracy and social Progress) told radiookapi (2011) that the “budget of the electoral campaign is a secret of the party”. Disclosure is important to political party financing and it is said to be a necessary condition for any system of public control of political finance according to Wall *et al.* (2006:83) as they point out that “there should be a transparent system of disclosure of the funding received by any party or candidate.” Nam-Katoti *et al.* (2011) have also noted that political parties should be accountable to the public through disclosure of their sources of funds, expenditure and other activities. They further caution that disclosure of political finance is essential because it contributes to an overall transparency of the electoral process, offering voters an opportunity to learn more about political contenders in order to make informed decisions at the polls. Requirements to disclose sources of funding are likely to stimulate parties/candidates to raise and also spend their financial resources in ways that are acceptable to a majority of voters and not to provoke political scandals (Nam-Katoti *et al.* 2011).

Secondly, the Law on political party funding does not impose limits on campaign spending. For example, one of the presidential candidates during the 2011 elections, Jean Andeka Djamba, had USD 30 000 for his electoral campaign while another presidential candidate, Kakese Malela, had USD 5M, a fund he had raised thanks to a three-year savings (Radiookapi 2011). This situation does not help to level the playing field for actors and does not allow fairness in the electoral process.

#### **5.2.5. A weak judicial System**

For free and fair elections to become a reality, an independent and neutral administration is essential (Elklit and Svensson 1997). Equally important is an independent judiciary capable of resolving election conflicts impartially by upholding the Constitution, including the electoral laws, without siding with the incumbent leadership (Forje, 1997; Touraine 1997 cited by Osei-Hwedie and David Sebudubudu 2005). Dahl (1989:58) has argued that elections should be held later in democratic-transition process than has often been the case. This implies that a number

of other preconditions of democracy must be met, at least in part, before free and fair elections can be held.

An independent judiciary is one of the hallmarks of democratic societies. In constitutional democracies around the world, the only branch of the government whose independence is emphasized is the judiciary (Gibler & Randazzo 2011). This is due to the critical role that the rule of law plays in sustaining democratic governance.

One should not expect a strong independent electoral commission in a country where there is no strong rule of law. Bratton (2008) note that free and fair elections are directly linked to the independence of the judicial system, a competitive media environment, the ability of civil society to be involved in public life and a political landscape that allows free expression of diverging views. Diamond (2002) regards the impartial treatment of rival candidates and parties by the courts, police, and military as an essential part of electoral fairness in transitional settings.

In the DRC, the judiciary is the third arm of government that works with the executive and the legislature in the practice of democracy within the established constitutional framework (Executive, Legislative and Judiciary). For example, in the DRC, it is the judiciary that validates the results of the elections at all levels, during electoral disputes, and it is also before the magistrate body that the elected President takes his oath to respect the Constitution and the laws of the Republic (Article 74 of the Constitution). Therefore, the true guarantor of the Constitution and the laws of the DRC is the judiciary. In spite of that, the “DRC’s judiciary suffers from the same systemic defects as the CENI” (Mangu 2012:33). The dominant influence of the executive has hindered the independence of the country’s leading judicial institutions and rendered them unable to fulfill their mandate of holding the executive branch to account.

Political control over the judiciary remained as strong as ever. The President of the Republic maintained significant power over the judiciary, including the power to appoint Supreme Court judges without confirmation by the National Assembly. According to article 82 of the

Constitution of the DRC of 2005, "the President of the Republic appoints, relieves them of their duties and, if necessary, revokes by ordinance the magistrates on the advice of the Superior Council of the Judiciary."

Theoretically, the DRC Constitution enshrines the principle of separation of powers between the executive, the legislature and the judiciary. However, in practice, the executive power predominates and outweighs the other two. Thus, the lack of effective independence of the judiciary in the DRC is opposed to the constitutional principle of separation of powers.

According to Mogopodi (2006:12) the resolution of election related conflicts is an important element in ensuring free and fair elections and stability in a democracy Therefore, election disputes require to be settled by independent judiciary in a prompt manner. Furthermore Klassen (2013:10) notes that if a dispute resolution body lacks independence, especially personnel and institutional autonomy, it is easier for incumbent parties or candidates to interfere with the process.

The CENI, unlike its counterparts in some countries, has no jurisdiction to deal with such conflicts. The CENI does not have the power to deal with electoral disputes as these are left to the judicial system of the country. Wall *et al.* (2006:205) has noticed that "many components of the judicial system may interact with EMB activities". The lack of independence of the judiciary affects the independence of the CENI given that its judges are obliged to give legal reasons for a decision of conviction taken elsewhere by political authorities. This statement is confirmed by the fact that, on 27 April 2012 the court invalidated the election of 32 members of the National Assembly owing to irregularities and fraud, instated 31 other candidates in their place (validated by the Assembly on 4 May) (UN 2012). The European Union (EU) mission chief Mariya Nedelcheva noted that the nomination of 18 new magistrates by the president, raised doubts about the independence of the Supreme Court, which was charged with examining the preliminary results and declaring them official (AFP 2011). Out of the thirty-one new parliament members [who were instated], twenty five were political allies of the incumbent president.

This was believed to give president Kabila the needed majority to have an upper hand over the parliament. Tshisekedi, from the main opposition party went far and ‘annulled’ the legislative elections and his party, the *Union pour la démocratie et le Progrès Social* (UDPS, Union for Democracy and Social Progress) “boycotted” the Assembly (Reid 2013:47).

The CENI had strongly disagreed with the decision of the Supreme Court. The CENI’s deputy president said during a press conference:

“It is not enough to say that the judgments of the Supreme Court enjoy absolute sovereignty, but the judgment must meet the requirements of the law”.

Jacques Ndjoli, former CENI deputy president. (Radiookapi 2015)

It is a basic principle of law of evidence that, a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claims may fail... In the election petition case, the burden of proof is therefore on the Petitioners to prove not only non-compliance with electoral laws as alleged in their petition but also that, the non-compliance was outcome determinative, i.e., affected the results of the election. Furthermore, in a democracy all parties must have an equal chance of being heard. Surprisingly, the Supreme Court has issued its judgment without hearing any party involved as reported by Radiookapi (2015). In this regard, Jacques Ndjoli said:

“It is possible to seize the same court so that it can rectify the clerical errors or interpret them by hearing all the parties involved. If the court has other election results, it has to be proved to us”. Sic.

In this regard, Hengelela *et al.* (2016:80) wrote: “However, the judiciary lacks independence from political and financial powers at play. Attempts at putting in place alternative resolution mechanisms to address electoral disputes have not yet been successful. Together, these factors explain the underperformance of the CENI since 2011”.

In the same vein, Tumba (2014:108) notes that after the 2011 elections the “Supreme Court lacked judicial independence and did not perform its duty, especially in resolving electoral disputes and complaints raised by some election contenders”.

This situation questions the CENI's independence since such issues around the globe are dealt differently. As the case of Tanzania electoral commission where the Constitution states that, 'No court is allowed to inquire into the election of a presidential candidate who is declared by the National Electoral Commission (NEC) to have been duly elected', or into any matter done by the NEC in discharging its duties (Article 75(12) of the Constitution of the United Republic of Tanzania of 1977).

In the European Union (EU) the code of good practice in electoral matters of the Venice Commission (Venice Commission 2002) suggests that appeals may be heard by an electoral commission. It notes that the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the electoral commission the first appeal level and the competent court the second (Venice Commission 2002:30).

The Ghanaian constitution goes to great lengths to protect the independence and integrity of the judiciary; given that the rule of law is the fulcrum around which democratic governance pivots (Tommasoli 2012). The 1992 constitution of Ghana under Article 125 vested judicial power in the judiciary (Constitution of Ghana 1992). Clause 1 of Article 125 posits that "Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this constitution" (Constitution of Ghana 1992). Similarly, to bolster the independence of the judiciary in the exercise of its constitutional obligations, the constitution makes it expressly clear under Clause 3 of Article 125 that judicial power lies solely with the judiciary and for that reason, neither the President (executive) nor Parliament (legislature) shall possess or be endowed with final judicial power (Constitution of Ghana, 1992). Furthermore, the constitution insulates the judiciary from the control of any person or authority when discharging its judicial and administrative functions as prescribed by the constitution under Article 127 (Constitution of Ghana, 1992). The constitution makes provisions to ensure that judicial officers can administer justice without fear or favor.

To guard against packing of the courts with Justices sympathetic to the agenda of the executive branch, the constitution mandates that Justices appointed by the President must be subjected to the scrutiny of Parliament who may confirm or reject the nominated candidate. Thus, both the Supreme Court and the Electoral Commission have demonstrated increasing independence from Ghana's ruling party (Gyimah-Boadi 2012:30).

Article 64 of the 1992 Constitution of Ghana allows any Ghanaian citizen to petition the Supreme Court to challenge the election of a president. Article 64 (1) states "the validity of the election of the president may be challenged only by a citizen of Ghana who may present a petition for the purpose to the Supreme Court within twenty-one days after the declaration of the result of the election in respect of which the petition is presented" (Constitution of Ghana 1992). However, before escalating to the Supreme Court, the Ghanaian electoral commission has the power to invalidate election results before their announcement or publication. The commission investigates allegations of irregularities when brought to its notice and nullifies the results if these allegations are established. On the other hand, when the allegations are made after the announcement and publication of the provisional results, only the Supreme Court of Ghana can invalidate the electoral results. In either of these cases, the annulment of one election presupposes the organization of a new one (Hounkpe and Fall 2012:69).

#### **5.2.6. A too-strong presidency**

Just over a decade ago (in 2005), the Democratic Republic of the Congo witnessed a profound moment in the country's history, when millions of people went to the polls to vote for a new constitution. It was significant, not least because the wording of the constitution had been agreed by the government and dozens of rebel leaders, who had finally come together after seven years of war. A key part of the constitution, dictated that a presidential election must be held every five years, with a non-renewable presidential limit of two terms (Constitution of 2006 Art 70). This detail was crucial for a simple reason: no president of the DRC since independence in 1960 had met a peaceful political end.

President Joseph Kabila, who succeeded his father less than two weeks after the latter was assassinated in 2001, has won two questionable presidential elections (2006 and 2011) since then and was supposed to step down after his second term ended in December 2016. While it is clear he could manipulate the elections and win again, the DRC's constitution bars Kabila from seeking a third term (Article 70, Constitution of 2006). At the writing of this study, the DRC is in the midst of an electoral crisis as the country has descended into a political crisis, many scholars have focused mostly on the drama surrounding President Joseph Kabila's attempts to cling to power by delaying elections.

The presidential election was supposed to be held in November 2016, but the CENI said that a lack of funds and logistical obstacles will prevent a new poll from being held before December of 2018 (CENI 2015). And that means President Joseph Kabila would remain in power for more than two terms and that would violate the country's fragile democratisation process and the popular will which the international community observes dumbfounded. There is apprehension that the lack of commitment from Kabila about the end of his term could mean that he intends to stay in office indefinitely. The most effective method to do so has been to compromise the CENI.

In his article, Kleinfeld (2017) cautions: "At the heart of Kabila's current strategy to stay in power is control over the Independent National Electoral Commission. The CENI is considered a big player in driving delays and executing Kabila's strategy."

Congolese people, while they are upset with the CENI composition, they also recognize that the CENI is being prevented from holding free and fair elections because of Kabila's control over the CENI.

The general elections scheduled for 2016 could have been different. Including the fact that the constitution barred Kabila from running for a third term, Congolese people have been so disappointed with the performance of their president that, according to Autesserre (2017), they were preparing to vote for his political opponents. There is a growing anger over Kabila's refusal to relinquish power after his second full term.



That is why the former US president Barack Obama said during his address at the African Union in Addis Ababa in 2015 that “Africa’s democratic progress is also at risk from leaders who refuse to step aside when their terms end,” (The Guardian 2015). This is also in the spirit of Rakner and Svåsand (2002:46) when they argue that the wide presidential power in many African countries has negatively impacted on the institutional development in Africa. It is conceded that this statement rings true for the DRC where there is concentration of power in the president Joseph Kabila. Jinadu points to the fact that across Africa there is strong popular resistance to attempts by incumbent presidents to extend their tenure through constitutional amendments or extra-constitutional or unconstitutional means (Jinadu 2014).

In a rare media interview in June 2017 with the German newspaper Der Spiegel, Kabila said in reference to the upcoming elections (Africanews 2017):

“I promised nothing at all, I want to organise elections as quickly as possible... we want perfect elections, not just elections. The government is in the process of registering voters that is going well.”

Despite the fact that the CENI has, on several occasions, declared that it is independent and enjoys some legitimacy, Kabila’s interview has questioned this independence. The administrative independence of an EMB is also characterized by the fact that the government cannot tell the EMB how and where to perform its duties, such as how, where and when hold elections.

Due to the powerful presidency, the growth of independent institutions such as the CENI has been affected and this continues to be a threat to their independence. As a matter of fact, during the 2011 elections, Kabila had a strong control over the CENI by appointing the chairperson Pastor Daniel Ngoy Mulunda, who is, according to Mavungu (2013), “a family member of president Kabila and a founding member of Kabila’s People’s Party for Reconstruction and Democracy” (Parti du peuple pour la reconstruction et la démocratie – PPRD).

In Mavungu’s article (2013), three months before the 2011 elections a national officer of the CENI told the author:

*“I do not see how Ngoy Mulunda will sit there and declare the defeat of his political boss Joseph Kabila” (Anonymous interviewee, September 2011).*

Mangu (2013:7) argues that, in 2011 the opposition opposed the nomination of the CENI’s chairperson, Ngoyi Mulunda, on the grounds that he came from the same province (Katanga) as President Kabila and was “a founding and influential member of the presidential party”. The opposition believed the election would be rigged in favour of the president and the majority and the CENI would lose its autonomy and impartiality if Mulunda were to preside over the bureau. In the same vein, in his book titled “the DRC: between hope and despair”, Deibert (2013) has noted that Kabila announced the head of the CENI for the 2011 elections would be none other than his close confident pastor Ngoy Mulunda. Like so many of his confidants, he continues, Ngoy hailed from Katanga [province] and had been touted by Kabila as his “spiritual adviser”. The author notes that perhaps more practically for Kabila’s aims, Ngoy had been a founding member of the PPRD and had actively campaigned for the president in the 2006 elections. Yonekawa (2013:79) went so far by positing that Ngoy Mulunda was a “former political advisor” of president Kabila, “who is also his cousin”.

Mavungu (2013) observed that Pastor Ngoy Mulunda is believed to have orchestrated the 2011 vast electoral fraud in favour of the incumbent president Kabila. Politicians in both the opposition and presidential camps regarded him as the main instigator of the botched electoral process and called for him to be replaced. The above raises a dangerous issue of leadership as centralizing the power in the office of the president through patronage and clientelism over the CENI.

In Ghana, in 2015 the chairperson of the EC Mrs. Charlotte Osei was appointed by Ghana’s head of state, president Jhon Mahama in accordance with Article 70(2) of the 1992 Constitution, one year before the 2016 presidential election but it did not prevent her for declaring Mr. Nana Akufo-Addo of the main opposition party New Patriotic Party (NPP) as the winner and president-elect of the presidential election at the expense of Jhon Mahama who appointed her.

The behavior of Ghanaian leaders as well as their supporters, after the election, has further solidified Ghana's credentials as a country determined to strengthen its democratic institutions and enhance its ability to live by the rule of law. Ghanaian leaders' fidelity to democratic institutions is a more effective way, than political opportunism, to ensure peace and security, as well as political and economic development.

#### **5.2.7. DRC's Parliament: An obstacle to the CENI's independence**

A representative national legislature is often the first institutional check on the executive branch. The legislature is the body usually responsible for making laws, including electoral laws, and it may also approve the government budget and scrutinize all public accounts, including those of EMBs (Wall *et al.* 2006:204). However, the attitude of the DRC' Parliament is far from being blameless; not only the parliament is slow to endow the CENI with the necessary laws to advance the electoral process; the Parliament destabilizes the CENI by modifying these laws according to the interests of the parliamentary majority. Thus, this situation is obstructing the CENI to carry out its works for a long period of time.

The National Assembly exercises the legislative power concurrently with the Senate. In accordance with Article 100 of the Constitution of 2006, both chambers enjoy the legislative function inasmuch as they pass the laws.

At the writing of this thesis, Kabila's People's Party for Reconstruction and Development (PPRD) and its allies control 341 of the 500 seats in the National Assembly—a supermajority. On April 14, 2016, Kabila loyalists in the parliament filed a petition at the Constitutional Court seeking clarity on three seemingly contradictory constitutional provisions. Article 70 limits the president to two five-year terms. Article 73 requires elections to be held 90 days before the expiration of the president's mandate. And Article 75 requires the president to hand over the reins of government to the Senate president during the election. Article 70, however, states that the president's term expires after the winner is declared and assumes office. Ruling party cadres seized on this inconsistency in taking their case before the Constitutional Court. Opposition

lawmakers immediately cried foul, seeing this as an attempt to sidestep term limit provisions. Their suspicions were confirmed on May 11, 2016, when the Constitutional Court ruled that Kabila could indeed stay in office beyond the end of his mandate if the presidential election were delayed. Such maneuvers continue in the ongoing crisis, further damaging the credibility of the parliamentary process. Thus, the supermajority enjoyed by the PPRD, itself realized under controversial circumstances, has negated the role that the Parliament is intended to play as a popular check on executive power in the DRC.

That is why Mavungu's (2013:1) article on the Democratic Republic of Congo (DRC) shows that the 2011 elections were not only administratively chaotic, fraud and violence were deliberately introduced in order to ensure that the incumbent president, Joseph Kabila, stayed in power and members of his majority party would dominate the National Assembly and control all the state institutions.

This situation however, also happens in most of the countries in West Africa where EMBs are entrenched in the constitution, but the executive and legislature have sometimes used the process of enacting electoral laws to whittle down or frustrate the powers of EMBs (Jinadu 2014). Wall et al. (2006:204-205) note that there are numerous examples of delays in law-making which affected electoral performance, as in Malawi in 1997, arising from lack of understanding or cooperation between the legislature and the EMB or between the legislature and the head of state.

#### **5.2.8. The influence of the international community**

Lopez-Pintor (2000:89-91) argues that the intervention by the international community has generally been considered effective in assisting both the democratization process and the establishment of electoral management bodies (EMBs) in particular. In some cases the international community has literally taken over the organization of the election, as was the case in Namibia in 1989, Cambodia in 1993 under the authority of the United Nations Transitional Authority in Cambodia (UNTAC) and Bosnia- Herzegovina in each of the elections

held under the administration of the Organization for Security and Co-operation in Europe (OSCE).

However, the influence of the international community<sup>10</sup> has negatively influenced the democratisation process in the DRC. Not only does it fund the electoral budget very widely, but the international community attaches to the CENI a very expensive "electoral expertise" which, in 2006 and 2011, managed the funds of donors without referring to the Bureau of the CENI.

What is a bit questionable is this:

"...the worst thing is, since 1960<sup>11</sup> nothing has changed. The DRC is still being colonized by Belgium and the international community... I confirm that the DRC is not independent because the Congolese people do not have the right to elect their president, and that before being the president of the Congolese people, he is the president of the international community to allow to the same international community and Belgium to make use of the DRC' wealth..."

Laurent Louis<sup>12</sup>, Belgian Parliament member, speech at the parliament of Belgium. 19 January 2012.

His speech however, raises a number of questions relating to the practical independence of the CENI. If the international community and Belgium can choose and impose on the DRC a head of state and some parliament members who are supposed to be elected by the Congolese through free and fair elections, then the CENI is just a simple tool that the international community uses to impose its power.

The situation of imposing leaders on the DRC is not peculiar to the country young democracy's history. On the 22<sup>nd</sup> June 2017, during the plenary of the European Parliament, a member of the European parliament, Jean-Luc Schaffhauser, went even further and said (youtube 2017):

"First of all, I would like to thank my colleagues for the relevance on the analysis of the DRC' situation. It is a country that I love so much... The main problem of the DRC is its wealth. May I bring you up to date that they (the

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<sup>10</sup> The International community in this study refers mainly to the United Nations and its Agencies, Belgium, France and the United States

<sup>11</sup> The DRC got its independence by Belgium in 1960, 30 June

<sup>12</sup> Laurent Louis is a Belgian federal parliament member and president of the Liberal Democratic Movement (MLD). Accessed online at [1 December 2017] [www.youtube.com/watch?v=iYIhCfB97oM](http://www.youtube.com/watch?v=iYIhCfB97oM)

international community) went to look for Laurent Desire Kabila because Uganda and Rwanda have both decided, with the international community support, to invade the country? May I remind you that while Laurent Desire Kabila was invading the DRC, a number of companies were signing contracts? They were American companies. May I also point out that when Laurent Desire Kabila turned around by being patriot for his country, an order was issued, here in Brussels, to eliminate him; and another order was issued in Washington? He was indeed assassinated fifteen days later. In this regard, may I remind you that they went to look for Joseph Kabila, by saying that they would manipulate him because he was a Rwandese national and they would make him the DRC's president? All this is manipulation [from the international community]. What is needed for the DRC is a renewed sovereignty, a national army that is effectively fighting, a MONUSCO that is militating in favor of peace and predators should be arrested"

Jean-Luc Schaffhauser, member of the National Front of the European Parliament.

The international community has always been very partisan in the DRC. It uses the weakness of the country to push for a desired outcomes. Kambuya (2011) notes that there are those in the DRC who think that the election results (in 2006) did not reflect the will of the Congolese people but that of foreign powers. An example that is often mentioned is the statement by the Belgian foreign minister that "we believe the best chance for Congo is for Kabila to be elected" (quoted by Kambuya 2011:165). That is why Yonekawa (2013:80) has observed that the presence of national and foreign "army groups, and the UN security forces" influenced the vote in favour of president Kabila, especially in the east of the DRC.

Patrice Lumumba transcribed by Shmidt (1961:230-231), wrote: "Throughout my struggle for the independence of our country I have never doubted the victory of our sacred cause, to which I and my comrades have dedicated all our lives. But the only thing we wanted for our country is the right to a worthy life, to dignity without pretension, to independence without restrictions. This was never of the Belgian colonialists and their western allies, who received, direct or indirect, open or concealed, support from highly placed officials of the United Nations, the body upon which we placed all our hope when we appealed to it for help."

Ugeux<sup>13</sup> said (Youtube2 2017):

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<sup>13</sup> Dominique Ugeux is a Belgian political scientist, writer, former diplomatic adviser, former UN expert, former politician, international political and economic consultant and has known Africa since 1951. He is considered one of the best experts of African continent. He is the author of: " The assassination of Gaddafi: A signal to step up jihadist terror in Libya, Africa and West" and "the Mobutu I knew"...

“The bloody Republic of Congo, as I baptized it, has no more sovereignty, this sovereignty so much cherished by the Congolese people. And then it is necessary to have the intellectual honesty to recognize that Belgium has played a negative role by installing Joseph Kabila on the throne of a presidential monarchy in the DRC.”

It is against this backdrop that Nzongola-Ntalaja makes a valid argument stating that the struggle for democracy in Congo is “inextricably linked to the struggle for national liberation.” He writes, “[i]t involves the quest for national sovereignty and genuine liberation from both colonialism and neo-colonialism in all its forms, as well as the ability of the Congolese people to freely determine their own destiny and to use their bountiful natural resources to improve their living conditions” (Nzongola-Ntalaja 2003:2).

### **5.3. Conclusion**

It will be stressed here that without a vibrant, competent and strong electoral body, the conduct of elections would be seriously flawed and the whole democratization process thrown into disrepute or grounded to a halt (Luqman 2009:62). The abounding literature on democratization indicates that a major challenge facing new democracies in Africa is institutional failure – lack of credibility. These discourses present a debilitating performance of key governance institutions such as the judiciary, parliament and the executive, among others, without a reference to the electoral institution that is expected to hold credible elections (Gyimah-Boadi 2003).

The preceding chapter has highlighted the challenges that threaten the independence of the CENI. The analysis revealed that the CENI lacks practical independence due to its composition which is referred to as a political-based composition. Not only members of the CENI are appointed by the political forces of the National Assembly, but these members are delegates of their political parties, thus, undermining the independence and impartiality of the CENI. This chapter has also identified other factors that limit the independence of the

CENI which include the unstable security of tenure of the members of the CENI, taking into account the fact that no CEI/CENI chairperson has worked until the expiration of the six years term as stipulates in the DRC electoral laws, which endangers the necessary continuity of election administration in the DRC. Some of them have been illegally dismissed from their position despite constitutional and legal guarantees for their removal; the lack of financial independence of the CENI which has been the main reason of the postponement of the 2016 general elections; the issue of political party funding which is not handled by the CENI; a weak judicial system since the CENI does not have the power to deal with electoral disputes; a strong presidency by Kabila who has an upper hand over the CENI as well as many other state institutions; the attitude of the DRC's Parliament which destabilizes the CENI by modifying the electoral laws according to the interests of the parliamentary majority; the influence of the international community which negatively impact on the CENI' independence; and the non-ratification of the ACDEG. The next chapter proposes a way forward towards to strengthen the independence of the CENI



## CHAPTER SIX: STRENGTHENING THE INDEPENDENCE OF THE CENI: THE WAY FORWARD

### 6.1. Introduction

Consolidating democracy through elections depends largely on the institutional foundations of the electoral processes (Shola 2010), particularly the EMB– in this case, the CENI. De Souza (1998 cited by Okello 2006:34) states that strengthening EMBs is necessary in the electoral process as it contributes to safeguarding the franchise, hence deepening representative democracy. The modality for guaranteeing EMB independence has also featured in debate. Jinadu (2014:9) has observed that the discussion ranges over four main areas. The first is the qualifications required for membership of the EMBs; the second the extent of, and limits to the power of the executive branch to appoint and remove EMB members, and under what conditions; and the third is security of tenure of those members. The fourth and final issue is the EMBs' revenue base and powers of procurement and the extent to which EMBs are shielded from the encumbrances of the civil service's financial and procurement rules.

It is important to stress the outset how difficult a case the DRC presents for democratic reform. It is contended that the reforms should be comprehensive to cover all aspects that affect the CENI's independence and functioning. This is in line with the commitment of the African Union on the strengthening of institutions of democracy in Africa<sup>14</sup>, as expressed in the African Charter on Democracy, Elections and Governance (ACDEG).

To strengthen the independence of the CENI and protect it from interference by the executive and the legislature, these are points that need attention in future reforms:

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<sup>14</sup> Eg CSSDCA Solemn Declaration of 2000, which requires African states to strengthen institutions of democracy as a way of enhancing the democratisation process in Africa.

## 6.2. De-politicization of the CENI

Abuya (2010) argues that guarding against election fraud real or perceived, requires a change in the mode of appointing electoral commissioners. The views of Abuya have been confirmed by several studies which found a direct correlation between the mode of appointing officials and their ability to discharge their role independently.

The political party-based system that the DRC has adopted in the composition of the National Independent Electoral Commission (CENI) has meant in practice that commissioners are often more inclined to act in the interest of their party than as impartial upholders of the electoral laws, as one informant in Tumba's study (2014:77) succinctly put it:

*"The members of the INEC were selected according to the law on the establishment of the INEC, but they acted irresponsibly. Each member attempted to pay back his sponsor (political party) and this way of doing things seriously undermined the credibility of the elections. You know what, the political parties represented within the INEC appointed some of their political members as voting officers."*

Electoral management is of life - and - death importance to politicians who are subject to it, and it is possible for them to lobby EMBs to make the election results more advantageous. Therefore, it is desirable for EMBs to be neutral entities separate from the executive and legislative branches of government, as well as from political parties.

The presence of politicians on the EMB may undermine confidentiality in matters such as the security of ballot materials.

The impact of this politicization on the electoral process has been to sacrifice the principle of impartiality in favour of short-term political goals. In this regard, Lehoucq (2002:36) has rightly observed, there is the need to "depoliticize" the electoral governance, while Wall at al. (2006:89) note that "Depoliticization of EMBs may be more appropriate as confidence in the electoral process grows". One of the ways of achieving this is by establishing an independent EMB. This is likely to generate acceptance of the electoral process by the electorate and

thereby ensure regime legitimacy. Therefore, the appointment process needs also to be reviewed by the DRC legislature to strengthen the CENI's independence. Appointment procedures of CENI members need to be reviewed to render them more transparent, inclusive and stringent. The role of the President of the Republic in the selection and appointment procedure should be very minimal, because "the greater the number of political actors involved in the appointment process, the less stakeholders believe that the EMB commissioners are hand-picked by the incumbent to do his/her bidding" (Aaken 2007:25).

This study suggests that the CENI should be an expert based electoral commission as opposed to a multiparty based one. Expert-based or non-party-based EMBs are those which the legal framework requires to be made up of individuals appointed on the basis of their professional standing. In some cases, members of an expert-based EMB may be nominated by political parties or civil society, but this does not imply that such nominees will be directed by their nominating political parties or act in a partisan manner (Wall et al. 2006:89).

In this regard, this study suggests that the Catholic Church through its national managing body, CENCO (Congo's Conference of Catholic Bishops) be the head of a panel in charge of receiving nominations, conducting interviews and recommending candidates for appointment. The reason beyond this argument is because the CENCO has decisive political weight in the DRC; it is a body that fights particularly for a lasting peace in the DRC. The CENCO is one of the most trusted institutions [perhaps the most trusted institution] in the country that enjoyed public trust (Nzongola-Ntalaja 2003:41, Dizolele 2010). And since the 2011 elections, the CENCO has criticised Kabila's regime attempts to extend its time in power and has called, in many instances, for peaceful marches in various cities, demanding that president Kabila steps down.

Thus, the panel should be headed by the CENCO, and constituted with two representatives of women's rights, two representatives of the national youth league, two university' professors (preferably one law professor and one professor of political sciences), four representatives of NGOs working towards the strengthening of democracy in the DRC, especially in the electoral

matters, one judge, one representative of the national organisation of disable people and two representatives of media.

Entrusting to them this role will be a public trust building exercise toward the administration of the electoral process in the DRC. This panel should conduct nominations based on one's integrity, knowledge of election processes, competence, public respect and impartiality (Kabemba 2005). The rationale of this approach is to increase the credibility of election results by ensuring political neutrality of EMBs since non – credible elections may well destabilize a political regime.

The list of the selected candidates should then be forwarded to parliament for approval by a simple majority. The final stage should be the formal appointment of the commissioners by the President. Okello argues (2006) that formal appointment of commissioners by the President is important since it enhances the status and profile of the appointees.

### **6.3. Security of tenure**

Jinadu (2014) emphasizes that “security of tenure of EMB members appears more important than the process for appointing them”. Therefore, the best option will be to adopt the model of Ghana commissioners who work until the official age of retirement. Aaken (2009) advises that Life-long tenure will increase the independence of the (head of the) EMB, which should increase the probability of a fair election. This will ensure that the CENI commissioners act independently and fearlessly. It would also enable the CENI's members to accumulate experiences and draw lessons for improving the electoral process. As Shola (2010:7) put it “job security generally increases the stakes officials have in the electoral process: if they mess up the process, they may lose their positions”.

### **6.4. Adequate funding allocation**

With regards to funding, it is necessary for the DRC's legislator to rethink the electoral fund project as a national project that is no longer financed by the international community. One option could be the establishment of an Elections Fund into which donations from corporate

bodies, individuals and the donor community would be directed; the fund could be fed also with special taxation. Another could be endeavoring to include elections in the national budget. The first option would not only take away the pressure of fund sourcing, but it would also strengthen the electoral body's neutrality and independence by reducing the dependence on government and freeing it from the perception that the body is influenced through financial manipulations. The CENI should independently elaborate its budget and submit to parliament as an autonomous budget without prior approval by the government. A law should provide a minimum threshold budget that should be made available to the CENI to enable to it continuously improve the management process by for example employing new technologies in election management in order to minimize irregularities. Okello (2006:35) cautions that the legal provision is important since it makes it obligatory to provide minimum funding and at the same time it is enforceable. The economic constraints and the political culture in many African countries make the legal guarantee relevant and important. Therefore, the government of the DRC through relevant ministries and departments should ensure that the CENI is timely allocated adequate funding to initiate the process of election preparations early enough. This is consistent with the electoral cycle approach that requires strengthening of the key processes associated with elections. The government should ensure fidelity to the constitutional implementation agenda.

CENI should also be allowed to independently seek external funding according to its needs. This would enhance its efficiency and guard against the possibility of the institution being starved of funds by the government.

## **6.5. Political Parties public funding**

Regulating the funding of political parties and electoral campaigns is a further important factor in the regularity of the electoral process. To enhance multi-party democracy in the DRC, national legislation should provide for the funding of political parties participating in the national and provincial legislatures on an equitable and proportional basis. It is important that

political parties obtain public funding to allow fairness in the electoral process. This is necessary in order to level the playing field and to strengthen the democratic process. The study therefore suggests that legal provisions be introduced for fair and transparent state funding of political parties. The law should also provide for the disclosure of private funding of parties and candidates and, if necessary, expenditure ceilings should be introduced for electoral campaigns in order to limit the adverse influence of money in electoral politics, as well as allowing for a more level playing field.

The Carter Center (2011) notes that one important purpose that political finance legislation can serve is to limit corruption through disclosure laws concerning contributions and spending. Hence, the DRC should take active measures to prevent public officials from making personal gain or profit from their position or privileging certain constituencies or companies for their financial support. And the law should provide for the duty not to abuse state resources for campaign purposes. As De Vos (1994:119) states ‘...it will give the incumbent regime an unfair advantage constituting an unfair election practice.’

## **6.6. The reform of the judicial system**

The independent and impartial manner in which the judiciary resolves disputes, including electoral disputes, indicates the level of maturity of a country’s democracy (Azu 2013). Since elections provide legitimacy to the power to rule a country it may be manipulated in various ways. As Maphunye (2013:8) has noted, to be perceived independent, EMBs require an independent judiciary which can exercise further checks and balances in terms of the separation of power principles.

For challenging and eliminating frauds and corrupt practices in elections, an independent and strong judiciary is required since good elections are directly linked to the independence of the judicial system. Kerr (2013:167) notes that in countries where rule of law is weak, the EMB

independence and capacity may not accurately capture the EMBs' ability to deter executive manipulation and minimize administrative problems.

The DRC law makers should introduce an effective and lasting reform of the judicial system, which should be able to independently and impartially examine all electoral disputes. The independence and impartiality of the judiciary in resolving electoral disputes are crucial to democratic governance. This is because they have direct implications for whether the electorate would accept its judgment as credible, legitimate and binding or reject it as compromised. If they accept it, the involvement in the judiciary in the dispute resolution process strengthens democratisation. But if they reject it, that can lead to conflict and derail the democratisation process.

#### **6.7. The DRC Parliament: the neutral referee**

The DRC parliament should review the legislative framework for elections and ensure that meaningful reforms are introduced that can strengthen the electoral administration and management. Legislative processes for reforming election process should embrace multi sectorial approach involving other key stakeholders. While it is acknowledged that the legislative jurisdiction of Parliament is limitless, Parliament should refrain from instituting amendments to the electoral laws for the upcoming elections in the DRC as this will complicate the electoral process especially from election management perspectives. Parliament members should act in the interest of the populations who elected them, and not act for the interest of their political parties and should not serve at the pleasure of the executive.

This study also suggests that the CENI should be given the power to place amendments to the electoral law on the agenda of the legislature. Canada and Palestine are examples where the EMB may make recommendations for amendments to electoral laws, although this is done by a line ministry or a government office in many other countries (Wall *et al.* 2006:204).

## 6.8. From strong man to strong institutions.

“Africa does not need strongmen, it needs strong institutions.”

Barack Obama, former US president in his speech to the Ghanaian parliament in 2009, July 12 Accra.

“There is a lot that I would like to do to keep America moving. But the law is the law, and no person is above the law, not even the president.”

Barack Obama, former US president, address at the African Union. July 28, 2015 Addis Ababa, Ethiopia

This sentence, uttered during his speech at the African Union in 2015, summarises president Obama’s message to Africa when it comes to the need for strong institutions. In his speech he highlighted that the first president of the United States, George Washington (1789-1797), refused to run for a third term in 1798, during the nascent years of the republic, despite popular acclaim and instead stepped down to ensure there was peaceful transition and the principles of democracy upheld. South Africa’s Nelson Mandela did the same thing. Strong and independent institutions are vital for good governance. When institutions are strong, the presidency does not matter. In the words of Former UN Secretary Kofi Annan<sup>15</sup> “general greater efforts are needed to build the institutions, processes and behaviors that are vital for genuine multi-party competition and the attribution of political power. Such elections bestow legitimacy on the winner, provide security for the losers, and end the “winner-takes-all” politics that discourages democratic practice.” Joseph Kabila, who organised the DRC’s only two multiparty elections since independence, should avoid sowing chaos and instability while the country needs peace and stability the most. He should allow Congo’s first ever peaceful transfer of power to take place, which will be his greatest legacy. He should also avoid any attempt of seeking a third term.

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<sup>15</sup> Kofi Annan's speech at Kronti ne Akwamu lecture, available online at [12<sup>th</sup> January 2018]  
<http://m.myjoyonline.com/marticles/news/full-text-kofi-annans-speech-at-kronti-ne-akwamu-lecture>



## 6.9. The international community

“I know and feel deep in my heart that sooner or later my people will rid themselves of their internal and external enemies, that will rise up as one in order to say ‘No’ to colonialism, to brazen, dying colonialism, in order to win their dignity in a clean land”

Patrice Lumumba, Transcribed by Schimdt (1961:230-231)

The DRC is an internationally sovereign and independent state and is neither under Belgium colonization nor a colony of the international community. The sovereignty principle has been underlined among the principles considered by the classical international law as a basis of relations among states. Sovereignty has at the same time been considered as one of the essential or fundamental characteristics of a state.

Having that in mind, the international community should avoid meddling in the DRC internal affairs and respect the international law principle of non-interference in the internal affairs of states as stipulated in the Declaration of the United Nations on Inadmissibility of Interference in Internal Affairs of States and on Protection of Independence and Sovereignty (Under the Resolution No. 2131 (XX) dated 21 December, 1965).

Belgium and the international community, especially the UN and its allied organizations that specialize in democratic governance should support the growth of democracy in the DRC through the holding of regular, free and fair elections and protect the will of the Congolese people. The international community should support the democratisation process in DRC in sponsoring the electoral process but the funding should be independently and freely managed by the CENI.

## 6.10. Conclusion

Elections are a very important pillar of democracy and have become generally accepted as necessary means of changing and legitimizing governments globally. Although elections are a means of changing regime peacefully, their mismanagement constitutes a means of triggering violence and insecurity. Therefore, an electoral management body needs to be practically independent in managing the electoral process.

In the previous chapter, the review has revealed that the CENI lacks practical independence due to its composition as well as the influence of other factors. This chapter has proposed further ways of strengthening the independence of the CENI, and it is argued that the composition of the CENI has to be depoliticized; its members should enjoy a strong security of tenure and the issue of political parties funding should be effective and handled by the CENI in order to enhance political competitiveness in the electoral process. An adequate funding should be timely realized so that the CENI carries out its works with independence. The Judiciary, the parliament and the executive (presidency) should support the growth of democracy in the DRC by allowing the CENI to work without the interference of any quarter.

## CHAPTER SEVEN: GENERAL CONCLUSION

### 7.1. Introduction

It is important to preserve Africa's democracies through incorporating Electoral Management Bodies to ensure free and fair elections. The institutionalization of Electoral management bodies (EMBs) is meant to promote democracy; they not only guarantee that elections are held and administered efficiently, but also promote fairness, openness and transparency, and hence contribute to the legitimacy of democracy and the enhancement of the rule of law.

This study has sought and whether it complies with most of the criteria of an ideal independent EMB in order to conduct free and fair elections in the promotion of democracy in the DRC, by using the successful example of the Ghana's electoral commission. To investigate this problem, five principal objectives were set out. The first objective was to determine the characteristics of an ideal independent EMB. The second sought to analyze the role of independent EMBs and their impact on democratisation in Africa. The third was to assess the level of independence of the CENI and EC with regard to the characteristics of an ideal independent EMB. The fourth objective sought to identify the factors and weaknesses that limit the practical independence of the CENI. And the fifth tried to propose a way forward in order to strengthen the independence of the CENI.

In the introductory chapter of this dissertation, the problem of the study, its objectives and the methodology employed in investigating the research problem were copiously discussed.

The chapter highlighted the politico-social environment in which the elections are held in the DRC. The holding of elections in the DRC began against a backdrop of war and a general trend towards plural politics and multiparty electoral competition in Africa where Mobutu's dictatorship, who ruled for more than three decades, was overthrown and replaced by Laurent-desire Kabila in 1997. The instauration of Laurent Kabila did not the end war nor introduce electoral democracy in the DRC. Laurent Kabila was assassinated and replaced by his son Joseph

Kabila who facilitated the work of the inter-Congolese political negotiations in Sun City in South Africa (2001-2003 with more than 350 delegates representing the government, ex-rebels, the political opposition and the civil society). The transitional constitution was then adopted and made provision of the Independent Electoral Commission (CEI) tasked with managing the 2006 electoral process. The CEI was dissolved and replaced by the Independent National Electoral Commission (CENI) in 2011. The later managed the 2011 electoral process which were characterised by frauds and irregularities due to the lack of independence of its members. This was the backdrop of the electoral management in the DRC.

The chapter also put emphasis on the importance or rationale of conducting this study. In this study, I argued that it is important to assess the level of independence of the CENI by using the successful model of Ghana' electoral commission, to make propositions for strengthening the CENI, by removing all current interferences, structurally, administratively, legally and financially and to comply with the requirements of free and fair election, in order to be able to cope with the tasks ahead as the CENI prepares itself for the holding of 2018 general elections.

This study has made use of two theoretical frameworks: the new institutionalism theory and the theory of democratic transition. The new institutionalism theory has been applied to provide a framework upon which the CENI can be transformed into a professional, impartial and independent institution, since the CENI displayed serious institutional weaknesses in 2006 and 2011 that had an impact on both the electoral process and the result thereof. The theory of democratic transition has been used to help the CENI to become a strong institution in supporting democracy in the DRC as this theory sees institutions as having a key role to play in the formation and maintenance of democracy.

In terms of methodology, this study is a case study of the CENI and its handling of the 2006 and 2011 elections in the DRC. The document analysis method has been used for data gathering and scholarly materials such as books, thesis, articles, journals and internet sources where appropriate and necessary were used.

In the second chapter, quite an extensive literature that gave a panoramic perspective of the study was reviewed. These reviewed works made in-depth analysis of not only elections and elections management, but also pointed out what was required to ensure that EMBs are independents. The review has also focused on the legal framework which governs the electoral process in Africa such as: the AU Declaration on the Principles Governing Democratic Elections in Africa which reaffirms the universal principles of democratic elections as required in the Universal Declaration of Human Rights; African Charter on Democracy, Elections and Governance which obliges member states to establish and strengthen impartial and independent electoral commissions in Africa in order to conduct a transparent electoral process; the ECOWAS Supplementary Protocol on Democracy and Good Governance which covers key recommendations relating to the accession to political power and the holding of elections in the West Africa. Its binding status makes it the best instrument that provides reasonably necessary framework in tackling the electoral challenges, though of sub-regional application; the Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections whose principal objective is to promote the holding and observation of democratic elections based on the shared values and principles of democracy, the rule of law and respect for human rights enshrined in the SADC Treaty. However, its status of non-binding instrument makes it a dog which barks without biting.

The chapter has also reviewed the notion of free and fair elections, it has highlighted the election management problems in Africa which are limited in many instances to the operations of the EMBs, it has also examined the issue of the characteristics of independent EMBs and their importance to democratisation, and finally it has focused on problems that beset the electoral commissions in the DRC and Ghana. This has provided the broad context in which the CENI was analyzed.

Chapter Three focused on the characteristics of an ideal independent EMB, by looking at various examples worldwide and by analyzing the statutes, mandate, appointment, tenure and independence of members of the EMBs. The study considered these issues important in understanding the DRC's electoral body configuration. The fourth chapter assessed the formal

independence of the CENI and the electoral commission of Ghana (EC) by looking at the various electoral laws that establish them. The assessment was based according to the characteristics of an ideal independent EMB which include their tenures, structures, mandates, compositions and the rules they have designed to ensure credible management of the elections. In the fifth chapter, the dissertation determined the factors that limit the behavioural independence of the CENI and looked also at the current political situation in the DRC and assesses the challenges that lie on its road to democracy. In the sixth chapter, the study proposed a way forward to strengthen the independence of the CENI.

## **7.2. Summary of findings**

In an attempt to determine the characteristics of an ideal independent electoral management body in chapter three, five indicators of independence of EMB were identified, namely: the institutional independence of the EMB; its functional or operational independence; its financial independence; its personal independence and its accountability.

The institutional independence refers mainly to the legal form taken by the EMB and requires that an EMB is institutionally separated from the executive branch of government and does not include members of the government in its composition.. Institutional independence means that an EMB has a secure legal status which is established by the constitution or established by law, and this legal provision explicitly provides for and guarantees its institutional independence and autonomy from the executive branch of government. This will promote the independence of the EMB and will exclude the right of instructions by the government.

The functional or operational independence relates to the daily activities of an EMB. For instance receiving and validating the nominations of electoral participants; conducting polling; counting and tabulating the votes; the conduct of voter registration, boundary delimitation, voter education and information, media monitoring and electoral dispute resolution. Functional independence also includes the freedom that an EMB has to hire and fire its staff according to its needs.

The financial independence embraces the question of who decides on the budget of an EMB. To be financially independent, an EMB needs to have an adequate funding and should develop its own budget and should be guaranteed by the laws.

The personal independence refers to the way in which the top officials of an EMB are appointed, their tenure of office and the way in which they should be dismissed. Members of EMBs must be selected in a transparent manner in order to ensure the confidence of the public and the political parties alike, and thus guarantee their independence. Their security of tenure in office should be guaranteed by law, preferably a Life-long tenure which increases the independence of the EMB's commissioners and a commissioner can only be removed by a court conviction, in other words, that they cannot be removed or dismissed by executive decision.

As any other public state institution, an EMB needs also to be accountable for the use of its funds and the way it carries out of its mandate. It was noted that parliamentary accountability secures an EMB's independence since reporting to the executive or government raises the possibility of taking instructions that will help secure the election for the ruling party.

In the same chapter, the study has tackled the equally thorny issues such as voter or civic education, voter's roll compilation, boundary delimitations, political party funding, which often indicate an EMB's character and independence. Furthermore, the chapter has also analysed the constitutions and operations of the electoral commissions in Africa. This study has identified some constraints related to the management of elections in Africa which include the overweening influence of the heads of states in the appointment of commissioners, the politicization of electoral commissions where the EMBs are composed of political party's representatives, budgetary constraints which limit the EMB's independence and subjugate them to the incumbent regime, and the use and abuse of incumbency. It goes without saying that in order for electoral bodies to contribute to the realisation of democracy in Africa,

electoral reforms are important which can restore public confidence thereby enhancing the credibility of an EMB.

In assessing the formal independence of the CENI and the electoral commission of Ghana (EC) in Chapter Four, the electoral laws that establish the CENI and EC have shown that both EMBs are legally independent and guaranteed in the DRC and Ghana constitutions. However, formal safeguards like the establishment of a statutory electoral body, budgetary independence, significant tenure and freedom from direction cannot guarantee behavioural independence or independence of action since formal provisions alone do not secure independent behaviour.

That is why the study has analyzed the behavioural independence of the CENI in Chapter Five. The study found that while the legal provisions theoretically guarantee the independence of the CENI, many other legal provisions limit the practical scope of this independence. The CENI lacks practical independence due to legal (weak judiciary system), political (mode of appointment of its members, the strong presidency and the influence of the parliament on the functioning of the CENI), economic (lack of financial means), external (the influence of the international community on the functioning of the DRC's institutions) and administrative (security of tenure) challenges.

The composition of the CENI has been referred to as “a political representation”. The study found that the CENI is highly politicized and is composed of “delegates” of political parties represented in the National Assembly. This mode of staffing the CENI has affected the independence and the impartiality of its members. The chapter has also discovered that the members of the CENI are unstable from their position and have been removed or dismissed illegally despite constitutional and legal guarantees for their removal only through due process. This situation has hindered the CENI to accumulate experiences and draw lessons for improving the electoral process. The issue of the financial independence of the CENI has also been raised in this chapter. It was argued that the CENI suffers from a lack of financial availability to manage the electoral process and this was one of the main reasons the 2016 presidential election was postponed. This point considerably limits the independence of the CENI since it depends on the goodwill of the Congolese government and the international community to finance the



elections, which at many instances has not been timely realized. Political party funding is another issue that threatens the independence of the CENI. political party funding is not included in the CENI's mandate, which would have been better suited to handle this issue given its status as an independent institution, as in Ghana or in South Africa. It is handled by the executive which, in 2011 elections, has made use of it to finance the electoral campaign of the ruling party. This situation has thus distorted political competitiveness and violates the principle of equality between candidates during the 2011 elections. The lack of independence of judiciary in the DRC is another issue identified in this chapter that undermines the independence of the CENI. The CENI does not have the power to deal with electoral disputes as these are left to the judicial system of the country. The involvement of the presidency, the parliament and the international community in the works of the CENI is another point affecting the independence of the CENI.

The thesis set out to propose a way forward in order to strengthen the independence of the CENI, and it is noted that the composition of the CENI has to be depoliticized. The study has suggested that the CENI should be an expert based electoral commission as opposed to a multiparty based one and should include independent personalities from civil society organisations. Its members should enjoy a strong security of tenure and the issue of political parties funding should be effective and handled by the CENI in order to enhance political competitiveness in the electoral process. An adequate funding should be timely realized so that the CENI carries out its works with independence. The Judiciary, the parliament and the executive (presidency) should support the growth of democracy in the DRC by allowing the CENI to work without the interference of any quarter.

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