

Management and Dispute Resolution of Elections in East Africa



Management and Dispute Resolution of Elections in East Africa

Management and Dispute Resolution of Elections in East Africa

© East Africa Law Society, 2017

info@ealawsociety.org

Edited by: East Africa Law Society

Design by: Noel Creative Media Limited

CONTENTS

Glossary.....	iii
Elections in East Africa: Summary.....	iv
Part 1: Democracy’s Darkening Sky?	1
A history of democratic stagnation and retreat.....	1
Constitutions Without Fidelity: East Africa’s Changing Outlook.....	2
Common Themes and Trends in Electoral Management in East Africa.....	2
The Problem of Electoral Violence and Intimidation.....	3
The Role of the Executive in the Appointment of EMBs.....	3
The Promise versus Performance of BVR and other Electoral Technologies.....	4
EMBs, Judiciaries and Electoral Dispute Resolution.....	4
Managing Political Parties and Their Nominations.....	5
Contested Voters’ Registers.....	5
Voting, Voter-Turnouts, Transmission and Tallying of Results.....	6
Civic Education.....	6
Part 2: Country Case-Studies	7
CASE-STUDY1: TANZANIA.....	7
A Case of Deep-Seated Voter Apathy?.....	7
Tanzania Adopts Technology... With Some Glitches.....	8
The Police, Security and Partisanship.....	9
The Best Democracy Money Can Buy.....	9
The Elections Dispute Mechanism Has a Major Gap.....	9
The Zanzibar Outlier: Historical Difficulties Resurface.....	10
A Flawed Voter Registration Exercise.....	10
Voting and Cancellation of Elections in Zanzibar.....	10
The CCM Wins The Election... By a Landslide.....	11
A Reprise: Four Lessons for Tanzania.....	11
CASE STUDY 2: UGANDA.....	12
Elections in Uganda: Executive Impunity, Judicial Conservatism.....	12
Electoral Impunity, the Enduring Legacy Of 2001.....	12
The Court lays down the law, 2001.....	12
Over-Voting, Can These Results Be True?.....	14
The Glitches of using Technology in Constructing the Voters’ Register.....	14

The Electronic Transmission of results still open to Manipulation	15
A Constrained Pre-election Environment	15
What Lessons Do We Learn From Uganda?	15
CASE STUDY 3: BURUNDI	17
A Legacy of Division And Violence	17
Term-Limits and the Perils of Mismanaging Elections.....	18
Antecedents of 2015	18
Post election situation	19
Role of the Electoral Management Body	19
Institutionalized Pervasive Human Rights Violations	20
A Lesson Spurned?.....	20
Part 3: Conclusion and Way Forward	21
Resolving the Challenges of Electoral Management in East Africa	21
A. RESOLVING CROSS-REGIONAL CHALLENGES.....	21
The problem of Electoral Violence and Intimidation.....	21
The Role of the Executive in the Appointment of EMBs.....	22
The Use of BVR and other Electoral Technologies.....	22
Electoral Dispute Resolution EMBs	22
Managing Political Parties and Their Nominations	23
Creating Voters' Registers that have Integrity	23
Voting, Voter-Turnouts, Transmission and Tallying of Results	23
B. DEALING WITH IN-COUNTRY CHALLENGES	23
Tanzania	23
Uganda	24
C. IMPLICATIONS FOR THE EAST AFRICAN COMMUNITY.....	24
Flawed Elections Have Left Each of the Countries Unstable or Vulnerable.....	24
The EAC Must Stand for Treaty Commitments Both at Home and in the Region.....	25
Regional Democracy Cannot Be Built With Non-Democratic Member-States.....	25
The Youth Are Being Left Behind, yet It Is Their Future at Stake	25
Need to Return to the Basics	25
What Lessons for Kenya and Rwanda in 2017?.....	26

GLOSSARY

BVR	Biometric Voters' Register
CCM	Chama cha Mapinduzi
CEMI	Commission Electorale Nationale Indépendante
CSO	Civil Society Organisation
EAC	East African Community
EMB	Election Management Body
EVID	Electronic Voter Identification
ERT	Electronic Results Transmission
IEBC	Independent Electoral and Boundaries Commission
IPOD	Inter Party Coalition for Dialogue
LHRC	Legal and Human Rights Centre
NRM	National Resistance Movement
TACCEO	Tanzanian Civil Society Consortium on Election Observation

ELECTIONS IN EAST AFRICA:

SUMMARY

This is a three-part study of challenges faced in Electoral Management and dispute resolution of election petitions in East Africa. Starting with an overview of a growing trend towards democratic and constitutional back-sliding, this study looks at emerging trends in electoral democracy in East Africa, emphasizing common trends and practices as they have emerged from the latest elections in the region: Tanzania and Burundi (2015) and Uganda (2016). After exploring the common themes and trends, Part 2 is a more granular study of individual case-studies, Tanzania, Uganda and Burundi.

This Part highlights the electoral issues that are specific to each country: the ruling party CCM's dominance in elections as a whole and the mismanagement of the elections and politics of Zanzibar; the use and abuse of the security forces and the judicial system in Uganda. The Burundi case study - in which no real election can be said to have taken place- is used to review the consequences of mismanaging both the elections and constitutional term-limits. This is to emphasize what is at stake when elections are handled poorly in any member country of the EAC.

Part 3 is the conclusion and way forward. It addresses resolving common problems as well as in-country challenges. It also explores the principal implications for EAC region as a whole and offers proposals for the upcoming elections in Kenya and Rwanda.

Democracy's Darkening Sky?

A history of democratic stagnation and retreat

"Democracy is perhaps the most promiscuous word in the world of public affairs", said Bernard Crick¹, remarking on the tendency of the supporters of every system of government to label their particular system a democracy. Were he writing today, he could well have remarked on the recent tendency in Africa to treat elections- and the associated phenomenon of "electoralism" - as democracy. Elections are now a regular feature of politics, in Africa generally and in East Africa more specifically. No eligible incumbent has lost an election in East Africa since the transition to competitive politics at the turn of the 1990s. Indeed, only in Kenya have non-incumbent political parties repeatedly won the presidency, itself hardly a remarkable fact given the short shelf-life of political parties in Kenya where parties are as quickly created as they are wound up or abandoned and at every election since 2002, the winning coalition has been purpose-built for that one election only.

In short, democracy seems to have grown very shallow roots. On a trend analysis, it certainly seems as though democracy is actually in retreat: voters have grown more cynical and are staying away from the ballot; Burundi held a deeply divisive election in 2015, after an attempt by the incumbent to legitimize his eligibility for a third term through judicial manipulation. Now that country is rapidly becoming a failed state, generally ignored by the African Union and the East African Community even though it could -as has happened before- destabilize Rwanda next door and the region eventually. Apex courts have become ineffectual and timid in matters of election rigging and unusually deferential to the executive power, shying away from making findings of fraud even when illegalities by incumbents are rife. Rwanda has now scrapped presidential term limits, joining Burundi and Uganda which did so a decade ago. Every election time, Uganda seems as if it could be on the mend and looks like reaching a turning point. However, it invariably refuses to turn and always seems to flirt with danger.

On the whole, though, outright electoral fraud has declined, reflecting changes in the global sentiment about such matters but it is now also commonplace for so many aspects of the elections to be partially flawed with the result that small cumulative irregularities eventually compromise the fairness of the election as a whole. Electoral management bodies are independent by constitutional prescription but not always so in practice and performance. To use Thandika Mkandawire's justly famous phrase, East African countries are now increasingly "choiceless democracies." This is deeply troubling: East Africa wants to be a political federation and proclaims, in Article 6 of the EAC treaty, that it is committed to democracy, the rule of law and human rights. It is unlikely to achieve any of the vaunted goals of the Community if internal democracy within members' states is in such a parlous state.

1 Bernard Crick, *In Defence of Politics* (1993)

Constitutions Without Fidelity: East Africa's Changing Outlook

Is this grim prognosis correct? At first glance it would seem not. The growing democratic stagnation has, paradoxically, coincided with renewed interest in making or revising Constitutions. All countries have either written brand new Constitutions or substantially revised the old ones. Yet this expansive faith in new Constitutions has not bred any faith in constitutionalism²: In Uganda, Burundi and Rwanda presidential term-limits have been scrapped. Where that option has proved untenable such as in Kenya and Tanzania, an equally sinister trend has emerged: in Kenya elections involving eligible incumbents have been very violent whilst in Tanzania, the CCM has out-smarted the opposition to keep its hold on power or altogether mismanaged the election.

In general, the emerging picture is of a region in which democracy's hold is tenuous; constitutional back-sliding is taking place; electoral institutions are still weak and democratic consolidation has not only come to a halt but democracy itself may be, in fact, in retreat. As pointed out in an article in the East African³, even international indices by such as Freedom House Survey, the World Bank's Doing Business Survey and the Mo-Ibrahim Index of African Governance underline these realities.

This, then, is the context of this study of the three most recent elections in East Africa: the Tanzanian and the Burundi elections in 2015 and the Uganda in 2016. The aim is to explore, in a more granular way, some of the micro-realities of recent elections, to explore the underlying trends, examine the prospects for free elections and tease out the implications for the region as a whole.

Common Themes and Trends in Electoral Management in East Africa

The overall trend towards democratic and constitutional backsliding is underlined by some common themes and trends. Though the intensity and scale of each of these elements differs by country, the patterns are nonetheless strong enough to justify a conclusion that these are the Community's common realities. First, electoral intimidation and violence remains a pressing problem and it does not look as if electoral violence will abate any time soon. Second, executives continue to manipulate electoral management bodies to their benefits, even in those countries such as Kenya, where a complicated appointments process is constitutionally mandated and designed to reduce such influence. Third, the promise of technology - which was meant to increase electoral transparency - has not been fulfilled and often the technology itself has become part of the electoral fraud. Fourth, no country in the region has found a wholly satisfactory method of resolving electoral disputes, especially disputes related to the Presidential election. Fifth, political parties routinely break election laws rigging elections in party primaries before the general election and the Electoral Management Bodies appear either complicit in such irregularities or helpless to do anything about them. Sixth, voters' registers remain problematic- whether these are manual or biometric - and it seems that they will remain so for a while yet. Seventh, the tallying and transmission of results is unsatisfactory and controversies about the outcome of elections - especially the presidential election- will continue so long as this is not straightened out. Finally, the design and delivery of a comprehensive civic education programme, especially in light of adoption of new and unfamiliar electoral technologies in Kenya, Uganda and Tanzania.

Below we elaborate on each of these themes and trends.

2 Confirming the insight in the seminal essay by the late Okoth Ogendo, *Constitutions without Constitutionalism: An African Paradox*, in Douglas Greenberg S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (Chapter 4) OUP, New York.

3 See Wachira Maina, *East Africa: Regional Democracy Under Threat as Leaders Fix Polls and Voters Stay Away*, *The East African*, January 16 2016.

The Problem of Electoral Violence and Intimidation

Elections have either been preceded by or led to violence in Kenya, Uganda, Burundi and Zanzibar. Of the East African countries, only mainland Tanzania has been relatively free of widespread violence. But even there, violence is not altogether absent: In the last election cases of intimidation, especially by the security forces and party cadres were common and in places tensions were high enough to affect voting. One scholar comments that election violence in Tanzania is explained by CCM's "desire to protect and uphold the union by maintaining a stronghold over Zanzibar which in turn compromises election management and administration."⁴ According to this argument, violence is inevitable as "the opposition tries to push for fairness and independence of the election process." Though the laws of most of the EAC countries allow the electoral management bodies to draw upon the police force to manage incidences of electoral violence, in practice these bodies have been ineffectual and sometimes even complicit in the intimidation and associated violence, especially when the intimidation is being done by the security forces, as is often the case in Uganda.

The impact of electoral violence has varied across countries. There is the immediate impact that it has on voting: turnout declines when violence breaks out ahead of the elections. Sometimes violence may drive electoral reform. In part it is the tensions and violence related to elections down the years that nudged Zanzibar towards reform of its Electoral Management body, the Zanzibar Electoral Commission. When politicians can reap the benefits of electoral violence without personally bearing any of its costs, theory predicts they will provoke violence again and again. Uganda has a similar problem of impunity. Electoral violence can also be dangerously destabilizing: the violence that preceded the election in Burundi in 2015 spawned a failed coup attempt and widespread human rights violations, assassinations and internal displacement and mass flight of Burundians into neighbouring countries. Though for now Burundi is still holding together, the long-term outlook is not good and the region could be destabilized in the coming years.

The Role of the Executive in the Appointment of EMBs

In theory, all the Electoral Management Bodies in East Africa are constitutionally independent of the executive and the legislatures⁵. However, independence in law has not secured independence in fact. And it is now clear that the process of appointment has not insulated EMBs from political manipulation or influence. Moreover, it has also become clear that even where the process is seemingly ratcheted and elaborate the opportunities for manipulating the electoral management bodies still exist. Kenya has a very elaborate process of appointing the Commissioners of the IEBC, complete with parliamentary scrutiny and approval. This elaborate process was meant to guarantee neutral choices and the appointment of strong technical teams. Unfortunately, it has neither guaranteed integrity nor independence of the Commission. The IEBC has performed no worse or better than that of the Electoral Commission in Uganda which is appointed in a relatively straight forward political process: chosen by the president and approved by parliament. In Burundi and Rwanda, the commissioners are appointed in a process that is very similar to that of Uganda except that in Rwanda the approval and scrutiny is by the Senate. In Burundi, commissioners are identified by political parties according to a formula that reflects the power-sharing agreement of the 2000 Arusha Accord. Of the East African countries only the Council of Commissioners in Rwanda does not serve full-time.

4 Poncian, Japhace, Explaining Election Violence in Tanzania: The Interplay between the Union Politics and Electoral Administration and Management (December 31, 2015). In P.B. Mihyo (Ed), Election Processes, Management and Election -based Violence in Eastern and Southern Africa. Addis Ababa: Organisation for Social Science Research in Eastern and Southern Africa (OSSREA), pp. 123-142.. Available at SSRN: <http://ssrn.com/abstract=2726640>

5 For a detailed discussion of Electoral Management bodies, their powers, establishment and performance see Election Management Bodies in East Africa: A comparative study of the contribution of electoral commissions to the strengthening of democracy, being an AfriMAP and the Open Society Initiative for Eastern Africa review conducted by Alexander B Makulilo, Eugène Ntaganda, Francis Ang'ila Away, Margaret Sekaggya, Patrick Osodo.

One abiding problem in the appointment of Commissioners has been how the different countries apply the constitutional criteria and thresholds: criteria laid down in law are a floor, the minimum permissible qualifications. They are a necessary condition. Unfortunately, these criteria are treated as both necessary and sufficient. No East African country makes a genuine effort to find the candidates best qualified once they establish that the candidates nominated have met the minimum qualification specified in the laws. This 'resting on the floor' has not worked for the EAC, commissioners are qualified as the law requires but they are rarely the best that they could be if the countries invested more effort in not merely meeting the bare minimum but in trying to make of their commissions they best they might be.

The Promise versus Performance of BVR and other Electoral Technologies

The deployment of electoral technology is the new fad in the management of elections in East Africa, and Africa more generally: Biometric Voter Registration has been used in Kenya, Uganda, Tanzania and Rwanda. But the degree to which technology is actually operational and effective in securing electoral integrity in these countries varies. Uganda ran both manual identification and an electronic one in its election earlier this year. Burundi uses a fully manual system. Tanzania did a biometric voter registration in 2015. The turn to technology has been based on the assumption that identifying voters by some biometric feature - such as fingerprints- makes it harder if not impossible to cheat. Technology only works if there is a working ethical and legal framework designed to go with it. Technology itself is morally neutral and can stop electoral fraud only when four basic conditions are met. One, the electronic database must have integrity. Two, the link between the database and voter identification system at the polling station must be sound. Three, officials at the station polling station must know how to use the technology. Finally, the support infrastructure- reliable power supply, good connectivity and security- must be in place. If these conditions are not met, electoral technology will turn out to be mere extravagance. In 2013, Kenya invested US\$293 million in the election – three times what the country had invested in the 2007 election – at the end of which the Independent Electoral and Boundaries Commission, IEBC, said that key components of its electoral technology had failed. This translates to, Kenya paid US\$ 21 per registered voter or US\$29 per vote cast, to put in place an electoral system that was eventually inferior to the manual one it had before: the system was not simple, transparent or accountable, requirements imposed by the constitution.

EMBs, Judiciaries and Electoral Dispute Resolution

Electoral disputes present another area of emerging common practice in the East African Region. On this Tanzania is an outlier: the results of the presidential election cannot be challenged in court. In all the other countries, they can and often are, especially in Kenya and Uganda. Yet as the practice in Uganda and Burundi since 2013 has shown, courts will not rule against presidents once they have been elected and sworn in. This now seems to be a continent-wide trend. As we have seen in, Uganda (2016), when superior courts are asked to make findings on substantive violations of electoral law in presidential elections, they often recoil and hide behind excessive formality. Constitutions in Kenya and Uganda mandate courts to settle electoral disputes without undue regard to procedural formalities. In fact, in the petition in Uganda in 2016, the courts resorted to formalities to reject evidence of malpractice.

This flight from substantive justice and evolving reluctance to rule against presidents is rooted in a new 'electoral theology' of peace over justice. After bloody elections in Kenya, Zimbabwe, Cote D'Ivoire over the last decade, a view has sedimented that if electoral justice and fairness can plausibly lead to violence, then countries should err on the side of peace. This has had the perverse effect of rewarding the fraudsters. Those who can both rig elections and unleash violence if results are challenged will almost invariably be the winners. By making honesty low value, this mindset has almost definitely guaranteed that elections will be violent. The courts

and EMB appear to have accepted this. It is now an inescapable fact of electoral case-law: courts will be deferential to incumbents and it seems unlikely that any court in the continent and in the East Africa region will hold a presidential election invalid once the declaration of results is made and the swearing-in complete.

Managing Political Parties and Their Nominations

The political party system in East Africa is very varied: in Kenya parties are merely electoral vehicles for political entrepreneurs, shape-shifting institutions that run with the prevailing needs of the politicians. In Tanzania, Chama Cha Mapinduzi,(CCM) remains dominant to a degree unimaginable in the other countries except perhaps Rwanda where the Rwanda Patriotic Front, RPF is virtually the only party. In Burundi, parties are bargaining vehicles, each faction fabricates a party as a mechanism for parlaying itself to power. In Uganda, the NRM not only dominates but also makes it very hard for its competitors to participate effectively in elections. This salad bowl picture makes it hard to draw firm conclusions about “an emerging party dynamic” in the region. However, whether weak or dominant, it is also clear that most elections in the region are won or lost at the party nomination stage, so the behavior of parties during nomination is part of the analysis of the quality of elections in this region.

Party regulation is one of the mandates of Electoral Management Bodies in East Africa yet in the face of incumbent parties- as in Kenya- or dominant party systems- as in Tanzania, Uganda and Rwanda- these bodies have proved both timid and ineffectual especially on critical competitive factors such as access to state financing; use of state resources for campaigning and access to public media. Parties close to government routinely ignore electoral codes, abuse their privileged positions and get overwhelmingly positive coverage by state owned media. The incumbent privileges have had two consequences: one, there is a cachet in getting the nomination of an incumbent party and two, being close to the state and its resources, incumbent parties have a major head-start in elections. In Kenya, where parties are regional and therefore often ethnic based, getting the support of the regional party is the dispositive element. So at election time, there is a scramble to be the preferred nominee of the dominant regional party as that almost invariably guarantees victory in the subsequent general election. Electoral management bodies know that elections are being won before Election Day but do not appear to understand what to do to ensure that these preliminary elections are themselves fair.

Contested Voters' Registers

Many elements go into the making of a free and fair election but the making of a voters' register that has integrity is a key one. Each country has its own method of creating the voters register and none is without controversy.

One of the abiding challenges of voter-registration in East Africa has been its relationship with the civil registry and the national ID system. Tanzania does not have a national ID system; Kenya and Uganda do. In Kenya, the ID contains the same identifiers as the voting card: name of the person, biometric information- finger-print or picture; place of origin or voting area. Why have two registration systems? In recent reforms in Kenya, one proposal was to enfold the civil registry into the voters' registry. Uganda constructed its BVR register for the 2016 election from the civil registry, showing that it can be easily and cost-efficiently done. More important biometric registration has obvious merits: In Tanzania, all previous voting cards were declared invalid. In the process, 52,062, multiple registrations were identified and eliminated.

In Burundi CENI created its voters register using its own data collection from its periodic voter registration exercises in which eligible voters register using official documents. In Rwanda, the Voters' register is extracted from the National ID card database and updated through a process of public verification. In Uganda, though there is continuous voter registration, in the

2016 election they also used the civil register to update their records. Like Kenya and Tanzania Uganda also uses BVR. Drawing data from the civil register minimizes voter registration costs but it does not matter if that register has no integrity. Even registers are up to date; periodic voter registration exercises can marginalize some voters given the seasonality of activities in agricultural countries, which all EAC countries are. BVR is an excellent way to build an electoral data-base but its integrity depends on actual biometric verification. If not, it is no better than a manual system. In each of the countries covered in this study questions were raised about the integrity of the register in the respective last elections.

Voting, Voter-Turnouts, Transmission and Tallying of Results

There is not one country in the East African region in which actual voting, vote counting, transmission and tallying of results and eventual announcement have not been contested. In the presidential elections in Uganda in February 2016, President Yoweri Museveni got 100 percent of the votes cast in 47 of a sample of 60 polling stations that reported 100 percent voter turn-out. According to a statistical tool for detecting electoral fraud developed by Peter Klimek, Yuri Yegorov, Rudolf Hanel and Stefan Turner⁶ such high turnout figures for a victorious candidate in unusually high voter turnout elections signal systematic fraud. The announcement of results in Zanzibar generated controversy and eventual cancellation of the results. In Uganda, there were claims - none verified so far- that some ballot papers were pre-marked. The results' transmission was unsatisfactory: the process was often not transparent and there were insufficient reconciliation measures especially in terms of entering the right data into the polling station forms. These problems have been compounded by the fact that EMBs have not been very transparent and open about crucial aspects of the elections: consultations with stakeholders are weak or relations are fraught with suspicion- whether in Tanzania, Uganda or Burundi- and when critical decisions are taken, such as the decision to cancel the results of the Zanzibar election, no cogent arguments are given.

One problem area has been parallel tallying. EMB have been anxious to retain control of the exclusive right to announce results. This has meant that parallel tallying by media or CSOs has not been encouraged, a problem that means that it is not possible to judge the integrity of the tallying by the EMBs. In Tanzania, the police raided the offices of LHRC/TACCEO's on the claim that the centre was counting, tallying and disseminating election results contrary to the law. A number of LHRC/TACCEO data clerks and officers were arrested. They also seized computers and other equipment.

Civic Education

In Tanzania, Kenya, Burundi and Uganda it is the duty of the Electoral Commission to provide or at least oversee voters' education. However, the performance of all the commissions in these countries has not been up to scratch especially because in three of the four countries the last elections also marked the first time electoral technologies were deployed in such a significant way- BVR in both Uganda and Tanzania and BVR, Electronic Voter identification Devices and Results Transmission system in Kenya. There were two primary limitations: lack of a comprehensive voter education programme and insufficient lead-time for the conduct of voter education. Without proper civic education confusion often resulted. In Kenya the electoral technology was not properly tested: in fact, the few tests conducted failed. In Tanzania, in Morogoro, for instance, some people refused to register fearing that the 'BVR Card'⁷ would be used by the authorities to track down those who failed to pay charges and fees levied by government. In Uganda, some election officials did not know how to use the technology, implying lack of forward planning and training on the part of the Electoral Commission.

⁶ See Peter Klimek, Yuri Yegorov, Rudolf Hanel and Stefan Turner, *Statistical detection of systematic election irregularities* Proceedings of the National Academy of Sciences of the United States, PNAS, October 9, 2012 vol. 109 no. 41.

⁷ Page 78 of the Tanzania report

PART 2

Country Case-Studies

Part 1 has detailed the broad picture of the fortunes of electoral democracy in East Africa and also showed some of the commonalities of electoral management in East Africa. Part 2 is a more granular assessment of elections in three East African Countries, Tanzania, Uganda and Burundi. These case studies illustrate discrete challenges of electoral management unique to each of the three countries, drawing from experiences from the latest election conducted in each. Some common problems will emerge once again but it is their peculiar forms in the individual countries that this part attempts to highlight. The Burundi case study is a cautionary tale, a reminder of what can go wrong when elections are manipulated.

CASE-STUDY 1: TANZANIA



A Case of Deep-Seated Voter Apathy?

The 2015 general election in Tanzania was the fifth election since 1995 when the country transitioned to multiparty democracy. Noting the trends towards multiparty democracy in the world at the time President Nyerere had cautioned Tanzanians about the wisdom of wetting one's hair when you see your neighbours getting a shave "lest you get a rough shave." In a sense, then, Tanzania went plural to forestall future pressure rather than in answer to prevailing public demand. Since then, the ruling party has shaped rather than been shaped by events, showing remarkable longevity and resilience in facing off opposition and if need be, renewing itself in the face of existential threats. The result has been remarkable dominance by the party of independence. Elections in 2000, 2005 and 2010 showed wildly varying voter-turnout numbers- Table 1- but the 2015 election showed a jump in both registration and turnout. In all though, the dominance of the CCM has been unassailable, more so in Zanzibar, discussed below⁸.

Table 1: Swinging Registration and Turnout Numbers in Tanzania

Year	Voter Turnout	Total vote	Registration	VAP Turnout	Voting age population
2015	62.68%	14,574,957	23,253,982	58.31%	24,994,742
2010	39.49%	7,952,497	20,137,303	37.53%	21,189,992
2005	69.64%	11,438,350	16,425,913	65.51%	17,459,595
2000	72.77%	7,341,067	10,088,484	45.72%	16,055,200
1995	76.5	6,831,578	8,928,816	47.92%	14,256,000

⁸ Source: Voter Turnout data from the International Institute for Democracy and Electoral Assistance, IDEA, at <http://www.idea.int/vt/countryview.cfm?id=227>

The table shows a dissatisfied electorate. Looking at the turnout figures in column 2 the turnout does not seem too bad, except for the 2010 election where only 37.53% of the eligible voters actually registered (column 5) and of these only 39.49% bothered to turn out to vote. In three of the last five multi-party elections, less than 50 per cent of eligible voters have bothered to register in Tanzania. That means that although in two of those more than 70 percent actually turned out to vote, the total number of eligible voters far outstripped those that did vote raising some serious doubts about the depth of Tanzanian democracy. The figures for 2015 are puzzling: The National Election Commission registered 93 percent of the eligible voters yet the final turnout figure on Election Day as a percentage of the eligible is only 58.31%. One plausible explanation which has been offered is that the BVR registration encouraged many more people to register because they could subsequently use the voter's card as an identity card. That would make sense and also explain why 8,679,023 people registered but never turned out to vote: maybe they had never intended to from the very first.

Tanzania Adopts Technology...With Some Glitches

Thus far, the political context: Tanzania introduced Biometric Voter Registration ahead of the 2015 election. This means that in much the same way as in Kenya and Uganda, the objective of the BVR in Tanzania was to eliminate the most common of voters' register problems. Initially Tanzania had the Permanent National Voters' Register (PNVR)⁹, which was, as in many other places, regularly updated- as it was before the elections in 2007 and again before the elections in 2010 to remove dead voters; register those who had come of age in the inter-election years and correct any erroneous information.

Nevertheless, as noted about Kenya, technology assumes that a sound ethical framework is in place and that election officials are competent in its use. A group that observed the biometric voter registration exercise in Tanzania noted cases "of fraudulent registration"¹⁰ in which illegal immigrants and non-citizens along the border regions were registered as voters. The problem, it seems, is that the National Electoral Commission lacked the means to identify citizens apart from being registered in the presence of Local Government Chairmen in the border regions.

One of the common complaints about the exercise was the depth of consultations with stakeholders. Political parties, especially the opposition, felt that the changeover to the BVR systems was opaque and without sufficient consultation with key actors. The political parties felt that they had been ignored and that their fears had not been assuaged: would voter information be secure and free of manipulation? How exactly would the technology work to obviate fraud and multiple voting? The effect of insufficient consultations saw skepticism about the technology, suspicion about its efficacy and reluctance about adopting it. It became clear eventually in Tanzania, once adopted, that the technology worked better than the manual system used previously.

Ironically technology also revealed poor planning and lack of preparedness by the electoral management bodies. When deployed, the technology coverage was compromised by basic problems: inadequate electric power and low battery life for example. Staff capacities in the use of technology cut across the entire country: some registration clerks did not know how to use the machines; some polling officials forgot their passwords not to mention lap-tops that died before voting began. Sometimes the kits were inadequate even though fit for purposes. Tanzania needed 15,000 BVR kits according to the NEC estimates but only 8,000 were procured and eventually deployed.

⁹ See Article 5(3) of the Constitution of the United Republic of Tanzania 1977; also Sections 11A and 12 of the National Elections Act and Sections 15A and 15B of the Local Authorities Act.

¹⁰ See Interim Statement by Tanzania Election Monitoring Committee TEMCO On Biometric Voter Registration (BVR) In Tanzania Dar es Salaam, August 15, 2015 at pp. 5-6

Even with BVR registration, problems were rife, suggesting that there were structural problems affecting registration. There were reports of omissions from the BVR. Of the 800 registered people in one village, the name of only one appeared in the register. In another district, one opposition party official claimed that the names of 22,412 voters were missing in the register¹¹ and in yet another it was said that 210 foreigners had illegally registered. The conclusion then is that BVR eliminated many but not all of the problems that were experienced under the old manual system. At the same time, BVR systems had problems: inconsistencies between information on the BVR cards issued to voters and the voters' register; names were altogether missing from copies of the register displayed at the polling stations, often disenfranchising voters.¹²

The Police, Security and Partisanship

Even though Tanzania did not experience the type of heavy-handed interference in electoral politics characteristic of Uganda and Burundi, there were credible accounts of police partisanship. The police were generally seen as pro-government and anti-opposition. There were also reports that the police failed to act when supporters of the ruling party destroyed campaign posters and other electoral materials put up by the opposition. There were cases of candidates arrested and locked up, often for very flimsy reasons, during the campaign period and just before the elections.¹³ Perhaps most ominous was the deployment of military personnel in areas where the six elections that had been earlier cancelled were held in December. Whatever the reason it is clear that the heavy presence of the military personnel may have intimidated voters and could, at least partly, account for the low voter turnout in those elections.

But perhaps there were expectations that the police would play this role even before the elections. Just five days before the election, President Dr. Jakaya Mrisho Kikwete gave the police 399 out of a planned total of 777 vehicles, among which were crowd control trucks built to dispense tear gas, and not simple crowd control equipment.

The Best Democracy Money Can Buy

Bribery has become a pervasive problem in East Africa. In Tanzania it is christened traditional hospitality (or takrima) and is rife during elections. Unfortunately, neither in Tanzania nor in the rest of East Africa have electoral management bodies been effective in dealing with allegations of corruption and treating, a problem has been defining what amounts to electoral bribery. A common practice in Tanzania is to fuel boda bodas for their operators; another is to go slow on arrests and police harassment during campaign periods and bump up police allowances. Demolitions of houses erected illegally on public land stopped during the elections but promptly re-started after the results were announced. Such conduct defies classification and leaves electoral commissions stumped.

The Elections Dispute Mechanism Has a Major Gap

In Tanzania, a petition may be filed to challenge the election of Member of Parliament in the High Court and to the Resident Magistrate's Court in case of a petition challenging the election of a councilor. Not so in the case of the presidential election: once "a candidate is declared by the Electoral Commission to have been duly elected [as president] then no court of law shall have any jurisdiction to inquire into the election of that candidate."¹⁴ As discussed below in the case of Zanzibar, this gap in the law could provoke a constitutional crisis or prolong one even if it does not cause it.

¹¹ District Secretary for CHADEMA in Igunga District, Tabora, quoted in

¹² The TACCEO report says that more than 100 prospective voters with cards in their hands did not vote at Dawasa polling station in Kawe in Dar es Salaam. A polling officer was reported to have described the problem as 'BVR machines' technical errors.'

¹³ This happened in Viziwaziwa ward, Kibaha, in Coast region; in Same East constituency, in Nachingwea and Magu

¹⁴ Article 41(7) of the Constitution of Tanzania of 1977

The Zanzibar Outlier: Historical Difficulties Resurface

Special mention must be made of elections in Zanzibar where elections have been controversial over the last two decades. Even though the registration of political parties and their administration is a union matter, the Spice Isles have their own electoral management system under the Zanzibar Electoral Commission (ZEC) under a first-past-the-post majoritarian system with in-built proportional elements to cater for a gender quota. The Zanzibar Electoral Commission (ZEC) has not had a happy history and has been complicit in electoral irregularities. It is said to have rigged out the CUF leader Seif Sharif Hamad in 1995; it mismanaged the 2000 election leading to violence and widespread chaos in which 35 were killed with another more than 2000 fleeing to neighbouring Kenya. CCM won that election and the subsequent one in 2005 amidst further claims of fraud and tensions. Although the two parties, CUF and CCM had signed a reconciliation agreement in 2001, it did little to ease underlying tensions or secure for the government the legitimacy it sorely needed. A history of political instability and illegitimate elections eventually culminated in a 2010 Referendum and formation of a Government of National Unity, that saw Zanzibar with a president and two vice presidents (both being presidential appointees). The First Vice President comes from the political party which came second and whilst the Second Vice President is from the President's party and is also the leader of the government business in the House of Representatives. Cabinet positions are politically negotiated and there is no formula for how they should be shared out.

A Flawed Voter Registration Exercise

There were significant differences in the way the 2015 election was run in Zanzibar: first, the ZEC did not use BVR in Zanzibar and the voter registration itself was somewhat unusual because Zanzibar in effect holds two separate presidential elections, the vote for the president of Tanzania and the vote for the president of the islands. Any registered voter is eligible to vote for the president of Tanzania but to be eligible to vote for the president of Zanzibar a voter must also be registered as a resident of Zanzibar and hold a Zanzibar Identity Card.

In 2015 voter registration proved controversial. Many youths complained that they were not able to get the Zanzibar ID mainly because the local administrators, termed Sheha's, would not give them the letters of residency required for the purpose.¹⁵ This disenfranchised many of them, by some accounts up to a third of new voters. Moreover, there were also claims that IDs were illegitimately issued to the unqualified: principally residents of mainland Tanzania¹⁶ and under-age voters.

The registration exercise itself was full of intimidation: the government deployed security forces across the isles. These forces, beefed up by militia with such deadly names such as *Ninja* and *Janjaweed*, attacked residents, beat up people including journalists, and blocked registration centers to stop the opposition from scrutinising the goings-on. By mid-June 2015, the political climate was so poisoned that on the 23rd of June, CUF members stormed out of Zanzibar's House of Representatives, leaving the Government of National Unity teetering on the edge. Matters got worse barely a week later when three of the opposition party's supporters were shot.

Voting and Cancellation of Elections in Zanzibar

In the run-up to elections in Zanzibar polls indicated a victory for CCM on the mainland and a victory for the opposition in Zanzibar whose presidency to that day was held by CCM. On voting day tensions were high but international observers thought them peaceful and generally fine.

¹⁵ For a detailed discussion of these and other issues relating to the 2015 election in Zanzibar see Dr Maïlys Chauvin, *Electoral shenanigans in Zanzibar: a sign of CCM desperation?* Africa Research Institute, August 6th 2015 at <http://www.africaresearchinstitute.org/newsite/blog/electoral-shenanigans-in-zanzibar-a-sign-of-ccm-desperation/>

¹⁶ Residents of mainland Tanzania are not entitled to get the Zanzibar ID unless they have lived in Zanzibar for 10 or more years. The LHRC report residents in Tumbatu alleged to have witnessed the arrival of 400 adolescents holding ZanID intending to register as voters.

However, the chairman of the Zanzibar Electoral Commission, ZEC, Mr. Jecha Salum Jecha unilaterally cancelled the results without discussion with the other electoral commissioners claiming that there were serious discrepancies. The chair accused the other six commissioners of being partisan and said that there were widespread cases of ballot stuffing and voter intimidation. The opposition suspected the Government's hand: the deputy chair of the ZEC was arrested as he prepared to announce further results. The legality of the cancellation was dubious and embarrassing for the union government, the very results that were said to be illegitimate in Zanzibar were used by the National Electoral Commission, NEC, to settle the presidential vote for President John Magufuli of the URT.

Jecha did not produce any evidence of the irregularities that compelled the cancellation. Instead, having stoked a serious constitutional crisis he disappeared for nearly three months, eventually resurfacing in January 2016, to announce a repeat election on the 20th of March 2016. The opposition, which had already claimed victory - verified by independent parallel tallying- was livid, noting that the effect of Jecha's actions was to leave the CCM deputy chair and president of Zanzibar Dr Ali Mohamed Shein in office.

The CCM Wins The Election...By a Landslide

The period to March 20 was characterized by political tensions, intransigence by the CCM and growing disillusionment by the opposition. In the end the CUF, the main opposition party decided to boycott the election. It was not a victory that the CCM will savour. By staying away from the polls, CUF denied the CCM the legitimacy it needed to speak for the islands. The hardliner elements in CCM argued that having boycotted the election, CUF should not be involved in the affairs of the Zanzibari government in any form. This is a myopic view that ignores CCM's precarious franchise and fragile hold on public trust and support. Given the grievances of electoral justice that still simmer in Zanzibar since the 1995 election, there is a danger that CCM's head-strong attitude will only serve to radicalize the voters in Zanzibar even further. This bodes ill for the future of the union. Most worrying is the resentment that must inevitably creep in as the opposition comes to believe that elections and peaceful means cannot win power in Zanzibar. Zanzibar has had a revolution before, its leaders know that and whereas none has talked in those terms yet, the insouciant attitude of the opposition in the wake of the repeat polls suggests that they may have lost interest in electoral politics of the CCM type for now.

The immediate loser is, once again, the Zanzibar Electoral Commission which has now indelibly tarred itself with the image of "the bull-dog of the CCM". It is unlikely to be trusted to run another election in the islands.

A Reprise: Four Lessons for Tanzania

1. Though the political argument for finality in presidential elections is sound, a peremptory ban on petitions such as the one in the Tanzanian constitution undermines the one sure method of resolving crises that politicians are unwilling or unable to resolve. The constitutional and political crisis that arose after Jecha cancelled the results raises question about the wisdom on the constitutional ban on challenging a presidential election through a petition. Even though, there were serious questions on the legalities of the cancellation, the fact that the results of a presidential election cannot be challenged in court put an unnecessary barrier in the path of a court case, the one method that had a real chance of resolving the problem. Tanzania must re-think the wisdom of this provision of the constitution. When political parties are unreasonable or when their leaders act illegally as both Dr. Shein and Mr. Jecha did, the law should not abet their conduct. The opposition alliance, Ukawa - of which CUF is a member- has already called for a new electoral commission as well as the enactment of the right to petition presidential results in courts.
2. The Zanzibar situation is both a political and personal matter for President John Pombe Magufuli. The crisis will inevitably test President Pombe Magufuli's credentials as "a

different kind of leader". The dishonesty evident in the first election and Dr. Shein's stubborn refusal to accept the will of the people will put into question President Magufuli's own legitimacy if he chooses to do nothing about the unsatisfactory situation evolving in the Isles. What decision will Magufuli and CCM take on this state of flux? Will Magufuli ask Shein to reach out to CCF?

3. The unfinished constitutional reform has merely postponed difficult political negotiations about the future of Tanzania as a Union, not resolved them. Thus even though President Magufuli seems to have made anti-corruption and governance reforms his priority, a constitutional settlement especially as regards the status of Zanzibar and the degree of autonomy that it should enjoy will be, in the long run, more important questions. The challenge is whether CCM can unwind from the position that they took just before the election when the party completely changed the draft that the Constitutional Commission had put forward for debate and adoption. More broadly, the knock on effect of the Zanzibar debacle on national politics could be that it gives new wind to the call for a new constitution by the opposition coalition Ukawa.
4. Elections can be won by targeted deployment of security forces but legitimacy cannot be won that way. It is in the long-term interest of the ruling party to rethink its own role and adjust how it plays politics in the new dispensation. Dominant parties often miss small shifts in the ground, partly because of complacency and partly because of a tendency to 'revert to the tried and tested.'" Complaints regarding elections in Tanzania invariably circle back to two issues: the way the government deploys and uses the security forces during the election cycle and the role of the publicly owned media. Whilst media manipulation may take a while to address, the mobilization of the security forces for political purposes- a notorious issue in Zanzibar- has been undermining the Tanzanian democracy.

CASE STUDY 2: UGANDA



Elections in Uganda: Executive Impunity, Judicial Conservatism

Electoral Impunity, the Enduring Legacy of 2001

In Uganda, elections has been the difficult relationship that has evolved between President Yoweri Museveni and the Uganda judiciary. The president has never shied away from criticizing the courts nor from using them to stymie or frustrate his opponents. He famously said that the "major work for the judges is to settle chicken and goat theft cases" not "to [determine] the country's destiny."¹⁷

The Court lays down the law, 2001

The 2001 election campaigns set the tone for future elections and for elections dispute resolution by the courts. The election itself was a heated affair with President Museveni threatening to put his perennial rival, Kizza Besigye "six feet under".¹⁸ Though the court ruled

¹⁷ When he lost a constitutional case in 2004 Museveni said that he would appoint a commission of inquiry into the judiciary in Uganda to put the judges back in line. The referendum case, a score of criminal cases in which Ugandan courts convicted politicians and party leaders for failing to pay dependent support or for winning election using illegal means coupled with a few other decisions that limited the executive's room for maneuver were the immediate trigger for the government sponsored constitutional amendment to cut back on the number of years a judge needed to have worked to be nominated to supreme court and the High Court. On June 29th 2004 hundreds of Movement supporters protested in the streets of Kampala asking the president to sack the judges who had presided over the referendum case. Some judges were sufficiently intimidated to stay away from away from their duty stations.

¹⁸ See J.P. Lawrence, In Uganda, Museveni finds biggest election obstacle in former friends The Christian Science Monitor, July 14, 2015.

that the elections were not free and fair but declined to nullify the outcome by a 3–2 majority decision.

At issue in that first petition, *Col. Dr. Besigye Kiiza v. Museveni Yoweri Kaguta and the Electoral Commission*,¹⁹ were a series of electoral violations: unqualified voters being allowed to vote; expulsion of party agents from polling stations; double-voting by some voters and political use of the military to intimidate the supporters of the opposition. In settling the issues before it, the Court had to decide two issues: the standard of proof and the burden of proof that the petitioner Besigye bore. The conclusion was that he not bore the burden of proof but that that burden required him to establish two things: one, that the elections had been characterized by illegalities and two, that those illegalities had had a substantial effect on the result.

Though Mr. Besigye lost the petition, a majority of the judges agreed with him that the Electoral Commission and the NRM had committed a series of illegalities. The Electoral Commission had failed to compile and update the voters' register and voter's roll for each constituency. This had led to multiple voting and ballot stuffing. The Commission had not, in addition, fully complied with the provisions of electoral law or with the principles underlying that law. As for the government, it had deployed the military who had then grossly interfered in the elections. Nonetheless, the court concluded that this did not invalidate the election since the petitioner had not proved that the illegalities and irregularities had substantially affected the result.

According to Chief Justice Odoki, though the petitioner had proved irregularities had occurred he had failed to prove that Museveni "did not obtain more than 50% of valid votes of those entitled to vote". He dismissed the petitioner attempt to do this by statistical analysis as "academic, theoretical and speculative and lacking in expertise and credibility."

In dissent, Justice Tsekooko was no less unequivocal that "there was no justification for involving the army in the election" given the fact that the "country was not under an emergency nor under a threat of sudden invasion." The judge noted that "no democratic choice can be made freely when members of the UPDF force the voters how and for whom to vote."

The Electoral Commission had been neither transparent nor accountable: it had arbitrarily reduced the period for inspecting the register from 21 to 3 days; the electoral commission violated the law in two other cases²⁰ even though in only one of these was the decision to nullify the result upheld on appeal.²¹

Thus, by 2016 election some repeat patterns could be anticipated: the elections would be attended by traditional irregularities, including especially the involvement of the military and the police in elections; inability or unwillingness of the electoral commission to fully enforce the law; a formalistic reading of the election law- especially section 59(6)(a) of the Presidential Elections act by the Supreme Court and a range of other irregularities. The anticipation proved correct, the election was characterized by new and old irregularities and, as had happened before, some of these would end up in court, in the case of *Amama Mbabazi v. Yoweri Kaguta Museveni and 3 others*.²²

In this petition, the Supreme Court was asked to answer six questions of which only four are of interest in this study. These four questions were similar to those that the court had been asked in 2001 and again in 2006: a) did the respondents comply with election law in the conduct of the 2016 elections?; b) was the election conducted according to the principles set out in the

19 Election Petition No. 1 of 2001- [2001] UGSC 3 (21 April 2001)

20 Masiko Winifred Komuhangi v. Babihuga Winnie, Court of Appeal Elect. Petiti. Appeal No. 9 of 2002, 04 Nov 2002 and Amama Mbabazi and Electoral Commission v. Garugba James, Election Petition No. HCT-05-CV-EPA-0003 of 2001; Election Petition No. HCT-05-CV-EPA-0003 of 2001 and reported as [2002] UGHC 6 (17 May 2002)

21 Amama Mbabazi and Electoral Commission v. Garugba James Court of Appeal Elect. Petiti. Appeal No.12 of 2002 - 12/17/2002.

22 Presidential Election Petition No. 1 Of 2016

law?; c) if there was non-compliance under a) and b) did the that failure to comply affect the result in a substantial manner and d) if there was a finding of illegality were those illegalities committed by president Museveni personally, or with his knowledge and consent?

The court decided, as it had in the previous two Mr. Besigye petitions, that there were widespread violations of the law but even though there had been non-compliance with the law this “non-compliance did not affect the *results of the election in a substantial manner.*”

The issue that arises is whether there ever will be illegalities and irregularities that will be widespread enough for the Court to decide that they have affected the election in a substantial manner.

Over-Voting, Can These Results Be True?

In the 2016 election, nearly 60 polling stations had 100 per cent voter turn-out. In 47 of these President Museveni got 100 per cent of the votes cast and there were no invalid votes; in another eight he got 98.5 per cent of the votes cast meaning that 95 per cent of the polling stations with 100 per cent voter turnout were won by President Museveni with an average of 99.3 per cent. According to a statistical tool for detecting electoral fraud developed by Peter Klimek, Yuri Yegorov, Rudolf Hanel and Stefan Turner²³ such systematically high percentage numbers for a winning candidate with very high turnout rate is a sign of systematic fraud. This should have been of concern to the Electoral Commission. Interestingly and in contrast, Mr. Besigye led in all polling stations with less than 60 per cent turnout-rate, the average turnout in the 2016 election was 63 per cent. The data released by the Electoral Commission in announcing the results included 235 polling stations which had not been tallied. These accounted for 135,439 registered voters. Though this number would not have been enough to close the gap between the winning candidate and the second candidate, nonetheless the number is large enough to raise questions about the integrity of the Electoral Commission in tallying and collating results.

The Glitches of using Technology in Constructing the Voters' Register

Like Kenya and Tanzania, Uganda deployed biometric technology in the 2016 election. The Electoral Commission constructed the biometric voters' register from the civil register, a move hailed by some observers as both cost-effective and practical. There was some controversy about the procurement of the Biometric Voter Verification System (BVVS) equipment but the procurement problems were nowhere near the procurement problems experienced in Kenya. In Uganda the equipment was procured from Smartmatic at an estimated cost of US\$3 billion (about USD \$1 Million). Over 30,000 machines for the 28 000 polling stations were procured. There was some initial controversy: donors had pulled out of the biometric technology procurement because they failed to agree with the Electoral Commission (EC) on the sourcing of suppliers with the result that the acquisition was funded wholly by the Uganda government. Once acquired, the BVR was deployed without adequate consultations with stakeholders, which led, in turn, to complaints that the resulting lack of information and voter education on the new system had created registration glitches. For example, political parties complained that they were disadvantaged in that they were not able to mobilise their supporters to register as voters in good time.

Then there were issues to do with the use of the kits. On voting day, some polling stations did not deploy the biometric kit, principally, because of skill problems: some officials had difficulties using them, others entered the wrong access codes- in all underlining that the Commission had not invested enough time in training staff, itself a function of insufficient lead time in purchase of the kits. Unfortunately, one of the knock-on effects of late procurement of technology is not only inadequate time to train staff and inform parties and voters but also apprehensions whether the technology is a benign or malign measure. Some Ugandans were suspicious that the introduction

²³ See, Peter Klimek, Yuri Yegorov, Rudolf Hanel and Stefan Turner, *Statistical detection of systematic election irregularities* at <http://www.pnas.org/content/109/41/16469.full>

of a new technology so late in the day was merely a ploy to rig the election first, by introducing a new layer of technical complexity and second, by compromising the secrecy of the vote. Though the fears proved unfounded, the issue points to the need for both preparation and transparent and proper communication between the electoral management body and stakeholders.

Where the kits were not deployed, officials used printouts of the register, which had, in any case already been provided as a fail-safe back-up to the BVR kits. All in all, the Electoral Commission had put in place sufficient manual back up to ensure that voters were not disenfranchised if the technology should fail.

However, notwithstanding its admirable contingencies should the technology fail, the Electoral Commission may have itself disenfranchised many voters by its unusually arbitrary cut-off date for inclusion in the voters' register. Only voters who got onto the roll by the 11th of May 2015 could vote in the February, 2016 election, meaning that anyone who turned 18 in the intervening nine months did not have a chance to vote in 2016. The voters' register should be closed only a few months before the election and in any case not more than 3 months before the election. If the Electoral Commission had adopted such a proposal, anyone who turned 18 within 6 months of the initial cut-off date of May 11th 2015 would have been able to vote in the 2016 election.

The Electronic Transmission of results still open to Manipulation

Uganda deployed an Electronic Results Transmission and Dissemination System (ERTDS). This was meant to provide a seamless link between the polling station and the national tallying centre. However, the system was not transparent, it had been deployed without sufficient stakeholder inputs and consultations and when the results were finally announced, the tallying was neither transparent nor accountable: the system provided only aggregated results and failed to show running data from the polling station, raising questions exactly what inputs were being made into those totals.

A Constrained Pre-election Environment

One key difference between Uganda, Kenya and Tanzania is the degree of pre-election interference with the opposition by the government in Uganda. Governments in Kenya have - at least since 2002- had less scope for stopping opposition campaigns. That is, in part, a result of regional and ethnic politics in Kenya. Voting patterns in Kenya are highly ethnic and regional and in areas that are opposition strong-holds the government does not have much scope for regulating political activity. This, in part, might explain the fact that electoral complaints in Kenya are mostly with regard to the register, to tallying and to manipulation of results in the strong holds of incumbents. In contrast Uganda's elections have been dogged by complaints about campaign restrictions; highly compromised and partisan police and security forces that are deployed both before, during and after the elections. In every presidential petition filed since 2001, the court has been told of the over-bearing involvement of the security forces in elections. The leading opposition candidate in Uganda, Mr. Kiiza Besigye, has faced many tribulations since his first foray into presidential politics in 2001. In 2016 as in 2001, 2006, 2011 there were many reports that the opposition was being obstructed, arrested and generally intimidated, all to discourage the leaders and their supporters from participating in the election.

What Lessons Do We Learn From Uganda?

1. The test for electoral invalidity in Uganda is too restrictive and no petitioner is likely to fulfill its requirements: The way in which the Supreme Court of Uganda has framed the test to be used for deciding whether an election is valid has set such a high bar it is unlikely that a petition will ever be prosecuted effectively. The court has formulated the test thus: a petitioner must not only demonstrate that illegalities have been committed but that the failure to comply with the law affected "the results of the election in a substantial

manner." In electoral law, the phrase "affect the result" – means to show that without the offending illegality, "a different person would have won the election." The test formulated by the Uganda Supreme Court turns on what the "substantial" effect is. There are two types of substantial effect: normative substantiality and numerical substantiality. If the military intimidates the electorate so much that they do not turn out to vote, it would be impossible to demonstrate the numerical effect of the voters who stayed away yet there would be no doubt that the military's illegalities affected the result, perhaps even in a substantial way. The second substantiality is numerical. This refers to irregularities and errors whose statistical impact is demonstrable, for instance tallying errors. The Supreme Court has not refined the difference between these two concepts and has failed to grasp that illegality is an independent ground for electoral invalidity, irrespective of whether it is statistically demonstrable that those illegalities have affected the result.

Where illegality is concerned the question is whether the practices and violations complained of are so extensive that they may reasonably be supposed to have affected the result'. If illegality is not an independent ground for invalidating an election what incentive does a compromised electoral commission have to conduct an honest election?

Then there is the alternative case, an election that is conducted, on the whole, in compliance with the law, but in which there are irregularities that can be shown, numerically, to have affected the result. For instance, tallying errors in which constituency data and announced final results do not match can be cured by scrutinizing the ballots and establishing the real winner. So the impact of tallying errors on a grand scale is numerically demonstrable.

The Supreme Court has failed to appreciate that substantial impact on elections is not the same thing as numerically demonstrable. If voters are intimidated to stay away – either from registering or voting - in the strong-holds of a petitioner, their votes cannot be counter factually counted to show that this 'illegality substantially affected the result.' This distinction is the central insight of Lord Denning's decision in the leading case of *Morgan v. Simpson*. The court summarized the applicable law in the following three propositions.

- a. If an election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not ...
 - b. If an election is conducted substantially according to the law, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it does not affect the result of the election ...
 - c. An election that is conducted substantially according to the law but in which there is a breach of the rules or a mistake that affects the result - then that election is vitiated."
2. The environment for competitive elections does not exist in Uganda. Though the ruling parties has been dominant both in Uganda and Tanzania, the political environment in Uganda; the ability of the ruling party to call upon the security forces to deploy in a partisan manner; the frequent use of prosecutorial powers to harass and occupy the opposition in the election period have all contributed to a situation where the opposition has no realistic chance of winning an election in Uganda. This is compounded by judiciary's formulation of the test for invalidity discussed above. In addition, the Electoral Commission has not shown sufficient backbone to resist executive excesses during election time. In fact in many cases it has been accused of being complicit in those excesses. There is a perception element in this but that too is a problem of the Electoral Commission's own doing. That is, the Electoral Commission could have done better in communicating with stakeholders and building confidence.

3. Uganda needs to complete the Electoral Reforms that have been pending for some time now. Before the election in 2016, an Inter- Party Coalition for Dialogue (IPOD)²⁴ proposed a series of electoral reforms that were meant to create an even playing field. These reforms reflect many of the concerns that different Uganda groups have proposed in the past. They include measures to depoliticize the Electoral Commission, including limiting their terms so as to eliminate the possibility of their being compromised by expectations of re-appointment; changing the electoral unit to the constituency and banning special interest groups, especially the Army from making nominations to parliament and re-introducing Presidential term limits and, finally, changing the electoral system from first-past-the post system not in place to a system of proportional representation.

CASE STUDY 3: BURUNDI



The Burundi case-study is about what can go wrong when constitutional manipulation and flawed elections mutually re-inforce each other. It focuses on President Pierre Nkurunziza's decision to renege on the Arusha Accords, his arm-twisting of the Constitutional Court to legitimize his third term bid and the resulting political and constitution crisis in Burundi.

A Legacy of Division and Violence

The history of elections presents a cyclical pattern: initial optimism followed by rapid or gradual decline. A surge of optimism followed the election of Melchior Ndadaye in 1993 but after his assassination later that year, gloom descended on the country as Burundi slipped into one of Africa's most vicious civil wars. Factional fighting and political fragmentation followed, unleashing a large cast of spoiler militias, opportunists and ethnic extremists. Gerard Prunier, author of *Africa's World War*, counts at least eight street militias that sprung up on all sides of the conflict: *Sans Defaite* (The undefeated); *Imbogaraburundi* (Those who will bring Burundi back); *Sans Pitie* (The pitiless ones); *Sans Echec* (Those who never fail); *Itangoheka* (Those who never sleep); *Inziraguhemuka* (Those who did not betray); Chicago Bulls and *Sans Capote* (Those who never wear condoms). These eponymous names, tell the intent of these groups, unbridled mayhem. Which explains why peace proved illusory for so long and why a ceasefire dialogue was so intractable.

Similar optimism attended the Arusha Peace Process. The Arusha Peace and Reconciliation Agreement for Burundi in 2000 was meant to create a common platform for peace upon which the warring groups could end the civil war. However, two important players, Pierre Nkurunziza and his National Council for the Defence of Democracy- Forces for the Defence of Democracy, CNDD-FDD and Agathon Rwasa and his Forces Nationales de Liberation, FNL, stayed off, elbowed out by their Tutsi foes. This not only weakened the peace agreement but also permitted war to run for another three years and served to radicalize these two groups and, long-term, deepen their suspicion of the accord. This means that even though, CNDD-FDD grudgingly accepted the terms of the agreement in 2003 and leveraged its terms to win power in 2005 – it has never expressed full support for it or shown any real commitment to make it work. To the contrary, CNDD-FDD's radicals have steadily dug at the foundations of the Arusha Accord. The story of elections in Burundi since 2005 has been one of gradual but definite decline: each new election has been progressively worse than the previous one and all culminating in the controversial and dangerously destabilizing 2015 election.

²⁴ See a discussion of some of these proposals at <http://www.parliament.go.ug/index.php/about-parliament/parliamentary-news/549-parties-propose-43-electoral-reforms>

In some ways, perhaps, the Arusha agreement was too complex. One commentator has said that it was never a peace agreement but “a deal between government and political parties” which merely “urged armed groups, which did not initially sign it, to suspend hostilities and negotiate a ceasefire.”²⁵ Lemarchand has reached a more cynical conclusion: the proliferation of both Tutsi and Hutu parties in Arusha and beyond, an opportunistic grasp for power not a commitment to peace. In his words, the Arusha Agreement was a “top-heavy political machinery”, “a rush to the trough” whose principle purpose was “to provide as many jobs as are needed to meet the requirements of political stability. The government is not meant to govern; its purpose is to offer an attractive alternative to rebellion.”²⁶

Stef Vandeginste²⁷, a lecturer in the University of Antwerp, Belgium agrees. According to him, Burundi’s history over the last two decades has followed a particular pattern: cycles of violence are invariably followed by inter-ethnic accommodation and a peace of sorts. Vandeginste plausibly argues that this cyclical process of elite co-optation has weakened elite belief in elections. This means, in turn, that for some time now “Burundian politicshas been dominated by discussions on how to share control of the state among elite actors and their networks.” For these elites, peace means reaching an agreement on “the allocation of power, state resources, and privileges.” Violence then acts as a form of bargaining in which power sharing is envisioned as the end goal. The problem with this perverse understanding of power sharing is that it short-circuits elections by rewarding insurgents who lack a significant popular basis. More problematically, any little rebel movement in Burundi expects to be silenced by offer of government positions if they can cause enough mayhem to provoke diplomatic attention.

Term-Limits and the Perils of Mismanaging Elections

The less cynical saw in the Arusha Accords elements of the consociational arrangement negotiated in South Africa in 1990 and of the post 1994 Rwanda government, an opportunity to share power principally between the Tutsis and Hutus, but also within sub-factions of each. The point of this was to resolve traditional political grievances by an offer of special guarantees for military appointments and appointments to key institutions. These guarantees, in turn, were to be partly ratcheted through security architecture and a two-term limit on the president’s tenure, which would allow higher turnover in the presidency. Nkurunziza had been elected in 2005 and again in 2010 and so when he announced that he would run in 2015 many people, Burundians and foreigners alike were shocked.

Nkurunziza’s argument for a third term was unpersuasive: He and his supporters argued that he had not really served a full presidential mandate in 2005 because in that election Nkurunziza had been elected not by popular vote but by parliament. On their reading, the two-term limit really meant two terms based on a popular mandate. Few bought this otiose reading of the 2005 Constitution – read together with the Arusha Accord- though the Constitutional Court of Burundi was arm-twisted to say that Nkurunziza’s reading was correct. A dissenting judge, the Court’s Vice President Sylvere Nimpagaritse, had to flee the country. Regional and international leaders- President Jakaya Kikwete of Tanzania, the United States, and the African Union- told Nkurunziza that the move was ill advised. Within Burundi, there was a fallout within the ruling party: the more moderate members of CNDD-FDD revolted, their allies in the military then launched a coup attempt and once it failed both the politicians and their military allies fled the country. The hollowed out CNDD- FDD in effect left the old hardcore FDD elements in charge. In the mean-time disorder ruled the streets of Bujumbura, the capital city. Frustrated youth, a divided military, a partisan police force and an intransigent Nkurunziza with his lawless

²⁵ See International Crisis Group, *Insights from the Burundian Dialogue (III): Back to Arusha and the Politics of Dialogue*, 7th July 2016.

²⁶ See Rene Lemarchand, *The Dynamics of Violence in Central Africa*, p. 149.

²⁷ See Briefing: *Burundi’s Electoral Crisis – Back to Power-Sharing Politics as Usual? See African Affairs*, at <http://afraf.oxfordjournals.org/content/early/2015/08/17/afraf.adv045.full.pdf+html>

militia, the Imbonerakure - "those that see from far"- made a dangerous political broil, worrying neighbours that the country could implode and destabilize the region and especially Rwanda, the next door neighbor where Tutsi and Hutu often fight over the issues of domination and exclusion. Some urged that the election be delayed, including South Africa's Jacob Zuma and EAC heads of state. The government seemed to soften, twice delaying the election amidst a mediation effort led by Uganda but as the election drew near, Nkurunziza and his allies dug in, boycotting the mediation effort and holding the election anyway.

Antecedents of 2015

Yet Nkurunziza's actions before and since 2015, effectively suggest that the Arusha Accord is now dead. His CNDD-FDD has never hid its resentment of that agreement. After appearing conciliatory and inclusive in his first government, Nkurunziza soon found the restraints imposed on total power by the accord inconvenient and inconsistent with his broader goals of political dominance. He started systematically undermining the spirit if not the letter of Arusha Accord, first by leaning more towards the Hutu radicals in his own party and then by shuffling heads of leading institutions around, always giving more power to his supporters.

The 2010 election foreshadowed much that seemed to surprise people in 2015. In 2010 the election was chaotic: there were multiple grenade attacks both on the eve and election day. There were also political murders and more than 60 people were wounded in violent incidents. It was said that the FNL had engineered these attacks and a ruthless crackdown on the party was launched. Rwasa fled the country. Shortly thereafter, it became clear that there was a clandestine operation targeting Rwasa and FNL after more than a dozen people, believed to be supporters of the opposition were murdered, gagged and bound. Rwasa later returned to the country based on assurances by the Attorney General that there was no warrant out for him. Though the opposition boycotted the 2015 election again, the names of the candidates remained on the ballot and Agathon Rwasa now sits as a deputy in parliament, five of his supporters were appointed to cabinet, all having accepted the results of 2015 election.

Post election situation

An economic crisis seems inevitable: donors have withdrawn financial support and it is unlikely that commercial agriculture can survive mass exodus and institutional collapse. Business are cutting back investments and some entrepreneurs have left, fearful that they might be targeted or 'just exasperated by the systematic extortion racket organized by the regime.'²⁸ As the International Crisis Group, ICG, notes, the regime has become more hardline.²⁹ Hate speech, assassinations, flight of the intelligentsia and extremism are on the rise and it now seems inevitable- even with the current relative calm- that Burundi will slide back into insurgency and rebellion. Meanwhile Mr. Nkurunziza has slow-punctured all efforts to start a genuine national dialogue, seeking – through violence and chicanery- to control who can participate and frustrating those committed to Arusha such as the exiled Conseil National pour le respect de l'Accord d'Arusha et de l'Etat de Droit, CNARED -The National Council for the Restoration of the Arusha Peace and Reconciliation Accord and the Rule of Law).

At the same time, even as a humanitarian crisis starts to sediment in rural Burundi, Mr. Nkurunziza is seeking scape-goats, one by blaming the Tutsi for the on-going crisis and two, by baiting Rwanda by accusing Kagame of fomenting, through his Tutsi allies, the trouble in Burundi. But perhaps this was inevitable, a throw-back to Nkurunziza's rebel days when he fought the then Tutsi dominated army late 1990s and early 2000s. Memory plays role in another way, the implacable advocates of hutu radicalism- Nkurunziza and Agathon Rwasa - lost relatives in the 1972 genocide³⁰ against the Hutus before they fled Burundi to become the rebels of the future.

²⁸ See ICG, *A Dangerous Third Term*, *infra*.

²⁹ *Burundi: A Dangerous Third Term*, Africa Report no. 235, 20th May 2016.

³⁰ See Rene Lemarchand, *The Dynamics of Violence in Central Africa*, p. 145.

Role of the Electoral Management Body

The Electoral Commission performance was constrained but the question is whether, in the context of overall tightening of the electoral environment, it really could have. In 2010 the opposition boycotted the elections after flawed municipal polls eroded their faith in elections overseen by CNDD-FDD, which had become increasingly authoritarian in the single party mode. But the commission was also ineffectual: according to a Freedom House study³¹, its opaque practices in the municipal elections undermined the confidence of opposition parties in the general election and eroded the commission's credibility; its dispute resolution rules have been described as weak and it lacked political skills, failing to reach out to key actors when it mattered.

Institutionalized Pervasive Human Rights Violations

An investigation launched by UN Human Rights Council³² in January reported back in September 2016, concluding that Nkurunziza's government is guilty of systematic human rights abuses: executions, torture, rape, disappearances and mass arrests. The UN investigators say that for some of these violations they cannot exclude "crimes against humanity". Burundi response is that the United Nations is biased and investigators "politically motivated" working from anonymous and unverifiable sources. That will not persuade anyone: The UN has verified 564 cases of executions between April 26, 2015, and August 30, 2016 and the investigators conducted 227 interviews many of them inside Burundi. They suspect a more gruesome reality: they were not allowed to visit several sites thought to be mass graves captured on satellite imagery. As in Kenya in 2008, the investigators have also prepared a list of suspects, which they have now handed over to the UN High Commissioner for Human Rights. This could find its way to the ICC, which is already on the Burundi question.

In April 2016, Fatou Bensouda, the International Criminal Court (ICC) prosecutor, announced that she was launching a preliminary examination having received reports that detailed "acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances." Burundi is now firmly on the radar of the Security Council and the ICC. In August, the Burundi's government rejected 228 United Nations police who were meant to deploy in the country to monitor human rights abuses. Burundi's security forces, a government spokesman said, had taken full charge of the situation. 500 people have been killed and nearly 270,000, at the last count, are in neighbouring countries. Nearly 100,000 more are internally displaced.

A Lesson Spurned?

In spite of the deterioration of the situation in Burundi, the East African Community appears relatively sanguine. Yet the grim situation reported to the human rights council suggests a country on the brink. Long-term, this undermines the emergence of an EAC community based on the values of democracy and human rights. It questions whether the aspiration of an East African political federation is realistic at all. With chaos and breakdown looming in Burundi; flawed elections in Uganda and political exclusion in Zanzibar it is questionable whether East Africa is becoming democratically stronger or weaker. The prognosis, based on the analysis in this study is not positive. Hard times lie ahead.

31 See *Election Management Bodies in East Africa: A Comparative Study of the Contribution of Electoral Commissions to the strengthening of Democracy*, being a review by AfriMAP and the Open Society Initiative for Eastern Africa with contributions from Alexander B Makulilo, Eugène Ntaganda, Francis Ang'ila Away, Margaret Sekaggya and Patrick Osodo.

32 See *Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council Resolution S-24/1, 20th September, 2016 - Human Rights Council Thirty-third session Agenda items 2 and 10, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General.*

Conclusion and Way Forward

Resolving the Challenges of Electoral Management in East Africa

This study has analysed that electoral democracy in East Africa is facing some deep-seated challenges. These challenges are three parts. First, some of these are cross-regional; the second set of challenges are unique to individual member and the third set of challenges relate to the region as a whole. Starting with cross-regional challenges this Part summarizes the actions that need to be undertaken to deal with these three sets of challenges.

A. RESOLVING CROSS-REGIONAL CHALLENGES

The problem of Electoral Violence and Intimidation

Violence or the threat of violence has blighted elections in all East African countries except Rwanda. Even there though, the last presidential election was preceded by a series of grenade attacks in the capital city Kigali. The transition and consolidation of democracy will fail unless the problem of violence is addressed.

- a) At a regional level, the members' states of the community must adhere to their treaty commitments as well as to international commitments³³ and the AU's African Charter on Democracy, Elections and Governance.
- b) At the state level, all countries have ratified the African Charter on Human and people's rights as well as the international Covenant on Civil and political rights. They must honour those commitments and should ratify the optional protocol to that covenant in order to allow individuals to file communications on electoral violence to the Human Rights Committee.

³³ According to the National Democratic Institute, NDI, the international standards for the conduct of elections are as follows:

1. The electorate must be free and must believe it is free to make political choices without intimidation, bribery, undue influence or fear of retribution for their vote.
2. The electorate must be adequately informed about the electoral contestants in order to make a genuine choice.
3. Voting must take place by secret ballot, based on universal and equal suffrage – and there must be a genuine opportunity to exercise this right – free from unreasonable or arbitrary restrictions and discrimination.
4. There must be a sound legal framework and an impartial and effective election administration that conducts its activities in an open manner. This includes counting and publicly reporting accurate election results.
5. Those seeking to compete peacefully for political power must be free to associate into political parties and gain access to the ballot without discrimination.
6. Political contestants must be given a fair chance of reaching the voters and winning their support. This requires an electoral environment in which political parties and candidates are free to express their messages to the public and have adequate opportunity to do so, have the freedom and opportunity to organize peaceful assemblies and other demonstrations of public support, and to move freely throughout the country to seek votes.
7. The news media must be free to gather and impart information about political contestants and issues of political importance.
8. The government-controlled media must provide a medium through which political contestants can speak to the electorate, and must be required to cover all political contestants accurately, fairly and in an equitable fashion. Private media must be strongly encouraged to act ethically and in accordance with guidelines for proper election-related coverage.
9. Citizen organizations must be able to participate in the electoral process to help educate other citizens about the importance of the elections and must be free to monitor every aspect of the electoral process.
10. The due process of law and equal protection of the law must be available to provide appropriate, immediate and effective remedies for citizens and electoral contestants in order to guarantee the integrity of the electoral process and peaceful resolution of complaints.

- c) Electoral violence thrives on impunity therefore taking decisive actions against perpetrators will discourage others from engaging in future actions of violence against their opponents.

The Role of the Executive in the Appointment of EMBs

As already noted a highly ratcheted method of appointing the EMB will not resolve the problem of their independence. However, whilst a proper method of appointment is not a sufficient condition to guarantee independence, it is necessary. Moreover, there are international standards for the conduct of elections and they include openness and the possibility of scrutiny of Electoral Management Bodies: it is both an normative and political obligation to take all steps to secure the independence of EMB. In sharply divided politics such as exists in Zanzibar, Burundi, Kenya, a trusted and independent electoral management body can be the difference between violence and peace.

The Use of BVR and other Electoral Technologies

Electoral technology can improve elections but to do so effectively the legal and institutional environment must be one that promotes the integrity of the technology and enhances the stakeholders faith and trust that it works. That means investing in the right technology, creating the right legal environment, training all users - both voters and officials- and ensuring robust security measures so that everyone has faith that it is tamper-proof.

According to IFES and NDI³⁴, standards for electronic and voting technologies should be “as open and transparent as possible, with broad participation by recognized technical institutions and experts” and ideally should include³⁵:

- a) The system must be accessible and usable by all voters.
- b) The technology must be interoperable so that all equipment bought for the purpose works together even if procured from different sources.
- c) The system must have in-built contingency procedures and backup systems and properly tested.
- d) The system must guarantee the secrecy of the ballot and must have security features that ensure this. This means data security; secure authentication mechanisms and limits to who has access to the system.
- e) The system must be auditable: this means it must have voter-related information such as the number eligible, the number of votes cast, the number of invalid votes etc. It should also be able to detect voter fraud.

Electoral Dispute Resolution EMBs

The resolution of electoral disputes is unsatisfactory in all East African countries. There are two challenges: In Tanzania, the problem is lack of a judicial route for challenging presidential election. In Kenya, Uganda and Burundi it is the unusual deference that superior courts have shown towards the presidency where elections are concerned. The solution is twofold:

- a) Judiciaries need to be less supine where electoral malfeasance is concerned. To do so, their independence needs to be strengthened- that means both their institutional independence (laws, codes and constitutional independence) and decisional independence (guarantees that judges will not be punished- directly or indirectly for making decisions that the executive does not like).
- b) Winners of presidential elections should not be sworn in for at least three months after being declared victorious. Courts have demonstrated that they will not rule an election invalid one the winner is sworn-in. However, if there is a lead-time of three months allowing for all disputes to be settled before the winner is sworn-in the courts would probably show less deference to presidents-elects and may, for that reason, be ready to hold elections invalid.

³⁴ This part draws significantly from the 2013 report by the International Foundation for Electoral Systems, IFES, and the National Democratic Institute for International Affairs, NDI; Ben Goldsmith & Holly Ruthrauff, *Implementing and Overseeing Electronic Voting and Counting Technologies* at http://www.eods.eu/library/Implementing_and_Overseeing_Electronic_Voting_and_Counting_Technologies.pdf

³⁵ See Wachira Maina, *Electoral Management in Kenya: Undoing a History of Corruption, Opacity and Fraud*, The Kenya Human Rights Commission, August 2016.

Managing Political Parties and Their Nominations

Most political malfeasance during elections now takes place at the level of political parties. Electoral management bodies need to pay more attention to party processes including how party nominations are conducted and how they campaign. Of particular concern is how party youth groups are mobilized to intimidate opponents. EMBs need to be stronger in enforcing electoral codes including being prepared to cancel the nominations of parties that use unlawful methods to gain advantage in elections.

Creating Voters' Registers that have Integrity

None of the East African Countries has a fool-proof voters register partly because of manipulation- as in Kenya and Zanzibar- or uncertainty about the integrity of the underlying civil register from which the voters' register is constructed – as in Burundi and Uganda. All the countries have also chronically under-registered the youth. Both of these are dangers to electoral democracy in the region. To ensue credible voters registers, member states of the EAC need to:

- a) Provide adequate resources including technology for EMB to take early steps to register as many of the eligible voters as possible especially in terms of collecting biometric information to verify and authenticate the registers. In 2015, Nigeria was able to do a biometric verification and authentication of the register which eliminated 10 million ineligible, dead or double-registered voters from the register.
- b) Conduct special mass voter registration exercises targeting the youth and those coming of age in the inter-electoral period to ensure that youthful voters are not being systematically marginalized.

Voting, Voter-Turnouts, Transmission and Tallying of Results

Over-voting, that is, polling stations that chronically reporting unusually high voter turnout figures is a cross-regional problem- Zanzibar, Kenya and Uganda are serial culprit. That problem is then compounded by unverifiable tallying and vote transmission system. There are a number of steps that can introduce integrity into both voting and tallying and transmission of results. These include:

- a) Improve election observation, especially observation by local NGOs. For this to happen the laws relating to observation, especially domestic observations must be strengthened.
- b) Results announced at the polling station should be final so that if national results are challenged, the legitimate results for verifying the national results is the polling station data. This would eliminate the fraud that occurs in transmission if coupled with legal amendments that make parallel tallying legitimate and protected.
- c) Electoral management bodies should have the courage to cancel all results from polling stations that report above 95 percent voter-turnout. No East African country has compulsory voting and if countries with compulsory voting such as Australia typically report 95 percent and below, equivalent turnout in East Africa should be treated as fraudulent. (The last time Australian voter turn-out hit 96 percent was 1954).

B. DEALING WITH IN-COUNTRY CHALLENGES

Tanzania

1. Tanzania's peremptory ban on presidential petitions is now evidently a destabilizing rule and may well have been responsible for converting the political crisis in Zanzibar into the constitutional crisis it has now clearly become. There is urgent need to repeal this rule, perhaps as part of the efforts to complete the process of constitutional reform that begun a few years ago but which now lies in limbo.
2. It is now time to complete the constitutional reform that was suspended just before the elections in 2015. The failure to complete that process has contributed to the crisis in Zanzibar and will continue to do so until the status of the Isles vis a vis the mainland is agreed within a framework that the people of Zanzibar have faith in.

3. The deployment of party militia and the security forces has undermined elections in Tanzania and, especially in Zanzibar. If the CCM wants to stabilize the country, it needs to think beyond the narrow goal of staying in power at all costs. This will mean its needs to commit itself to leveling the playing field, especially by reigning in the government owned media and committing itself to reforming the security forces to be politically neutral.

Uganda

1. The test for electoral invalidity in Uganda, as already noted, is too restrictive and no petitioner is likely to fulfill its requirements. It behooves the Supreme Court to re-frame the test so that in assessing whether violations of electoral law affect the result in a substantial way, there are two separate tests: a) normative substantiality and b) numerical substantiality. This means that a petitioner should be entitled to get an order of invalidity if he proves either of two things: one, the legal violations are so substantial that a reasonable person must infer that the result has been affected or, two, that the numerical errors are so substantial that on a re-tallying it is obvious that the results have been affected.
2. The security forces and the judicial system in Uganda have been used to shrink the environment for competitive elections. The ruling party frequently deploys the security forces in a partisan manner and as frequently uses its prosecutorial powers to harass and occupy the opposition in the election period. This is compounded by the inability of the Electoral Commission to resist executive excesses during election time. The changes that are required entail a political commitment by the ruling party to resist the temptation to resort to force and a legal commitment by the judiciary to refuse to be used as the stalking horses of the ruling party against the opposition.
3. In addition, it is time for Uganda to complete the Electoral Reforms that have been pending for some time now. These reforms includes depoliticizing the appointment and management of Electoral Commission; limiting the terms of commissioners to one long-term and eliminating the special representation of interest groups, such as the Army from making nominations to parliament which merely politicizes the army by giving it a legitimate excuse to engage in partisan politics.

C. IMPLICATIONS FOR THE EAST AFRICAN COMMUNITY

In this final sub-part of Part 3, the study explores how the themes and issues covered here will impact the East African Community. This conclusion presents that the failure to consolidate democracy in East Africa, coupled with the clear evidence of back-sliding already alluded to are a cause of concern for the community. There are four reasons why they are.

Flawed Elections Have Left Each of the Countries Unstable or Vulnerable

The result of these difficulties is that none of the East African countries can be said to have made significant progress towards consolidating electoral democracy. In Kenya politics is more ethnically divided than it has ever been. The election in 2017 will probably serve to deepen what are already deep divisions. Violence is possible, even likely. In nearly more than 25 years of multiparty elections in Kenya only two- 2002 and 2013- have been without violence. In Burundi, the country is more delicate than it has ever been since the Arusha Accord. Both what is happening in-country and the flight of many of its intelligentsia to neighbouring countries seem like a recipe for regional destabilization. In Tanzania, the election of President Magufuli was initially seen as a breath of fresh air especially because of his asceticism and commitment to fighting corruption. Unfortunately, the political situation in Zanzibar and a growing concern about claw-backs on constitutional freedom has dampened some of the earlier enthusiasm for him. If constitutional talks are re-kindled, there is a chance that Zanzibar will want legal autonomy, perhaps even sovereignty. That, too, could destabilize what so far has been East Africa's most stable country. Rwanda continues to notch high marks for the discipline of its economic management but with presidential term-limits now scrapped and the opposition facing serious constraints, political space appears to have shrunk considerably. In Uganda, the space for democratic politics has remained constrained even with the end of the movement government. The institutional infrastructure for competitive politics does not exist and the security forces are too embedded in politics, a dangerous thing given a long history of military interference in the politics of the country.

The EAC Must Stand for Treaty Commitments Both at Home and in the Region

It is not possible to build regional democracy without in-country democracy. The Treaty establishing the East African Community commits member states to democracy and human rights, imposing a collective responsibility to pursue both at the regional and domestic level. However, member states have been rather timid in standing up for those values when they have been under stress as they now are in Burundi and were in Zanzibar in 2015. This lack of visible commitment to the practice of democracy in member states does not just point to the weak democratic credentials of the leaders of individual states but also raises doubts whether East Africa can do regionally what no leader is willing to do at home.

Regional Democracy Cannot Be Built With Non-Democratic Member-States

The East Africa Community aspires to be a political federation before they are strong democracies at home. That seems like a losing proposition. Often forgotten is that political and economic integration must work for the people of East Africa or they do not work at all. Political integration depends on shared values and a sense of community. So little investment has been made in this that it is difficult to believe that the East African Community could survive a popular vote of the type that was involved in Brexit vote on Britain's membership to the European Union. Immigration remains difficult in East Africa even with commitment to the four common market freedoms - on goods, services, free movement of people and right of residence. In addition, many east Africans live far from the community's international borders and as noted "few East Africans have crossed an international border- in the community- and fewer still will cross one in their life." It is obvious that "a headlong rush to political union without proper democratization of regional institutions will be seen as elite-bargaining and, almost certainly, will unleash angry nationalism in member states" which would "permanently damage the EAC."

The Youth Are Being Left Behind, yet It Is Their Future at Stake

As voter turn-out figures for individual countries- discussed in the first part of this study- show, there is a growing democratic deficit in member countries. Democracy in the region is growing less inclusive. East Africans who are eligible to vote are not registering to vote, especially the youth. Given the demographics of the region this is a worrying trend. Even when there is high voter registration, as there was in Tanzania in 2015, voter turnout as a percentage of the eligible voters remains low, suggesting a deep seated malaise perhaps even cynicism about politics. The fact that East Africa has a very young electorate, many of whom are also the region's unemployed this exclusion and disenchantment with politics is a potentially destabilizing factor that does not bode well for efforts to build the community. If the older voters are the ones turning out to vote then the future of the community is being determined by those who have the least stake in it.

The truth is that there is only one democracy being built: it cannot be split into regional and domestic elements. If member states have not embraced democracies at home, they have no legitimacy or moral authority to try to export it to regional institutions.

Need to Return to the Basics

The fundamental aspect of free and fair elections hinge on the very rudimentary elements of an educated polity free to access information about the candidates or parties of their choice. This carried out in an atmosphere where candidates have equal coverage from national media houses and ample security to ensure that they and their supporters are not prone to intimidation and harm. This should then lead to the actual elections and the need for adequate appropriate technologies that are understood and easily applied or utilized. Security at the polling stations should be guaranteed and electoral malpractices and offences should be well addressed and resolved. The results should be perceived to be impartial and the body managing the entire voting system and civic education should be credible, strong and non-partisan. Is this a long and impossible wish list? It may seem so, but it is imperative that we exercise constant vigilance, every one of us, to ensure that we move closer to the arena where we freely elect our leaders.

What Lessons for Kenya and Rwanda in 2017?

The electoral cycle in Kenya has almost gone full circle and it is necessary to ensure that the following matters be addressed as a matter of priority to ensure that the elections slated for 24th August 2017 are successful. These measures include, with relation to the EMB:

- i. The autonomy and independence of constitutional bodies such as the IEBC is secured as guaranteed by constitutional stipulation. The underlying assumption in the design of tenure provision is that a country will make a real effort to identify and appoint independent officials. If they do so, then the provisions on security of tenure exist to protect the independence of these officials. However, if a country chooses officials who are not professionally independent protecting them with security of tenure provisions makes them doubly dangerous in that they can be compromised and yet it is so difficult to remove them from office. As the recent arguments in Kenya over the reform of IEBC show, there is a fundamental misunderstanding of this point: Security of tenure provisions exist "to protect good people from interference not to protect bad people from being removed." The objective of these provisions is "not to create difficulties in removing failed officers, its goal is to ensure that there is justice in the process of removal, rather than make removal almost impossible."
- ii. Electoral management bodies in Kenya are not ineffective because they lack statutory powers, they are ineffective because even though they have ample powers in law, they are generally unwilling to act in the face of pressure from the ruling party. This means that although it is useful - even necessary - to vest real powers in the electoral management body, it is worth remembering that in high impunity environments such powers are unlikely to be exercised if they threaten the regime's vital interests.
- iii. Though it is important to make sure that the process through which Commissioners are appointed is robust enough to weed out the incompetent and the corrupt, it is important not to confuse a robust system of appointment with a complex process of appointment. It is become clear that Kenya has a complex rather than robust process of appointing electoral commission since the process seems congenitally unable to produce independent officials. The appointments process needs to inspire public confidence but if the way the selection criteria is applied do not identify Commissioners who have integrity, good judgment and the courage, the guarantee of institutional independence to the electoral management body corporately is useless.
- iv. The termination of the tenure of the individual commissioners needs to be aligned with the needs of the electoral cycle. If the terms of the commissioners end on the eve of the election, preparations for the elections are undermined. In Kenya EMB's tenure has been mismanaged time and again, in 1997 and 2007 the tenure of the commissioners ended on the eve of creating flux and pre-election tension. Old commissioners leave with institutional memory and new commissioners come in to manage an election when they are still on a steep learning curve. This undermines public confidence and the credibility of the EMB's credibility.
- v. Proper institutional design of the electoral management body is essential to the EMB's performance. Unfortunately, the IEBC has a very unsatisfactory internal structure, its operations are not streamlined, conflicts between the secretariat and the commissioners are common; the CEO is overweening and sometimes the decision-making and authority lines seem fuzzy. In one case the chair- who is supposedly non-executive- procured legal services without going through the tender process. The former CEO cancelled a tender made by the IEBC's tender committee; the chair was informed that the EVID technology the commission was about to buy was unfit for purpose but he failed to inform the rest of the commission or the secretariat. The IEBC act has not addressed these structural weaknesses. More needs to be done: the roles of each organ, including its TORs, need to be defined and properly delineated; many of the processes of the IEBC need to be open to scrutiny and the bureaucracy trimmed and flattened.
- vi. The Problem of the Register: In 2007, so it was in 2013: the voter's register was not credible, even though it was biometric. The problem was the fluidity of the figures in the register and the fact that there were multiple rather than one comprehensive register. There is need to have this register unified and held transparent to ensure that only qualified voters are entered into it.
- vii. Irregular Tallies and Failed Transmission: One of the immediate triggers for the violence after the 2007 election and in 2013 were further pointers to the dangers of manipulating tallying and transmission of results, despite the plethora of BVR, EVID and ERT. This must be addressed with all due sobriety to ensure that the results tally with the actual number of voters.



No. 6 Corridor Area, Off Jandu Road
P.O. Box 6240, Arusha, Tanzania
Tel: (+255 27) 254 3226 /7 (+255 786) 821010
E-mail: info@ealawsociety.org
Website: www.ealawsociety.org