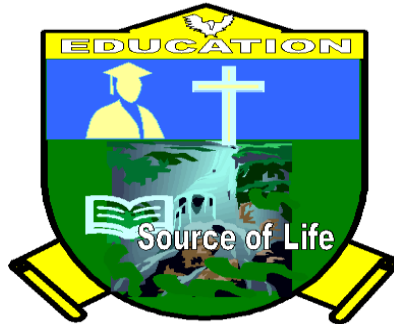


# **RUAHA CATHOLIC UNIVERSITY**



**RUCU**

**A CRITICAL ANALYSIS OF THE LAWS WHICH GUARANTEE THE  
AUTONOMY AND INDEPENDENCE OF ELECTORAL ADMINISTRATORS:**

**A CASE STUDY OF TANZANIA AND KENYA**

**A Research Paper Submitted in Partial Fulfillment of the Requirement for the  
Award of the Bachelor of Laws Degree (LLB) of Ruaha Catholic University, Iringa,  
Tanzania.**

**BY**

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**JULY 2021**

**CERTIFICATION**

The undersigned certifies that she has read and hereby recommends for acceptance by the Ruaha Catholic University the research paper by Tusekelege H. Mwakasege, titled “**Critical analysis of the Autonomy and Independence of laws guiding the election process, case study of Tanzania and Kenya,**” in partial fulfillment of the requirement of the bachelor degree of Laws (LLB) at Ruaha Catholic University.

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(Supervisor)

Date\_\_\_\_\_

**DECLARATION**

I, Tusekelege H. Mwakasege, I do hereby declare that this research paper is my own original work and that it has never been presented to any other University for a similar or any other degree award.

Signature\_\_\_\_\_

Tusekelege H. Mwakasege

(Researcher)

Date\_\_\_\_\_

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## **ACKNOWLEDGEMENT**

I extend my special appreciation to our HEAVENLY FATHER, who has enabled us to see this day and accomplish this task. That, his guidance has been absolute since my first day at RUCU.

I would like also to express my sincere gratitude to my supervisor Dr. Ana Luis Haule for cooperating with me despite of all inconveniences. The accomplishment of this work would not be possible without her guidance and toleration thereto.

## **DEDICATION**

This work is dedicated to my father Hezron Mwakasege and my mother Winifrida Rujumba for their moral and financial support, without forgetting my brother Isaya Mwakasege, my sister Tumwitike Mwakasege and my young brother Isakwisa Mwakasege. Also, this work is dedicated to all who are looking forward to create a better democratic nation that promote and protect free and fair election and wish to see Tanzania be the state where citizens are free to exercise their right to elect the leader of their own choice without more restrictive laws that violate the international standards and the right itself.

## **ABSTRACT**

This study is based on analysis of the autonomy and independence of laws guiding the election process, case study of Tanzania and Kenya, where researcher aimed at analyzing the independence and autonomy of the electoral officers (electoral commission and returning officers) basing on their appointment, powers, function and dismissal.

The study involved library research and field research; library research helps to lay down the theoretical framework of the study, field research was conducted for the purpose of supporting the theoretical framework by gathering relevant information from various respondents mainly, collection of data involved questionnaire.

The study found that the legal and institution framework in Tanzania does not guarantee the independence and autonomy of electoral officers compared to Kenyan laws because the members of National Electoral Commission are appointed by president without consulting parliament and also members may be dismissed by the President, where the commission can act in a great fear and influence from president who is a member of ruling party, also DEDs to become automatic returning officers while they are appointees of president, denies their independence and autonomy because they are answerable to the president, where we question on the impartiality in their duties and also it is contrary to the Constitution where Constitution prohibits people who are involved in the conducts of election to be member of any political party.

## ABBREVIATIONS

|              |   |
|--------------|---|
| ICCPR.....   | International Covenant on Civil and Political Rights.   |
| UDHR.....    | Universal Declaration on Human Right                    |
| UNHCR.....   | United Nations Human Rights Commission.                 |
| NEC.....     | National Electoral Commission                           |
| DEDs.....    | District Executive Directors                            |
| AU .....     | African Union   |
| TANU.....    | Tanganyika African National Union                       |
| UTP.....     | United Tanganyika Party                                 |
| ANC.....     | Africa National Congress                                |
| AMNUT.....   | All Muslim Union of Tanganyika                          |
| PCP.....     | People's Convention Party                               |
| AIM.....     | African Independence Movement                           |
| PDP.....     | People's Democratic Party                               |
| EISA.....    | Electoral Institute for Sustainable Democracy in Africa |
| CCM.....     | Chama Cha Mapinduzi                                     |
| CHADEMA..... | Chama cha Demokrasia na Maendeleo                       |
| CUF.....     | Civil United Front                                      |
| EMB.....     | Electoral Management Bodies                             |



## **TABLE OF LAWS**

### **International Legal Instruments**

The Universal Declaration of Human Rights of 1948.

The International Covenant on Civil and Political Rights of 1976.

### **Regional Legal Instrument**

African Charter on Democracy, Election and Governance of 2007

### **Domestic Legal Instruments**

#### **Kenya**

The Constitution of Kenya, 2010

Elections Act No.24 of 2011 (R.E. 2016)

The Election Offences Act, No. 37 of 2016

Political Parties Act, No. 11 of 2011

Independent Electoral and Boundaries Commission Act No. 9 of 2011

#### **Tanzania**

The Prevention and Combating of Corruption Act No. 13 of 2007

The Constitution of United Republic of Tanzania of 1977 (as amended by Cap 2 of 2015)

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**TABLE OF CASES**

*Bob Chacha Wangwe V. Attorney General & 2 others Misc Civil Cause No. 17 of 2018*

*(unreported)*

*Rev Christopher Mtikila V. Attorney General [1995] TLR 31*

*Raila Odinga and Another v. The Independent Electoral and Boundaries Commission & 2 Others*

*Supreme Court of Kenya Petition No. 1 of 2017*

## TABLE OF CONTENTS

|                                      |             |
|--------------------------------------|-------------|
| <b>CERTIFICATION .....</b>           | <b>i</b>    |
| <b>DECLARATION .....</b>             | <b>ii</b>   |
| <b>COPYRIGHT .....</b>               | <b>iii</b>  |
| <b>ACKNOWLEDGEMENT .....</b>         | <b>iv</b>   |
| <b>DEDICATION .....</b>              | <b>v</b>    |
| <b>ABSTRACT .....</b>                | <b>vi</b>   |
| <b>ABBREVIATIONS.....</b>            | <b>vii</b>  |
| <b>TABLE OF LAWS .....</b>           | <b>viii</b> |
| <b>TABLE OF CASES .....</b>          | <b>ix</b>   |
| <b>TABLE OF CONTENTS .....</b>       | <b>x</b>    |
| <b>CHAPTER ONE:.....</b>             | <b>1</b>    |
| <b>GENERAL INTRODUCTION .....</b>    | <b>1</b>    |
| 1.1 Introduction .....               | 1           |
| 1.2 Background of the Problem.....   | 1           |
| 1.3 Statement of the Problem .....   | 12          |
| 1.4 Literature Review .....          | 13          |
| 1.5 Hypothesis .....                 | 18          |
| 1.6 Objectives of the Research ..... | 18          |
| 1.6.1The General Objective.....      | 18          |

|   |           |
|---|-----------|
| 1.6.2 The Specific Objectives of the Research .....           | 18        |
| 1.7 Significance of the Research .....                        | 18        |
| 1.8 Research Methodology .....                                | 19        |
| 1.8.1 Research Design .....                                   | 19        |
| 1.8.2 Sampling and Sample Size .....                          | 19        |
| 1.8.3 Research Methods.....                                   | 20        |
| 1.8.4 Data Collection .....                                   | 20        |
| 1.9 Data Analysis.....  | 21        |
| 1.10 Scope and Limitations .....                              | 22        |
| 1.11 Conclusion.....  | 22        |
| <b>CHAPTER TWO: .....</b>                                     | <b>23</b> |
| <b>CONCEPTUAL FRAMEWORK OF ELECTION AND ELECTORAL</b>         |           |
| <b>ADMINISTRATION IN TANZANIA .....</b>                       | <b>23</b> |
| 2.1 Introduction .....  | 23        |
| 2.2 The Concept of Elections .....                            | 23        |
| 2.2.1 Elements of Free and Fair Elections.....                | 24        |
| 2.2.2 Function of Election in Democratic system .....         | 26        |
| 2.3 The concept of autonomy and independence in election..... | 27        |
| 2.4 Returning officers.....                                   | 27        |
| 2.5 Conclusion.....   | 28        |

|   |           |
|---|-----------|
| <b>CHAPTER THREE:</b>   | <b>29</b> |
| <b>LEGAL AND INSTITUTIONAL FRAMEWORK OF ELECTION AND ELECTORAL ADMINISTRATION</b>   | <b>29</b> |
| 3.1 Introduction  | 29        |
| 3.2 International Legal Instruments   | 29        |
| 3.2.1 Universal Declaration of Human Rights of 1948   | 29        |
| 3.2.2 The International Covenant on Civil and Political Rights 1976   | 30        |
| 3.3 Regional Legal Instrument   | 30        |
| 3.4 National Legal Instruments  | 31        |
| 3.4.1 Tanzania  | 31        |
| 3.4.2 Kenya   | 37        |
| 3.5 Conclusion  | 41        |
| <b>CHAPTER FOUR:</b>  | <b>42</b> |
| <b>RESEARCH FINDINGS</b>  | <b>42</b> |
| 4.1 Introduction  | 42        |
| 4.2 The analysis of independence and autonomy of the National Electoral Commission of Tanzania and the Independent Electoral and boundaries Commission of Kenya | 42        |
| 4.2.1 Tanzania  | 42        |
| 4.2.2 Kenya   | 44        |
| 4.2.3 Analysis of the collected views   | 47        |

|  |           |
|--|-----------|
| 4.3 The analysis of independence and autonomy of the Returning officers.....   | 48        |
| 4.3.1 Tanzania.....  | 48        |
| 4.3.2 Kenya.....   | 49        |
| 4.3.3 Analysis of the collected views .....  | 50        |
| 4.4 The outcome of non-existence of independence and autonomy of electoral administration<br>bodies in the democratic state..... | 50        |
| 4.5 Conclusion .....   | 51        |
| <b>CHAPTER FIVE:.....</b>  | <b>53</b> |
| <b>CONCLUSION AND RECOMMENDATIONS .....</b>  | <b>53</b> |
| 5.1 Introduction .....   | 53        |
| 5.2 Summary of the Research Findings.....  | 53        |
| 5.3.Recommendations .....  | 54        |
| 5.3.1 To the government.....   | 54        |
| 5.3.2 To the law makers.....   | 55        |
| 5.4 Conclusion .....   | 55        |
| <b>BIBLIOGRAPHY.....</b>   | <b>56</b> |

## **CHAPTER ONE:**

### **GENERAL INTRODUCTION**

#### **1.1 Introduction**

The independence and autonomy of the Electoral officers is crucial in a democratic state like Tanzania, because it helps to promote free and fair election so as to respect will of the people by putting their interested leader in a respective position. This study intends to reveal the guarantee of independence and autonomy of the National Electoral Commission and Returning officers by the Constitution and the electoral laws in force in Tanzania, this will be effective by comparing with the international standards and laws from other countries which are believed to be protecting the independence of the electoral officers such as Kenya.

#### **1.2 Background of the Problem**

The United Republic of Tanzania is a state located in the Eastern part of Africa. As the name suggests it is a union of two countries which are Tanganyika and Zanzibar, Tanganyika attained its independence in 1961 from British rule and Zanzibar's revolution was in 1963 which marked the end of British Colonial rule therein.<sup>1</sup> The united Republic of Tanzania was reborn on 26<sup>th</sup> April 1964 whereby the two countries united to create a single state and this marked the end of government of Tanganyika substituted by the Government of the United Republic of Tanzania, but Zanzibar maintained the Revolutionary Government of Zanzibar (RGZ).

Tanzania multiparty system started even before independence where first multiparty election was held in Tanzania in 1958 was known as "uchaguzi wa kuratatu" when sir Edward Twinning aimed at transferring the government to the winning the political party,<sup>2</sup> where there was two competitive parties which were U.T.P (United Tanganyika Party) which was made by white

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<sup>1</sup> <https://www.trtworld.com> retrieved on 10<sup>th</sup> April 2021

<sup>2</sup> A. H. Senguji., & T. Lodge., *A Handbook of Tanzania Electoral Laws and Regulations*: National Electoral Commission, Dar es Salaam, 2000, pg. 2

settler, and TANU which was made by the local people where Mwl J.K. Nyerere was the leader of the party, as the governor was the body which supervise the election where set up different condition that will set difficulty for the local people to engage in the election among of those conditions were; for a person to qualify in voting, he was supposed to have 400 pound income of the year. The other multi party election was conducted in 1960 for a transitional government which would lead the country to independence under the premiership of the late Mwalimu Julius Kambarage Nyerere.<sup>3</sup>

After Tanganyika attained independence on the 9<sup>th</sup> day of December, 1961. On Independence Day there were already in existence four political parties, namely Tanganyika African National Union (TANU), United Tanganyika Party (UTP), Africa National Congress (ANC) and All Muslim Union of Tanganyika (AMNUT). Since multiparty system was permissible, between 1962 and 1963, three new political parties were formed, these were People's Convention Party (PCP), African Independence Movement (AIM) and People's Democratic Party (PDP).<sup>4</sup> Thus the presidential election under a new Republican Constitution which was held on 1<sup>st</sup> December 1962 was a multiparty election.<sup>5</sup> It would however, be noted that pre-independence and post – independence, Political parties did not last long because TANU commanded the political powers at the expense of other parties, as a result these other parties did not last long. Hence subsequent elections were held under one party system in which candidates of a single party, TANU competed in each constituency. The outcome of an election under this system was to confirm the existing order or to usher in a new order approved by the existing order.

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<sup>3</sup> <https://www.jstor.org> retrieved on 10<sup>th</sup> April 2021

<sup>4</sup> <https://www.nytimes.com> retrieved on 10<sup>th</sup> April 2021

<sup>5</sup> <https://www.nzdl.org> retrieved on 10<sup>th</sup> April 2021



On 5<sup>th</sup> February 1977, TANU and ASP merged to form a single party Chama Cha Mapinduzi (CCM) and assumed its power both in Tanzania Mainland and Zanzibar,<sup>6</sup> CCM has been in power ever since to-date, the incumbent party continued to hold elections under a one-party system which prevailed until the restoration of multiparty system in July 1992 and subsequent first multiparty competitive elections in 1995.

In Tanzania, 8<sup>th</sup> Amendment of the Constitution of United Republic of Tanzania establish National Electoral Commission under Article 74 (1)<sup>7</sup> Provides for the establishment of National Electoral Commission which is composed of members who are appointee of the president and go further by granting the president power to remove any member of the commission from the office on the ground of misconduct and failure to discharge the function.

Also, there was enactment of political parties Act of 1992, which denies citizen the right to engage in presidential post candidates in their individual capacity outside institutional independent candidates and if one wants to participate in politics one is compelled to join a political party, this situation has been challenged by different politician which seemed to violate the individual right to be voted for, as stated in the case of *Rev Christopher Mtikila v. Attorney General*,<sup>8</sup> the High court of Tanzania dismissed the petition on the ground that it violates the constitution. Also, amendment of Act No.4 of 1992 which abolished the one- party system, and there after the Political Parties Act<sup>9</sup> which enabled the birth of many parties.<sup>10</sup>

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<sup>6</sup> <https://www.eisa.org> retrieved on 12<sup>th</sup> April 2021

<sup>7</sup> The Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>8</sup> [1995] TLR 31

<sup>9</sup> Cap 258 R.E. 2019.

<sup>10</sup> M. Nyirabu., *The multipart Reform process in Tanzania: Dominance in ruling part.* African e-Journals Project Vol 7 No 2. 2002 pg. 105

In 30<sup>th</sup> January 2007 respectively, the African countries adopted an African Charter on Democracy, Elections and Governance where Article 15<sup>11</sup> provides obligation to the state parties, that the state parties shall establish public institutions that promote and support democracy and constitutional order, also state parties shall ensure that the independence or autonomy of the said institution is guaranteed by the constitution, and ensure that these institutions are accountable to competent national organs and provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

Independence of electoral institutions means that the electoral bodies are free to exercise statutory and discretionary duties free from force or influence from the any political party, there are two ways of looking at the independence issue;<sup>12</sup> first, is to look at the independence of the commissions as a legal entity, they have the ability to make decisions as it relates to election administration and management which includes; approving or disapproving candidates for elections, determining demarcation of constituencies, designating polling stations, issuing registration and voting procedures and dealing with all complaints in relation to election procedures. Second, is to see the appointment of the commissioners as falling within the executive mandate of presidential duties, dependence on government for funding and personnel further undermines their ability to ensure independence.<sup>13</sup>

In Tanzania, the Electoral Management Bodies do not have own personnel. All National Electoral Commission personnel are government employees seconded to the commission. The Electoral Commissioners in the national level are only appointed by the President by virtue of

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<sup>11</sup> African Charter on Democracy, Elections and Governance, 2007

<sup>12</sup> S. Karume., *Dilemma of political transition in Tanzania, Towards institutionalization of multiparty democracy in Tanzania*. EISA 2004 research report No. 7

<sup>13</sup> *Ibid*

Article 74 (1)<sup>14</sup> and require no further approval as it is not provided by the laws of the land compared to other jurisdictions, also the Tanzania Electoral Commissioners can be re-appointed after the expiration of their five years tenure, hence providing a room for manipulation of the Electoral Commissions' undertakings as to act in favor of the President who appointed them and may re-appoint them.<sup>15</sup> This electoral law is different from Kenyan electoral law where the Electoral commission is composed of personnel who come into being upon appointed by the President of Kenya and approved by the National Assembly by virtue of Article 250 (2) of the Constitution of Kenya.

Further, in the district level section 6 (1) and 7 (1) of the National Elections Act<sup>16</sup> provides for the appointment of Directors of election (City Directors Municipal directors and District Executive Directors) to become Returning officers, while, the said directors under the Act; appointed by the president and they are answerable to the president. This situation is different from Kenyan jurisdiction where section 4 (1) of The Election Act<sup>17</sup> provides that the Commission shall appoint country returning officers where this may reduce personnel from the ruling party and influence from the ruling party and affect the independence of electoral body in exercise of electoral duties.

Impartiality or autonomy in the election means that the management bodies should act fairly, neutral and not favored or discriminate any political party during election.<sup>18</sup> According to Goodwin-Gill,<sup>19</sup> Electoral Management Bodies' aims should be to; ensure that those responsible

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<sup>14</sup> Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>15</sup> M. Shubi., *Overview of Electoral Process in Tanzania: A Dissertation paper submitted in Partial fulfillment of the requirements for degree award of the Mzumbe*, 2017

<sup>16</sup> [Cap 343 R.E. 2015]

<sup>17</sup> The Election Act of Kenya of 2011

<sup>18</sup> <https://eos.cartercenter.org/summaries> retrieved on 15th April 2021

<sup>19</sup> G. Gill., *Free and Fair Elections: International Law and Practice (Geneva: Inter Parliamentary Union)*, 1994, pg. 88

for the administration of the elections are trained and act impartially, ensure that coherent voting procedures are established and made known to the voting public, ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers, as appropriate, encourage parties, candidates and the media to accept and adopt a code of conduct to govern the election campaign and the election period ensure the integrity of the process for counting votes and lastly, announce the election results and facilitate any transfer of authority.<sup>20</sup>

Now that multipartyism is in place in the country, six multi party Presidential and Parliamentary elections had been held in Tanzania since the restoration of multipartyism, these are 1995, 2000, 2005, 2010, 2015 and 2020 general elections. All the times, the ruling party CCM had won the elections. Many legal issues have been raised by lawyers, opposition political parties and other stakeholders that the present electoral system and laws do not provide a room for democratic, free and fair election in the country. These issues have stimulated a need for conducting this research on the legal and practical aspects relating to multiparty-general elections in Tanzania.

The laws guiding elections for the Presidency and Members of Parliament are; the National Elections Act,<sup>21</sup> The Constitution of the United Republic of Tanzania,<sup>22</sup> The National Elections [Presidential and Parliamentary Elections] Regulations, 2015 and the National Elections (Election Petitions) Rules.<sup>23</sup>

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<sup>20</sup> C. Lasham., UNIDEM SEMINAR “*Organisation of Elections by an Impartiality Body*”, Transparency and Impartiality of the Electoral Administration on election day, Belgrade, 2005 pg. 5

<sup>21</sup> CAP 343 R.E. 2015

<sup>22</sup> 1977 as amended by CAP 2 of 2015

<sup>23</sup> G.N. No.447 of 2010

In 1985 the National Election Act was enacted, and section 7(1)<sup>24</sup> establish the agents responsible for election who are Returning officers and assistant returning officers and the Act empowers National Electoral Commission to appoint the returning officers prior to the election. The NEC has responsibility of ensuring that the returning officers are sufficiently familiar with the electoral laws, rules and regulations and are responsible for supervising the registration of voters, in their constituencies, supervising the conducts of electors in their constituencies and declaring result in their constituencies. However, on 2000 before election, the law amended, that the local Election officials (so called Returning officers) were no longer recruited through application and selected based on merit. Where since that time (City Directors Municipal directors and District Executive Directors) automatically becoming returning officers for the matter of registration or election but the issue is that the said directors are government officials and president appoints (City Directors Municipal directors and District Executive Directors) in their respective district, he believes that they are the one who are loyal to him and they can act according to what he wishes, and there is great chance that those who are selected to be DEDs are among members of ruling party who assisted president in one way or another to get such position, also there is no other person who have right to challenge the appointed (City Directors Municipal directors and District Executive Directors).<sup>25</sup>

But the National Election Act brought some questions as per sections 6 (1) and 7 (1) & (3) of National Elections Act<sup>26</sup> provides for the appointment of Directors of election (City Directors Municipal directors and District Executive Directors) to become Returning officers,

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<sup>24</sup> National Election Act CAP 343 R.E. 2015

<sup>25</sup> A.B. Mork., *The United Republic of Tanzania. Presidential and parliamentary election*. NODEM Report 4/2006 pg. 28

<sup>26</sup> [Cap 343 RE 2015]

while, the said directors under the Act; are appointed by the president and answerable to the president.

Moreover, According to Article 8 (1) (a)<sup>27</sup>

*“The United Republic of Tanzania is a state which adheres to the principles of democracy and social justice and accordingly.....”*

One can see from the constitution that the Constitution requires principles of democracy to be adhered in the country. Therefore, it is the right of the people to elect their leaders according to their constitution and other laws.

However, there have been day to day complaints advanced by opposition political parties, lawyers and other stakeholders that the present Constitution and the electoral laws do not provide for a room for multiparty democratic general elections in Tanzania. The laws have been created not to ensure the function of multiparty democracy but rather to restrain the opposition parties and thus giving pace to the ruling party Chama Cha Mapinduzi and to ensure its political dominance and power.

In Kenya, citizens voted for the first time in 1957 during the country’s legislative elections, they voted for eight African seats in the parliament which previously had 14 seats for Europeans, six seats for Indians, one for Arabs and six seats appointed for the Africans.<sup>28</sup>

The first universal suffrage was held in 1961 and pre-independence political party the Kenya African National Union (KANU) won majority of seats in the expanded 65-seat parliament despite the European dominance. In the 1963 elections, the system was changed again and seats were increased to 129 House of Representatives and a 38-seat Senate, KANU won majority seats

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<sup>27</sup> Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>28</sup> [www.africanews.com](http://www.africanews.com) retrieved on 20<sup>th</sup> April 2021

and the country saw its first African Prime Minister in the person of Jomo Kenyatta, this led to independence in 1964 and Kenyatta became the first President.<sup>29</sup>

After the independence Kenya was established as a republic in December 1964, and Kenyatta was elected Kenya's first president the same month,<sup>30</sup> however the disagreement between the president and his first vice president led to the withdrawal of Jaramogi Oginga Odinga from Kenyatta's KANU party in 1966, and the formation of the rival Kenya People's Union (KPU) party together with his supporters in parliament. This entrenched the ethnic divisions along party lines with the Kikuyu majority behind KANU and Luo behind KPU.

A by-election was held that year after a constitutional amendment to allow the breakaway KPU to stand for elections. KPU won majority of votes but KANU won majority of seats. The Senate was abolished subsequently and the House of Representatives transformed into the National Assembly. Kenya was transformed into a one-party state in 1969 and KPU was banned leaving KANU as the only party that won all seats in 1969, 1974, 1979, 1983 and 1988 elections led by Kenyatta.<sup>31</sup>

Kenyatta died in 1978 and the presidency was continued by his vice president Daniel Arap Moi who became the second president. Furthermore, in 1992, President Moi restored multiple party politics after democratic pluralism swept through Africa.<sup>32</sup> He won that year's elections, President Daniel Arap Moi won the 1997 elections and groomed current president Uhuru Kenyatta to take over the presidency and continue his father's legacy in 2002, Moi stood down in 2002 for Uhuru Kenyatta to stand. He led KANU to its first defeat to an opposition coalition led by Mwai Kibaki. The coalition fell apart and Uhuru backed Kibaki to win the 2007

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<sup>29</sup> <https://kenyalaw.org> retrieved on 25<sup>th</sup> April 2021

<sup>30</sup> <https://www.britannica.com> retrieved on 28<sup>th</sup> April 2021

<sup>31</sup> <https://www.klrc.go.k-> retrieved on 01<sup>st</sup> May 2021

<sup>32</sup> <https://www.refworld.org> retrieved 01<sup>st</sup> May 2021

elections against rival Raila Odinga who had unsuccessfully contested for the first time in 1997 after he returned from exile to take part in the country's multi-party politics. Odinga supported Kibaki in the 2002 elections as part of the opposition coalition until they fell out after the polls.

In 2007, the Electoral Commission of Kenya was later disbanded and replaced by the Interim Independent Electoral Commission of Kenya. the new constitution, which was passed during the 2010 Referendum. There was also the first election run by the Independent Electoral and Boundaries Commission (IEBC), which replaced the Interim Independent Electoral Commission (IIEC) where under Article 88 provide for establishment of commission and that members of the commission to be appointed in the consultation of the parliament.<sup>33</sup>

Kenya general Election held in 2007, almost 1,300 people were killed and more than 600,000 displaced after violence that saw Uhuru Kenyatta and his running mate William Ruto indicted by the International Criminal Court in 2011 for incitement of the ethnic violence against Odinga's supporters.

In 2011, the parliament passed the Election Act<sup>34</sup> whereby under section 39 (1)<sup>35</sup> provides for the appointment of country returning officers. Also, the Independent Electoral and Boundaries Commission Act<sup>36</sup> provides power for Commission to appoint country returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the country for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

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<sup>33</sup>O. Z. Elisha., *Hand Book on Kenya's on the electoral law and systems*. Nairobi 2012, pg. 32

<sup>34</sup> Election Act No. 24 of 2011

<sup>35</sup> *Ibid*

<sup>36</sup> Act No. 15 of 2010



In 2013, Elections were held under the Constitution<sup>37</sup> that was approved after a referendum, Uhuru Kenyatta defeated Raila Odinga, whose party won the most seats in the National Assembly. Uhuru was running again in 2017 for his second term against Raila Odinga who had been unsuccessful in 1997, 2007 and 2013.

In 2017, the Kenya's Supreme Court cancelled the August 8, 2017 presidential election on September 1, 2017 citing electoral irregularities after accusation of fraud by the opposition party named National Super Alliance (NASA) party led by Raila Odinga, the Independent Electoral and Boundaries Commission (IEBC) set October 26 for the repeat of election which were participated by all the candidates, according to a court order, except Cyrus Jirongo who was declared bankrupt by a court, this is due to the Supreme Court of Kenya is the only court vested with jurisdiction to hear and determine disputes relating to the presidential elections, three presidential petitions were filed at the Supreme Court within 7 days of the declaration of the results of the Presidential Election under Article 143.<sup>38</sup> The three petitions were consolidated, heard and a decision given within 14 days. One among the petitions was the case of *Raila Odinga and Another v. The Independent Electoral and Boundaries Commission & 2 Others*.<sup>39</sup> Where the court held that the election was conducted in accordance with principles laid down in the Constitution and law relating to elections, there was no instance of fraud or illegality found or proven, any irregularities that were found did not favor any particular candidate and could not have impacted in anyway on the result of the election hence the petition was dismissed.

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<sup>37</sup> The Constitution of Kenya, 2010

<sup>38</sup> Constitution of Kenya, 2010

<sup>39</sup> Supreme Court of Kenya Petition No. 1 of 2017

### 1.3 Statement of the Problem

In Tanzania mainland the Electoral Administration is divided into two levels in the national level and in the district level, in national level there is National Electoral Commission and in the district level there is Returning officers. However, the issue is independence and autonomy of the Electoral administrators in exercising their duties, such that;

The Electoral Commissioners in the national level are only appointed by the President and require no further approval as it is not provided by the laws of the land compared to other jurisdictions, also the Tanzania Electoral Commissioners can be re-appointed after the expiration of their five years tenure, hence providing a room for manipulation of the Electoral Commissions' undertaking to act in favor of the President who appointed them and may re-appoint them.<sup>40</sup> Where this situation is different from Kenya where the Electoral commission is composed of personnel who come into being upon being appointed by the president of Kenya and approved by the National Assembly by virtue of Article 250 (2) of the Constitution of Kenya.

In the district level, sections 6 (1) and 7 (1) & (3) of National Elections Act<sup>41</sup> provides for the appointment of Directors of election (City Directors Municipal directors and District Executive Directors) to become Returning officers while, the said directors under the Act are appointed by the president and they are answerable to the president. This infringes Articles 74 (14)<sup>42</sup> which prohibits any person concerned with the conduct of elections to join any political party while the appointed members of Electoral commission are the appointed members from the ruling party as per Section 6 (1) and 7 (1) of the National Elections Act<sup>43</sup> where the effect is; it ensures that the election in the country be owned by the political party in power and thereby reprehensive to the

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<sup>40</sup> M. Shubi., *Overview of Electoral Process in Tanzania: A Dissertation paper submitted in partial fulfillment of the requirements for degree award of the Mzumbe*, 2017

<sup>41</sup> [Cap 343 RE 2015]

<sup>42</sup> Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>43</sup> [Cap 343 RE 2015]

very nature of a free democratic society in whose governance, the citizens participate by way of free and fair election, such that the National Elections Act does not set out any safeguards to ensure independence from their appointing authority on matters of elections, while in Kenyan jurisdiction section 4 (1) of The Election Act<sup>44</sup> provide that the Commission shall appoint country returning officers.

There are steps taken by political activists to challenge the said Section 6 (1) and 7 (1) & (3) of the National Elections Act such as in the case of *Bob Chacha Wangwe v. A.G & 2 others*.<sup>45</sup> In this case, the High court held in favor of the petitioner that the said Section under the National Elections Act violates the Constitution, but in appeal by the respondent to the Court of Appeal, the court set aside the rule drawn by the High Court. Moreover, under Article 15 of the African Charter on Democracy, Election and Governance<sup>46</sup> requires the member state parties to establish institutions and shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution, but in Tanzania the independence and autonomy of the Electoral institutions is questioned.

#### 1.4 Literature Review

**Kinya, E.**<sup>47</sup> The author explains the guarantee of democracy by Kenyan law by explaining the structure of electoral administration of Kenya whereby there is the Independent Electoral and Boundaries Commission (IEBC) where this is the electoral commission electoral in Kenya established under Article 88 (1) of the Constitution of Kenya, which provides that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established under the Constitution and any other elections as prescribed by an Act

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<sup>44</sup> Election Act, No. 24 of 2011

<sup>45</sup> Misc. Civil Cause no 17 of 2018 (unreported)

<sup>46</sup> The African Charter on Democracy, Election and Governance of 2007

<sup>47</sup> E. Kinya., *Electoral Process in Kenya*, Kenyan Law. Retrieved in <https://www.KenyaLaw.org.com> on 20<sup>th</sup> April 2021 pg. 24

of Parliament, The Independent Electoral and Boundaries Act provides that the commission shall consist of a chairperson and eight (8) other members.<sup>48</sup> The procedure for appointment of chairperson and members of the Commission shall be in accordance with the procedure set out in the First schedule. The schedule requires the President to appoint a selection panel which shall invite applications and publish names of all applicants, the panel is then required to consider the applications, shortlist and interview the applicants.

After the interviews, the selection panel is required to select three persons qualified to be appointed as chairperson and thirteen persons qualified to be appointed as members of the commission and forward these names to the President for nomination of one person for appointment as the chairperson and eight persons for appointment as members. The President is then required to forward the list to the National Assembly for approval, upon consideration and approval the National Assembly forward names to the President for appointment.<sup>49</sup>

The Constitution<sup>50</sup> provides that a person is not eligible for appointment as a member of the commission if the person has, at anytime within the preceding five years held office, or stood for election as a Member of Parliament or of a country Assembly, or a member of the governing body of political party, or holds any State Office, and the member of the commission shall not hold another public office.

According to section 39 (1) of The Independent Electoral and Boundaries Commission Act provides power for Commission to appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly, where according to the author the

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<sup>48</sup> *Idem*

<sup>49</sup> *Idem* pg. 25

<sup>50</sup> The Constitution of Kenya, 2010

process of making the appointment of member of the commission deployed the proper procedures which would result an independent and impartiality body which will enhance free and fair election, also the process of appointment of returning officers is good process when you compared with the process which is applicable in Tanzania where Directors of election (City Directors Municipal directors and District Executive Directors) to become Returning officers while they are part and parcel of the ruling political party. Also, the author shows that the Electoral Commission members pass through different stages so as to be qualified as a member where this can help to deny members whom they believe that he may not act fair. In Tanzania only president appoint members and he is not questioned on his appointment as this study will reveal impacts of this situation and how to handle this situation.

**Lasham, C.**<sup>51</sup>He wrote an article basing on the seminar.<sup>52</sup>In his article of Transparency and Impartiality of the Electoral administration on the election day: The importance of management of election and the role of electoral administrators. He explains that the independence of the Electoral Management Body is crucial for the success of any election. If the Electoral Management Body is perceived as not being independent, then there is little chance of the electoral administration on election day being perceived as transparent and impartial. The Electoral Management Body should be a neutral and balanced mechanism, able to carry out its duties in an impartial manner. The question then arises whether it should be established under the constitution or by statute. There is a strong argument for the Electoral Management Body to be a constitutional body, rather than a mere statutory body, in order to prevent the government of the day from changing the components of the Electoral Management Body by parliamentary procedures.

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<sup>51</sup> C. Lasham., *Transparency and Impartiality of the Electoral administration on the election day: The importance of management of election and the role of electoral administrators*, 2005

<sup>52</sup> UNIDEM SEMINAR “*Organization of Elections by an Impartial Body*” Belgrade, 24-25 June 2005

**Norman, A. Et al.,**<sup>53</sup> Authors in their article of evolution of election management under multiparty parties explains that, in 1992 the law allowed the establishment and registration of political parties by (Act, No. 5 of 1992). Consequently, multi-party democracy called for the establishment of the body entrusted with authority to conduct and supervise elections processes. Such a body should be perceived to be free, independent, transparent, principled, accountable and credible. Hence the Constitution of the United Republic of Tanzania was also amended to establish an independent body which will carter for the administration of elections under the multi-party political system which is National Electoral Commission where the Constitution show that members of the commission are appointed by the president and may be dismissed by the president

Authors explains further, that there are complains submitted by the opposition parties and other human right activists to challenge the appointment of members of commission by the president, that the body is not independents members are appointed by the president who is also the chairman of the ruling party CCM. Also, there is no point to look at the appointment criteria as a weakness of the National Electoral Commission since it is a worldwide phenomenon. They further added that even the presence of judiciary is dependent on the appointing authority, in this regard the president who is also the Chairman of the Ruling Chama Cha Mapinduzi.<sup>54</sup> From that point I upholding views of the authors that the independence and autonomy of the National Electoral Commission is questioned in performing its function. Authors based only in the National Electoral Commission; however, this study will go further and look on the independence and autonomy of the returning officers who administer election in the local level

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<sup>53</sup> A. Norman., *Evolution of Election Management bodies of Tanzania*, Academic journals Vol 6 (11), 2011 pg. 697

<sup>54</sup> *Ibid* page 698

**Weinstein, L.**<sup>55</sup> Author in his Article of the politics of Government expenditures in Tanzania, he explains that the ruling party winning a legislative or executive election with a large margin is crucial for a hegemonic party's long term survival for three reasons: the ruling party is able to maintain its ability to manipulate electoral laws, continue its monopoly access to resources, and sustain the perception of the party's. First, with a supermajority, the ruling party can unilaterally amend the constitution to its electoral advantage by creating formidable barriers for opposition entry. For example, the Tanzanian ruling party amended the constitution after the 1995 election to restrict public funding to opposition parties after numerous parties took advantage of this resource during the first multi-party election. Additionally, control of the legislature enables the ruling party monopoly access to abundant government resources and an important source of economic patronage. Finally, winning the election formidably is critical. This notion is consistent with the views from the many respondents who argued that government amend laws by pass bill through Parliament (many members of the Parliament are from the ruling part) and president accept bill to be law, which affect the independence and autonomy of the electoral officer.<sup>56</sup>

This study reflect the Tanzanian laws in guarantee the independence of returning officers and the National Electoral Commission where by the amendment of constitution which establish the national electoral commission offer the wide power to the ruling part to control the election, by the appointment of members of commission by the president who is the chairman of the ruling part. Also the Nation Election Act which assented by the president so as to become the law in the country, hinder the independence and autonomy of returning officers since the law requires the

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<sup>55</sup> L. Weinstein., *The Politics of Government Expenditures in Tanzania*, Los Angeles, California University, 2010 pg. 9

<sup>56</sup> *Ibid* page 10

district executive directors to become returning officers automatic while the said directors are appointed by the president who is member and chairperson of the ruling part.<sup>57</sup>

## **1.5 Hypothesis**

It seems that Tanzania legal and institutional framework are not well framed to ensure independence and autonomy of the electoral administrators.

## **1.6 Objectives of the Research**

This research has General objective and specific objectives;

### **1.6.1 The General Objective**

The research is to critically examine the guarantee of the independence and autonomy of Electoral Institutions in Tanzania and Kenya.

### **1.6.2 The Specific Objectives of the Research**

- i. To analyze the independence and autonomy of the National Electoral Commission of Tanzania and the Independent Electoral and boundaries Commission of Kenya
- ii. To examine the independence and autonomy of the returning officers
- iii. To determine the outcome of un independence and un autonomy of electoral administrators in a democratic state like Tanzania

## **1.7 Significance of the Research**

One among the significance of this research is that, it addresses the limitation of laws and institutions in guarantee of the independence and autonomy of the electoral officers such as NEC and Returning officers, where this will help the society to be aware of laws of their nation, strength and weakness of laws guiding election process by comparing with the Kenyan laws and

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<sup>57</sup> *Idem* page 11



other international standards. Also, this study will help law draftsmen to draft laws which will protect independence and autonomy of the electoral officers and Electoral institutions.

## **1.8 Research Methodology**

These are basic methods that were employed in the research in order to find the relevant research findings where the researcher used primary data such as interview and questionnaire and secondary source of data (library research) where she referred articles, books, reported cases, journals and other related documents.

### **1.8.1 Research Design**

Doctrinal approach method was applied to examine laws, rules and regulations by using reports and case laws. This approach is also known as documentary review since it is mainly focused on reading various publications, journals, newspapers, text books, articles and research reports. Also, researcher used non-doctrinal design where questionnaires were used in collecting data from the respondents.

### **1.8.2 Sampling and Sample Size**

The selection of respondents based on purposive and simple random sampling. In this method a researcher chose her sample according to her wishes and desire. To choose or leave an item for the purpose of research depends entirely upon the wishes of the researcher so the researcher chose items or units which in her judgment are representative of the whole. The researcher used Political Parties Officers, member of different political parties such as ruling party and the opposition parties, magistrates and also advocates were used as the source of data, for the purpose of obtaining data from the specialized officers in their fields who gave their views basing on their professional and daily experience which is basic essential of the study. The researcher employed simple random sampling when targeting ordinary people from the field area,

because random sampling is effective sample because they can represent different groups of people rather than selecting them based on one group of people from the society.

Targeted population was 30 people as sample respondents which included, 15 Political Parties Officers (5 CCM officers, 5 CHADEMA officers and 5 CUF officers), 10 lawyers in Iringa (5 advocates and 5 magistrates), and 5 citizens from Kenya, this sample size cover important respondents who have knowledge about the study and they can give important data.

### **1.8.3 Research Methods**

These are basic methods which were used by a researcher in collection of data where researcher used both primary and secondary data in data collection, it is through this method researcher made analysis of the law and conduct documentary review so as the research problem is addressed and approached.

### **1.8.4 Data Collection**

#### **1.8.4.1 Primary Data Collection**

This method is known as field research, where by researcher went to the field and collect data from the respondents who gave their views on whether Tanzanian laws guarantee the independence and autonomy of the electoral administration and how it is compared with Kenyan jurisdiction.

#### **Questionnaire method**

Under this method, the researcher employed open ended questionnaire. The importance of this method is that, it gives respondents freedom of expression concerning the topic, hence provide depth information which are helpful to the researcher. Also, it helps in the discovery of new facts to build-up the research and lastly this method help a researcher to reach many respondents within a short period. In this method the questionnaires were distributed to 5 Political

Parties Officers,(2 CCM officers, 2 CHADEMA officers and 1 CUF officer), 10 members of different political parties such as 4 from the ruling party and the 6 from opposition parties and 10 lawyers in Iringa (3 advocates and 7 magistrates), and 5 citizens from Kenya via their emails. The essence of using these respondents is that lawyers especially advocates are aware of the laws and they can view their legal perspective on the comparison of Tanzanian laws and Kenyan laws on the independence and autonomy of the electoral administrators.

#### **1.8.4.2 Secondary Data Collection**

##### **Documentary Review**

The researcher used library research so as to lay the theoretical framework and for the purpose of access works of other researchers and identify the knowledge gap that this study sought to cover. These data were collected from different existing documents by going through reading various publications, the researcher spent some time in the library to explore the available literature from theses and dissertations, reading of journals, brochures, newspapers, text books, articles and research reports. This method is important in the study because it enabled a researcher to get data from Kenya so as to compare with the independence and autonomy of the electoral administration in Tanzania.

##### **Electronic Sources of Data**

Electronic sources are significant in this study, various websites, electronic journals, books and reports were accessed. Therefore, in regard to this different search engine was used such as; <https://kenyalaw.org> and google scholars were visited too.

#### **1.9 Data Analysis**

The researcher used qualitative approach in respect to the data collected from statutes, reports, international standards, case laws and the samples with regard to the autonomy and

independence of electoral institutions and its returning officers, qualitative analysis involves use of words and explanation to analyze data from the beginning of this research up to the end of this research.

### **1.10 Scope and Limitations**

The research has been conducted on analysis of the autonomy and independence of the laws guiding the election process in Tanzania and Kenya.

The researcher had limitation especially in finding and obtaining data, some of the respondents did not return the questionnaires and this brought some difficulties to the researcher to obtain data on independence and autonomy of electoral administrators in Tanzania, also there was no response to questionnaires distributed to citizen of Kenya via their emails, thus the researcher failed to get enough data from Kenya citizens and therefore ended up collecting data through documentary review and electronic source of data.

### **1.11 Conclusion**

The aspect of free and fair election requires the independence and autonomy of electoral administrators because through their supervision in elections is what brings the outcome of free and fair election, where by in Tanzania the laws seem to violate or hinder the independence and autonomy of electoral administrators and this is seen from how laws are structured. Since it is one of the requirements of a democratic society that the independence and autonomy of electoral administrators must be adhered then if it is violated, the societies have an oppressive system.

## CHAPTER TWO:

### CONCEPTUAL FRAMEWORK OF ELECTION AND ELECTORAL ADMINISTRATION IN TANZANIA

#### 2.1 Introduction

This chapter intends to discuss the concept of election and address the electoral administration in Tanzania from top level to the grassroots level so as to enable reader to know all aspects of electoral administration in Tanzania also this chapter address how is the electoral officer connected to each other and perform their function each other.

#### 2.2 The Concept of Elections

Democracy can be seen as a way of government firmly rooted in the belief that people in any society should be free to determine their own political, economic, social, and cultural systems.<sup>58</sup> More commonly, the concept of democracy is used to describe a political system designed to widen the participation of ordinary citizens in government the powers of which are clearly defined and limited.

An election is a formal group decision-making process by which a population chooses an individual or multiple individual to hold public office.<sup>59</sup> Elections have been the usual mechanism by which modern representative democracy has operated since the 17<sup>th</sup> century. Elections may fill offices in the legislature, sometimes in the executive and judiciary, and for regional and local government. This process is also used in many other private and business organizations, from clubs to voluntary associations and corporation.<sup>60</sup> The transparency of the

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<sup>58</sup> B. Mesfin., *Democracy, elections & political parties. A conceptual overview with special emphasis on Africa*. 2008 Paper no 166. Pg. 23

<sup>59</sup> Collins English Dictionary. Glasgow, HarperCollins Publishers, 18<sup>th</sup> edition, 2016

<sup>60</sup> Robert, & M. Henry., et al. *Robert's Rules of Order*, Newly Revised 11th Ed. PA: Da Capo Press, Philadelphia, page. 438–446.

electoral process determines the legitimacy of government that accedes to power, and this depends on people's confidence in the sense that there have been free, fair and credible elections.<sup>61</sup>

The International Institute for Democracy and Electoral Assistance (IDEA)<sup>62</sup> identifies various standards to be borne in mind when determining whether the election has been conducted in a free and fair means. They include; guarantee of universal, equal and free right to vote without coercion or intimidation, regular elections at prescribed periods, all parties and candidates should be able to put out their manifests freely to the electorates during the electoral campaign, the electoral campaign period be well defined, and that the legal framework should provide for the right to freedom of expression, equitable access to the media for all parties and candidates and equal political rights.

According to Collins,<sup>63</sup> electoral process leading to free and fair elections is a chain and not about a single actor. It involves many players including political parties, candidates, voters, electoral management bodies (EMB), law enforcement agencies, media and adjudication bodies, so that any weakness in the electoral chain often affects the overall management and outcome of elections.

### **2.2.1 Elements of Free and Fair Elections**

AU Declaration on the principles governing Democratic Elections in Africa<sup>64</sup> The head of states agreed and endorsed the following principles to govern democratic elections:

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<sup>61</sup> Ongoya Z. Etel, *A Handbook on Kenya's Electoral Laws and System: Highlights of the Electoral Laws and System Established by and Under the Constitution of Kenya 2010 and Other Statutes*. Electoral Institute for Sustainable Democracy in Africa (EISA), 2012, pg. 124

<sup>62</sup> <https://www.idea.int> retrieved on 10<sup>th</sup> May 2021

<sup>63</sup> O. Collins., "*Supporting Kenya's Election Processes: Lessons from Past Evaluation*", Report Prepared for the Joint Donor Group on Elections. 2014 pg.14

<sup>64</sup> African Union Declaration on the principles governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002

1. Every citizen shall have the right to participate freely in the government of his or her country, either directly or through freely elected representatives in accordance with the provisions of the law.<sup>65</sup>
2. Every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination.<sup>66</sup>
3. Individuals or political parties shall have the right to freedoms of movement, to campaign and to express political opinions with full access to the media and information within the limits of the laws of the land.<sup>67</sup>
4. Individuals or political parties shall have the right to appeal and to obtain timely hearing against all proven electoral malpractices to the competent judicial authorities in accordance with the electoral laws of the country.<sup>68</sup>
5. No individuals or political party shall engage in any act that may lead to violence or deprive others of their constitutional rights and freedoms. Hence all stakeholders should refrain from, among others, using abusive language and/or incitement to hate defamatory allegations and provocative language. These acts should be sanctioned by designated electoral authorities.<sup>69</sup>
6. All stakeholders in electoral contest shall publicly renounce the practice of granting favor to the voting public for the purpose of influencing the outcome of elections.<sup>70</sup>

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<sup>65</sup> Article IV of African Union Declaration on the principles governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002

<sup>66</sup> *Ibid*

<sup>67</sup> *Ibid*

<sup>68</sup> *Ibid*

<sup>69</sup> *Ibid*

<sup>70</sup> *Ibid*

7. In covering the electoral process, the media maintain impartiality and refrain from broadcasting and publishing abusive language, incitement to hate, and other forms of provocative language that may lead to violence.<sup>71</sup>

### **2.2.2 Function of Election in Democratic system**

Competitive elections determine the democratic legitimization of the exercise of public authority, and through this legitimizing criterion will be different from the non-competitive selection methods. Competition ensures legitimacy of decisions taken by the elected representatives.

Delegating political representation allows voters to choose those persons who, in their opinion due to the views and values held, seem to be the best representatives, the delegation of political representation as a result of the elections lead to transfer of the decision-making powers rests on the assumption that voters will be able to choose from among themselves those who have the appropriate attributes (knowledge, integrity, loyalty to the principles, ability to cooperate).<sup>72</sup>

The function of enforcement of political accountability assumes the possibility of drawing consequences against persons holding public office. It consists in the expression of disapproval for their political activity and the consequences thereof, including the political consequences. This distinguishes the political accountability from other types of responsibility found in the political system, such as constitutional or criminal.<sup>73</sup>

Realization of the control function is based on the potential to cause reflection in voters whose aim is to assess what has been done by the government and make a comparison with the

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<sup>71</sup> *Idem*

<sup>72</sup> W. Wojtasik., *Functions of Elections in Democratic Systems*. University of Silesia, Poland, 2014, Page 27

<sup>73</sup> *Ibid*



visions for the future, projected both by those seeking re-election, as well as those aspiring to seize power.

### **2.3 The concept of autonomy and independence in election**

Autonomy means the quality or state of being self-governing. It's the capacity to make an informed, uncoerced decision.<sup>74</sup> Independence is the fact or state of being independent, freedom from dependence, exemption from reliance, direction of one's own affairs without interference.<sup>75</sup> Autonomy and independence in election exists when an institution which is responsible for administration of election is self-governing, not under control of a government or any other authority, an institution lacks autonomy when its choices are influenced by factors such as threat or coercion and control by the higher authority. The demand for autonomy and independence is linked to the attainment of substantive policy goals such as free and fair election and need to attain democratic election across a range of domain such as culture, language, laws governing a society and other things.<sup>76</sup>

The constitution and other legal and policy framework governing the election management bodies should clearly stipulate its independence and institutional autonomy in the performance of its mandate, such as enactment of laws which guarantee the independence and autonomy of the electoral administrators.

### **2.4 Returning officers**

Refers to a public official appointed to conduct and preside at an election in the district level.<sup>77</sup> Their responsibilities are to plan and organizes the delivery of access to voting, manages and controls financial, material and human resources, communicates information to the public,

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<sup>74</sup> <https://www.britannica.com> retrieved on 10<sup>th</sup> May 2021

<sup>75</sup> <https://www.definitions.net> retrieved on 10<sup>th</sup> May 2021

<sup>76</sup> A.G. Gagnon & M. Keating, *Political Autonomy and Divided Societies*, Palgrave Macmillan, 2012, page 15

<sup>77</sup> <https://www.dictionary.com> retrieved on 11<sup>th</sup> May 2021

candidates, political parties, field liaison officers and to take control of electoral events within the electoral district in which they are appointed.<sup>78</sup>

## **2.5 Conclusion**

The chapter is about elections which help in understanding on the meaning of Elections function of election and the elements of free and fair elections which enhanced on the marking point of free and fair election. Furthermore, it stipulated on Electoral Administration, electoral Commission, returning officers in whom it discussed their powers, composition but also their duties.

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<sup>78</sup> India Election Commission, *Handbook for Returning Officers*, Election Commission of India, University of California, 2008, page 83

## **CHAPTER THREE:**

### **LEGAL AND INSTITUTIONAL FRAMEWORK OF ELECTION AND ELECTORAL ADMINISTRATION**

#### **3.1 Introduction**

This chapter aimed to cover up the laws that govern free and fair election, independence and autonomy of electoral institutions, also this chapter addresses the international standards on elections and electoral administration, regional and domestic laws. The international instruments discussed hereunder Tanzania is a member party or state party to them.

#### **3.2 International Legal Instruments**

##### **3.2.1 Universal Declaration of Human Rights of 1948**

The Declaration under Article 21 provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. It goes further to provide that the will of the people shall be the basis of the authority of government, and that this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedures.<sup>79</sup> The will of the people is the basis of government where this can include several matters such as the will of the people can be adhered if there is independent Electoral administration, also the voting procedure and counting of votes can be effective conducted if there is independent and autonomy of Electoral administration which cannot be influenced by any political party, and Electoral administration involves both National Electoral Commission and returning officers.<sup>80</sup>

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<sup>79</sup> Universal Declaration of Human Rights (UDHR,) 1948

<sup>80</sup> *Ibid*

### **3.2.2 The International Covenant on Civil and Political Rights 1976**

The International Covenant on Civil and Political Rights is a convention from the United Nations Human Rights Commission that was signed on 16<sup>th</sup> December 1966 and after being ratified came into force on 23<sup>rd</sup> March 1976. The covenant comes to protect human rights. Thus, the ICCPR is an agreement between states to ensure that the states protect and observes human rights.

Under Article 25<sup>81</sup> secures the right and opportunity of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine or periodic elections which are by universal suffrage and held by secret ballot, guaranteeing the free expression of the will of electors and to have access on general terms of equality to public service of his or her country. The International Covenant on Civil and Political Rights does not have specific provision that provides for independence and Impartiality of electoral administration, however, the guaranteeing of the free expression of the will of electors does involve views.

## **3.3 Regional Legal Instrument**

### **3.3.1 African Charter on Democracy, Elections and Governance 2007**

This is regional agreement which had objective of promoting democracy and enhance good government. Under Article 15<sup>82</sup> provides that (1) state Parties shall establish public institutions that promote and support democracy and constitutional order, also (2) state Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution. This regional instrument on the democracy emphasize the principles of democracy to be adhered by the member state where become essential in the development of democracy to

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<sup>81</sup> The International Covenant on Civil and Political Rights of 1976

<sup>82</sup> African Charter on Democracy, Elections and Governance of 2007

the African countries especially in requiring member state to establish independent and autonomy institutions which supervise election.

### **3.4 National Legal Instruments**

#### **3.4.1 Tanzania**

##### **A. The Constitution of United Republic of Tanzania, 1977**

This is the mother law of the country, and any other law which is conflicting with constitution is void. Article 74 (14)<sup>83</sup> prohibits any person concerned with the conduct of elections to join any political party. This law reduces the influence of any political party in the election conduct which can protect independence and impartiality of electoral officers which can enable all parties to be treated equally in the elections process.

However, the Constitution allow the member of political parties to involve in the election process, where the Constitution give power the president to appoint member of electoral commission under Article 74(2)<sup>84</sup> and also president have power to remove any member of Electoral commission on ground of fail to discharge his function or due to misconduct. While president is the member of ruling part and he has indirect influence towards members of the electoral commission, this situation threatens the independence and Impartiality of members of electoral commission in carrying out their function, also this Article is contrary to Article 74(14) of the Constitution which prohibits any person concerned with the conduct of elections to join any political party. The system of appointing members of the electoral commission must change so as to have independent body which supervise the election, as the appointment of commission in Kenya where president appoint members in consultation of Parliament.

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<sup>83</sup> The Constitution of United Republic of Tanzania, 1977, as amended by CAP 2 2015

<sup>84</sup> *Ibid*

Article 41(7)<sup>85</sup> provides that no court shall have jurisdiction to inquire into the election of presidential candidate. Furthermore, the Constitution of United Republic of Tanzania and the Zanzibar Constitution restrict any court to question anything done by NEC in course of discharging their duties. Where this grant unlimited power to the commission in exercise their duties which can affect justice due to the influence from the ruling party.

### **B. The National Elections Act CAP 343 R.E. 2015**

In Tanzania the major statute that governs matters of elections of the central government is the Elections Act which provides for; who may contest in different posts and provides for the competent authority which supervises the Elections. However, the statute contains limitations that have substantial effects to the practice of multiparty democracy. These limitations lead to the outbreak of various complaints from members of different opposition political parties as well as from other people who are interested in political matters, who particularly challenge the law as being contrary to the Constitution of United Republic of Tanzania. Sections 6 (1) and 7 (1) & (3)<sup>86</sup> provides for the appointment of Directors of election (City Directors Municipal directors and District Executive Directors) to become Returning officers, while, the said directors under the Act are appointed by the president and they are answerable to the president. This led to the rise of complaints on questioning the independence and autonomy of the returning officers because they act in favor of ruling part as indication of loyalty and appreciation of their appointment by the chairperson of ruling party. This indicate that executive use their power to manipulate laws so as to monopolize election which discourage free and fair multiparty general election.

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<sup>85</sup> Idem

<sup>86</sup> The National Elections Act CAP 343 R.E. 2015

### **C. The Local Authorities (Elections) Act, CAP. 292 R.E. 2015**

The Local Authorities (Elections) Act, governs elections at the Local Government Authorities in Tanzania Mainland, also it governs the appointment and coordination of election officers at lower levels. Section 9(1)<sup>87</sup> which is the same as Section 7 of the National Elections Act, Cap. 343, mentions the City Director, Municipal Director, Town Director and District Executive Director as Returning Officers for LGAs in respect of which he or she is a Director, elections in Tanzania are governed, managed and coordinated by two systems, which are also created under different laws. The NEC is purporting to be an independent electoral body, while the above named returning officers at LGAs level are under the Prime Minister's Office (now under President's Office), Regional Administration and Local Government Authorities. The 'independence' of the electoral processes is really in question.

### **D. Prevention and Combating of Corruption Act**

The Prevention and Combating of Corruption Bureau (PCCB) has powers to influence election management, it is established under the provisions of The Prevention and Combating of Corruption Act<sup>88</sup> and its mandated to control and combat corruptions and abuse of public office, the PCCB is headed by the Director General (DG) who is appointment by the President, one of its role is to supervises the implementation of certain provisions of laws in election management such as Section 21 of the Election Expenses Act,<sup>89</sup> which provides for acts which are termed as unfair conducts during elections, the acts fit within PCCB mandate as the institution which is better placed to do the best during elections because its structure has basis in every district. However, despite this structural advantage PCCB has failed to trace and combat corruption during elections.

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<sup>87</sup>The Local Authorities (Elections) Act, CAP. 292 R.E. 2015

<sup>88</sup> The Prevention and Combating of Corruption Act No. 13 of 2007

<sup>89</sup> Election Expenses Act, No. 6 of 2010

The 2015 general elections seemed to have been the most expensive and corrupt elections because of its competitive nature. The number of election corruption cases was not obtained during the compilation of this report and that there are no any records on media, including social media on nature, places and progress of election corruption cases.<sup>90</sup>

#### **E. Electoral Administration in Tanzania.**

It is widely recognized that the quality of electoral administration has a direct impact on the way in which the outcome of elections is regarded by domestic actors, especially political parties, and whether or not these actors see the electoral process since their incapacity of these bodies have been a continuing source of political tension as a result of their lack of independence, insufficient financial support and administrative capacity.<sup>91</sup>

An election is a source of peaceful change or a cause of serious instability' mainly depends on the character, competence and composition of a number of institutions. Institutions such as the electoral commission ought to be 'independent, competent and perceived as completely fair by all the candidates and parties participating in the [electoral] process.' Furthermore, the electoral commission's standing will depend on its ability, including resources and real legal prerogative, to impartially handle election-related complaints and effectively redress irregularities, thus effectively facilitating the resolution

In Tanzania the electoral administration divided in two levels National Electoral commission in the national level and Returning officers in the district level.

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<sup>90</sup> Legal and Human Rights Centre & Tanzania Civil Society Consortium for Election Observation Report on the 2015 General Elections of United Republic of Tanzania Page 35

<sup>91</sup> A. B. Mork., *The United Republic of Tanzania. Presidential and parliamentary election*, NODEM Report 4/2006 pg. 30



### **i. The National Electoral commission**

Under Article 74<sup>92</sup> provides for the establishment of the Tanzania National Electoral Commission (NEC). According to the Constitution, the NEC is declared to be "an autonomous department" that shall not be obliged to comply with orders or directions of any person or any government department. Additionally, the Constitution provides that "no court shall have power to inquire into anything done by the Electoral Commission in the discharge of its functions. The NEC is responsible for the Presidential, Parliamentary and Local Council elections. The functions and mandate of the NEC are to supervise and manage the conduct of the Presidential and Parliamentary elections, coordination of voter registration, and boundary delimitation. The Commission is also responsible for voter education throughout the country and for declaring the final results of the Presidential election."<sup>93</sup>

The NEC comprises a Chairperson, the Vice-Chairperson and five commissioners. The President of Tanzania appoints all the members of the Commission. The Chairperson of the NEC must be a Judge of the High Court or Court of Appeal. All the members of the Commission are appointed for renewable five-year terms. Only the President may remove Commissioners on grounds of failing to discharge their functions due to illness or for misconduct. Under the oversight of the Commission is a Secretariat, headed by the Director of Elections, which manages the operational aspect of elections. The President of Tanzania appoints the Director of Elections from among civil servants recommended by the Commission. For its regional administrative and operational structure, the NEC utilizes senior local government officials.

National Electoral commissions empower to create regulations and guidelines in order to facilitate effective conduct of electoral duties. These guidelines are directed to electoral staffs

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<sup>92</sup> The Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 2015

<sup>93</sup> Report of the Commonwealth Observer Group, Tanzania General Elections, 2015, Page 27

such as returning officers, assistance returning officers, polling staffs and political parties. This institution has the great influence in affecting the duties of returning officers, so if the National Electoral Commission is not independent, there is great danger that the conduct of returning officers to be affected by the commission which can endanger the practice of democracy in Tanzania.

## **ii. Retuning officers**

Returning officers are agents responsible for election who are used by National Electoral commission (NEC) to supervise election in district level.

In accordance with section 7(1)<sup>94</sup> the primary agents responsible for elections are the returning officers and the assistant returning officers, who are appointed by the NEC prior to an election. NEC is responsible for ensuring that the returning officers and assistant returning officers are sufficiently familiar with the National Elections Act, the constitution and all other pertinent rules and regulations prior to an election, and providing them with appropriate training as its required.<sup>95</sup> Returning officers and assistant returning officers are responsible for supervising the registration of votes in their constituency, supervising the conduct of election in their constituency and declaration of result of election in the constituency.

Importance of independent and impartial returning officers towards Free and Fair elections are;

- Reduces double registration of voters in their constituency.
- Reduces complains from the people due to good supervision of the conduct of election in their constituency.
- It helps to build good government by declaration of correct results of the election.

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<sup>94</sup> National Elections Act CAP 343 R.E. 2010

<sup>95</sup> D. Kadima, & S. Booysen., *Compendium of Elections in Southern Africa 1989-2009*, 20 Years of Multiparty Democracy, EISA, Johannesburg, page 540-543

## **F. Office of the Registrar of Political Parties**

The Office of Registrar of Political Parties (ORPP) is established under Section 4.<sup>96</sup> The ORPP is an institution under the Prime Minister's Office. Its primary responsibility is to facilitate registration of the political parties and monitor their day-to-day operations in Tanzania Mainland and Zanzibar. It is also responsible for institutionalizing, nurturing and enhancing multiparty democracy through the Election Expenses Act, as well as other related laws, rules and regulations. As stated above, ORPP is headed by the Registrar of Political Parties (RPP) who is also a presidential appointee, this office act as a link between the national electoral commission and the returning officers.

### **3.4.2 Kenya**

#### **A. The Constitution of Kenya, 2010**

Under article 88 (4) of the Constitution.<sup>97</sup> It is provided that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established under the Constitution and any other elections as prescribed by an Act of Parliament, section 5 (1)<sup>98</sup> provides that the Commission shall consist of a chairperson and six (6) other members. The procedure for appointment of chairperson and members of the Commission shall be in accordance with the procedure set out in the First Schedule. The first schedule requires the President to appoint a Selection Panel which shall invite applications and publish names of all applicants, the Panel is then required to consider the applications, shortlist and interview the applicants.<sup>99</sup>

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<sup>96</sup>Political Parties Act, Cap. 258 RE 2002

<sup>97</sup>Constitution of Kenya, 2010

<sup>98</sup>Independent Electoral and Boundaries Commission Act No. 9 of 2011

<sup>99</sup>Section 1 (1)-(6) of the first schedule of Independent Electoral and Boundaries Commission Act No. 9 of 2011

The Selection Panel is required to select two persons qualified to be appointed as chairperson and six persons qualified to be appointed as members of the Commission and forward these names to the President for nomination of one person for appointment as the chairperson and six persons for appointment as members. The President is then required to forward the list to the National Assembly for approval. Upon consideration and approval, the National Assembly forwards the names to the President for appointment.<sup>100</sup>

The Constitution provides that a person is not eligible for appointment as a member of the Commission if the person has, at any time within the preceding five years, held office, or stood for election as, a Member of Parliament or of a County Assembly; or a member of the governing body of a political party; or holds any State office, a member of the Commission shall not hold another public office.<sup>101</sup>

The recent practice in Kenya has shown the advantage of major legal reforms which provided opportunities for the aggrieved party to file election petition to the Supreme Court of Kenya challenging presidential election. The Supreme Court of Kenya is the only court vested with jurisdiction to hear and determine disputes relating to the presidential elections. Under the Kenyan Constitution, presidential election petitions are to be filed within 7 days after declaration of the results by the Independent Electoral Boundaries Commission, under Article 143<sup>102</sup> The petitions (that is legal documents used to file a case in court of law) are supposed to be heard and determined by the Supreme Court within 14 days.

Constitution of Kenya is among of few constitutions in the Africa which respect and protect human right especially in promoting free and fair election because it uses good system of appointment of members of commission, and the Executive (government) has the minimal

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<sup>100</sup> First schedule section 5 of Independent Electoral and Boundaries Commission Act No. 9 of 2011

<sup>101</sup> Article 88 (2) (a) and (b) of The Constitution of Kenya, 2010

<sup>102</sup> The Constitution of Kenya, 2010

influence towards the appointment of members, then this reduces fear from the Commission in exercising its duties.<sup>103</sup>

### **B. The Elections Act of Kenya.<sup>104</sup>**

This is principle legislation that govern the election process in Kenya, and in the electoral administration read together with Independent Electoral and Boundaries Act, that according to section 39 (1)<sup>105</sup> provides power for Commission to appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the country for purposes of the election of the country Governor, Senator and county women representative to the National Assembly.

According to section 4(1) of The Elections Act,<sup>106</sup> the Commission shall appoint county returning officers to be responsible for (a) receiving nomination papers in respect of candidates nominated for the post of Governor or county woman representative to the National Assembly and the Senate; in sub section 2 (2) Prior to appointment under sub section (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations. (4) The county elections coordinator shall not be appointed as the returning officer or the deputy returning officer of the county in which he or she is deployed.<sup>107</sup>

Where according to the author the process of making the appointment of member of the commission deployed the proper procedures which would result an independent and impartiality body which will enhance free and fair elections, also the process of appointment of returning

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<sup>103</sup> Constitution of Kenya Review Commission, The People's Choice: The Report of the Constitution of Kenya Review Commission: short version, 2002, page 79

<sup>104</sup> Elections Act No. 24 of 2011

<sup>105</sup> Act No. 9 of 2011

<sup>106</sup> Election Act No.24 of 2011

<sup>107</sup> E. Kinya., *Electoral Process in Kenya*: Kenyan Law. Retrieved in [http// www. Kenya Law. Org.com](http://www.KenyaLaw.Org.com) on 20<sup>th</sup> April 2021 pg. 25

officers is good process when you compared with the process which is applicable in Tanzania where Directors of election (City Directors Municipal directors and District Executive Directors) to become Returning officers while they are part and parcel of the ruling political party.

### **C. The Election Offences Act<sup>108</sup>**

This is one among laws that govern the election process in Kenya, where by this law provides for what acts amounts to election offences and the penalties or sanction for the offence committed. Such as offences relating to register of voters,<sup>109</sup> offences relating to multiple registration as a voter,<sup>110</sup> offences by members and staff of the commission,<sup>111</sup> and from several offences mentioned the act provide for sanction such as, payment of fines and imprisonment, example section 24<sup>112</sup> provides that any person who contravenes a provision of the Election Offences Act is liable on conviction, to pay a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both.

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<sup>108</sup> Act No. 37 of 2016

<sup>109</sup> As provided under section 3 of Election Offences Act No. 37 of 2016

<sup>110</sup> As provided under section 4 of Election Offences Act No. 37 of 2016

<sup>111</sup> As provided under section 6 of Election Offences Act No. 37 of 2016

<sup>112</sup> Election Offences Act No. 37 of 2016

### **D. Political Parties Act<sup>113</sup>**

This act regulates the formation and operation of political parties, it provides for the registration of political parties and how they are regulated, also it provides for funding and accounting of political parties, and the resolution of disputes within the political parties. The Act under section 33<sup>114</sup> establishes the office of Registrar of Political Parties that is independent and cannot be controlled by any person or authority. Registrar of political parties is an essential part in election as he has power to deregister any political party whenever the political party does not promote free and fair nomination of candidates and if the political party contravened the provision of Article 91 of the Constitution as provided under section 21 (1) (a)- (g).<sup>115</sup>

### **3.5 Conclusion**

In this chapter researcher has shown international standards which agreed by different nations on the promotion and protection of independence and autonomy of the electoral bodies, however Tanzanian laws and institutions has not complied with those standards in a greater extent but when you look on Kenyan laws and institutions its seen that Kenyan legal and institution framework has designed to protect and promote the electoral bodies.

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<sup>113</sup> Act No. 11 of 2011

<sup>114</sup> Political Parties Act No. 11 of 2011

<sup>115</sup> *Ibid*

## **CHAPTER FOUR:**

### **RESEARCH FINDINGS**

#### **4.1 Introduction**

In this chapter researcher present and analyze data collected from library sources and field research and answer the research hypothesis that researcher guess prior the collection of data that the legal and institution framework of Tanzania does not guarantee the independence and autonomy of electoral administrators, where the researcher present data basing on the research objectives also researcher use qualitative method in analysis of data.

#### **4.2 The analysis of independence and autonomy of the National Electoral Commission of Tanzania and the Independent Electoral and boundaries Commission of Kenya**

##### **4.2.1 Tanzania**

The Electoral Commissioners are only appointed by the President and require no further approval as it is not provided for by the laws of the land compare to Kenya jurisdictions, also the Tanzania Electoral Commissioners can be re- appointed after the expiration of their five years tenure,<sup>116</sup> hence providing a room for manipulation of the Electoral Commissions' undertakings as to act in favor of the President who appoints and may re-appoint them.

This indicate the limitation of democracy in Tanzania where elections are doubted by the most election stakeholders in the state as to the impartiality and independence of the electoral institutions (NEC) and the efficacy of the laws governing them as to guarantee their independence and precision as to realize democratic elections in the state.

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<sup>116</sup> The qualifications set out in Article 74 of The Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015 does not except the five years a person served in office, hence a person can be reappointed



Article 74 (14) of The Constitution<sup>117</sup> prohibits any person concerned with the conduct of elections to join any political party while some appointed electoral administrators belongs to political parties it is contradictory, and power of president to appoint member of electoral commission under Article 74(2)<sup>118</sup> and to remove any member of Electoral commission brings fear to the electoral administrators thus un independence take place because they work on sake of the president who appointed them.

After looking at how the National Electoral Commission is not independent, the researcher went further and look on how the un independence and non-impartiality of National Electoral Commission affects duties of returning officers in carrying free and fair election. The National Electoral commission has power to create regulations and guidelines in order to facilitate effective conduct of electoral duties as provided in section 3.<sup>119</sup> These guidelines are directed to electoral staffs such as returning officers, assistant returning officers, polling staffs and political parties, hence this institution has the great influence to affect duties of returning officers, also the commission has the duty of control conducts of returning officers in their constituencies, so if the Commission is not impartial for enhancing Free and Fair Elections and for promotion of democracy, then there is no confidence that the commission to control the conducts of returning officers in a good faith and for promotion of free and fair elections.

Although the commission according to the Constitution is non-partisan due to the fact that president appoints the seven members the commission may be perceived as not neutral, the president is head of state government and represents a political party. According to **Mork**.<sup>120</sup> In his report on 2005 election where the NODEM team visited in three constituencies and found that

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<sup>117</sup>The Constitution of United Republic of Tanzania, 1977 as amended by Cap 2 of 2015

<sup>118</sup> *Ibid*

<sup>119</sup> CAP 343 R.E. 2010

<sup>120</sup> A.B Mork., *The United Republic of Tanzania, Presidential and parliamentary election*. NODEM Report 4/2006 pg. 35

political parties other than CCM had complained about the work of returning officers and conduct of returning officers themselves. In two instances they had sent written complaints to National Electoral commission, but neither had received any formal response which served to enforce their lack of trust in electoral administration.

Moreover, the constitution of Tanzania denies the institution of court proceeding by any person who is aggrieved by conducts of National Electoral commission by virtue of article 41(7)<sup>121</sup> which provides that no court shall have jurisdiction to inquire into the election of presidential candidate. Furthermore, the Constitution under Article 41 (7)<sup>122</sup> restrict any court to question anything done by NEC in course of discharging their duties. This provision authorizes any act done by NEC regardless that affect the election in one way or another.

Also, for effective implementation of the election expenses law the mode of PCCB officials appointment should be revisited and give the vetting power to parliament. The PCCB confidence and credibility to deal with corruption during election can decrease if the appointment of the PCCB's Director General will be subjected to parliamentary vetting and not single handedly appointed by the President.

#### **4.2.2 Kenya**

Here the researcher refers different written documents which explains on the National commission of Kenya (The independent Electoral and Boundaries Commission of Kenya) on the process of appointing members, dismiss of the members and criteria which prohibits the appointment of members, and remedies that the court may grant a person where the electoral officers fails to act independent and autonomous, then the researcher compared with the National

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<sup>121</sup> The Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>122</sup> *Ibid*

Electoral Commission of Tanzania basing on the data which have collected through questionnaires from different respondents.

Under article 88 (4) of the Constitution.<sup>123</sup> The Constitution provides that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established under the Constitution and any other elections as prescribed by an Act of Parliament, section 5 (1)<sup>124</sup> provides that the Commission shall consist of a chairperson and six (6) other members. The procedure for appointment of chairperson and members of the Commission shall be in accordance with the procedure set out in the First Schedule. The first schedule requires the President to appoint a Selection Panel which shall invite applications and publish names of all applicants. The Panel is then required to consider the applications, shortlist and interview the applicants.

The Selection Panel is required to select two persons qualified to be appointed as chairperson and nine persons qualified to be appointed as members of the Commission and forward these names to the President for nomination of one person for appointment as the chairperson and eight persons for appointment as members. The President is then required to forward the list to the National Assembly for approval. Upon consideration and approval, the National Assembly forwards the names to the President for appointment.

The Constitution provides that a person is not eligible for appointment as a member of the Commission if the person has, at any time within the preceding five years, held office, or stood for election as, a Member of Parliament or of a Country Assembly; or a member of the governing

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<sup>123</sup> Constitution of Kenya, 2010

<sup>124</sup> Independent Electoral and Boundaries Commission Act No. 9 of 2011

body of a political party; or holds any State office, a member of the Commission shall not hold another public office.<sup>125</sup>

This process indicates collective participation of members of commission by all parties in the country represented by members of the parliament, where this process helps to the appointment of appropriate members in the Commission.

In Kenya the recent practice has shown the advantage of major legal reforms which provided opportunities for the aggrieved party to file election petition to the Supreme Court of Kenya challenging presidential election. The Supreme Court of Kenya is the only court vested with jurisdiction to hear and determine disputes relating to the presidential elections, three presidential petitions were filed at the Supreme Court within 7 days of the declaration of the results of the Presidential Election under Article 143<sup>126</sup> and then three petitions were consolidated, heard and decision was given within 14 days. One among the petitions was the case of *Raila Odinga and Another v. The Independent Electoral and Boundaries Commission & 2 Others*.<sup>127</sup> Where the court held that the election was conducted in accordance with principles laid down in the Constitution and law relating to elections, there was no instance of fraud or illegality found or proven, any irregularities that were found did not favor any particular candidate and could not have impacted in anyway on the result of the election hence the petition was dismissed.

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<sup>125</sup> Article 88 (2) (a) and (b) of Constitution of Kenya, 2010

<sup>126</sup> Constitution of Kenya RE 2010

<sup>127</sup> Supreme Court of Kenya Petition No. 1 of 2017

### 4.2.3 Analysis of the collected views

Basing on the questionnaires filled by the advocates,<sup>128</sup> majority of the respondents are on the view that these two articles are conflicting each other, as Article 74(1)-(5)<sup>129</sup> which give power president to appoint and remove any member from the electoral commission, and article 74(14)<sup>130</sup> which prohibit any person concerned with the conduct of elections to join any political party, because some of appointed members of NEC and returning officers belongs to the political parties. Also, appointment of NEC members by the president lead to creation of a great fear to the members of commission since the president may appoint members whom he knows that they are in the same hand so they cannot act against his will.

Through questionnaires filled by Advocates<sup>131</sup> upon their views on the independence and autonomy of the commission they are in opinion that, it is not enough for the electoral commission to claim itself to be impartial, it must be said to be impartial by the citizens who feel secure for the body to administer election on their behalf. If the electoral body has lost the confidence of the people, there could never be fair election. NEC has been reported to commit some acts, which make people doubt its impartiality, it is silent on the irregularities committed by the ruling party unlike the misconducts by the opposition where NEC becomes bitter.

From there the researcher agree that the National Electoral Commission is not independent as it favors the ruling party, However, officers from the ruling part through questionnaire<sup>132</sup> they tend to protect their party by saying that the Commission is independent and their party has no any interference with the commission responsibilities, where to my views that is not true because the commission is made by members who are in the same boat with the

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<sup>128</sup> The response from five respondents (Advocates) through questionnaires obtained on 9<sup>th</sup> May 2021

<sup>129</sup> The Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>130</sup> *Ibid*

<sup>131</sup> The response from five respondents (Advocates) through questionnaires obtained on 9<sup>th</sup> May 2021

<sup>132</sup> The response from five respondents (CCM officers) through questionnaires obtained on 9<sup>th</sup> May 2021

chairman of their party, so members of the commission will prove their loyalty by acting on what the president want.

### **4.3 The analysis of independence and autonomy of the Returning officers**

#### **4.3.1 Tanzania**

Researcher looked on how the returning officers are independent in exercising their duties in the election, where researcher used open ended questions so as to ask question to the members from the opposition parties, nonpartisan and electoral shareholders on whether returning officers are free to exercise their duties and accordance to the electoral laws.

According to Mork.<sup>133</sup> section 6 and 7 of National Election Act are contrary to Article 74(14) of the Constitution as he considers the (City Directors Municipal directors and District Executive Directors) presidential appointees and they are same side with the president, to put the credit on this he say that there is no members from the opposition part who are appointed as DEDs, however if there is some members when they move from the opposition party to CCM (ruling part) they can be given different position such as DED, DC RC and others, he has go further and say that this has been a long stay cry especially by the opposition and has remained to be the case during the 2015 elections. As such, he referred LHRC/TACCEO recommendation for needed reforms to make the electoral commissions winning public confidence.

Basing on the analysis in the case of *Bob Chacha Wangwe V. Attorney General & 2 Others*<sup>134</sup> in the decision that was made by both court of records such that court of appeal and high court where the decisions made were conflicting, the High Court of Tanzania in Dar es Salaam on, May 10, 2019, declared null and void provisions 7 and 7A of the National Elections

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<sup>133</sup> A.B. Mork., *The United Republic of Tanzania. Presidential and parliamentary election*. NODEM Report 4/2006

<sup>134</sup> Misc Civil Cause No. 17 of 2018 (unreported)

Act<sup>135</sup> prior to the judgment, these provisions allowed the District Executive Directors to be returning officers during elections contrary to Article 74 (14) of the Constitution<sup>136</sup> which prohibits persons concerned with conducts of elections to join any political part, the Court of Appeal overturned the original decision of High Court, saying that there are enough safety measures in place to make sure that the officers act with independence.

The applicants focused on the appointment of the director of elections, city directors, Municipal District Executive Directors as returning officers in elections. All these officials, however, are appointed by Tanzania's President, without proper safeguards to ensure that they are independent in relation to all election matters, Wangwe argued that their role as returning officers infringed the constitution, the challenged laws thus allowed elections to be 'owned' by the ruling party, so they were repugnant to the very nature of a free democratic society' in which citizens should be able to participate in free and fair elections.

#### **4.3.2 Kenya**

Returning officers are appointed by the commission (Independent Electoral and Boundaries Commission) as provided under section 39 (1A) of the Election Act<sup>137</sup> and upon appointment the returning officers are responsible for doing different activities such as tallying, announcement and declaration of the final results (in the prescribed form) from each polling station in a constituency. The returning officers work hand in hand with the commission and the mode of appointment of returning officers is also approved by the parliament therefore in Kenya the independence and autonomy of returning officers is guaranteed by the law from the constitution<sup>138</sup> up to the Elections Act.<sup>139</sup>

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<sup>135</sup> CAP 343 R.E. 2010

<sup>136</sup> Constitution of United Republic of Tanzania, 1977 as amended by CAP 2 of 2015

<sup>137</sup> Elections Act No. 24 of 2011

<sup>138</sup> Constitution of Kenya, 2010

### **4.3.3 Analysis of the collected views**

It was responded by CHADEMA and CUF officers that the time president appoints (City Directors Municipal directors and District Executive Directors) in their respective district, he believes that they are the one who are loyal to him and they can act according to what he wishes, and there is great chance that those who are selected to be DEDs are among of members of ruling party who assisted president in one way or another to get such position, also there is no other person who have right to challenge the appointed (City Directors Municipal directors and District Executive Directors) on the ground of partisan. Therefore, the returning officers are not independent as they work to fulfill the interest of the one who appointed them.<sup>140</sup>

Researcher comes with the views that the legal and institutions framework in Tanzania does not guarantee independence and autonomy of electoral administrators compared to legal and institution framework of Kenya where the electoral officers have independence and autonomy in exercising their duties.

### **4.4 The outcome of non-existence of independence and autonomy of electoral administration bodies in the democratic state**

After the researcher know that in Tanzania independence and autonomy of electoral bodies is not guaranteed by the electoral laws, then researcher go further and look on how non existence of independence and autonomy of electoral administration bodies (the national commission and returning officers) affects the democratic state.

It was responded by respondents (Magistrates) that the state will not be a democratic state if the electoral administration bodies are monopolized by one political party, democracy is where the election is held free and fair by having independent electoral bodies which supervise and

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<sup>139</sup> Section 39 of the Elections Act No.24 of 2011

<sup>140</sup> The response from six respondents (3 CHADEMA officers and 3 CUF officers) through questionnaires obtained on 9<sup>th</sup> May 2021.



announce electoral result without any favor, so the un independent electoral bodies may lead to the poor supervision of the election conducts and announce of incorrect result which can rise complaints from the citizens.<sup>141</sup>

Other respondents are on the views that, shifting of political parties officers from the opposition party to the ruling party (CCM) is due to the un independence of administrative bodies where they believe that it become difficult to win election if they are contesting in different positions through the opposition parties.<sup>142</sup>

Some respondents are on the views that, the exercise of the results which are instinctively manipulated by a ruling party in order to prevent opposition political parties winning elections despite the fact that citizens might courageously vote for change, and the cumulative effect of such a misdemeanor will be, unfortunately, political uncertainty and the sharpening of ethnic politics which will, in turn, inspire the widespread disillusionment of Africa's citizens who will be forced to rethink that the solution to prevailing problems cannot be found within the framework of democracy.<sup>143</sup>

#### **4.5 Conclusion**

Generally, this chapter indicate that Tanzanian legal and institutional framework is not framed to guarantee independence and autonomy of the electoral administrators (returning officers and national electoral commission) which lead to serious effects towards the democracy and good governance, as the leaders who elected by the will of citizen may not give position that they deserve where this situation is different from Kenyan Jurisdiction where the independence and autonomy of the electoral administrators is protected in a different laws. Also, Tanzania does

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<sup>141</sup> The response from five respondents (Magistrates) through questionnaires obtained on 9<sup>th</sup> May 2021

<sup>142</sup> The response from five respondents (CUF officers) through questionnaires obtained on 9<sup>th</sup> May 2021

<sup>143</sup> The response from five respondents (3 CHADEMA officers and 2 CUF officers) through questionnaires obtained on 9<sup>th</sup> May 2021

not comply with the international and regional standards which aimed at protection of independence and autonomy of the electoral institutions Such as the African Charter on Democracy, Elections and Governance which require member state to ensure that the independence or autonomy of the said institutions is guaranteed by the constitution.

## **CHAPTER FIVE:**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

In this chapter the researcher has summarized what she discovered in her study and what she developed basing on the gaps that left by other researchers and recommendation which can be essential in solving the problem to respective authorities.

#### **5.2 Summary of the Research Findings**

The research is about the analysis of independence and autonomy of the electoral bodies which are National Electoral Commission and the Returning officers where the researcher found that the National Electoral Commission has lost the confidence to the people on independence and autonomy in exercise its statutory duties, due to the procedure of appointment of members and that NEC has been reported to commit some acts, which make people doubt its impartiality, it is silent on the irregularities committed by the ruling party unlike the misconducts by the opposition parties where NEC becomes bitter. Also, the researcher has discovered that the National Electoral Commission have the great control to the conducts of the returning officers, so if the National Electoral Commission is not independent the conducts of NEC to returning officers may hinder free and fair elections. Also, the researcher found that the situation of Sections 6 (1) and 7 (1) & (3) of The National Elections Act<sup>144</sup> provides for the appointment of Directors of election (DEDs) to become Returning officers, while, the said directors are appointed by the president and they are answerable to the president. This infringes Articles 74 (14) of The Constitution<sup>145</sup> which prohibits any person concerned with the conduct of elections to join any political party while the appointed members of Electoral commission are the appointed

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<sup>144</sup> [Cap 343 RE 2015]

<sup>145</sup> The Constitution of United Republic of Tanzania as amended by cap 2 of 2002

members from the ruling party and can hinder the free and fair elections because the ruling party monopolize the elections and electoral officers acts in their favor.

Also lack of any organ which challenge the result of presidential election open the wide discretionary power to the Commission to do any act which they see that it fit to them without any authority to question them.

### **5.3. Recommendations**

#### **5.3.1 To the government**

To enhance the standing and independence of the NEC, its members should be appointed by the President of Tanzania subject to Parliamentary approval. The independence of the NEC would be enhanced if key positions, such as that of the Director of Elections, were appointed directly by the NEC rather than by the President of Tanzania; it would similarly increase the independence of the ZEC if parallel procedures will be adopted in Zanzibar.

The NEC's decision-making processes for the demarcation of constituency boundaries are currently not subject to judicial or parliamentary review. This needs to be reconsidered, to strengthen the legal and electoral framework, the NEC's constitutional mandate to demarcate constituencies should be made statutory.

To ensure fairness, justice and transparency in the demarcation process, the government should allow provision for aggrieved parties in election to have recourse to the High Court as the court of first instance.

There must be, separation between political party and State, and establish the conditions for competition in legislative elections on an equitable basis.

### **5.3.2 To the law makers**

Electoral laws should be revised in order to meet the demands of the multiparty state. The main law applicable in election matters is the Elections Act cap 343 R.E. 2015, although there have been some amendments, it is recommended that this piece of legislation is outdated. The whole setup was fit for one party state. A new law should be enacted which will take into consideration current political environment in the country. The new law should not favor any party, but should ensure that voters have equal chances. States should take the necessary legislative steps and other measures.

### **5.4 Conclusion**

Generally, this study is about analysis of legal and institutional framework which guarantees independence and autonomy of the electoral administration towards free and fair Elections, and the analysis show that the Tanzania laws and institutions do not sufficiently offer suitable environment for promotion of democracy compared to Kenyan laws and institutions. However, the democracy will be meaningless if the principles of democracy are not adhered, the international instruments, bilateral and multilateral agreements has made different standards which aimed at promote democracy by different states, so the law makers must ensure that at the time that they draft bill, they should look on international standards it and also consider majority views about a particular matter.

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