



Independent Electoral Commission

Historical Background

In the period immediately following Botswana's independence, the administration of elections was implemented by the Permanent Secretary to the Office of the President. This was against democratic best practice as the Permanent Secretary was directly under the President who had a great interest in the outcomes of the elections, on account of being a politician themselves. The status quo compromised the autonomy (both the perceived and the actual) of elections, shown in part by the numerous complaints from the opposition parties.

The criticism around the past administration of elections led to establishing the Office of the Supervisor of Elections (Sebudubudu, 2008)¹ in terms of the then section 66(1) of the Constitution Amendment of 1987. The Supervisor of Elections faced its own share of criticism, its autonomy was a matter of contention. The main argument was the appointment of the Supervisor of Elections, which fell solely under the prerogative of the President, arguing this compromises its autonomy (Lekorwe & Tshosa, 2005)². Sebudubudu (2008) highlighted that the administration of the secretary of elections was marred by allegations of cheating, rigging elections and unfairness, and the opposition continued to apply pressure, with Botswana National Front (BNF) threatening to boycott the 1994 elections (Sebudubudu, 2008). In addition, concerns were raised that the Secretary of Elections was under control or influence of the government of the day, as it was a department under the Office of the President, thus receiving directions from the Office of the President (Lekorwe & Tshosa 2005). These contentions lead to section 66 repeal in 1997, and introduction of section 65(A) in the Constitution establishing the Independent Electoral Commission, effectively removing the Secretary of Elections and replacing it with the Independent Electoral Commission. As its name suggests, the Commission is expected to be "independent" thus addressing the concerns of autonomy raised by stakeholders.

Independent Electoral Commission

Section 65(A) of Botswana's Constitution establishes the Independent Electoral Commission (IEC), which consists of the Chairman who shall be a judge of the High Court appointed by the Judicial Service Commission (JSC), a legal practitioner appointed by the JSC; and five other persons fit, proper and impartial, also appointed by the JSC from a list of persons recommended by the All Party Conference.

The All Party Conference is a meeting of all registered political parties convened from time

¹ Sebudubudu, David. 2008. "Independent Electoral Commission." Research Articles (Dept of PAS).

² Lekorwe, M., & Tshosa, O. (2005). The Organisation of Elections and Institutional Reforms. In 40 Years of Democracy in Botswana. Gaborone: Mmegi Publishing.



to time³. The Constitution provides that if the All Party State Conference fails to agree on all or any number of persons to form part of the Commission up to the dissolution of Parliament, the JSC shall appoint such person or persons as they deem fit. The composition of the IEC was intended to be made up of persons of integrity, honesty and incorruptible character. Given the weight of appointing authority given to the JSC, a close look at the composition of the Commission is warranted.

The Functions of the IEC

The functions of the IEC are stipulated under Section 65(A)(12) as to (i) conduct and supervise elections of the Elected Members of the National Assembly and members of a local authority, and conduct of a referendum; (ii) to give instructions and directions to the Secretary of the Commission in regard to the exercise of his or her functions under the electoral law prescribed by an Act of Parliament; (iii) ensure that elections are conducted efficiently, properly, freely and fairly; and (iv) perform such other functions as may be prescribed by an Act of Parliament.

In addition the Constitution provides that the Commission shall on the completion of any election conducted by it, submit a report on the exercise of its functions under the preceding provisions of this section, to the Minister for the time being responsible for matters relating to such elections, and that Minister shall, not later than seven days after the National Assembly first meets after he or she has received the report, lay it before the National Assembly.

The Autonomy of the IEC

The Constitution purports to protect the autonomy of the IEC under Section 65(A)(8) which provides that the Commission should regulate its own procedure and proceedings. This is a similar clause to the liberty given to the courts of Botswana to confer independence in the procedure and proceedings of the judiciary. The rationale for Section 65(A)(8) is to avoid unjustifiable interference in the carrying out of the Commission's functions, which is commendable, especially that it is a constitutionally enforceable provision. In addition, 65(A)(4) & (5), provides for tenure of the member of the Commission stipulating that the Chairman and the members of the Commission shall not hold office for a period of two successive lives of Parliament. Security of tenure (especially constitutional) for any position of this calibre is a basic requirement as per democratic theory and practice, as this ensures that the persons occupying the office are able to carry out their functions without fear of termination. Unfortunately, in the case of Botswana and the IEC, the Constitution does not provide for reasons a member can be removed from the position, similar to the Secretary of the IEC as dissected below.

Secretary to the Independent Electoral Commission

The Commissioners of the IEC are part time, only meeting from time to time, thus necessitating the appointment of the Secretary to the IEC, who heads the IEC. The Secretary is assisted by such staff as the Commission may appoint. The Commissioners

³ Section 65A(3) of the Constitution



play a supervisory role towards the Secretary, by giving instructions and directions to the Secretary with regard to the exercise of his or her functions under the Electoral Law⁴.

Section 66 of the Constitution establishes the Secretary to the IEC and unlike the Commissioners, the Secretary is appointed by the President. The lack of a consultative authority in the appointing procedure is considered undemocratic, as the President has a great interest in the outcomes of the elections; the vested interest of the president poses a high risk of the abuse of power to influence the administration of elections, for their own interest or that of their political party. The Secretary office is a key piece in the administration of free and fair elections, and the risk of the President using his power to influence this position is one that cannot be ignored. It is paramount that systems should be put in place that can withstand even a corrupt leader in power, who with the current status quo, would easily tamper with the fairness of Botswana's elections.

Functions of the Secretary

Section 66(3) of the Constitution stipulates that the functions of the Secretary shall be subject to the directions and supervision of the IEC, to exercise general supervision over the registration of voters for elections of- (a) the Elected Members of the National Assembly; and (b) the members of any local authority, and over the conduct of such elections. Further functions of the Secretary are found under Section 3 of the Electoral Act⁵ as follows:

- (a) Exercise general direction and supervision over the registration of voters;
- (b) Exercise general direction and supervision over the administrative conduct of elections and enforce on the part of all election officers, fairness, impartiality and compliance with the provisions of this Act;
- (c) Issue to election officers and registration officers such instructions as he may deem necessary to ensure effective execution of the provisions of this Act; and
- (d) Exercise and perform all other powers and duties conferred and imposed upon him by the act.

According to the Electoral Act the Secretary is also responsible for appointment of officers such as the principal registration officer for each constituency, registration officers, returning officers and their assistants and presiding officers. Furthermore, the Secretary is responsible for the establishment of polling districts and stations after constituencies delamination by Delimitation Commission under Section 64 of the constitution, the secretary shall divide and establish polling stations and shall cause notice of boundaries of every such polling district.

The Constitution under Section 66(4) provides for disqualification from appointment of the Secretary⁶ However, unlike the Commissioners of the IEC the Constitution doesn't provide for tenure in office of the Secretary, instead only provides for the age of retirement 65 years. As highlighted above, security of tenure is very paramount in securing the office, ensuring

⁴ Section 65(A)(12)(b)

⁵ Cap 02:09

⁶ Section 66(5) of the Constitution of Botswana



the person in office may carry out their functions without fear of losing the position unjustifiably.

Deficiencies and need for Legal Reform

A. Writ of elections as a prerogative of the President not the IEC

The administration of elections falls under the IEC, the rationale being to have an independent body to ensure that elections are free and fair. It is a good democratic principle to ensure that parties that have a great interest such as those who would stand for elections do not have a great influence on the election process. Section 34 of the Electoral Act provides that for the purpose of a general election to the National Assembly or of a by-election to fill a vacancy therein caused by death, resignation or otherwise, the President shall issue a writ under the public seal of Botswana, addressed to the returning officer of each constituency for which a Member is to be returned, fixing- (a) the place and day at and on which, and the hours between which, the returning officer will receive nominations of candidates for election; (b) the day for the taking of any poll which may become necessary. Thus the IEC doesn't have power to set dates for elections or issue writs of elections, instead the President who is an interested party is the one responsible. This contradicts best practices whereby election date is fixed in the constitution (Sebudubudu, 2008).

B. Secretary to the IEC appointment

The IEC was formed as a responsive measure to the complaints of autonomy of its predecessors. The Secretary of Elections was criticised based on the appointment solely placed on the President, an interested party, the core of argument being that this undermines Independence of the Secretary of Elections. The legislator failed to use the opportunity of the constitution amendment to rectify this complaint, currently under section 66 the Secretary to the IEC is solely appointed by the President. The appointment of the Commissioners of the IEC demonstrates a better democratic process for appointment, however when it came to the authority that would lead the IEC this was not done. As highlighted above the role of the Secretary is very fundamental to the fairness and equality of elections as they play a major role in the administration of the electoral process. The Secretary should be appointed by the commission and accountable to it (Sebudubudu, 2008).

C. Silent on instances for removal of commissioner

A key role of written law is that it helps to guide people on how to run their lives, makes them and protects them from being adversely treated, as consequences to actions are explicitly stated. Section 66 provides for instances for removal of Secretary citing; inability to perform the functions of his or her office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section. Furthermore, the Constitution provides for a tribunal to investigate removal of the Secretary. The rationale is to ensure that an unfit person does not stay in



office, in addition it protects the person from being adversely removed as steps are to be followed before one is removed. It is unfortunate that this protection is not afforded to the Commissioners of the IEC, the constitution should afford this protection to ensure they will be able to carry out their functions effectively with their offices secured.

IEC AND BOTSWANA'S CURRENT POLITICAL LANDSCAPE: THE NEED FOR PUBLIC ENGAGEMENT

On account of the deficiencies highlighted above, specifically that pertaining to the independence of the IEC, the argument of Botswana's political playing field being unlevel is strengthened (Poteete, 2012)⁷. The powers of the president with respect to the appointment of the secretary of the Commission is akin to a referee being chosen by one of the teams playing in a tournament; impartiality may be there but the optics do not look right to onlookers and the other parties concerned.

More than the optics of the Commission however, there is another pressing issue of its relationship with Botswana. Botswana have generally had a conservative political culture, using only the power of their vote to show pleasure or displeasure with government and political leadership. In a 2022 Afrobarometer survey conducted in Botswana, a small majority (29%) of respondents believed that the last (2019) elections were completely free and fair, followed by 27% who believe they were free and fair but with minor problems. 21% believed that they were not free and fair, 12% said they were free and fair with major problems and lastly, 10% said they did not know how to rate the freeness and fairness of that election.

The above mixed views regarding a fundamental question of a cornerstone of democracy (free and fair elections), is worrying. It points to a need for IEC's direct engagement with Botswana, outside of issuing writs of elections and announcing election results. The commission needs to actively build a relationship with Botswana, which the development of, will aim at addressing the electorate's understanding of Botswana's electoral framework and also their familiarity with the methods of recourse that are available to anyone who is contesting election outcomes.

It is also important that the commission engages Botswana from the perspective of being candidates. Botswana has in recent times become increasingly polarised along party lines, shown in part by the quality of political debate visible on social media. As partisanship takes centre stage, some populist politicians may try to hijack the electoral conversation and use it for political mileage. It is important that IEC targets this issue in its engagements now, and not underestimate the problem's ability to morph into political instability. It is true that the IEC's mandate is the administration of elections but it cannot leave untouched the issues arising around the conversation of elections. Candidates and parties need to be educated on

⁷ Poteete, A. (2012). Electoral competition, factionalism, and persistent party dominance in Botswana. *Journal of Modern African Studies*, 75-102.



the importance of public trust in the electoral system and that the integrity of elections is not an issue to be used for politicking.

CONCLUSION

Botswana's administration of elections is entrusted to the Independent Electoral Commission (IEC). From the inception of IEC and its predecessor, the issue of independence from executive control has been a controversial one, as it is with a lot of Botswana's democratic institutions. While it cannot be ascertained as fact that the secretary of the IEC being a presidential appointment has compromised previous elections, the fact that it is a question is enough to warrant advocacy around its remedy. Democracy should always be *seen* to be done as much as it should be done. The fact that Botswana are giving mixed reviews of the quality of elections and the electoral system is further proof of not only the need for reforms, but of the need for more efficient public engagement by the IEC. The freeness and fairness of elections is a fundamental question of democratic practice such that controversies around it cannot be ignored.