

Electoral Management Body Independence

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Introduction

Good morning ladies and gentlemen.

I am honoured to have been asked to speak today about the importance of Electoral Management Body independence at this landmark event, held on the 20th anniversary of the Electoral Commissions Forum of the SADC.

It is a particular pleasure to be here with a number of good friends and colleagues; and to be in Maseru, which I am this week visiting for the 4th time, having worked in the past with the IEC of Lesotho; and having also observed the 2017 Lesotho elections as a member of the Commonwealth Observer Group.

I bring you congratulations on your anniversary - and best wishes - from past and present participants in the Cambridge Conference on Electoral Democracy, whose main meeting was held for the 17th time earlier this year. The Cambridge Conference is an informal networking opportunity for Chairpersons and some other top leaders of EMBs in leading Commonwealth countries, who have over the years discussed a range of current issues – including, of course, many aspects relating to the independence of EMBs.

This morning I aim to reflect on some of the key principles relating to EMB independence; to share with you some of the points that have emerged from discussions at the Cambridge Conference over recent years; and to make a few observations based on my experience in different regions and countries.

I want to look at three main dimensions of EMB independence – the constitutional and legal framework; the operational framework; and the human factor.

But first, a few thoughts on the context.

Principles & Guidelines

The '*Principles & Guidelines on the Independence of EMBs in the SADC Region*¹', adopted in 2007 by the Annual General Conference of ECF-SADC in Luanda, could hardly be clearer about the importance of EMB independence. ECF-SADC should be rightly proud of the emphasis it places upon promoting the independence of EMBs within the region. But I did detect that when EMB independence was discussed at last year's Annual General Conference, there may have been some concern that the *Principles & Guidelines* describe an ideal world that is difficult, if not impossible, to achieve given the environment – political, financial, cultural, and so on – in which EMBs operate.

¹ Luanda, 2007

<http://aceproject.org/ero-en/regions/africa/BW/principles-and-guidelines-of-the-independence-of>

Perhaps one way to look at it, is that ECF-SADC's statement of the principles of independence is at one end of a spectrum of attempts to capture what can be agreed in various contexts about the independence of EMBs.

An example from the other end of the spectrum comes from Europe – where it is quite common (mainly in western Europe) for elections to be managed by arms of the government, or (in eastern Europe) for EMBs to be staffed entirely, or almost-entirely, by representatives of political parties, keeping an eye on one another – what I have come to call the electoral equivalent of 'mutually assured destruction'.

The *Code of Good Practice in Electoral Matters* agreed by the Council of Europe's Commission on Democracy through Law², has surprisingly little to say about EMB independence: its main principles are simply:

- *An 'impartial body' must be in charge of applying electoral law.*
- *The national electoral commission must be permanent*
- *Bodies appointing members of electoral commissions must not be free to dismiss them at will.*

On the whole, I think that when considering the subject of EMB independence, it is better to begin at the more detailed, more idealistic, end of this spectrum, than at the very brief, more legalistic, end.

EMB independence and citizens' rights

If the conditions for a 'fair' election are to exist, the rights of citizens - not just to vote, but also to hear from, and interrogate, those seeking electoral office - must be upheld. And parties and candidates must be treated equally - and must be able to campaign peacefully - without interference from the state.

It is an important role of the EMB, its members and staff, not just to organise electoral processes, but to play a part in considering and ensuring the integrity and legitimacy of the democratic process – in order to protect the political rights of citizens.

That is why it matters that the ECF-SADC *Principles & Guidelines* take a human rights approach as their starting-point - recalling at the outset that in line with the *Universal Declaration of Human Rights*³ and the *African Charter on Human & Peoples' Rights*⁴, every citizen has the right to take part in the conduct of public affairs, directly or through chosen representatives; and that the will of the people should be expressed through free and fair elections so as to constitute the basis for legitimate and credible authority of government.

² Strasbourg, 2002

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)

³ Paris, 1948

https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

⁴ Banjul, 1981

http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

It is this rights-based approach that leads us so quickly to why an independent, impartial EMB is so important. Perhaps the most fundamental principle for EMBs, their stakeholders and those who work in them is that the EMB is there to serve the people – not the government, or political parties, or international interests.

In the UK Electoral Commission, we used the catchphrase '*putting voters first*' – and you will not be surprised to hear that on many occasions when faced with a difficult question, trying to determine what was in the best interests of the voters was the best approach to finding an answer.

Another important lesson I learned while in office was that if you approach questions around election management primarily in terms of ensuring that citizens' rights are protected and upheld, rather than primarily in terms of ensuring that citizens understand their duties, many questions become easier to deal with. To take a few examples, a rights-led approach will encourage EMBs to do everything they can to ensure:

- that all eligible citizens can register to vote
- that persons with disabilities are able to vote
- that the voting procedure is straightforward and secure for every individual; and
- that there is a level playing-field for parties and candidates contesting an election.

1st dimension: Constitutional and legal framework

The first dimension of EMB independence that I want to consider is the constitutional and legal framework.

EMBs must operate according to the law, and they are constituted according to the law. So - an obvious starting-point is to begin with the legal status of the EMB itself. What status, powers and duties does it have under the constitution and election law?

EMB models

We are familiar with the classification of EMBs into 'governmental', 'mixed' and 'independent' models. The details of how different EMBs operate depend quite significantly upon the legal framework which governs them, and many people may think they can guess which of these models is likely to offer a better or worse guarantee of independence.

But this is not the whole answer. There are examples of 'governmental' EMBs which are staffed by public servants in national environments where there are strong expectations and guarantees that public servants will act impartially - and where as a result the EMB enjoys a high reputation for independence.

And there are examples of EMBs whose official title, specified by law, includes the magic word 'Independent' - but which are regarded as falling quite short of that description.

There is no “best practice” model or blueprint for constituting an EMB. The particular history and circumstances of a country, and often the surrounding region, dictate the model adopted. The role of an EMB can be discharged by a single Chief Electoral Officer, or EMBs may have as few as three or as many as twenty members.

EMB members may be appointed on merit or drawn from political parties. The UK, for example, now has a 10-member Electoral Commission, with 6 members from politically-neutral backgrounds and 4 from political parties. Apart from their political background or allegiance, EMB members may be chosen for their general reputation in society, or for their particular experience or skills (very often, legal experience). There may be an aim of trying to have an EMB whose membership reflects to some extent the diversity of a country’s society.

In almost every case, EMB members will formally be appointed by the head of state or the head of government. But there is increasing acceptance of the need for the names eventually approved to have been through a process that will make it likely that they command as much cross-party and cross-society support as possible.

There seems no particular correlation between an EMB’s degree of independence and the number of its members.

But it requires great leadership skill to maintain unity in a multi-member EMB. We have seen examples where splits between different EMB members – or between EMB members and EMB staff – become public, often damaging the institution’s overall reputation for independence. The emotional and personal cost to Chairpersons of keeping their EMB together can, we know, be high.

In discussions at the Cambridge Conference on the risks of a split EMB, there was a consensus that, when faced with differences – sometimes extreme differences - of perspective or political allegiance between individual EMB members, a Chairperson’s only option may be to focus on ensuring that every step taken by the institution follows the law at every stage, thus minimising the risk of internal divisions leading to chaos in the electoral process. On the other hand, the point was made that of course no one wants to find themselves in this position. An EMB in this situation can lose its ambition, lose the initiative and fail to do much more than keep things ticking over. If the legal framework does not serve citizens well, it is a shame if the EMB, because of its internal divisions, is unable to do anything except leave the problem to the judiciary and the legislature to sort out. A split EMB lacks the institutional self-confidence to point to defects in the law and propose remedies; or indeed, to find creative ways to work within the law to ensure that citizens have a greater chance to exercise their democratic rights successfully.

How can an EMB guard against finding itself in this position? There is little help to be found in the pages of constitutions or the law-books. Instead, our Cambridge participants have consistently pointed to the importance of EMB members trying to leave their political or other views at the door and to work together to commit themselves to a set of shared, fundamental objectives and values which will govern their own work and the expectations they set for their staff.

Working together like this brings the opportunity of stepping back and considering how the fundamental principle - that an EMB is there to ensure that citizens' democratic rights are upheld - should be expressed in day-to-day terms.

Pressure on Commissioners

Commonly, the legislative framework gives EMB members, once appointed, notable security of tenure while in office. But there are ways for influential politicians and others to exert pressure.

We have heard in our Cambridge discussions that threats to the personal safety of Commissioners and their families are by no means uncommon, and must be dealt with. But there is an effective, non-violent way to exercise pressure on EMB members who are in office for one or two time-limited terms. I have seen myself how EMB members awaiting a decision on their re-appointment for a second term can find it difficult to ignore this factor when considering the various decisions they must take. And I have understood how it can be made clear to EMB members that, while they may enjoy apparent freedom from harassment while in office, they may find their future chances for making a living limited when their time at the EMB comes to an end. Or they may find it suggested that their future prospects may be enhanced if they make certain decisions while at the EMB.

There are very strong reasons for limiting the terms of EMB members. And I don't think it is a good idea to have EMBs made up only of people approaching retirement. But it is important that women and men who have more to offer their country when their time as an EMB member ends have the support of their fellow EMB members, of prominent people across their society, and – very importantly – of their colleagues in EMBs elsewhere in their region and across the world. It can be a vital part of a brave electoral commissioner's survival kit.

So – of course it is important that an EMB's powers and functions must be enacted in legislation. But there is only so much that can be done through legislation, appointment procedures and so on to reassure citizens and electoral contestants that an EMB is independent. The proof of the pudding is in the eating. People will make up their mind about an EMB's independence based on how it operates; and what its members do.

2nd dimension: Operational framework

Let me therefore turn to the operational dimension. People's views about an EMB's independence will be based on how they see it operates (or is allowed to operate) in practice, not just on how its high-level legal framework is set out.

I would suggest that the key areas where an EMB must have, and be seen to have, independence of action include:

- Adequate funding - assigned by parliament, and not subject to arbitrary control on the part of government;
- Appropriate staffing, accommodation, facilities for training, and equipment;

- Power to appoint its own personnel, with effective control over any seconded members of the public service;
- Protection against arbitrary dismissal of members and staff;
- Strong internal controls - including in regard to procurement - to guard against corruption, incompetence or waste.

Finance

Let me start by considering financial independence.

This is not an easy area. However much we might want an EMB to be able to deploy whatever resources it decides it needs, that is not how the world works. I have already argued that EMBs – perhaps more than any other public institutions - are the servants of the people. But if so, then they should be particularly conscious of the fact that it is ultimately the people’s money that they are spending. They should take care to prepare accurate and well-founded plans and budgets for their work - particularly in view of the fact that EMBs’ budgets typically include very significant ‘spikes’ in election years, for obvious reasons.

An EMB has a responsibility to estimate its funding requirements accurately, based on the entire electoral cycle (including, for example, voter registration and voter education), not just on individual electoral events. I welcome the increasing interest – for example, from International IDEA and from IFES - in ensuring that the processes by which EMBs establish their funding requirements represent the best possible practice. This is partly because they owe it to those who provide the money, not to demand more than is necessary; partly because they owe it to the electoral contestants and the voters, not to ask for less than is necessary; and partly because if EMBs are to argue successfully that they should be trusted with significant national resources, they must establish an impeccable track-record of financial management - and that starts with their requests for funding.

For its part, the state has a responsibility to ensure that the EMB is provided with adequate resources, in good time. Delayed or inadequate funding is a common problem for EMBs who are preparing to manage an election. Sometimes delays or under-funding have sinister motives. But sometimes there is a genuine lack of understanding among those being asked to approve funding, of the reasons why elections are expensive - and why spending is needed well in advance. I believe that many EMBs could do more to set out, clearly and simply, just why elections cost what to many people seems a very great deal of money.

In the UK, for example, I was concerned that while it was generally known that an election cost ‘about £100 million’, few people in the government or Parliament really understood what that money paid for in any detail. I therefore published an analysis⁵ of the costs of a national poll held in 2011. It showed just how much was spent on voter information; on setting up and equipping almost 43,000 polling stations; on hiring and training 120,000 staff who worked in polling stations and over 80,000 staff

⁵ *Costs of the May 2011 referendum on the UK parliamentary voting system* (Electoral Commission, 2012)
http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/153000/Costs-of-UK-May-2011-UKPVS-referendum.pdf

who counted the votes; on printing almost 46 million ballot papers and an equivalent number of polling cards; and so on.

Simply setting out these figures helps to increase public and stakeholder awareness. And they show that the EMB has the figures at its fingertips, and is in control of its costs - thus making it harder to allege that it cannot be trusted.

But if, despite their best efforts, EMBs' requests for public funds do not succeed, this is one area where in my view EMBs must be ready to decide on their appetite for disagreements with the executive. If the EMB is fully confident of the case it is putting forward for adequate and timely funding, then it should be confident to state – publicly if necessary – that governmental delays or withholding of funds will jeopardise the electoral process.

Donor finance

If I may, let me say a word about donors.

Donor resources remain a sometimes essential, and welcome, requirement for running elections in a range of countries. The key principle in relation to donor support is that it must be managed in a way that does not compromise the independence of the EMB, or its authority, or its priorities. Elections are a matter of national sovereignty and it should be for the national EMB to decide what resources it requires, and whether and how to deploy resources obtained from international donors.

The EMB must ensure that the resources deployed on an election – whether they come from the national treasury or from donor funds – are focused where they are needed and aligned with the EMB's own analysis of priorities. The EMB needs to be in the driving seat.

To close my thoughts on financial independence - in return for adequate funding, an EMB must show that it can be trusted. It must ensure that it uses its funds with care, and that it can account for what it has done with the public funds allocated to it. It must have strong financial management procedures, founded on good practice and fully open to scrutiny. It should publish its accounts on time, and it should report on its activities – especially its management of each election – clearly acknowledging and explaining how what it has done and spent compares with its initial plans and budgets.

EMBs need to make sure that all of the public funds placed in their trust are handled to the high standards that citizens expect. This is another area where there is scope for fruitful cooperation between different EMBs across a region. Often there will be good practice available, or important lessons learned, which fellow-EMBs will be happy to share.

Staff

An independent EMB needs the power to hire, fire and discipline its staff. There should be no doubt that staff members seconded from the public service to work -

either permanently or temporarily - on elections, are solely responsible to the EMB at all times when involved in matters relating to elections. Even the powerful Election Commission of India has had to deal with this issue, by establishing its authority to discipline civil servants who are seconded to work on election duties, if they fail to carry out those duties satisfactorily.

If an EMB is to show itself independent, then it must be able to overcome the perception that staff working on elections are too closely associated with, or too easily influenced by, the government, if it is the government that pays them and decides their future careers. One response to this risk is to appoint the head of secretariat, or a group of top staff, as employees of the EMB, even if other staff are civil servants. Another is to mandate a strong code of values and behaviour, strictly enforced. It is important to point out here that if EMB Commissioners are not prepared to be seen following the code, it is not easy to ensure that staff follow it.

So - more important than organisation charts, codes of conduct and discipline are the expectations and values that are established for both EMB members and EMB staff. This is where my 3rd dimension – *the human factor* – becomes critical. Written policies and instructions are essential. But without the example of strong leaders who constantly show how these policies and instructions are to be applied every day, they do not come to life; and their principles do not become absorbed throughout the organisation so that citizens can see that their EMB is doing its best to safeguard their rights and interests.

A quite common question in recent years has been how to get the relationship right between the members and the staff of an EMB.

Partly this question arises because legislation gives powers and duties to both members and staff; and does not always succeed in aligning them clearly. Often, however, I think that much of the solution lies in the hands of the members and staff themselves.

For example, in the UK the Electoral Commissioners and staff jointly developed a quite detailed statement of who was responsible for what, and agreed on how each group would keep the other informed of what was happening, so that there were no surprises.

Ultimately, a great deal depends on the personal relationships between EMB members and staff, and particularly the Chairperson and the head of the staff group. Whatever the law or the internal documentation may say, citizens and others tend to hold the Chairperson responsible for everything that the EMB does – especially if they do it wrong. It is not a strong answer to try to explain that something was in fact nothing to do with the Chairperson, because it was left to the chief electoral officer to get on with. Stakeholders expect the Chairperson to know what is happening.

A lot of the issues here can be addressed via frequent conversations between members and staff; and the principle of ‘no surprises’ is a valuable one here.

Transparency in results tallying

Before I leave this dimension of how an EMB operates, I would like to say a few words about one particular aspect of operational transparency which has loomed large in many elections across the world in recent years.

Advances in both technology and election management, especially in the field of voter registration and checking voter ID, have gone some way to reduce allegations that electoral processes are failing in the pre-election stage and at the polling station.

But concerns have shifted to what happens when the polling stations close. We have seen examples in many countries of allegations that things have gone wrong with the process of transmitting and tabulating results from local polling stations to feed into regional and national election results.

It seems to me that while the processes we have in place to deal with these final and vital stages of the election would probably be adequate for transmitting and tabulating sensitive official data in what I would call a 'peace-time' environment, they have proved inadequate for use in the heat of an election process, when things need to be on a 'war footing'.

At the heart of the issue, I think, is the need for enhanced transparency. The process of transmitting both ballot papers and results from polling stations to counting or tabulation centres needs to be fully observable – and observed.

When mistakes are found in polling station results – as is almost inevitable in at least a few cases – the process for notifying the polling station manager of the issue and requiring them to check and re-calculate their results must be straightforward, fully-explained and fully observable – and observed.

There must not be a situation where, even if the earlier stages of vote-counting are fully observed, things seem to go into a 'black hole' at the national tallying centre, while everyone waits for the EMB to declare the final results.

And EMBs need to consider how best to tackle the fact that while they are processing and calculating the official results, political parties and the media will be telling citizens what they claim the result ought to be – sometimes deliberately telling a false story so that when the EMB does announce the final result, citizens are taken by surprise.

I have no easy answers today to this challenge. But it lies at the heart of the need for operational transparency. And I think that over the next few years, addressing this will be among the top problems that EMBs need to solve.

3rd dimension: The human factor

So far, I have talked about two formal, or structural, dimensions – the constitutional and legal framework; and the operational framework.

But all my experience and observation leads me to the view that it is the third dimension - *the human factor* - that carries most weight. When push comes to shove, it is the quality of 'fearless independence' that citizens surely want to see – independence of action and decision-making, not subject to the influence of the government, political parties or others.

And that quality comes from the people within the EMB, and most importantly those who lead the institution.

Central to an EMB's independence is its *leadership*. The Chairperson, the members of the EMB and the chief officer must be fearless, and prepared to take positions which may be unpopular with the current establishment in order to maintain the precious independence of their institution.

That takes courage and sometimes significant sacrifice.

As one of my good friends, who has served in the hot-seat as an EMB leader, has said – *'the way the head of the EMB discharges their office without fear or favour will shape the way the EMB is seen as being independent or not.'*

As well as showing resilience, courage and focus, strong EMB leaders also do everything they can to strengthen their institutions' professionalism, competence and capacity.

I think there are three particular areas where they should focus – and they can do this whether or not their legal and operational environment is helpful or not.

Transparency is one of these. I sometimes used to say that the Electoral Commission in the UK should be 'super-transparent'. I encouraged everyone to work on the basis that anyone could and should be able to see anything we did, unless it was clearly confidential. We knew it was important not just to explain our decisions, but also the reasons for them and the data and evidence on which we based them. We aimed to say the same thing to all our stakeholders, including the political parties. We aimed for exceptional levels of financial probity and accountability. None of this was invented in the UK – we were a new EMB, and we learned from other EMBs across the world, and from other successful independent institutions, in the UK and beyond.

The second priority is focusing on the *values and culture* of the EMB. I have observed that EMBs with a strong reputation for independence spend a lot of time thinking and talking about what matters to them, and how their principles apply in their day-to-day actions and decision-making.

An EMB which has a strong culture of independence will be more effective in the short term, and stronger in the longer term. Leaving the values and culture of their institution stronger when they themselves leave office should be a central aim of most EMB leaders.

Building alliances and being ready to learn from others is the third area. An EMB cannot simply assert its own independence, if it is surrounded by people who deny it.

EMB leaders must invest time and effort in building and maintaining relationships on a wide front, including with those in civil society, the media, the judiciary, the diplomatic community, and regional and international electoral networks. And, as far as can be achieved, with citizens themselves, through outreach and voter education activity.

I have not included in this list of allies, the political and governmental community. Of course, they are among the most important stakeholders that an EMB needs to deal with, and huge efforts go into establishing and strengthening relationships with them.

As I have suggested, if politicians and the executive can reach a better understanding of the electoral process and how the EMB works, the EMB should have a somewhat easier time. But there is an obvious reason why I do not include politicians and the executive in my list of potential allies. EMBs are used to being attacked from all sides of the political spectrum – but there are real risks for an EMB which finds that the government, or the opposition, is becoming their so-called best friend!

Conclusion

So – my final list of the key attributes of an independent EMB is: fearless leadership; transparency; values and culture; and the ability to ally itself with a network of those who care about the key principle of ensuring citizens' democratic rights.

We are fortunate indeed that so many outstanding women and men have been ready to step forward and take up the responsibilities that come with leading an EMB. It is a thankless and often lonely role. We all know that we are only ever as good as our last election, so the pressures never go away.

But many of those who have taken on these responsibilities say that this has been one of the most important and fulfilling things they have ever done.

Let us hope that the flame of democracy which continues to bring such dedicated individuals to the cause of serving our citizens, burns ever more strongly as we face the future.

Thank you.