

ACEEEO CONFERENCE

What's in a name: does calling an EMB independent make it so?

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Introduction

Ladies and gentlemen,

Let me begin by thanking the Association of European Election Officials (ACEEEO) for organizing this conference and inviting the United Nations Electoral Assistance Division (EAD) to participate. I am delighted to be here representing the Electoral Division of the United Nations and pleased to be among friends to discuss this important topic.

The argument I would like to present to you today is that in post-conflict democracies, new democracies and countries in transition, the so-called *independent model* of Electoral Management Bodies (EMBs) is the most likely to lead to impartial decision-making and to enjoy broad confidence.

Of course, there is no best or ideal model: the optimal design for an EMB will depend on numerous local factors and is for each country to decide. The United Nations does not have a universally preferred prototype, and we do not advocate a particular approach. But in our experience of providing electoral assistance in post-conflict and transition countries, almost all EMBs we have worked with, for over 20 years, fall in the category of the independent model. I believe this is so because this type offers the attributes that are most suited for overcoming the trust deficits born out of years of conflict.

I - Preliminary comments on terminology

1- To present this argument, I first need to clarify some terminology. As you know, we often use the word “independent” to refer to different features. The IDEA Handbook distinguishes between *structural* independence, meaning a separation from the government; and *normative* or *fearless* independence, as in: not bending to external influence.

I will use the word *autonomous* for the remainder of this speech when speaking about those EMBs that are institutionally separate from the government. And I will use the words *independent* and *independence* only in connection with how EMBs actually perform their duties, that is, their normative independence.

In using these terminologies, I actually refer to the EMBs autonomies or independence vis a vis Government or political influence (and not dwell into the influence that could be exert by non-national or local actors such as donors and vendors.)

2- Another preliminary point. The typology developed by the International IDEA authors in their Handbook on Electoral Management Design suggests that there are three

categories of EMBs: the independent model, the governmental model and the mixed model, This typology has of course proven very useful and is widely accepted. But as a scientific construct it carries the risk of simplifying the extremely rich variety in national practice. Take Sweden, for example. Its EMB is appointed by the government and is subject to broad ministerial directives. Yet it does have independent regulatory powers. The law is silent on whether it is autonomous or affiliated with a government entity, and there is no government supervision of its daily activities.

Cases like Sweden show the benefit of looking behind the three models and going into the features or attributes of individual EMBs. Countries do not generally choose one of the three categories as from a menu: rather, they design the various elements of election management within the context of their own political and legal history. Only later are the EMB then classified by observers and analysts as falling under one or the other type.

In presenting my argument today, I will describe some of these features and then draw conclusions about how they may affect an EMB's ability to work independently, particularly in post-conflict situations.

II - What does independence mean, and why is it important?

What does it mean for an EMB to *act* independently?

Regardless of the model a country chooses, it seems self-evident that electoral management is a business that must be carried out fairly and impartially. In other words, in its actions and decisions, *an EMB must not show favour to any political entity*. This is fundamental to the real and perceived integrity of an election.

As the UN Secretary-General noted in his A/64/304 of 14 August 2009 report to the General Assembly, “the true measure of an election is whether it engenders broad public confidence in the process and trust in the outcome. An election run honestly and transparently [...], with the effective and neutral support of State institutions [...] is most likely to achieve an accepted and peaceful outcome” – end of quote.

Observing impartiality, fairness and non-bias in decision-making is also an international commitment. The UN Human Rights Committee for example, has stated in its General Comment on the ICCPR of 1966 that an independent electoral authority should be established to ensure that “the electoral process is conducted fairly and impartially”. Numerous other global and regional instruments and codes of conduct include similar principles.

III – Some attributes of independence

How can the ability to act independently be brought about? What are the typical legal and institutional attributes that we associate with actual independence? I believe the following features are important, because they can affect the level of pressure to which EMB members may be subjected, either as individuals or as a collective. Let me highlight 6

main attributes:

1- Firstly, the mechanisms for the nomination and appointment of EMB members. An EMB that is composed of members who are appointed in a consultative manner is more likely to be a balanced reflection of the political and social make-up of the country, and to enjoy broad confidence as a collective.

For instance, In Burundi, the Head of State appoints the members of the Independent National Electoral Commission (1 Chair, 1 Deputy Chair and 3 commissioners) who are supposed to be independent and qualified individuals after having consulted the main opposition parties (as represented in Parliament). They also have a security of tenure of 5 years (despite the fact that all elections in Burundi are held the same year, every five years). Gender and ethnic balance are also taken into account. In the case of Togo, the EMB (including its sub-structures) is made of individual representing and designated by the main political parties. The Interim Independent Electoral Commission of Kenya is appointed in a similar fashion as it is the case in Burundi (the Chair and Commissioners are not members of political parties and ethnic balance is also taken into account). Côte d'Ivoire falls into the same category as Togo and in both cases the EMB is established as a result of a political/power sharing agreement among the main political forces.

Such consultations are not typically required by the laws relating to governmental EMBs. They are also not necessarily a given in autonomous EMBs (India is an example), but we find that this type often does involve a mechanism for multi-party nomination or consensus.

Recent experiences in Kenya and Afghanistan demonstrate the risks when the appointment of election commissioners – in both cases by the President – is not done with an effort at broad political consensus, even where this is not required by law. In both countries, the EMB were seen by many as having a political bias.

2- Secondly, the process for removing EMB members or staff from their duties.

Members of EMBs should be free from the pressure of arbitrary removal. Members of autonomous EMBs generally enjoy this protection. They may be dismissed only for reasons spelled out in the law, and after a predefined process which may involve the original nominating body, or the judiciary. For example, the President of the National Electoral Commission of Ghana is appointed for life. In Panama, the members of the Electoral Tribunal are appointed for a period of 10 years and cannot be removed. They are only accountable to the Supreme Court for crimes committed in the exercise of their function.

This is of course not the case in the governmental type of EMB. Ministers are by nature subject to political scrutiny, and while civil servants may enjoy protection of their jobs, they can be easily reassigned.

3 - Thirdly, the nature and frequency of reporting lines to other authorities, if any.

An EMB's nominal independence may be compromised if it is subject to onerous reporting requirements. We generally do not find this in autonomous EMBs. There may be requirements to submit financial reports or reports upon the completion of an election to parliament, but these will not be frequent enough to affect individual decisions. Governmental EMBs are of course fully accountable to the executive branch, and are subject to internal reporting obligations. In some Latin American countries like Panama and Costa Rica the EMBs are constitutionally the **fourth power** (executive, legislative judiciary and election) and don't report to another body.

4 - Fourthly, the way in which an EMB can draw on resources, and how it is held accountable for its management.

The less day-to-day control other authorities have over EMB resources; the less likely it is that the EMB can be "pressured" by the former. Governmental EMBs do not generally decide on their own budget, which forms part of a ministry's budget. Autonomous EMBs will often enjoy some level of freedom in managing and utilizing state resources, although the details will vary significantly across countries. In some cases, like in India, their requests for staff are considered legally binding on all government entities.

5 - The extent to which the EMB is in charge of all aspects of the electoral process or the level of distribution of decision-making powers across other entities.

The more fragmented the exercise of electoral powers (such as definition of the calendar, adoption of rules, boundary delimitation, accreditation of international observers, etc), the more dependent the EMB is on others entities. There does not appear to be a correlation of this feature to whether an EMB is autonomous or governmental. In Benin, for example, the autonomous election commission is separate from the executive. However, many of the electoral management functions, such as determining the election date, drawing electoral boundaries and even announcing election results are entrusted to other bodies.

6 - The extent to which the law prohibits interference in EMB activities and protects equal treatment.

Having explicit and enforceable rules against undue interference and favoritism can reduce the incentive to do so. There is less of a clear pattern here. In countries with governmental models, there may be general provisions protecting civil servants in the exercise of their duties, but not specifically geared to the EMB. For autonomous EMBs, such provisions can be more pronounced, but not necessarily so. In South Africa, for example, the Constitution obliges the organs of state to assist and protect the EMB's independence and impartiality. But we do not find such strong measures everywhere. Moreover, the protection of the right to equal treatment does not appear to be related to the type of EMB a country chooses.

To sum up, we find that many of the attributes that I believe offer the best protection or

reinforcement for independent behaviour are more often found in autonomous EMBs than in governmental ones. I am not saying that autonomous EMBs are inherently more impartial. There is no evidence to support such a conclusion. There are of course numerous governmental EMBs that act completely independently and enjoy broad trust.

I should also add that it is difficult to guarantee independence through legal measures only. For example, it is ultimately up to the appointing authority to make sure that the members of an EMB have integrity and that they can carry out their functions without interference. The social, cultural and political environment also affects an EMB's independence. Moreover, the commitment of the members to act independently as a collective is critical. The approach taken by the Independent Election Commission of Afghanistan in two subsequent elections illustrates these points. During the presidential election of 2009, the IEC was criticized for allegedly ignoring evidence of large-scale fraud that affected the election outcome. In 2010, under a new chairman but working under the same legal provisions as in 2009, the commission took a distinctly more activist approach to allegations of fraud, earning it the praise of observer groups.

So the attributes I have spoken about are necessary but not sufficient conditions, and the autonomous model is not inherently better than the others. And yet I know of no case in our (i.e. United Nations) experience in which a post-conflict country, a country in transition or a newly established democracy adopted the governmental EMB model. I believe this has a lot to do with *perceptions* of independence, an area in which the autonomous model outperforms the others.

IV - Perceptions of independence

The independence of an EMB, and its impact on the credibility of an election, has a strong subjective aspect. An EMB's independence is not only based on the regulations that protect it; it also lies in the eyes of the beholder: the voters and the parties.

The mere existence of governmental types of EMBs illustrates this point. Allowing a branch of government, with vested interests in the outcome of an election, to conduct the process can only happen where there is a high degree of trust among the voters.

Reputations are of course difficult to manage, particularly in a sharply divided electorate. Consultation and transparency appear to be effective tools. The Election Commission of Nepal, for example, in preparing for the Constituent Assembly elections of 2008, regularly consulted political parties and other stakeholders in the presence of media before issuing regulations and taking major decisions. This was a critical investment that paid off when the election results, which took most by surprise, were accepted by all the parties. But I believe that this outcome would have been impossible in the context of Nepal if a branch of the government had conducted the election.

V - Special circumstances of transitional situations

In transitional situations like in Nepal, power is often shared on the basis of negotiated

agreements, following lengthy and deadly conflict that will have divided society along ethnic or other lines. Under these conditions, public opinion will be polarized and electoral contests seen as a zero-sum game. The political system will be highly unstable, and democratic institutions, if any, will be fragile. State and government institutions will lack the trust of at least a large part of the population, because they will be seen (and often act) in partisan ways.

Conclusion:

These are not the conditions under which the executive branch of government will be trusted to conduct an election with high stakes. On the contrary, for credible elections, post-conflict situations seem to call for an electoral management body that:

- a) Is insulated from partisan bodies up to a certain point;
- b) Exercises most, if not all, relevant authority required to conduct an election;
- c) Consists of members appointed through a consultative process who are protected against the pressure of politically motivated removal;
- d) Can draw on financial and human resources without direct government or partisan control;
- e) Does not owe accountability to other bodies on individual decisions other than to an independent judiciary; and
- f) Can count on other legal protection mechanisms against interference in its decisions.

As noted before, it is in the independent model of EMBs that we most commonly find these attributes. Let me again make it clear that I am not advocating a particular model on behalf of the United Nations: these are simply my thoughts based on our accumulated experience. Decisions on how to design EMBs and electoral processes are solely for our member states to make.

In closing, I should add an important caveat. The establishment of an independent EMB can be costly. The UN does not advocate the creation of elaborate structures for their own sake. On the contrary, electoral events and institutions should be cost-effective and sustainable. When the crises have been avoided, the situation returns to normal, and donor funding drops, a country should still be able to deliver credible elections. In the immediate aftermath of a conflict, this principle is sometimes hard to reconcile with the need for institutions that can command broad trust.

Thank you very much for your attention.