

ELECTIONS MANAGEMENT IN KENYA - CHALLENGES AND OPPORTUNITIES

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"It is enough that the people know there was an election. Those who cast the votes decide nothing. Those who count the votes decide everything." Joseph Stalin

INTRODUCTION

The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve to choose people's representatives, and government. They demonstrate the people's sovereignty and accountability by politicians. They lend legitimacy to governments. For this to occur, a number of prerequisites must be in place, including agreement on the electoral system to be used, equitable delimitation of electoral boundaries and transparent management of the electoral process.

An electoral system here means the method used to determine how votes are cast and translated into seats won by parties and/or candidates. The electoral system thus consists of mediation between votes and representation as established by the electoral law. The Kenyan electoral system since independence has largely been the first past the post or plurality system.

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1. THE MANAGEMENT AND ADMINISTRATION OF ELECTIONS IN KENYA

The complexity and specialist skills necessary for electoral management require that an institution or institutions be responsible for electoral activities. Such bodies have a variety of shapes and sizes, with a wide range of title to match, which include 'Election Commission', 'Department of Elections', 'Electoral Council', 'Election Unit', or 'Electoral Board'.

The term 'electoral management body' or EMB has been coined as a name to refer to the body or bodies responsible for electoral management whatever wider institutional framework is in place.

In Kenya, the body responsible for elections since 1992 has always been the Electoral Commission of Kenya (ECK), which was structured along the independent model of an EMB.

The Independent Model of electoral management exists in those countries where elections are organized and managed by an EMB which is institutionally independent and autonomous from the executive branch of government, and which has and manages its own budget. Under the Independent Model, an EMB is not accountable to a government ministry or department, but to Parliament.

2. CONSTITUTIONAL FRAMEWORK

In 1963 the constitution of the newly independent Kenya created an autonomous electoral commission with a clear mandate to register voters, conduct elections, and delimit parliamentary electoral districts, among other electoral matters. Until 1991 the process for parliamentary and local authority elections came under the control of the supervisor of elections, an officer in the attorney general's chambers. However, notwithstanding the ECK's responsibility under the constitution for different electoral matters, between 1963 and 1991 it only carried out one function – the review and establishment of electoral district boundaries.

The constitution was amended in 1991 to introduce a multiparty system and to change the structure and responsibilities of the ECK. Eleven commissioners were appointed by the president. This number was raised to 12 in 1993. The ECK was given exclusive powers to manage the conduct of national and local elections, including full responsibility for voter registration, candidate nominations and voter education. Although the reforms introduced entailed significant change in the ECK's role, opposition

political parties complained about its composition; all its members were presidential appointees.

Following the establishment of the Inter-Parties Parliamentary Group (IPPG) in 1997, opposition parties received representation in the ECK through the addition of ten more commissioners in proportion to the seats held in Parliament. These IPPG reforms were a gentleman's agreement. They were not passed into law and like all such agreement, they were soon to be breached. Before the general elections in 2007, the President appointed nine (9) commissioners to the electoral commission without any reference to the opposition parties.

Lord Justice Vasey of the House of Lords described a gentleman's agreement as,

"an agreement between two men, neither of whom is gentle, where one expects to benefit from the agreement while he himself would not be bound by it."

3. THE LEGISLATIVE FRAMEWORK

The ECK was governed by the constitution and the November 1997 National Assembly and Presidential Elections Act. The Constitution Amendment Act, no. 17 of 1990, re-established the ECK and provided for its tenure and functions.

It also guaranteed its independent status, although an exception made through a constitutional amendment in 1997, empowered Parliament to make laws to regulate the effective conduct of the ECK's operations. Among the major issues covered by the Act are the registration of voters, nominations and campaigns and questions relating to the appointment of ECK staff, including a Code of Conduct for staff. In addition, the Act empowered the ECK to make regulations governing the electoral process.

An Electoral code of Conduct was introduced in 1997. The ECK's constitutional mandate was further supported by the 1998 Election Offences Act, designed to prevent election offences and illegal practices during elections. This Act (section 8) enabled the ECK to impose penalties and sanctions on parties, candidates and their supporters who violated the 1997 Electoral Code of Conduct.

4. INSTITUTIONAL STRUCTURE

At the end of 2008 the ECK had 22 commissioners, including the chair and vice-chair, who were appointed by the president for a term of five years. The commissioners were eligible for reappointment and enjoyed security of tenure through special safeguards and procedures. They could only be removed from office by a tribunal appointed by the president.

During elections the ECK appointed temporary election staff to assist in the administration of elections. These include returning officer, deputy officers, presiding officers, registrations officers and election clerks. The secretariat has a staff of over 600 based at the headquarters and in the regional offices.

5. DISSOLUTION OF ECK AND BIRTH OF IIEC

The ECK was disbanded by Parliament through a constitutional amendment which deleted the section that created the body. The Parliament then created two interim bodies to take over the functions of the ECK. These were the Interim Independent Boundaries Review Commission (IIBRC) and Interim Independent Electoral Commission (IIEC). The new section 41 of the constitution provides the functions of IIEC as follows:

- Reform of the electoral process and the management of elections in order to institutionalize free and fair elections,
- Establishment of an efficient and effective secretariat,
- Promotion of free and fair elections,
- Fresh registration of voters and the creation of a new voters' register,
- Efficient conduct and supervision of elections and referenda,
- Development of a modern system for collection, collation, transmission, and tallying of electoral data,
- Facilitation of the observation, monitoring and evaluation of elections and referenda,
- Promotion of voter education and culture of democracy,
- Settlement of minor electoral disputes during an election as may be provided by law, and
- Performance of such other functions as may be prescribed by law.

The disbandment of the ECK was occasioned by the disputed presidential elections results in the 2007 general elections and the post election violence that occurred thereafter. The IIEC is composed of a Chairman and eight Commissioners appointed by the President in consultation with the Prime Minister and after approval by Parliament.

They were recruited by the Parliamentary Select Committee on the constitution through a competitive process. The mandate of the IIEC is for 24

months from 28th December, 2008 or three (3) months after a new constitution comes into effect, whichever comes first.

6. CHALLENGES

- Time
- Staff
- Loss of institutional memory
- Legal challenges
- Lack of reforms in the electoral laws
- Voter apathy and loss of confidence in the electoral body
- High expectation

7. OPPORTUNITIES

- Clean slate – rebuild the EMB afresh
- Instill integrity of the people and process
- Legal and constitutional reforms underway
- Use of ICT in elections management
- Political will to reform electoral process
- Good will by the people and the development partners

8. CONCLUSION

The situation of the elections management body in Kenya is indeed quite unique and unprecedented. Between 28th December, 2009 and 8th May, 2009 (4½ months), there was no elections body in Kenya. The post-election violence altered the political landscape in Kenya. The President agreed to share power with his closest rival who became the Prime Minister. The dual executive structure was arrived at as part of the National Accord and reconciliation. Although the international commission set up to inquire into the 2007 elections in Kenya indicted almost every stakeholder in the political process, the first casualty appeared to be the electoral commission.

The move to disband the entire commission may have been motivated by the desire to break with the past and build a new institution for the future.

However, the reality for the interim body set up to midwife the new recovery is one of extreme challenges and punishing deadlines to deliver on its mandate in a race against time. It is indeed a herculean task that will require the support and co-operation of all the key stakeholders in the electoral process.

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