

ELECTORAL PROCESSES IN KENYA

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1.0 INTRODUCTION

“Election” is a simple word with a heavy meaning. It is through elections that democratic governance is guaranteed. Article 25 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Kenya in 1976, provides for the right of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives. The same Article further endorses the right of citizens to have the opportunity to participate, on general terms of equality, in public service. This then provides a sense of ownership in resulting policies.

On 4th August 2010, Kenyans brought forth a new constitutional dispensation. Article 38 of the Constitution expressly provides for “Political Rights”.

Historically, the electoral process in Kenya has evolved over-time. The first general elections at Independence in 1963 were held under a multiparty system. It is at the same time that the Kenya Independence Order-in-Council was established; and Schedule 2 of that Order-in-Council created the first Electoral Commission in Kenya with the Speaker of the Senate as Chairman. A Constitution amendment of 1966 created a de-facto one party system and subsequently in 1982, Kenya became a de jure state.

Latently, the management of the electoral process at the time, concentrated in the hands of the Executive wing of the Government. Further developments in the electoral process resulted into the replacement of secret ballot - a hallmark of any credible electoral system - with queue voting in 1988. Notwithstanding that, the management of elections was placed under the Supervisor of Elections in the State law Office (Attorney General).

Complexities in the political developments witnessed in the early 1990s in the country culminated in the re-introduction of multi-party democracy through the repeal of section 2 (A) of the constitution in 1991. This paved way for electoral reforms. The Electoral Commission of Kenya (ECK) was established with the mandate to conduct Elections. In

1997 the Inter-Parliamentary Party Groups (IPPG) negotiated for key electoral reforms including the amendment of the KBC Act and appointment of Commissioners that managed the successive elections of 1997 and 2002.

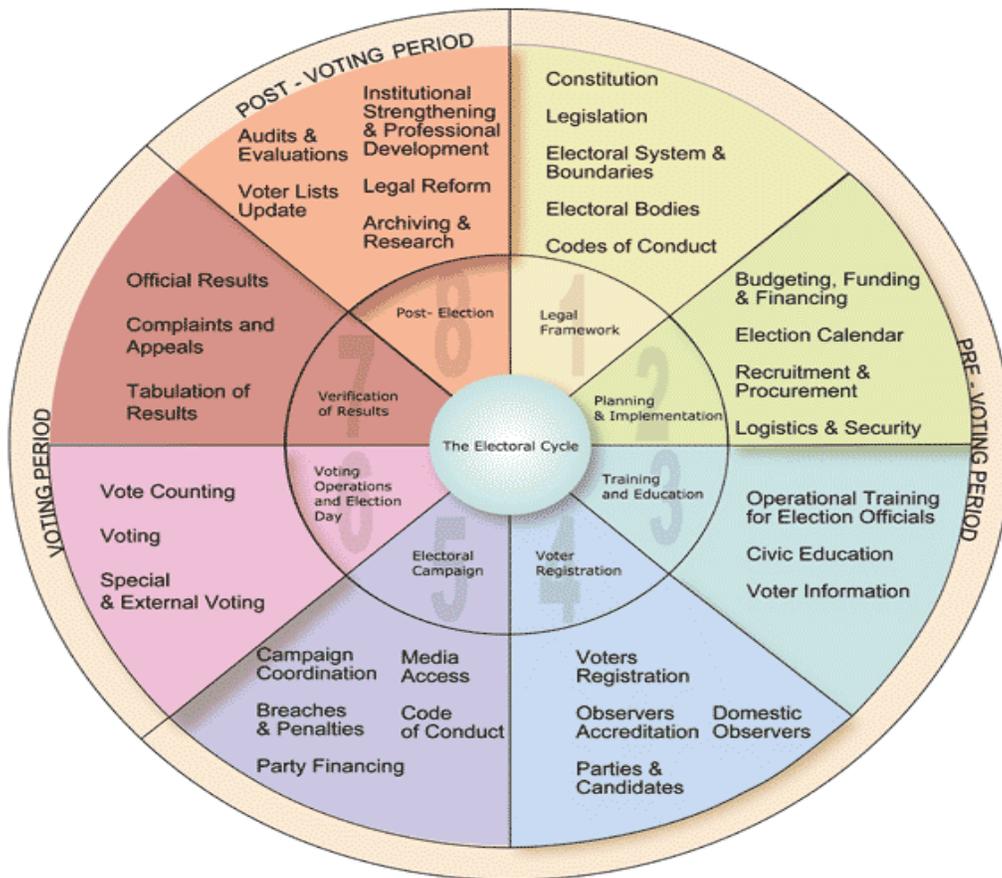
The 2002 elections brought about a transition in government. This milestone was followed by the strengthening of political parties through the enactment of the Political Parties Act, 2007. However, a stifle in the IPPG agreement in 2007 put the impartiality and independence of ECK on the spot and consequently, the post-election violence of January 2008. Thus, a National Accord Implementation Committee (NAIC) was establishment that did recommend the review of the electoral process among other issues. As result, the Independent Review Commission (Kriegler Commission) (IREC) was appointed to undertake the review.

Upon the completion of its work, IREC recommended for the establishment of a new Electoral Management Body with a lean policy making and supervisory board with a professional secretariat; and a review of the entire constitutional and legal framework. This was intended to bring it in line with the political and legal aspirations of Kenyans. Parliament, accordingly, introduced section 41 in the Constitution amendment Act, 2008 to create the Interim Independent Electoral Commission (IIEC) and stipulated its mandate under section 41A.

2.0 KENYA'S ELECTORAL PROCESS

Until recently, election was viewed as an event and all activities leading to the actual poll were mostly independent and non-related. Electoral cycle is a process encompassing a string of inter-dependent and inter-related activities. Regardless of the electoral system of a country, electoral process is normally categorized into 3 distinct phases; *pre-election activities*, *polling* and *post-election activities*.

Below is a graphical summary of the electoral cycle.



IIEC was mandated by Section 41A of the immediate former Constitution to undertake the following –

1. Reform of the electoral process and the management of elections in order to institutionalize free and fair elections;
2. Establishment of an efficient and effective secretariat;
3. Promotion of free and fair elections;
4. Fresh registration of voters and the creation of a new voters' register;
5. Development of a modern system for collection, collation, transmission, and tallying of electoral data;
6. Conducting of the referendum for the new constitution;
7. Facilitation of the observation, monitoring and evaluation of elections and referenda
8. Promotion of voter education and culture of democracy, and

9. Settlement of minor electoral disputes during an election as may be provided by law.

Upon its establishment, IIEC programmed its activities to be in line with the electoral cycle and has in the last 18 months since this establishment, managed to successfully operationalize its key mandates. Art. 28 of the Sixth Schedule of the new Constitution provides that the tenure of office of IIEC will continue for its unexpired term or on the establishment of IEBC, whichever is later.

2.1 Pre-Election Period

These are the preliminary processes that form the cornerstone of any credible election. Pre-election period contains the bulk of the activities that set the foundation for the actual election. Freeness and fairness of elections is gauged from this period. The following questions give an indication if elections are likely to be free and fair, even before the actual elections are undertaken - “do the laws in place provide for a level playing field for all candidates and for free and fair elections?” “Is the nomination process free and fair?” “Does the voter get fair, accurate and quality information related to the election?” “Is the electoral campaign conducted in a fair manner?”

2.1.1 Legal framework – suitability of the existing legal framework

A suitable and comprehensive legal framework is necessary for effective conduct and management of elections. The framework must, as a minimum, provide for the independence of the Commission; institutional, functional and financial independence.

The Commission successfully held 8 parliamentary and several civic by-elections from the time of its establishment. 4 of these parliamentary by-elections were conducted before the referendum that brought in the new Constitution. These elections were governed by existing laws including, National Assembly and Presidential Assembly Act and the Code of Conduct, Political Parties Act, Election Offences Act, The Police Act, KCB Act, etc.

On the 4th of August 2010, 72% of registered voters in Kenya ratified a new Constitution with a whopping 62%. This new constitutional dispensation drastically changed the electoral system in Kenya from First-Past-The-Post (FPTP) to a Mixed-Member-

Proportional-Representation (MMPR), which guarantees the principle of the equality of the vote in terms of its weight. In addition, vide Article 38, the Constitution expressly guarantees political rights to all citizens.

Article 88 of the Constitution establishes the new electoral body, IEBC, and outlines its mandate under Art. 88(4). The functions of the Commission have been expanded to include the power to regulate nominations of and campaign financing by political parties. To operationalize this, the Commission is currently working with the AG's office, the KLRC and the Ministry of Justice to develop relevant legislations taking into account the provisions of the new Constitution. Top in priority is the IEBC Bill, followed by the Elections Acts and related regulations. The Commission is also in the process of amending existing legislations, such as Political Parties Act, 2007.

2.1.2 Delimitation of electoral units

Delimitation of electoral units is another prerequisite to any election. It is these units that determine where one gets registered and eventually votes. IEBC is also mandated (as was ECK) to periodically review electoral boundaries (constituencies and wards) every 8-12 years. The next 2010 general elections however would be based on the current 210 constituencies.

2.1.3 Voter registration

Voter registration is another hallmark of democratic governance and a key mandate of the Commission. The Commission was mandated by Section 4A of the immediate former Constitution to conduct fresh voter registration to establish a new Voters Register when the former ECK was disbanded after the post-election crisis. Using both manual (OMR) and electronic registration (EVR) (piloted in 18 selected constituencies), the Commission managed to register over 12.4 million voters in 45 days! The EVR forms one of the many technological reforms that the Commission has adopted towards effective management of elections.

The new Constitution compels the Commission to undertake continuous registration of voters. The Commission also has the extended mandate to progressively facilitate

registration and voting by Kenyans in the Diaspora¹.The details of such an exercise will form part of the election legislations to be enacted.

2.1.4 Nominations

Nomination of candidates by political parties has always been viewed as a party-affair, especially at the grass root level. The new Constitution now gives power to the Commission to regulate the process of nomination of candidates by political parties. It also provides a clear shift in the manner of nomination of special seats such as those for women, persons with disability, workers and the youth. Article 90 provides for proportional representation based on party lists for nominees to the National Assembly, the Senate and to county assemblies.The Commission in consultation with key stakeholders, including political parties, is in the process of discussing the formulae for such representation and the required gender parity in the nomination processes. Such processes will also find grounding in the upcoming legislations.

2.1.5 Campaigns and Campaigns Financing

All political parties and candidates standing for elections are required to sign and abide by the Code of Conduct. The Code and the Election Offences Act, among others, guide the manner and conduct of candidates during the election process. Any breaches are punishable by law. The law is also very explicit on the official campaign period. The biggest challenge however is in the implementation of such laws.

The new Constitution has also enhanced the functions of the Commission by providing that it shall regulate the amount of money that may be used by or on behalf of a candidate or party in respect of any election. This will go a long way in ensuring a level playing field for candidates in an election.

¹ This is based on the ruling of the Interim Independent Constitutional Dispute Resolution Court, which was mandated to hear and determine disputes related to the constitution review process

It is the responsibility of the Commission to constantly monitor media coverage of political parties and candidates during the campaign period. It is a principle of electoral democracy that media coverage be equal and fair.

2.1.6 Voter Education

Voter education is critical in ensuring effective participation in any democratic governance process. It is through voter education that key stakeholders in the election process and the general public are informed of their rights and obligations in the process. This in turn enhances transparency and accountability and eventually public confidence in the conduct and management of elections.

The Commission conducted intensive voter education using target-specific methodologies. Uniform message was used, but was disseminated depending on the target audience. The quality and intensity of voter education directly affects the outcome of the election and also impacts on the by-products of such election. Unless for one reason or another, a voter makes a deliberate move to spoil his ballot, high numbers of spoiled ballots are mostly attributable to poor voter education.

IIEC was awarded the best Public Affairs Campaign of the Year (2010) by the Association of Public Relations Society of Kenya (APRSK) because of its creative campaign on voter registration and voter inspection.

2.1.7 Voter Observation and Accreditation

Any serious democracy allows external audit of its processes. IIEC has established a desk for accreditation of observers and agents for candidates, where relevant information and guidelines are shared. This is the forum where role and responsibilities of observers are clarified. Observation Reports forms one such responsibility. These reports provide a critical external audit of the processes and recommendations for improvement.

The Commission accredited over 4,000 observers during the referendum exercise, composing of both international and local groups. Amongst these include, different

Heads of Missions, the EU, the AU, IGAD and local observer groups such as ELOG (Election Observer Group), Civil Society Organizations, faith-based organizations and of course members of the media (both national and international).

Well-coordinated communication and information sharing with all key stakeholders is vital in effective management of elections. The Commission held consultative meetings with the observer groups, not only for purposes of sharing vital information, but also to train them and get their buy-in on the new technologies that the Commission intended to adopt. The Commission website² has also been an instrumental source of information.

2.1.8 Security

Security is a constant variable throughout the electoral cycle. It must feature as part and parcel of all the electoral processes, from registration of voters, voter education, during campaign periods, the actual polling day and of course during the counting, tallying and declaration of the final results. Experience has shown us that if any of these processes is not properly handled or any dispute arising is not well managed, security becomes even more imminent to contain disgruntled parties and their supporters.

As with any national process, election management involves huge number of personnel and material. Security of such personnel and material must therefore be guaranteed. For purposes of the referendum, the Commission had gazetted over 26,000 polling stations, where at least 4 polling officials and 2 security personnel manned each station.

The Commission established structured engagements with relevant government agencies dealing with security in designing a security plan for the referendum exercise. The plan was informed by the number of registered voters per polling station, the volatility of the area based on informed intelligence. Areas considered as hotspots were accorded additional security.

² www.iiec.or.ke

Security in the electoral processes encompasses many components including the following -

- (i) Security of IIEC Logistics Installations i.e. Warehouses, Go-downs and Stores. The Commission recruited warehouse managers to receive, record, pack and dispatch election materials, at the national warehouse, the regional, and during referendum, at the constituency level;
- (ii) Security of Administrative Establishments i.e. Security of IIEC premises in all 17 regional, 210 constituency and the headquarter offices;
- (iii) Security of IIEC Commissioners, permanent and temporary staff;
- (iv) Logistics Security i.e. security during movement of equipment, material and personnel throughout the country;
- (v) Security in the Voting Stations – during preparations, during the actual polling and finally in the counting and announcement of results;
- (vi) Security in the Tallying Stations – when transporting and receiving results from polling stations, tallying and declaration of constituency tallies;
- (vii) Security of members of the public during campaigns, voting and throughout the process;
- (viii) Security and reliability of data and transmission of results.

With regard to production and development of materials, the Commission put in measures to ensure that strategic materials incorporate additional security features that can stand election fraud. For instance the ballot papers and the new voters cards incorporated a hidden watermark with IIEC enhanced features that were only visible with an ultra violet light. The Commission has also established a Risk and Compliance Department whose one of the major tasks is to constantly and continuously assess and advice the Commission on security related matters.

2.2 Polling Period

This phase involves all operations of the actual polling day including, availability of polling materials at the polling stations and management of the voting. The existing laws on the management of elections are very comprehensive on what each of the players is required to do. To properly manage high numbers of voters, the Commission streamed polling stations with more than 700 voters to allow for shorter queuing time and smoother management of the station.

The timeliness in opening and closing a polling station is key to this phase of the process, the presence and management of observers, party agents or assisted voters is a good indication of how well polling was conducted. The law allows for registered voters to be assisted, but this has recently come under attack, on claims that it compromises the secrecy of the vote. There is therefore a need to relook at this issue and provide a mechanism that can best address the balance between maintaining the secrecy of the vote and at the same time, accord the needed assistance. This will be addressed in the upcoming legislation.

As mentioned earlier, security on the polling day is as important as after polling. Different countries employ different strategies to guard this. In the recent elections of Cote d'Ivoire, the government suspended SMS system on the day of polling and closed border points until after voting. This was aimed at containing security.

In its preparations, the Commission is devising methods of getting Kenyans in special circumstances to vote, such as Kenyans in the Diaspora. "Mobile" polling stations has been one of the ways of reaching pastoralist communities as they move around looking for pasture.

The bulk of the Observer Report is informed by the polling day activities. It is therefore important that observers, agents and members of the media, who are accredited to observe elections at a particular polling station be designated a place close enough to

observe the incidences but not too close to interrupt the polling or to compromise the secrecy of the vote.

2.2.1 Vote Counting & Declaration of Results

Depending on how the previous processes have been handled, vote counting may be the most emotive and contentious process of the day. It is therefore important that the election officials build consensus with all agents of the candidates/opposing sides on some of the issues that are likely to arise. Agreeing in advance with all concerned parties on issues such as “what would constitute a spoilt ballot”, where it is not obvious, greatly enhanced consensus building and therefore smoothed the counting process.

The law provides that all counting be done at the polling station in the presence of the agents and the observers. Streams would be counted and their results consolidated per polling station in Form 16A. These forms provide for counter-signatures for such agents and observers for them to endorse the results of that polling station. These forms were available in multiple copies to enhance transparency, where the agents remained with their copy, one copy was affixed at the entrance of the polling station, one was sealed in the transparent ballot box with the counted ballot papers and one was physically carried to the constituency-tallying centre.

The law as it exists today allows the official constituency results to be declared by the Returning Officer at the constituency-tallying centre, while the Commission declares the national results at the national tallying centre. This is based on the physical transmission of the relevant forms.

To fasten this process and to avoid unnecessary and unexplained delays, which were partly attributed to the post-election crisis, the Commission successfully piloted and subsequently adopted the Electronic Transmission of Results. The transmission would be effected as soon as Form 16A has been signed by the election officials and counter-signed by the agents at the polling station. The results would be simultaneously transmitted to the constituency-tallying center and the national tallying centre. Because of

this simultaneous transmission, the system has eliminated any suspicions on tampering with the results streaming into the national tallying centres.

The system has greatly enhanced transparency in the tallying and declaration of election results and has therefore been embraced by Kenyans as a transparent and efficient tool to election management. This has in turn considerably enhanced credibility of the Commission in the eyes of the public.

2.3 Post-Election Period

This period takes effect immediately the official results are declared.

2.3.1 Dispute Resolution & Election Petitions

This period commences with any dispute on the election results. Before the promulgation of the new Constitution, a petition could go on for the duration of the election calendar. This open-ended nature of the duration of election petitions posed a lot of challenges to the EMB; due to uncertainty of pending by-elections in terms of planning and cost factors. The Commission has so far conducted 8 by-elections arising from petitions based on the 2007 general elections, and still counting. The new Constitution now provides a time limit within which all petitions must be heard and determined.

Under the new Constitution, the Commission has been vested with powers, to settle electoral disputes, including disputes relating to or arising from political party nominations, but not to hear and determine election petitions and disputes subsequent to the declaration of election results.

The new Constitution further provides for legislation to establish subordinate courts. This may be an opportunity for the Commission to initiate discussion for the establishment of an Election Court to deal with election petitions and disputes subsequent to the declaration of election results.

2.3.2 Audit & Evaluations

This is the time the EMB sits down to reflect on its performance, learn from the past and improve on the future. The Commission undertook its post-referendum evaluation exercise a few weeks after the referendum. It brought together all the staff to critically analyze its performance. It is on the basis of this evaluation and the focus of the new constitutional dispensation that has influenced the design of the Commission's Strategic Plan, which is in its final stages.

Other than process audits, financial audits are a key evaluation tool on financial prudence of any organization. Subsequent funding for the Commission, whether from the exchequer or from development partners is pegged on how frugal and cost-effective the previous expenditure has been.

2.3.3 Cleaning Up the Voters Register

Under ordinary circumstances, the EMB would utilize this period to further enhance the accuracy of the Voters Register. This may be done internally by the EMB or, if resources allow, may open up the Register again for inspection. The Commission is continuously cleaning up the Register, especially of those details that may have been wrongly captured from the OMR forms.

Kenyans are known to vote from their home constituencies. But for purposes of convenience, most Kenyans registered for the referendum exercise in constituencies where they work and would therefore wish to transfer to constituencies of their choice. The Commission is currently in the process of devising the most convenient and cost-effective method of effecting this transfer before the 2012 elections.

With the promulgation of the new Constitution, the next general elections will entail at least six ballots –

1. The President
2. Member of the National Assembly from the Constituency
3. Woman representative to the National Assembly from the County

4. Member of the Senate (Senator) from the Counties
5. Member of the County Assembly from the Wards
6. County Governor from the County

Unless a new law is enacted to deal with local authorities as they currently exist, or Local Government Act (Cap 265) is repealed, election for councilors will form an additional ballot to the six above.

2.3.4 Capacity Building & Benchmarking

The Commission has been studying how other countries have handled such a high number of elections conducted on the same day. A simulation exercise (mock election) will be conducted in different settings (urban and rural) to allow the Commission get an in-depth insight and a feel of such an exercise, improve on it and design appropriate voter education for the public. Such an exercise will also allow the Commission to further legislate on issues that are pertinent to this exercise, among other legal reforms.

Capacity building and benchmarking is a necessity of every EMB. It is through these benchmarking activities that EMBs learn from experiences of other jurisdictions. This is the period to continue building institutional capacity of the Commission and to enhance professional development of Commissioners and the staff. The Commission has on several occasions participated in election observer missions of other countries as well as election related symposia and conferences. The Commission is continuously endeavoring to fully embrace technology in all election processes. This will commence with rolling out electronic voter registration countrywide and grounding electronic vote transmission in the law. The Commission has also been undertaking a benchmarking exercise on various systems of electronic voting in a number of countries namely, South Africa, Ghana, Tanzania and Brazil for future consideration in Kenyan elections.

2.3.5 Documentation & Archiving

Last but definitely not least, the Commission must document all processes employed, lessons learnt and best practices for purposes of improvement and to form the basis for further research.

3.0 CONCLUSION

In conclusion therefore, even though the Commission has the obligation to initiate electoral reforms, the speed of accomplishing such reforms depend on other external actors such as the National Assembly, The State Law Office, related Government Ministries and agencies, Civil Society Organizations and development partners, among others. The Commission for the Implementation of the Constitution will also be instrumental in the achievement of such reforms and any further delay in its constitution will negatively impact on such reforms. IIEC is conscious of the fact that the necessary processes towards enactment of all relevant laws that impact on electoral conduct and management may be a hiccup if not accorded the urgency that is required.

END