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AN AUDIT OF KENYA'S ELECTORAL ADMINISTRATION INSTITUTION



Photo by Boniface Mwangi

As an institution that serves broad and important political and public purpose it must have a high degree of functional autonomy. This requirement is fundamental because political parties and lobby groups tend to have partisan views and proposals. Regardless of the distribution of voters across contending parties, the ECK should be sufficiently independent to ensure that the contest is free and fair

By Kwame Owino

Kenyans started the New Year in the worst possible way after a dispute that started as an electoral matter led to the destruction of property, loss of lives and more political tensions. The purpose of this brief is to address itself to the extent to which the problems exhibited before, during and after the announcement of the general elections results reflect more systematic weaknesses in the design of critical institutions in the country. It is therefore neither intended to provide an explanation for the electoral results nor to assign blame to individuals or the

institutions. It intends to focus on identifying the structural factors that may have contributed to the inability of large proportions of Kenyans to exhibit trust in the Electoral Commission of Kenya (ECK).

Citizens of nations that experience great problems with governance understand that the right institutions provide the greatest protection and ensure that the stability and quality of governance is improved. Among nations that aspire to create democracy such

as Kenyans, one of these institutions is the one responsible for the management, planning and execution of tasks related to the choosing of leaders. The ECK has had a high profile for the reason that it has been responsible for

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these tasks since the abolition of laws that forbid the formation of multiple political parties. Over that time, it has managed elections according to the regular five year electoral cycle.

The Issues

Political contests resolved through elections are expected to be high stakes events because they give the express right of a party and its leadership to direct the public affairs of a nation. In addition, because an electoral process requires the involvement of the public, it is necessary that the results and the process are acceptable. This means that the process must be free of any possibility of corruption, bias or mismanagement. Management of the long election process relates to the various stages from planning, voter registration to management of tasks at the polling centers and the counting and release of results. Given the complexity of all the little steps, the ECK is required to perform the entire set of delicate duties with care and utmost competence all around.

Autonomy

As an institution that serves broad and important political and public purpose it must have a high degree of functional autonomy. This requirement is fundamental because political parties and lobby groups tend to have partisan views and proposals. Regardless of the distribution of voters across contending parties, the ECK should be sufficiently independent to ensure that the contest is free and fair. This important principle can only be ensured if the officers of the institution neither are nor subjected to external pressure by political parties, partisan voters or other collectives who wish to influence the outcome of the contest.

In the period preceding the general elections held in December 2007, specific decisions made by commissioners of the ECK have been variously interpreted. Some of these have involved statements in the media and allegations by observers which suggest that the institution is not sufficiently cushioned from influence by all political parties. Despite not having an proper review of these allegations they suggest that internal systems within the ECK may require independent review.

Campaign regulation

Many Kenyans understood that the general elections in December 2007 would be competitive and bear high stakes. To that extent therefore, the campaigns period would be a delicate period because of the possibility that candidates would employ tactics that could be illegal or in breach of the laws that govern the elections. For the two major parties in the contest, campaign rallies were quite large and comparatively frequent making it highly unlikely that the ECK was able to monitor the campaigns effectively to ensure that the contestants adhered to the prescriptions of the law. While there were instances of violence related to the campaigns, it is important to acknowledge that most of the rallies were concluded without outbreaks of violence.

Records management

A second factor that is critical for an institution that has been established for the purposes of ensuring elections administration is voter registration. In Kenya's case, this function is exclusively placed in the hands of the ECK. Registration of voters in Kenya requires that the individual should bear a valid national identity card in order to facilitate registration and issuance with a valid voters card.

A complication arises from the fact that the laws that grant the powers for the registration of voters are altogether different from those that deal with the department of the Registrar of Persons. As a result, often the ECK is compelled to have to wait for valid voters to receive their identity cards from the registrar of persons before they may be validly registered as voters. This tension is often most evident during the year in which elections are scheduled because the registration of voters is not coordinated with that of the Registrar of Persons' Department. Due to this failure to coordinate effectively, a large number of adult Kenyans are often unable to vote because of the bureaucratic complication.

A second part of records management which remains unsatisfactory especially during the general elections of 2007 is that of cleaning the electoral register. In the last five years since the voters register was compiled, it is certain that a number of Kenyans whose names remain on the election register are no longer eligible to vote. The reasons for the need to clean up the regis-

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ter is because of the possibility that a number of Kenyans are deceased hence are no longer valid voters. In addition, due to internal relocation and other reasons, Kenyans may wish to vote at different constituencies or municipal wards. The existence of a substantial number of ineligible voters posed a real danger to the elections because of the possibility that these may be used unscrupulously to influence outcomes for any of the contests.

Since a number of voters bearing voters cards issued by the ECK could not be found in the records, it is evident that the said Commission performed dismally as the records contained unacceptable errors. Indeed, the reform of the methods for voter registration remains one of the areas in which the ECK appears not to have made as much progress since the elections in 2002. Finally, by virtue of the fact that the number of registered voters was unprecedented and the election contests in constituencies, wards and at the presidential level was argued to be close, a small magnitude of error may have magnified results all around and compromised the outcomes all round.

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announce them. Many Kenyans recognized that this was a progressive step that the Commission took in spite of the fact that it was not a strict legal requirement. However, the same device was not available during the general elections in 2007. To that extent therefore, Kenyans depended on the Commissioners of the Electoral Commission of Kenya (ECK) to officially announce results. Given the delays that occurred because of the large number of electoral constituencies and polling centers in the country, anxiety rose when results could not be confirmed. Regardless of the fact that the delays may have occurred in good faith and were not malicious, the sudden change of a progressive policy has added to the reason used to query the overall integrity of the officers of the Electoral Commission of Kenya.

The lesson from this is that when a progressive step that has broad public approval is made; its sudden reversal creates a reason for an institution that performs such a critical service to be questioned. Due to these lapses, many Kenyans with different political allegiances consider that certain officers working within the Electoral Commission of Kenya did not perform their duties with diligence and unquestionable integrity.

Transparency

The sensitive nature of all elections place transparency and openness at the forefront of the whole process of administration of the entire process. The ECK digitized the electoral register and placed a substantial part of the record in the public domain. In addition, it added to that by facilitating the confirmation of registered voters by the use of the internet and mobile telephone. This presented an unequivocal statement of the desire to be transparent and allow voters to confirm the status of their registration. This created the impression that a comparably high degree of transparency would prevail in the collation, tallying and announcement of results.

During the referendum on the constitution held in 2005, the ECK results were promptly released and displayed on an electronic board at the designated results centre. This made it fairly easy for the official results to be confirmed from the institution that bears the responsibility to an-

Internal management

Kenya is a moderately large country with different degrees of development in infrastructure. It is expected that the Electoral Commission of Kenya (ECK) would bear this in mind as it organizes for the votes to be cast and for the results from the polling stations to be relayed eventually to the headquarters. The Commissioners of the Electoral Commission of Kenya (ECK) gave regular updates on the receipt of results from the varied constituencies in Kenya.

These updates were completely appreciated but raised questions about the degree of oversight in the different constituencies when it was stated that a number of officers managing polling stations were incognito. As an institution the Electoral Commission of Kenya (ECK) is responsible for the appointment, training and deployment of returning officers, and thus its level of over-

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sight over these officers was questionable. This is propelled by the fact that it admitted its inability to communicate with officers acting as its agents in the polling stations reflecting on its competence and level of control. To all dispassionate observers, it is clear that there were serious breaches that led to unnecessary delays in the presentation of the results. This charge on the failure to properly supervise its agents remains valid irrespective of the reasons for that delay as it put the Commissioners under undue pressure to account for the behaviour of its agents.

Conclusion

As stated in the introductory paragraph, the purpose of this brief is to review the performance of the Electoral Commission of Kenya (ECK) against select benchmarks of transparency, integrity and overall competence in management of elections in Kenya. For that reason, it is not an audit of the results but merely a check on the institutions performance regarding the various elements of elections administration and management. As it states above, its is evident that

minute errors in ensuring the integrity of the voter's register, internal management of its agents, reduction in levels of transparency did occur. This series of minor errors working independently reinforced each other and created the situation where the results are challenged and the contesting parties make different claims about the result. This would be easily resolved if the Electoral Commission of Kenya (ECK) was understood to be sufficiently autonomous but structural deficiencies lead to the claim that selected officers were biased.

Fortunately, there is discussion on the considerations that would ensure that elections management in the future would be undertaken by a sufficiently autonomous and transparent body. Some of these mechanisms would require a far more transparent process for appointment of all officers working for the commission and proper guidelines governing the use of discretion by the Commissioners and other officers of the Electoral Commission in Kenya. That is necessary to restore the faith of all Kenyans in the use of elections to appoint leaders and by extension in institutions that govern public affairs.



CREDIBLE ELECTORAL PROCESS: THE CORE OF AFRICAN EMERGING DEMOCRACY

By Jennifer Kargbo, Abdalla Hamdok and Denis Kadima

The quality of an election constitutes one of the determinants for deepening democratic governance. Although elections do play a critical role for the sustainability of democratic governance, democracy cannot be reduced purely to elections. Various other political processes play an equally important role for democracy to exist and be sustained, including respect for human rights, citizen participation, constitutionalism, rule of law, separation of powers and checks and balances and equal distribution of the national wealth.

Taking cognisance of these broader dimensions of democracy, elections nonetheless can be the primary inter-linkage between representative democracy and political accountability. High quality elections have a great potential for adding substantial value to accountable governance and the realisation of citizens' expectations.

Low quality elections may even become a political liability to democratisation itself. Therefore, there is a critical need to focus attention of key election stake holders to the task of improving the quality of elections in the region for the purpose of sustainable democratic governance

While many countries that constitute the Southern African Development Community (SADC) have embraced multi-party systems and hold regular elections, the quality of these elections differ from one country to another. Low quality elections may even become a political liability to democratisation itself. Therefore, there is a critical need to focus attention of key election stakeholders to the task of improving the quality of elections in the region for the purpose of sustainable democratic governance.

While elections are supposed to anchor sustainable democracy, in some countries elections have become a cost to democracy itself. Elections become a political asset to a democracy if they institutionalize democratic culture and practice. But if elections, instead of institutionalizing democratic culture, fuel political instability, then they become a political liability for democracy. To what extent do electoral systems and institutions turn elections into political assets and not liabilities?

Some of the salient areas to pay attention to in order to improve electoral quality for the deepening of democratic governance in Southern Africa are the following:

(i) To ensure that the legal frameworks are right and proper;

(ii) Ensuring proper conduct by political parties, electoral commission, supporters at pre-election, polling day and post-election phases;

(iii) Addressing the cost of elections and assess sustainability of elections given internal and external resources available to the election management bodies (EMBs);

(iv) Evaluate the degree of citizen participation in elections and share strategies for increasing public education and interest in elections;

(v) Promote a culture of constructive management of election disputes for purposes of maintaining political stability and peace; and

(vi) Encouraging EMBs to move more and more towards the utilisation of information communications technology for the improved quality of elections.

Broadly, stakeholders must pay attention to key areas to improve elections in the region.

First, it is the election administration, a process, which is as critical as electoral outcome itself. How are elections organised in Southern Africa? How are they managed? What regulatory frameworks are in place to ensure the credibility of the electoral process and the legitimacy of its outcomes? These questions speak to the democratic nature of electoral governance in the region and the extent to which key democracy stakeholders have confidence in the electoral administration and institutions. The more the stakeholders have confidence in the process and its outcome, the more

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do elections contribute positively to democracy and political stability. Conversely, the more the stakeholders exhibit low levels of confidence/or lack of confidence in the process and its outcome, the more do elections become highly contested and in some instances igniting conflict and political instability. All these issues are linked to the quality of elections. The quality of elections ranges from the administrative aspects of the process throughout all the stages and the management of the elections. With regard to the management of elections, the EMBs have come to play a critical role since the on-set of democratic transitions of the late 1980s and early 1990s.

The ECA's African Governance Report (AGR) and the deliberations that took place during the Fourth African Development Forum (ADF IV) in October 2004 noted numerous challenges facing the administration and management of elections in Africa in general and in the Southern African countries in particular. The ADF IV participants noted with satisfaction the emergence of better electoral laws and procedures and the significant enhancement of competitiveness of the elections since the 1990s. At the same time, they highlighted acute challenges in election administration and management, particularly with regard to whether the legal and administrative apparatus currently in place in the sub-region is sufficient to guarantee democratic electoral outcomes.

They raised a number of questions, including whether electoral commissions be made up of government appointees or selected from broad segments and interests of society. They further pondered over the appropriate tenure of electoral commissioners and how the commissions should be funded.

These and other concerns were further supported by the views of the general public that were captured in the AGR. For example, the results from the AGR Survey regarding the legitimacy of electoral authorities show that despite the fact that 57.6 per cent of respondents were of the opinion that political parties accept the legitimacy of the electoral authority as a manager of the electoral process, there was still a fairly strong perception in the Southern African sub-region that EMBs are far from being legitimate.

Contributing to these views is the inadequate public funding that goes to the EMBs, unattractive remuneration and poor conditions of service, and the man-

ner in which the government appoints the heads of the EMBs, and hence the EMBs' perceived lack of independence.

It should be noted that a number of guidelines, norms and standards for the effective and efficient management of elections in Southern Africa developed by various institutions in the region now exist and are very clear on best practice in this area. These include:

- The 2001 SADC Norms and Standards for Elections in the SADC Region;

- The 2003 EISA/ECF Principles for Election Management, Monitoring and Observation (PEMMO); and

- The 2004 SADC Principles and Guidelines Governing Democratic Elections.

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The second area is electoral system design, which reflects a political history of Southern Africa and the concomitant political culture, and which has had an overbearing imprint and impact on the nature of electoral systems that individual states have adopted since the independence period.

A majority of the Southern African states were under the British colonial rule and upon independence they adopted the Westminster constitution and political arrangement that go with it. It should then be noted that very few Southern African states have thus far taken a deliberate effort to adopt an electoral system of their own choice involving internal popular consultations. It is now common cause that the electoral systems adopted by Southern African states are not a product of a broad based internal debate in which citizens had a chance to make submissions on the kind of system they wanted to see adopted in their country.

Most electoral systems, electoral laws, electoral institutions and constitutions that govern elections in SADC countries were inherited from colonialism. Where limited changes have been introduced, they were hardly ever debated and in most cases they were partial and cosmetic rather than being comprehensive and substantive.

For an electoral system to add value to democracy, it must enhance accountability of the elected representatives to their constituency while at the same time ensuring broader representation of key political forces

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in the representative bodies. In this way a political system becomes more inclusive and participatory and accords the rulers legitimacy to govern. SADC states must make deliberate efforts of addressing election-related conflicts and war by, among other things, reforming their electoral systems accordingly.

In order to help define the vision and objectives for electoral reform process, Reynolds Reilly and Ellis isolate ten (10) key criteria that could prove useful to guide the process namely:

- 1). Ensuring a representative parliament and inclusive government;
- 2). Making elections accessible and meaningful;
- 3). Providing incentives for conciliation and constructive management of conflicts;
- 4). Facilitating stable, transparent and efficient government;
- 5). Holding the government accountable and responsive;
- 6). Holding the elected representatives accountable and responsive;
- 7). Encouraging "cross-cutting" political parties;
- 8). Promoting legislative opposition and oversight;

9). Making the election process cost-effective and sustainable; and

10). Taking into account international norms and standards (2005:9-14).

The above criteria are not meant to be prescriptive and applied by all countries. But they are a guide for reforms. Countries are not compelled to consider all of them. The historical, socio-economic and political contexts of each country plays a critical role in terms of choosing which primary criteria propel the reform project. Again, without being prescriptive in terms of which electoral system is better suited for Southern African countries which have their own peculiar historical, socio-economic and political contexts, it is only fair to propose that many countries need to undergo electoral reforms taking the relevant criteria into account. Such a process will then guide each country to an appropriate electoral system for deepening its democratic governance.

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THE COMMONWEALTH GROUP 2007 ELECTION REPORT

Introduction

Following an invitation from the Minister of Foreign Affairs of Kenya to constitute a Commonwealth observe Group for the 2007 General Election in Kenya, the Commonwealth Secretary-General, Rt Hon Don McKinnon, sent a three-person assessment Mission to Kenya in October 2007.

The purpose of the mission was to determine with the major stakeholders in the Kenyan political environment whether there was broad support for the Commonwealth to observe the elections. The mission was also mandated to ensure that com-

monwealth observers would have full access to polling and tallying centres.

The mission briefed all its interlocutors on the modus Operandi of a commonwealth observer Group. It was able to gather valuable information on the political scene in Kenya and factors impinging on the electoral process. It was also able to explore logistical arrange-

ments for the Commonwealth observer Group. The mission concluded that there was brad support for the presence of Commonwealth Observer and that the Group would be able to fulfill its mandate freely.



Commonwealth Observers Election Report

Accordingly, an observer group was constituted, which included thirteen Commonwealth eminent person supported by six commonwealth Secretariat staff members. The group was lead by H. E Dr Ahmed Tejan Kabbanm former President of Sierra Leone.

Some of the recommendations arising from the report:

In order to strengthen the independence of the ECK and further insulate the institution from possible political interference, it is recommended that the process for appointing ECK Commissioners be subject to screening and confirmation by Parliament.

The ECK should be a matter of priority reviews the processes for the transmission and announcement of result.

· Polling day procedures and operational arrangements should incorporate introducing of transparent ballot boxes among others suggestions.

· Implementation of a better system for updating the register of voters.

· Bring to immediate effect the Political Parties Act, 2007 which was assented to in October 2007.

· Place a limit on the amount of expenditure that can be incurred during the campaigns.

· A need for more effective and consistent training for all domestic observers.

· To amend the law to require ruling on election petitions within a specified time period.



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Event: International conference on the Right to Public Information

Date: 27th-29th February 2008

Venue: Atlanta, GA

Organizers: Carter Center

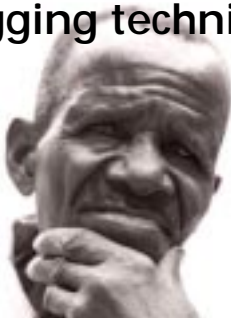
Event: 2nd Annual Fraud and Corruption Summit

Date: 5th - 7th March 2008

Venue: Stockholm, Sweden

Organizers: Mistieurope

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