

# Kenya: Compromised Independence of the EMB

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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. This was the furthest the government went towards institutionalizing the Electoral Commission of Kenya (ECK). 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. The IPPG also reviewed and brought in some laws which made the ECK more independent. Under the constitution, the ECK should not accept the direction of or instructions from any person or authority, but it has so far had many difficulties realizing this independence in practice.

## The Legislative Framework

The ECK is governed by the constitution and the November 1997 National Assembly and Presidential Elections Act. The Constitution Amendment Act, no. 17 of 1990, re-establishes the ECK and provides for its tenure and functions. It also guarantees its independent status, although an exception, made through a constitutional amendment in 1997, empowers 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 empowers the ECK to make regulations governing the electoral process.

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

## **Institutional Structure**

At the end of 2005, the ECK had 22 commissioners, including the chair and vice-chair, who are appointed by the president for a term of five years. The commissioners are eligible for reappointment and enjoy security of tenure through special safeguards and procedures. They can only be removed from office by a tribunal appointed by the president. During elections the ECK appoints temporary election staff to assist in the administration of elections. These include returning officers, deputy officers, presiding officers, registration officers and election clerks.

For administration purposes the ECK is supported by a Secretariat and by district election coordinators (DECs) at the district level. The DECs, who are appointed by the president, head the district offices and their main responsibilities include safeguarding the ECK's assets, equipment and other property; authorizing expenditure and accounting for the ECK's funds; and serving as supplies officers in the districts. The Secretariat is headed by a secretary general assisted by a deputy administrative secretary and by the various department heads.

## **Powers and Functions**

The powers and functions of the ECK include boundary delimitation, voter registration, and the running of local and national elections. The law further mandates the ECK to register political party candidates for parliamentary and local elections and to determine the eligibility of candidates. The ECK is also responsible for voter education.

## **Financing**

The ECK is funded by the government. It submits its budget to Parliament for approval through the Ministry of Finance. It has no control over its disbursements and relies on the DECs to manage its finances at the district level. According to the ECK, such financial arrangements are unsatisfactory and inefficient, and undermine its independence, given that DECs are appointed by the president. In addition, the funding allocated is usually inadequate, and the ECK is treated as a government department, which forces it to rely heavily on donor funding. The ECK's work has also been hampered by delays in funding and irregular remittances. This has severely hindered the planning process, and in some cases disenfranchised some communities as the ECK was unable to reach them and facilitate their participation due to the lack of appropriate funding.

## Professionalism

The ECK's professionalism has been criticized in the past. Between 1991 and 1997 in particular, its image was tainted and it suffered from a reputation for incompetence and unfairness. An improvement was seen during the 2002 elections, and many observers noted the improved professionalism and credibility of the chairman and commissioners compared with the previous elections. However, many observers also noted that the ECK lacked the experienced and skilled professionals and needed to adopt a proper human resources development programme. A transparent recruitment and deployment programme was also recommended. At the end of 2005, the commission's staff did not have proper terms and conditions of employment. Late appointments and renewals of employment were also problematic.

## Relations with the Media and Other Institutions

The Kenya Broadcasting Corporation (KBC) is mandated by the Kenya Broadcasting Corporation Act to provide equal coverage to all political parties. The act also empowers the ECK in consultation with the KBC to allocate free air time to registered political parties during an election campaign. The ECK is not, however, mandated to intervene over or rule on the content of news broadcasts that may be of a partisan nature. The ECK's relations with the media improved significantly during the 2002 elections. For the first time the ECK set up a media centre with the purpose of disseminating information on the electoral processes to the media.

The ECK has taken measures to improve its relationship with the political parties, the police and civil society organizations, especially religious groups. Peace committees set up in all electoral districts have not only greatly improved the ECK's relations with key electoral stakeholders but also enhanced its capacity to enforce the Electoral Code of Conduct. As a result several candidates have been summoned and fined for violations of the electoral law. Peace committees have also served as conflict management bodies and enhanced both communication and conflict management between the ECK and its electoral partners.

## Accountability

The ECK is required to observe all financial regulations and accounting procedures in the management of its funds and the disbursement of funds. It is also subject to the Parliamentary Accounts Committee (PAC) for all accounting queries.

## Electoral Reform Management

The ECK is empowered by the National Assembly and Presidential Elections Act (section 34) to make regulations relating to the electoral process. Prior to the 2002 elections the ECK made new regulations to enhance the credibility of the electoral process, which were approved by the National Assembly in October 2002. The major changes included an amendment to allow for continuous registration of electors and the counting of ballot papers at the polling stations.

The ECK is also playing an important role in ongoing reforms such as the Constitutional Review. As and when it is enacted, the proposed new constitution is likely to further enhance the credibility of the electoral process, as it includes a strengthened ECK.

Over the years the ECK's ability to manage elections efficiently and its credibility and impartiality have been the subject of never-ending scepticism. Its major obstacle is overcoming this image and winning trust as a commission with the ability and professionalism to conduct credible elections. In order to achieve this, two issues now stand out – control over the recruitment and supervision of its entire election staff, and control over the funding of electoral administration. The ECK itself recommends that its funds should come directly from the Consolidated Fund.