

**GUARANTEEING THE INDEPENDENCE OF ELECTION MANAGEMENT BODIES IN
AFRICA: A STUDY OF THE ELECTORAL COMMISSIONS OF KENYA AND SOUTH
AFRICA**

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Pretoria

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27 October 2006

DECLARATION

I, **Edward Odhiambo Okello**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Signed this 27th day of October 2006.

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I, **Kingsley Kofi Kuntunkrunku Ampofo**, supervisor, have read this dissertation and approved it in partial fulfilment of the requirements for the Masters of Law Degree of the University of Pretoria, South Africa.

Signed this 27th day of October 2006.

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DEDICATION

This dissertation is dedicated to the Okello family. Your support has seen me this far. To you, I owe my success.

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LIST OF ABBREVIATIONS

AAPAM	African Association for Public Administration and Management
ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
BCLR	Butterworths Constitutional Law Reports (South Africa)
CC	Constitutional Court (South Africa)
CMI	Christian Michelsen Institution
CSSDCA	Conference on Security, Stability, Development and Co-operation in Africa
ECA	Electoral Commission Act
ECK	Electoral Commission of Kenya
EMBs	Election Management Bodies
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IEC	Independent Electoral Commission
IPPG	Inter-Party Parliamentary Group
MOJCA	Ministry of Justice and Constitutional Affairs
NAPEA	National Assembly and Presidential Elections Act
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
SADC	Southern African Development Community
SCC	Supreme Court of Canada
UNDP	United Nations Development Programme
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Elections are the most visible feature of democracy because they link the people to the government and bring about political control by the people.¹ Although not in themselves a guarantee for democracy, as Khabele has rightly observed, elections are usually considered as one of the key pillars of a working democracy.² Some of the functions of elections in the democratisation process³ include the legitimisation of the political system, succession of governments and leaders, linking political institutions with the voters and peaceful settlement of conflicts.⁴ Elections, therefore, play a crucial role in the democratisation process in the world, particularly, in Africa.⁵

The foundation for 'election rights' is to be found in article 21 of the Universal Declaration of Human Rights (UDHR).⁶ This provision has been reinforced by article 25 of the International Covenant on Civil and Political Rights (ICCPR), which states that:

Every citizen shall have the right and opportunity ...(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections

¹ This point was emphasised by the Supreme Court of Canada in the reported case of *Haig v Canada* 105 DLR (4th) 577 (SCC) 613 where the main issue before the Court was whether prisoners could be allowed to vote in elections. In its judgment, the Court discussed the concept of elections in depth and stated, among other things, that the right to vote is the hallmark of democracy since it enables individuals to determine how they want to be governed.

² M Khabele 'Election and conflict' *Election update 2004 South Africa* The Electoral Institute of Southern Africa 19 (2004) 9. Besides elections, other pillars of democracy include political parties, the rule of law, constitutional limits on government and individual civil liberties.

³ This study adopts the definition of democratisation given by Barry and others as 'the process by which states move towards more democratic forms of political system'. The democratisation process leads to democracy. Democracy denotes a political system where there is meaningful and extensive competition among individuals and organised groups, a highly inclusive level of political participation and protection of human rights. See A Barry et al *Politics: An introduction* (2002) 171.

⁴ Khabele (n 2 above). She discusses the functions of elections in society especially in the successful management of conflicts.

⁵ There are 53 states in Africa, which have different electoral systems and processes. This study is, however, limited to the electoral commissions of Kenya and South Africa and thus it might not cover some aspects of independence of electoral bodies in other African countries. Information on the African states available at <<http://www.african-union.org/root/au/memberstates/map.htm>> (accessed on 26 August 2006).

⁶ UDHR GA Res 217A (III) of 10 December 1948. Article 21(3) of the UDHR states that the 'will of the people shall be the basis of authority of government and this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.'

which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.⁷

The importance of elections in the contemporary world calls for the need to establish a body to manage the elections.⁸ The critical importance of and the continuing need for such a body was aptly captured by Goodwin-Gill when he observed that 'experience and recent state practice confirms the necessity for oversight of the electoral process'.⁹ This position is also captured by the Organisation of African Unity (OAU) [now African Union (AU)] Declaration on the Principles Governing Democratic Elections in Africa of 2002.¹⁰

Election Management Bodies (EMBs) have thus been established throughout the world with the responsibility of administering elections. However, merely creating a body to administer elections does not create public confidence and integrity in the electoral process. The establishment and operation of such a body must meet the key requirements of credible election administration. One such requirement is the need for the EMB to be independent of any party.¹¹ The independence of the EMB is said, by and large to attract the confidence of all the stakeholders in the electoral process and create integrity in the process.¹²

In Africa, elections have gained momentum over the last fifteen years since the wave of democratisation began sweeping across the continent in the early 1990s, which resulted in multi-party elections in many African countries.¹³ This wave of democratisation made Barkan to comment that:

⁷ See also article 13 of the African Charter on Human and Peoples Rights (ACHPR), article 23 of the American Convention on Human Rights and article 3 of the First Protocol to the European Convention on Human Rights, which are to the same effect.

⁸ In this study, election management refers to the preparation and planning of elections by putting in place an administrative infrastructure for the holding of elections.

⁹ GS Goodwin-Gill *Free and fair elections: International law and practice* (1994) Geneva: Inter-Parliamentary Union 42.

¹⁰ OAU/AU Declaration on the Principles Governing Democratic Elections in Africa 38th Ordinary Session of Assembly of Heads of State and Government of the OAU, Durban, South Africa (2002). Available at <<http://www.african-union.org/root/au/Documents/Decisions/202002>> (accessed on 23 August 2006). Principle 4(e) of the said Declaration underscores the need to establish electoral bodies in the member states of the AU.

¹¹ Apart from the need for EMBs to be independent, they are also required to conduct themselves with integrity, impartiality, transparency and professionalism. See the Stockholm Principles of 1996 available at <<http://www.idea.int>> (accessed on 22 August 2006).

¹² Besides the management of elections, other factors that affect the national electoral process are the electoral system, level of literacy, poverty and political accountability.

¹³ Huntington has defined a wave of democratisation as 'a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period. See S Huntington *The third wave: Democratisation in the late twentieth century* (1991) 15.

[t]he current round of elections hold out the possibility for the internalisation of democratic electoral systems to the extent that they are becoming the first or second in a series or regularly held contests... *Multiparty competitive elections are becoming the norm rather than the exception in Africa*. Even in countries where the electoral process has been seriously flawed or where elections have not resulted in change of regime... *the holding of free and fair competitive elections has become the universal standard*.¹⁴ (Emphasis mine)

However, as one scholar has observed, the lack of autonomy of EMBs from the government in some African countries is one of the major challenges to the credibility of the electoral process on the continent.¹⁵ It is important to note at this point that the independence of EMBs, though not in itself a guarantee of free and fair elections, determines to a large extent the overall legitimacy and acceptability of an elected government by the electorate.¹⁶ Flowing from this discourse is the need for the independence of EMBs in Africa both in theory and practice in order to enhance democracy on the continent.

1.2 Statement of the research problem

Elections have become fundamental features on the African political scene. This has been so particularly since the early 1990s when the phenomenon of competitive politics was introduced on the continent. Udombana has observed that by August 2000, multiparty elections had taken place in almost all African countries.¹⁷ However, in some instances there have been reports of election malpractices related to the lack of independence of EMBs.¹⁸ Accordingly, one commentator has observed that:

[a]lthough multiparty elections have become more frequent and regular, it is clear that the quality of these elections and their ability to provide an opportunity to citizens to determine who governs them has been

¹⁴ JD Barkan 'African elections in comparative perspective' cited in Lopez-Pintor *Electoral management bodies as institutions of governance* (2000) 18.

¹⁵ J Hatchard et al *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective* (2004) 111. In Togo, for instance, most activities in the electoral process are handled by the Interior Ministry which also supervises the Electoral Commission by virtue of article 3 of the Togolese Electoral Code 2000-007 of 2000.

¹⁶ MC Fombad 'Election management bodies in Africa: Cameroon's National Elections Observatory in perspective' (2003) 3 *African Human Rights Law Journal* 27.

¹⁷ NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1219. See also SI Lindberg 'The democratic qualities of competitive elections: Participation, competition and legitimacy in Africa' (2003) 41 *Commonwealth and Comparative Politics* 78.

¹⁸ Eg, Schumba has noted that the Zimbabwean electoral body lacks independence from the Government. According to him, this stems from section 61 of the Constitution of Zimbabwe which establishes the electoral body and further provides for the presidential appointment of the commissioners. The President also determines their tenure of office and conditions of service. For further reading see G Schumba 'A critical reflection of the 2002 presidential elections in Zimbabwe' (2002) 2 *African Human Rights Law Journal* 334. See also West African Civil Society Forum Election Observation Report on the Togo presidential elections of April 2005 which also observed that Togo's electoral body lacked independence from the Government. Available at <<http://www.wascof.org>> (accessed on 23 August 2006).

steadily reduced since 1994. One of the major contributing factors has been the frequent irregularities in the administration of elections designed to favour incumbents.¹⁹

While it is important to acknowledge that there is no perfect electoral system and that even in the established democracies election irregularities still occur, the situation in Africa is worrying and needs serious reforms if genuine democratic elections are to take place.²⁰ Of particular concern is the mode of appointment of commissioners, financial autonomy and operational autonomy which have sometimes made EMBs appear to lack the independence needed to achieve their objectives. This has been compounded by the nature of politics in Africa where some leaders seek to entrench themselves in power for life, a phenomenon that Thomson has called the 'Big Man' syndrome.²¹

Kenya and South Africa have established EMBs to manage elections in accordance with the UDHR, the ICCPR and the OAU/AU Declaration of 2002. The Kenyan EMB has been in existence since 1991. Recently, the issue of its independence has become a central focus in a raging national debate on minimum constitutional reforms in Kenya. Similarly, the independence of the South African EMB, though believed to be sufficiently safeguarded, has also come to be questioned. These institutions play a crucial role in the democratisation processes in both countries and one of the ways of achieving this goal is by ensuring their independence from the political process. This study proposes to examine the independence of the two EMBs and propose ways of strengthening them with a view to enhancing the work of democracy in both countries.

1.3 Justification for the study

The principle of free and fair elections is premised on the need for an effective management of elections. The process of overseeing elections is thus very important in achieving free and fair elections since this goes to the root of democratic governance. This in turn requires that the bodies responsible for the management of elections be independent from any quarter particularly the executive. Commentators hold the viewpoint that the independence of these bodies creates a conducive environment for democracy to thrive while at the same time it creates public confidence in the electoral process. As Dundas has observed, 'an electoral body, however styled, is not only

¹⁹ Fombad (n 16 above) 31.

²⁰ Pastor has observed that 'even in advanced countries, democracy is a work in progress; it is nowhere perfect.' Therefore, even in these countries, election errors such as defective ballots and incomplete and inaccurate voter's roll still occur. See Pastor 'A brief history of electoral commissions' in A Schedler et al (eds) *The self-restraining state: Power and accountability in new democracies* (1999) 75.

²¹ A Thomson *An introduction to African Politics* (2004) 237.

responsible for the monitoring of elections on the polling day; it is also the custodian of integrity and legitimacy of a key phase in the democratic process.²²

Africa has experienced and continues to experience problems in the management of elections.²³ Part of the problem lies in the scarcity of resources such as adequate funds, personnel and logistics. However, the major problem in the management of elections in Africa is the lack of independence of EMBs from the shackles of executive control.²⁴

This study proceeds from the premise that independent EMBs are necessary and important in the democratisation process in Kenya and South Africa given the role of elections in the two countries, the strong executive branch of government and the distrust among the political actors. This study is significant as it examines how the independence of the two EMBs can be strengthened in order to promote democracy in the two countries. It is hoped that this study will attempt to make a contribution towards laying a firm foundation for the independence of EMBs in the two countries.

1.4 Research questions

An attempt will be made to explore and examine the following questions:

1. What pillars are there for the independence of election management bodies?
2. To what extent have the said pillars been adopted both in Kenya and South Africa?
3. What reforms should be made to the electoral systems of Kenya and South Africa to enhance the independence of their electoral commissions?

1.5 Literature review

There is a wealth of literature on the subject of elections. Most of the extant materials deal with the broad principle of free and fair elections within the ambit of human rights law. However, there is by and large a dearth of materials on the management of elections in Africa especially on the independence of EMBs on the continent.

The book written by Good-Win Gill, in my view, provides the ideal starting point for any research on the electoral process.²⁵ The book examines the legal foundation for elections both at the international

²² WC Dundas (ed) *Lets talk about elections* London (1997) 208 quoted in Lopez-Pintor (n 14 above).

²³ Some of the problems in the administration of elections in Africa occur in voter registration, compilation of voters' roll, counting of votes and compliance with electoral laws by the political actors. Similar problems are endemic in other regions of the world.

²⁴ See D Pottie 'Electoral management and democratic governance in southern Africa' (2001) 28 *Politicon* 135.

²⁵ Good-Win (n 9 above).

and regional levels. It presents the international law criteria and conditions for the conduct of free and fair elections. Hatchard and others²⁶ have examined the broad concept of free and fair elections. Their book examines, in a comparative context, the concept of constitutionalism and good governance in the Commonwealth countries of eastern and southern Africa.

Lopez-Pintor's book titled 'electoral management bodies as institutions of governance' provides the foundation for the study of EMBs.²⁷ The book examines the place of EMBs in a democratising world and discusses the technical aspects of their sustainability and their contribution to the legitimacy of democratic institutions. It further examines the relationship between election management and governance. The book concludes by stating that EMBs are important institutions for democratic building and governance.

Fombad's article titled 'election management bodies in Africa: Cameroon's National Elections Observatory in perspective'²⁸ has made an important and illuminating contribution in this area. However, the article is based on the EMB of Cameroon and, therefore, it does not offer a comprehensive assessment of the electoral processes in other African countries.

The article written by Padmanabhan discusses the transitional democracy within the context of the South African elections of 1994 and 1999.²⁹ It examines the performance of South Africa's two post apartheid electoral commissions. Furthermore, it analyses the choices of institutional design that went into formulating the two bodies and reviews the problems that resulted from these decisions. Mozaffar's article titled 'patterns of electoral governance in Africa's emerging democracies' offers a good reading on this topic. The article explores the patterns of electoral governance in Africa's emerging democracies through a systematic examination of the autonomy of EMBs in 41 African countries based on certain independent variables.³⁰

²⁶ Hatchard (n 15 above).

²⁷ Lopez-Pintor *Electoral management bodies as institutions of governance* (2000).

²⁸ Fombad (n 16 above).

²⁹ V Padmanabhan 'Democracy's baby blocks: South Africa's electoral commissions' (2002) 77 *New York University Law Review* 1157.

³⁰ S Mozaffar 'Patterns of electoral governance in Africa's emerging democracies' (2002) 23 *International Political Science Review* 85.

1.6 Methodology

The study employs a non-empirical method of research. Therefore, the study has used scholarly materials such as books, journal articles, law reports and legal instruments. The study has also used Internet sources where appropriate and necessary. Emphasis has been put on the quality of authors of the materials used and the authenticity of the sources of information, particularly, where Internet materials are quoted and relied on. A comparative analysis of the independence of the EMBs of Kenya and South Africa has also been attempted.

1.7 Limitations of study

This study is not without limitations. The major limitation that has been encountered in the course of this study is the dearth of materials on election management, particularly, the independence of EMBs. There is hardly literature on the independence of EMBs especially on the Kenyan EMB. The case study of the selected two countries has also limited the scope of coverage of this study.

1.8 Overview of the chapters

Chapter one introduces the study and the problem statement that has prompted the study. Chapter two analyses the concept of independence of EMBs. It also discusses the justification for their independence. A comparative analysis of the independence of EMBs of Kenya and South Africa is the subject of chapter three. Chapter four proposes to discuss the ways of further strengthening the independence of EMBs of Kenya and South Africa. The fifth and final chapter proffers conclusions and recommendations.

CHAPTER TWO

THE NOTION OF INDEPENDENCE OF ELECTION MANAGEMENT BODIES

2.1 Introduction

This chapter begins with a discussion of the provisions of international and regional human rights instruments that provide for election management. This is important since the international and regional instruments usually provide the yardstick against which the electoral process in any state can be measured. The chapter also attempts to analyse the concept of independence of EMBs. Finally, the chapter concludes by proffering the justification for the independence of EMBs.

2.2 International foundation of election management

There are two major international human rights instruments that provide for 'election' rights: the UDHR and the ICCPR. However, one of the identified weaknesses of these instruments is their failure to provide in detail, the ingredients of election rights particularly on the management of elections.³¹ This situation arose from the under-development of election rights in these instruments. This weakness notwithstanding, it has not been disputed that elections have to be managed by a body created specifically for that purpose. As Good-Win has observed, election management by an independent and impartial body is one of the key ingredients of free and fair elections, which should be embraced by every nation.³² Due to the importance of election management in the contemporary world, the ingredients of free and fair elections have been complemented by declarations, general comments and resolutions, which now make it clear that elections need to be managed by an independent and impartial body. Of particular importance in this regard is General Comment 25 adopted by the United Nations Human Rights Committee (HRC) on article 25 of the ICCPR.³³ Accordingly, the HRC has interpreted article 25 of the ICCPR as requiring an independent electoral authority to be established to supervise the electoral process and to ensure that elections are conducted fairly, impartially and in

³¹ These instruments provide for the participation of every citizen in the public affairs of his country, which includes the right to vote and be elected at genuine and periodic elections to be held by secret ballot. These instruments omitted to define terms such as 'genuine' and 'free' elections because they may not have been controverted issues at the relevant times. See articles 21 of the UDHR and 25 of the ICCPR which provide for election rights.

³² Good-Win (n 9 above) 67. He identifies other ingredients of free and fair elections as the following: the electoral law and electoral system, constituency delimitation, the right to vote, voter registration, civic education and information, organisation of political parties and candidates, respect for civic liberties, media rights and complaints and dispute resolution.

³³ The HRC is established under article 28 of the ICCPR with the responsibility for handling human rights complaints from state parties and individuals, adoption of general comments on the provisions of the ICCPR and consideration of state reports.

accordance with established laws which are compatible with the ICCPR.³⁴ These instruments thus form the international foundation of election management.

2.3 Regional foundation of election management

Election rights are also provided for by the three regional human rights systems in the world.³⁵ Like the UDHR and the ICCPR, these instruments do not provide the ingredients of free and fair elections in detail. Indeed, the wordings of these instruments are identical to those of the UDHR and the ICCPR. However, the provisions of these instruments have been complemented by other instruments such as declarations and resolutions, which have also underscored the importance of election management. For instance, the OAU/AU Declaration of 2002 complements the provisions of the ACHPR on elections.³⁶ Similarly, the Memorandum of Understanding adopted by the African leaders in 2002 stated, among other things, the establishment by 2003, of independent national electoral commissions or other appropriate bodies where they did not exist to ensure free, fair and transparent elections in all African countries.³⁷

The African Commission on Human and Peoples' Rights also adopted a resolution in 1996 on the electoral process and participatory government where it affirmed the importance of elections and called on member states to take necessary measures to preserve and protect the credibility of the electoral process, particularly the management of elections.³⁸ The resolution requires African states to provide the EMBS with the necessary resources and materials for the preparation and holding of free and fair elections.³⁹

2.4 Defining the concept of independence of EMBS

Although there is literature on election management and some international and regional human rights instruments have been adopted on election management, there appears to be no agreed definition for

³⁴ Para 20 General Comment 25: (Article 25 of the ICCPR: Participation in public affairs and the right to vote). (Adopted by the HRC at its 1510th meeting on 12 July 1996. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument). (accessed on 12 September 2006).

³⁵ See n 7 above.

³⁶ See n 10 above.

³⁷ The Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA Solemn Declaration), Declarations and Decisions adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government (Lomé: AHG/Decl.4 (XXXVI), 12 July 2000); and the CSSDCA Memorandum of Understanding (Durban: OAU, July 2002).

³⁸ Resolution on Electoral Process and Participatory Governance, Nineteenth Ordinary Session, Ouagadougou, Burkina Faso 1996. Available at http://www.achpr.org/english/_doc_target/documentation.html?resolutions (Accessed on 5 September 2006).

³⁹ The Resolution, however, did not provide for sanctions for failure by OAU member states to comply with the requirements under it.

the term 'independence' in relation to EMBs. A simple definition adopted at a regional seminar in Morocco defined it as 'how separate from any party or sitting government the electoral body is.'⁴⁰ This definition, however, is narrow in that it does not mention the pillars of independence of EMBs. It is contended that defining the independence of EMBs by mentioning the pillars of their independence is important since they provide the benchmarks upon which their independence can be assessed. White has made an attempt in this area by providing the criteria that can be used to determine the independence of Chapter nine institutions in the South African Constitution.⁴¹ Accordingly, he defines the term 'independence' as meaning the following:

An independent body is one that is outside government, whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the executive and can be removed only on objective grounds relating to job performance, one that is sufficiently well funded by parliament to enable it perform its functions and one that has control over its own functions.

In my view, the concept of the independence of an electoral body implies, first, that such a body is established permanently either by the national constitution or by legislation which provides for its independence from any party in the performance of its functions and exercise of its powers; secondly that the staff of the EMB should be independent of any party on the mode of appointment, removal and their conditions of service; and thirdly that the budget of the EMB should not be determined by the executive. In this sense a truly independent EMB can perform its functions and exercise its powers in an environment where it is free from direction, control and supervision from any quarter.

2.5 From whom should EMBs be independent?

EMBs in this writer's considered view, should be independent from the government and any other party that is interested in the outcome of the elections such as private entities, public officials, politicians and political parties. There are some scholars, however, who are of the view that EMBs should be independent from the government more than any other category of individuals.⁴² This position appears to be influenced very much by a number of factors such as the arrangement of state

⁴⁰ Definition adopted at the Regional Seminar on Improving Electoral Administration Process and Mastering Mechanisms to Strengthen Democratic Governance in African Countries, 6–8 March 2006, Tangier, Morocco.

⁴¹ J White 'Independent Communications Authority of South Africa' in S Woolman et al (eds) *Constitutional law of South Africa* (2005) 24E-5. Chapter nine institutions include the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission. In this writer's considered view, White's definition has the merit of providing standards for evaluating the independence of EMBs.

⁴² A Sawyer 'Governance and democratisation' in A Adebajo & I Rashid (eds) *West Africa's security challenges: Building peace in a troubled region* (2004) 103.

apparatus and the fact that the management of elections is usually undertaken by the government or governmental bodies.⁴³

2.6 Pillars of independence of election management bodies

The pillars of independence of EMBs are the normative standards that set the minimum attributes pertaining to the independence of EMBs. They provide the conditions for the independence of EMBs. For the sake of clarity, a distinction must be made at this point between two types of independence: formal independence and practical independence.⁴⁴ Formal independence is based on the law and deals with, *inter alia*, the establishment of EMBs, the mode of appointment of commissioners and their terms and conditions of service. Practical independence is concerned with the actual practice, that is, the operational independence of EMBs. Regardless of the type of EMB chosen, formal and practical independence must exist in order that an EMB can be regarded as fully independent. The following pillars determine the degree of independence of EMBs.

2.6.1 Permanency

The permanency of an EMB is at the core of its independence, institutional capacity building and sustainability. Permanency is usually provided by the law through the national constitution or legislation. However, the constitutional establishment is preferable since the constitution is the supreme law of the land and is usually difficult to amend.⁴⁵ Establishment by law guarantees the independence of an EMB and at the same time provides it with its constitutional and statutory powers and functions thus insulating it from sudden changes. The establishment of a permanent secretariat is another way of ensuring the permanency of an EMB as this enables it to engage permanent staff.

2.6.2 Appointment of commissioners and composition of EMBs

The mode of appointment of commissioners is crucial in ensuring the independence of an EMB. It is a confidence building exercise and contributes greatly to the image and integrity of the EMB. The mode of appointment of commissioners is, however, dependent on the nature of the EMB in question. Regardless of the nature of the EMB, the mode of appointment of commissioners must be provided by the law. The mode of appointment must also be clear, transparent and inclusive in order to increase operational independence and effectiveness of the EMB. The participation of the legislature in the

⁴³ Eg, in developed countries such as the United Kingdom and Switzerland elections are still being overseen by government departments.

⁴⁴ Mozaffar (n 30 above) 90.

⁴⁵ In Costa Rica and Venezuela, taking two examples from outside the African continent for purposes of comparison, it is noted that permanency has been guaranteed by establishing their EMBs as the 'fourth' branch of government with the status of the executive, legislature and judiciary. See Lopez-Pintor (n 27 above) 123.

appointment process is important and necessary at all levels. The mode of re-appointment of commissioners must be transparent, clear and inclusive. With regard to the composition, it must be broad based with manageable number of commissioners. This ensures that the people with right qualifications and background credentials are appointed as commissioners.⁴⁶

2.6.3 Conditions of service

The provision of satisfactory conditions of service is a prerequisite for the independence of EMBs. Satisfactory conditions of service for commissioners would enable them to perform their duties without fear of prosecution or dismissal. The conditions of service in this respect include the salaries, allowances, term of office and legal immunity. Due to the importance of the conditions of service in determining the independence of an EMB, it is necessary that the law provides for them. A regular review of the conditions of service needs to be conducted by an independent body specifically created for this purpose. This is important since it reduces the executive involvement in the process, which can undermine the independence of the EMB. In this regard, the term of office must not be too short to create uncertainty on the part of the commissioners, nor should it be too long to entrench them in their offices.⁴⁷ In addition, as Venter has proposed, the term of office must not coincide with the normal term of an elected government.⁴⁸ The remuneration of commissioners needs to reinforce integrity, independence and professionalism. Protection of the commissioners from legal action arising from any action taken in good faith in their official capacity is also necessary in ensuring that they act without fear or favour. However, the immunity must not cover cases of corruption or actions taken in bad faith.

2.6.4 Removal from office

The critical issues on the removal of commissioners concern the mode of removal and the institution to undertake it. It is important that commissioners enjoy security of tenure of office. In this regard, there needs to be a stringent procedure for the removal of commissioners. A stringent removal procedure may serve to insulate them from arbitrary removal from office and thereby ensure their

⁴⁶ Sawyer (n 42 above) 103. Individuals of high moral stature can play a crucial role in ensuring the independence of an EMB thus making its processes acceptable to all actors.

⁴⁷ Currently, the general trend is a renewable five years term. Longer non-renewable terms are a better guarantee of independence than renewable shorter terms. This is because the commissioners should not fear dismissal or non re-appointment if they act against the government.

⁴⁸ D Venter 'Elections and electoral systems in emerging democracies: A case for electoral system re-design in Malawi' a paper presented at the Constitutional Review Conference in Lilongwe 28-31 March 2006.

independence. Presently, removal by way of a tribunal like the ones for judges seems to be the preferred choice.⁴⁹

2.6.5 Hiring and firing of staff

Who should hire and fire the staff of the EMB? This is one of the questions that new democracies have to grapple with particularly due to the problem of scarce resources. An independent EMB needs to have the power to hire and fire its own staff according to its needs. However, this does not mean that it cannot request the government to provide it with resources to enable it undertake certain activities such as voter registration. Electoral staff and other personnel who are hired by an EMB are likely to owe their allegiance to the EMB and are likely to be more independent than those seconded by the government.

2.6.6 Operational autonomy

The term 'operational autonomy' relates to the daily activities of an EMB such as the planning, supervision and formulation of elections. Operational autonomy is important since it enables the EMB to determine its own activities and agenda. It also enables the EMB to operate without receiving instructions or directions from any quarter.⁵⁰ Autonomy operates at all stages of the electoral process. However, this does not mean that it can operate outside its powers or functions. Similarly, it does not mean that it cannot co-operate with other bodies in the performance of its functions. Co-operation with other bodies is important, but this needs to be done carefully so that it does not impair the EMB's operational independence.

2.6.7 Financial autonomy

The effectiveness of an EMB is adversely affected by the availability of resources especially its financial resources. This is because elections require a lot of financial resources. The requirement for financial autonomy ensures that an EMB has access to adequate financial resources to enable it perform its functions effectively. It also means that an EMB has control over its financial resources and determines their use. It is, therefore, important that an EMB enjoys financial autonomy from the government. The independence of an EMB can be affected by the allocation or timing of release of funds to it by the government. One of the ways of ensuring financial autonomy is by enabling it to

⁴⁹ Eg, under article 146 of the Constitution of the Republic of Ghana of 1992, an electoral commissioner can only be removed by the President upon recommendation by a Special Committee established by the Chief Justice for that purpose or on grounds of 'stated misbehaviour or incompetence or inability to perform the functions of his office due to infirmity of the body or mind.'

⁵⁰ In some African countries, EMBs seem to have a limited role in the election process since government ministries undertake most of the election activities. Eg, in Togo the Ministry of Interior has the responsibility for elections in the country. (See n 18 above).

prepare its own budget, which is then approved by the legislature. Indeed, this point was articulated by the South African Constitutional Court in the reported case of *New National Party v Government of South Africa and others (New National Party case)* when it held, *inter alia*, that:

Financial independence implies the ability of the Commission to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act...It is for Parliament, and not the executive arm of Government to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate.⁵¹

Financial autonomy also allows EMBs to determine their priorities and activities and attempt to achieve them in time without interference from any quarter. It also enables them to raise funds from other sources such as foreign donor agencies. In this sense, the financial independence of EMBs is guaranteed.

However, it is worth noting that like any other state agency, the independence of an EMB is not absolute. The independence does not mean that it is completely divorced from the government in its operations. Absolute independence is not possible as this can lead to undesirable consequences. An EMB has to co-operate with other government agencies in order to achieve its objectives, but this should not affect its independence.

2.7 Were election management bodies designed to be independent?

Mozaffar and Schedler have observed that EMBs originated from the political struggle and historical experiences in society.⁵² Lopez-Pintor has also noted that EMBs emerged in the late 18th century when mass elections were introduced in Europe and North America.⁵³ EMBs, he has further asserted, developed within the executive arm of the government because the running of elections was then considered as a public service operation best carried out by the government. Therefore, in many old democracies such as those of Western Europe and North America, EMBs were structured within the government as departments of the Ministries of Home Affairs, Interior and Territorial Administration.⁵⁴

⁵¹ 1999 5 BCLR 489 (CC).

⁵² S Mozaffar & A Schedler 'The comparative study of electoral governance – Introduction' (2002) 23 *International Political Science Review* 13.

⁵³ Lopez-Pintor (n 27 above) 131.

⁵⁴ Pastor (n 20 above) 77.

The decolonisation process after the Second World War led to the creation of new electoral authorities in the form of electoral commissions in the colonies.⁵⁵ However, most of the new electoral bodies were structured within the government. According to Pastor, the increased democratic space and the third wave of democratisation that started in the 1970's created an opening for agitation for independent EMBs.⁵⁶ Political actors often questioned the legitimacy of the executive in playing the role of a referee in the competition for power.⁵⁷ It was during this period that calls intensified in the old democracies aimed at making EMBs independent or creating new ones where none existed. These calls succeeded in some few countries where permanent and independent EMBs were established.⁵⁸ However, it is important at this point to note that some countries had independent EMBs even before the agitation began in the 1970s.⁵⁹

In Africa, EMBs were established during the colonial period to manage elections. They were established within the formal governmental arrangement.⁶⁰ The independence of African countries led to some changes of the electoral law. One of the major changes related to the status of the EMBs and the security of tenure of office of the election officials. However, with some few exceptions such as Nigeria, the position of EMBs remained within the government.⁶¹ This position was maintained in many African countries after independence.⁶² However, the introduction of one-party systems in many African states after independence seemed to have greatly affected the position and ability of these bodies to promote free and fair elections.⁶³

⁵⁵ R Lopez-Pintor 'Opportunity, scope and method of a handbook on structuring electoral management bodies' (2004) Stockholm: International Institute for Democracy and Electoral Assistance 2.

⁵⁶ Pastor (n 20 above) 75.

⁵⁷ The period of the 1970s is significant since according to Huntington, it marked the beginning of the third wave of democratisation, which started in 1974. See Huntington (n 13 above) 15.

⁵⁸ Eg, the EMBs of the United States, Australia and New Zealand were established in 1975, 1984 and 1993 respectively. See Lopez-Pintor (n 55 above) 2.

⁵⁹ Independent EMBs were established in Chile, Costa Rica and Uruguay in 1925, 1925 and 1924 respectively. See FE Lehoucq 'Can parties police themselves? Electoral governance and democratisation' 23 *International Political Science Review* (2002) 36.

⁶⁰ Mozaffar (n 30 above) 88.

⁶¹ Mozaffar has observed that in Anglophone Africa, the responsibility of managing elections rested with career civil servants who enjoyed security of tenure of office. In Francophone and Lusophone Africa, the responsibility of elections rested with the Ministry of Interior or Territorial Administration. Accordingly, he observed that the EMBs inherited by African countries at independence were not autonomous. See Mozaffar (n 30 above) 89.

⁶² Eg, in Kenya the position of the Supervisor of Elections was retained after independence until 1992 when it was abolished. Information available at <<http://www.eck.or.ke>> (accessed on 1 October 2006).

⁶³ See A Jinadu 'Matters arising: African elections and the problem of election administration' (1997) 2 *African Journal of Political Science* 2. One-party system was introduced in nearly all African states after independence with the exception of Botswana, the Gambia and Mauritius.

The advent of multiparty politics in Africa in the early 1990's led to constitutional changes that established permanent and independent EMBs to manage elections in some African countries.⁶⁴ In countries such as Togo, Cameroon and Tunisia, election administration were entrusted to the Ministries of Interior or Territorial Administration.⁶⁵ Yet, in others such as Nigeria and Sierra Leone, the existing EMBs were strengthened. The agitation for more independent EMBs intensified after the first multiparty elections in some African countries.⁶⁶ Various reasons were advanced for the electoral outcome in those countries. One of the reasons advanced by independent election observers was the lack of autonomy of some EMBs from their governments which weakened their ability to manage elections effectively and independently.⁶⁷ Accordingly, reports recommended for the electoral reforms in those countries particularly on the independence of EMBs. Indeed, these views were expressed in Africa when the report of a seminar on election administration in Africa was adopted in Accra, Ghana in 1993.⁶⁸ Some of the recommendations of the Report were as follows:

- i.) A permanent, independent and credible electoral agency should be responsible for organising and conducting periodic free and fair elections in the African states;
- ii.) The mandate of the electoral agency should be defined in the Constitution and should include the method of conducting elections; voter and other civic education; constituency delimitation; registration of voters, parties and candidates; formulation of electoral policies and procedures; and settling disputes in electoral matters;
- iii.) The composition of the electoral agency should include a reasonable number of members; they should be non-partisan, enjoy security of tenure, and be appointed by the head of state, subject to approval by parliament;
- iv.) The agency should be adequately funded, with all its expenses as a direct charge on the Consolidated Fund and be granted autonomy to establish its own accounting procedures and greater flexibility in procurement procedures than the government bureaucracy; and
- v.) Legal provision should be made to allow the electoral authority to mobilise additional staff and other resources during the conduct of elections.⁶⁹

⁶⁴ Eg, in Kenya, the Electoral Commission of Kenya replaced the Supervisor of Elections in 1990 vide a constitutional amendment number 17 of 1990.

⁶⁵ Lopez-Pintor (n 27 above) 40.

⁶⁶ Barkan has observed that failure to obtain democracy at the initial electoral experiences provided the basis for agitation for independent EMBs. Mozaffar has also observed that most of the controversies that surrounded the first multiparty elections in Africa mainly related to non-independence of the EMBs. There was consensus among the political actors that the administration of elections particularly the independence of the EMBs had to be reviewed. See Barkan (n 14 above) and Mozaffar (n 30 above).

⁶⁷ Eg, the Commonwealth Report on the 1992 elections in Kenya revealed many irregularities in the management of the elections some of which arose due to the lack of independence of the Electoral Commission of Kenya. For further reading see the Report of the Commonwealth Observer Group, Presidential, Parliamentary and Civic Elections in Kenya, Commonwealth Secretariat, 1993.

⁶⁸ African Association for Public Administration and Management (AAPAM) (1993) *Senior Policy Seminar on Strengthening Electoral Administration in Africa* Accra: AAPAM.

⁶⁹ See n 68 above.

Some of the changes on election management on the continent reflect these recommendations. The new EMBs on the continent increasingly tend to be commissions that are independent and permanent.⁷⁰ This trend still continues and calls to make EMBs independent in all respects are still being made throughout the world. One scholar has aptly remarked thus:

[t]he winds of reform are leading worldwide towards the creation of electoral authorities in the form of commissions that are permanent and independent of the executive, that include political party representatives, and that are staffed largely by professional civil servants.⁷¹

From the foregoing, it can be concluded that the initial designation of EMBs was not intended to make them independent from the government. Instead, they were expected to function within the existing governmental apparatus. However, the wave of democratisation that started in the 1970s, which intensified after end of the Cold War led to changes that elevated them to independent state institutions.⁷²

2.8 Accountability of election management bodies

Can EMBs be independent and accountable? To which institution should they be accountable? These are some of the issues that must be addressed by the law establishing EMBs since the accountability arrangements can affect EMBs' independence. It is important, however, to note that the independence of EMBs does not affect their accountability. Granted with their independence, EMBs still remain state institutions which conduct public functions. They must, therefore, be accountable to the state and the public. One of the ways of ensuring accountability is through the reporting process whereby they submit their annual reports to the legislature for scrutiny.⁷³ The annual reports usually contain detailed accounts of their activities. This process is necessary since it helps in maintaining public confidence in EMBs and ensures that they perform their functions effectively. It also ensures that they use public funds appropriated to them for the intended purposes.

The auditing of the financial accounts of EMBs by the Auditor-General is another way of making them accountable. Since EMBs are state institutions, their financial accounts must be audited by the

⁷⁰ Eg, the principles governing the establishment of some new EMBs in Africa such as those of Botswana, Mozambique, Namibia and South Africa seem to reflect these recommendations. See Lopez-Pintor (n 27 above) 43.

⁷¹ Lopez-Pintor (n 27 above) 120. New EMBs have been established in countries such as Mexico in 1990, Paraguay in 1996, Ukraine in 1998, Britain in 2000 and Sweden in 2000. In the US, calls have been made to make the Federal Commission more independent than it is presently. See the US Election Observation Report '2004 US Election: An international perspective,' (2004) Fair Election International 5 (available at <<http://www.fairelection.us>> (accessed on 21 August 2006)).

⁷² See Pastor (n 20 above) 75.

⁷³ Padmanabhan supports this mode of accountability because, according to him, it insulates the EMB from the political process and also checks the EMB's expenditure of public funds. See Padmanabhan (n 29 above) 1157.

Auditor General to ensure to ensure financial probity. Finally, EMBs also need to be accountable to the public through the publication of their reports or through other mechanisms. For instance, the dissemination of newsletters, pamphlets or booklets on their activities to the public is likely to foster public understanding of their activities. They can also ensure accountability through the assessment of their performance by the public.

2.9 Justification for the independence of election management bodies

From our discussion above, we have seen that EMBs were never intended to be independent entities different from the government. We also saw that the agitation for their independence in Africa increased from the early 1990s after the first multiparty elections had been conducted in some African countries. The question that arises is why should these bodies be independent?

Firstly, as has been stated in the previous chapter, elections are a necessary component of democracy since they provide the only peaceful and impartial mechanism through which well informed and rights-conscious citizens can participate in the affairs of the government.⁷⁴ Due to this importance, it is necessary that elections be conducted and administered by a body that is immune from political interference from any quarter. In this regard, as Lehoucq has rightly observed, there is the need to de-politicise the electoral governance. One of the ways of achieving this is by establishing an independent EMB.⁷⁵ This is likely to generate acceptance of the electoral process by the electorate and thereby ensure regime legitimacy.

Secondly, democratic elections are based on the notion that elections should be free and fair and that the will of the people should be reflected in the electoral outcome. The principle of free and fair elections is based on certain precepts. One such precept is an independent and impartial EMB to administer elections. As Mozaffar has aptly put it, the establishment of an independent EMB has become a 'compelling' international norm, a *sine qua non* of electoral credibility.⁷⁶ In contemporary Africa, the centrality of elections presupposes the existence of an independent and impartial body to manage the elections. An independent body would, therefore, be important in levelling the political playing field and also ensure that the political actors comply with the law.

⁷⁴ See n 1 above.

⁷⁵ Lihoucq (n 59 above) 36.

⁷⁶ Mozaffar (n 30 above) 16.

Thirdly, EMBs perform crucial functions such as organising, conducting and supervising elections at periodic intervals, demarcating electoral boundaries, voter registration and voter education. They are also charged with compiling and maintaining voters' roll and counting of votes. These are crucial functions, which have serious implications on the direction and survival of a country. As Hatchard has noted, a failure by an EMB to perform any of these duties satisfactorily can have undesirable consequences due to the interests at stake.⁷⁷ It is in this regard that the independence of EMBs is vital since this can prevent problems of poor election administration.

Fourthly, as Hammerstad has rightly observed, the creation of an independent EMB is one of the ways of preventing electoral violence.⁷⁸ This is because an independent body is likely to take control of the electoral process. It thus becomes difficult to perpetrate fraud or abuse the process hence reducing the chances of violence considerably.

2.10 Conclusion

The foregoing discourse has demonstrated that election management has become firmly established both at the international and regional planes. Moreover, states are now striving to establish permanent and independent EMBs to administer elections. To borrow some commentators' words, the establishment of permanent and independent EMBs has become a *sine qua non* of electoral credibility.⁷⁹ Thus, it is important that EMBs be established with the essential pillars of their independence and accountability arrangements in mind. Having examined the pillars of independence of EMBs in this chapter, the study now turns to the extent to which these pillars have been adopted in Kenya and South Africa.

⁷⁷ Hatchard (n 15 above) 111.

⁷⁸ A Hammerstad 'African commitments to democracy in theory and practice: A review of eight NEPAD countries' *African Human Security Initiative June 2004*. Available at <<http://www.africanreview.org>> (accessed on 23 August 2006).

⁷⁹ Mozaffar & Schedler (n 53 above) 15.

CHAPTER THREE

AN APPRAISAL OF THE INDEPENDENCE OF THE ELECTORAL COMMISSIONS OF KENYA AND SOUTH AFRICA

3.1 Introduction

Kenya and South Africa have different electoral systems and processes.⁸⁰ This is partly due to the different historical backgrounds leading to the creation of their electoral systems. While Kenya changed from one-party system to multiparty system in 1991, South Africa conducted its first democratic elections in 1994. However, the differences in the electoral systems and backgrounds notwithstanding, the two countries have established EMBs to manage elections. This chapter seeks to examine the extent to which the EMBs of the two countries have achieved electoral independence.

3.2 The Electoral Commission of Kenya

3.2.1 Historical background

The Electoral Commission of Kenya (ECK) was established in 1991 through an amendment to the Kenyan Constitution.⁸¹ At first, the ECK was composed of nine commissioners who were appointed by the President, but the number was first increased to 11 and then to 12 in 1992 and 1993 respectively. The critical test of the independence of the ECK came in 1992 when the first multiparty elections were conducted in Kenya. According to several observer reports on the elections, the management of the elections by the ECK was below standard.⁸² Part of the problem, it was stated, stemmed from the lack of independence of the ECK, particularly, the mode of appointment of commissioners and its composition. The President had the power to appoint the commissioners without consulting anybody or authority. This situation changed in 1997 when the Inter-Party Parliamentary Group (IPPG) agreed that parliamentary parties would nominate commissioners according to their parliamentary strength. The agreement enabled the opposition to propose ten additional commissioners who were subsequently appointed by the President.⁸³

⁸⁰ Kenya has First Past the Post electoral system where the candidate who receives the highest votes is declared a winner while South Africa has a Proportional system where seats are allocated proportionally to the votes cast for each party.

⁸¹ Amendment No 17 of 1990. The ECK replaced the Supervisor of Elections who was a civil servant. Information available at <<http://www.eck.or.ke>> (accessed on 1 October 2006).

⁸² See one such report, that is, the 1993 Report of the Commonwealth Observer Group (n 67 above).

⁸³ Information available at the ECK website (n 81 above).

3.2.2 The legal framework of the ECK

There are various laws that provide for the management of elections by the ECK. However, the most important laws for this study are the Constitution, the National Assembly and Presidential Elections Act,⁸⁴ the Election Offences Act⁸⁵ and the Local Government Act⁸⁶. The Constitution establishes the ECK with functions and powers to administer and supervise elections in Kenya. It also provides for the appointment of commissioners, their conditions of service, security of tenure, operational independence and removal procedure.⁸⁷

The National Assembly and Presidential Elections Act (NAPEA) buttresses the constitutional provisions by giving the ECK the overall power to conduct presidential and parliamentary elections in Kenya. It also empowers the ECK to make regulations for the proper conduct of elections. Furthermore, it contains an Electoral Code of Conduct and gives the ECK the right to conduct prosecution for an offence under the Code. At the council level, the Local Government Act provides the foundation upon which the ECK administers local government elections in Kenya. The Election Offences Act prescribes the election offences and sanctions for the offences. Do these laws provide adequate safeguards for the independence of the ECK? The next part of this discourse attempts to provide answers to this question.

3.2.3 Independence of the ECK

Permanency

Section 41 of the Constitution establishes the ECK and gives it the power to conduct elections in Kenya.⁸⁸ The constitutional establishment is important because it gives the ECK permanency since it can only be amended by a two-thirds majority of all the members Parliament.⁸⁹ Permanency also implies accumulation of administrative experience by the commissioners. Can it then be concluded that the constitutional provisions provide adequate measures aimed at ensuring the permanency and, therefore, the independence of the ECK? While the answer to this question is likely to be in the affirmative, it is important to note one weakness of these provisions and indeed the whole Constitution: the lack of entrenched provisions of the Constitution. Entrenched provisions would

⁸⁴ Chapter 7 of the Laws of Kenya.

⁸⁵ Chapter 66 of the Laws of Kenya.

⁸⁶ Chapter 265 of the Laws of Kenya.

⁸⁷ Secs 41, 42 & 42A of the Constitution.

⁸⁸ The Code of Conduct for members and staff of the ECK in the Second Schedule of the NAPEA reinforces the guarantees of the ECK's independence by providing for rules for the impartiality and independence of its members and staff.

⁸⁹ Section 47(2) of the Constitution.

provide additional safeguards against any changes that may be effected by a majoritarian government to important provisions of the Constitution such as those establishing independent oversight bodies.⁹⁰

Appointment of commissioners and composition

Section 41 of the Constitution provides for appointment of the ECK Chairman and between four and 21 commissioners by the President. The Chairman and the Vice-Chairman must be persons who have held or are qualified to hold the office of judge of the High Court or judge of appeal under the Constitution. The ECK is currently composed of 22 commissioners nominated by parliamentary parties and appointed by the President. However, while this move is welcome, the large number of commissioners poses a concern about the efficiency of the ECK.⁹¹

The appointment of commissioners as agreed by the IPPG in 1997 also suffers from non-stipulation by the law. The constitutional provision still reflects the pre-IPPG agreement meaning that the President still has the sole discretion to appoint commissioners.⁹² Indeed, the President appointed five new commissioners in 2006 without consulting the opposition parties.⁹³ How can such presidential appointees enhance the independence of the ECK? Can they resist pressure to act according to the whims of the President? While it is important to acknowledge that such an appointment does not necessarily mean subservience to the appointing authority, the mode of appointment creates an impression that the commissioners might be susceptible to the influence of the executive. This is especially so in a society characterised by politics of patronage and tribalism such as the case of Kenya.⁹⁴

Section 41(3) of the Constitution provides for the category of persons not qualified for appointment to the ECK. Accordingly, a member of the National Assembly, armed forces or public service cannot be appointed as a commissioner. However, what is not clear from this provision is whether persons who hold high political positions in parties are eligible for appointment as commissioners. The Code of

⁹⁰ Entrenched provisions protect certain constitutional provisions from sudden changes such as clauses on state sovereignty, bill of rights and state boundary. Thus, they require special amendment procedures which are usually more stringent than the requirements for amending ordinary constitutional provisions.

⁹¹ There has been a debate on the number of commissioners with some people suggesting that the current number of commissioners needs to be reduced. See 'Kivuitu under siege as government seeks control of ECK' *Kenya Times* 10 August 2006 6.

⁹² Sec 41(1) of the Constitution.

⁹³ See 'Kivuitu warns on extra MPs for 2007' *Daily Nation* 8 August 2006 1.

⁹⁴ See, for instance, K Masime & G Kibara 'Regime transitions and the institutionalisation of democracy in Kenya: The December 2002 elections and beyond' (2003) 1 *East African Journal of Human Rights and Democracy* 19. See also S Brown 'Theorising Kenya's protracted transition to democracy' (2004) 22 *Journal of Contemporary African Studies* 334. The

Conduct for the ECK, which bars its members from appointment to any political office only deals with those who are already appointed as commissioners. Moreover, this is an important issue that should not be left to a Code of Conduct whose enforcement is weak.

Another weakness in the law regards the re-appointment of commissioners. How should they be re-appointed? Should it be automatic upon successful completion of one's term and for how long should it be? These are issues that the Kenyan law does not provide answers for. This means that the President has the sole discretion to decide whether to extend the term of commissioners. This situation is the antithesis of the transparent and inclusive process required for the appointment of commissioners and has serious effects on the ECK's independence.⁹⁵

Removal of commissioners

According to section 41(5) of the Constitution, a commissioner serves for five years and can only be removed from office due to inability to perform the functions of his office or for misbehaviour. In such a case a Tribunal must be established by the President to enquire into the question of his removal from office. According to section 41(7), the members of the Tribunal must be people who are qualified to be appointed as judges of the High Court or Court of Appeal.⁹⁶ Similarly, those who hold office of the judge of the High Court or Court of Appeal and those who have held such office or Senior Counsel are also qualified for appointment to the Tribunal.⁹⁷ Indeed, the removal procedure is similar to that of removing judges of the High Court and Court of Appeal from office.⁹⁸ The removal procedure thus insulates the commissioners from interference from any quarter hence guaranteeing the independence of the ECK.

Terms and conditions of work

Section 41(4) of the Constitution provides for the security of tenure for a period of five years. Furthermore, since commissioners hold constitutional offices, their salaries and allowances are sourced directly from the Consolidated Fund, thus removing payment of their salaries and allowances

commentators have observed that the culture of cronyism, patronage and tribalism are some of the major problems that have affected the institutionalisation of democracy in Kenya.

⁹⁵ See 'Panic grips ECK over term renewal' *Kenya Broadcasting Corporation* 19 September 2006 1. Available at <<http://www.kbc.co.ke/story.asp?ID=38680>> (accessed on 20 September 2006).

⁹⁶ According to section 61 of the Constitution, a person is qualified to be appointed as a judge of the High Court if he is an advocate of the High Court of Kenya who has practised for at least seven years or has been a judge having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth.

⁹⁷ The qualification for appointment to the Tribunal ensures that people who have the experience of the law are appointed. This threshold is also important because of the perception that judges are usually above politics.

⁹⁸ Sec 41(7) of the Constitution.

from the annual budget.⁹⁹ Moreover, by virtue of section 3A of the NAPEA, the ECK and its staff are immune from any personal liability for actions done in good faith during the performance of their duties. However, one of the shortcomings is the term of office, which usually coincides with the normal term of an elected government.¹⁰⁰ This can have serious implications on the independence of the ECK since the commissioners would be concerned about their re-appointments during the electioneering period.

Administrative independence

Section 41(9) of the Constitution provides that the ECK shall not be subject to the direction of any other person or authority. This means that it can determine its own agenda and implement them without taking directions from any quarter. The ECK has a secretariat which is independent of the government. The secretariat was established in July 1998. However, there have been attempts to interfere with the ECK's mandate under the Constitution. For example, recently some Members of Parliament stated that Parliament would determine the location of additional constituencies to be created. This move made the Vice-Chairman of the ECK to remark that:

The Commission would not let Parliament do its work. They (MPs) can as well take the ECK job if they think they know best how to carve out the country. As far as ECK is concerned, the Constitution spells out considerations to factor in the exercise. It is the only law we know.¹⁰¹

In addition, the ECK is mandated to make regulations, but the regulations have to be adopted by Parliament before they come into force. This affects the independence of the ECK since Parliament can delay in adopting the regulations. Why should the ECK be denied the power to adopt regulations, which in any event are amenable to judicial review by the court?

Hiring of staff

Section 41(10) of the Constitution gives the ECK the power to hire its own staff. However, Parliament has been empowered to make provisions for the orderly and proper conduct of the ECK's functions.¹⁰² Under section 3 of the NAPEA, the ECK has complete authority to appoint officials for the conduct of

⁹⁹ Sec 104(5) of the Constitution.

¹⁰⁰ Eg, the terms of office of 18 out of the 22 commissioners will expire shortly before the next elections in December 2007.

¹⁰¹ 'Row looms over plans to review electoral boundaries' *The Standard* 31 July 2006 1. According to section 42 of the Constitution, Parliament has power to review the number of constituencies, but the responsibility of determining the location of the constituencies rests with the ECK.

¹⁰² The main threats to the operational independence are sections 24 and 25 of the Constitution. Section 24 gives the President the power to establish and abolish any public office in Kenya while section 25 provides that anybody who holds a public office in Kenya does so at the pleasure of the President. Offices of the ECK are public offices and can be affected by any decision based on these sections.

elections without the control of anybody. The ECK has also been empowered to determine the terms and conditions of its staff in consultation with the Treasury. However, the relationship between the ECK and other institutions particularly the Ministry of Justice and Constitutional Affairs (MOJCA) is not clearly spelt out. Indeed, this resulted into war of words between the ECK and the Ministry in 2003 over the issue whether the ECK was responsible to the Ministry or Parliament.¹⁰³ This issue has never been resolved and it remains a threat to the independence of the ECK.¹⁰⁴

Financial autonomy

The ECK lacks financial autonomy since its funds come from the Government and its budget is listed as an item under the budget of MOJCA. The dilemma of the ECK has been aptly captured by some commentators thus:

Despite the prescription that the ECK is independent, complaints have emanated from the Commission that it is hampered by several limitations in carrying out its mandate independently and effectively. These include the lack of fiscal independence ...There is no doubt that the absence of fiscal autonomy leaves the ECK vulnerable to undue pressure from the executive upon which it depends for the allocation of resources ...Consequently the executive may compromise the ECK's independence and activities by starving it of resources.¹⁰⁵

Worse still, the ECK is usually under-funded between elections, a situation that has affected its functions such as voter registration and education.¹⁰⁶ In order to ensure financial probity, section 105(2)(c) of the Constitution provides for the audit of its financial expenditure by the Controller and Auditor General.

3.3 The Independent Electoral Commission of South Africa

3.3.1 Historical background

The history of the Independent Electoral Commission of South Africa (IEC) is a short one. The 1994 elections were the first democratic elections in South Africa, the previous ones having been restricted to minority South Africans.¹⁰⁷ Prior to the 1994 elections, the responsibility for elections rested with the Department of Home Affairs. The Department derived its powers from the Electoral Act which

¹⁰³ See Masime & Kibara (n 94 above) 23. MOJCA has been listed as the administrative Ministry responsible for elections hence the responsible Ministry for the ECK. Available at <<http://www.justice.go.ke>> (accessed on 5 September 2006).

¹⁰⁴ A looming threat to ECK's independence is the Government's intention to reduce the autonomy of independent institutions to allow for 'some degree' of Government control over them. Reported in the *Kenya Times* (n 91 above).

¹⁰⁵ P Chitere et al 'Kenya constitutional documents: A comparative analysis' Bergen: CMI Report 2006 30. Available at <<http://www.cmi.no/publications>> (accessed on 5 September 2006).

¹⁰⁶ See Hammerstad (n 78 above).

¹⁰⁷ Padmanabhan (n 29 above) 162.

governed the electoral process in South Africa.¹⁰⁸ The negotiations that led to the first democratic elections in South Africa resulted in the creation of an Interim Electoral Commission in 1993.¹⁰⁹ This was done through the adoption of three interrelated statutes: the Constitution of the Republic of South Africa, the Electoral Act and the Independent Electoral Commission Act.¹¹⁰ The Commission was charged with the duty of managing and administering the 1994 transitional elections in South Africa. It was subsequently replaced by a permanent Independent Electoral Commission in 1996 when a new Constitution was adopted.

3.3.2 Legal framework of the IEC

There are three major laws that provide for the legal foundation of the IEC. At the apex of these laws is the Constitution of South Africa¹¹¹ complemented by the Electoral Commission Act¹¹² and the Electoral Act.¹¹³ Chapter 9 of the Constitution provides for the establishment of the IEC as one of the 'state institutions supporting constitutional democracy.'¹¹⁴ The Constitution also sets out the general principles and guidelines for the IEC. It provides for its functions, composition and independence. The Electoral Commission Act (ECA) establishes the IEC provides for its composition, powers, duties, administrative structure and financial accountability. It also establishes an Electoral Court and provides it with powers and duties. The Electoral Act provides for the regulations governing elections of the members of the National Assembly, provincial legislatures and local councils. Through these legal provisions, the IEC has been empowered to organise, plan and conduct elections in South Africa. Are the legal safeguards adequate in guarding the independence of the IEC? The next part of this study attempts to provide answers for this question.

¹⁰⁸ Act 45 of 1979.

¹⁰⁹ The negotiations between political actors began in 1990 and ended in 1994 when the first democratic elections were held in South Africa. The negotiations were aimed at creating democratic space in South Africa. Three factors led to the creation of the IEC: the institutional incapacity of the Department of Home Affairs to manage the elections, legitimacy of the elections administered by the Department and the existing political conditions. See Padmanabhan (n 29 above) 1163.

¹¹⁰ Acts 20, 202 & 150 of 1993 respectively. These laws were, however, repealed in 1996 when a new Constitution and other electoral laws were adopted in South Africa.

¹¹¹ Act 108 of 1996.

¹¹² Act 51 of 1996.

¹¹³ Act 73 of 1998.

¹¹⁴ Sec 181 of the Constitution. Other Chapter 9 institutions include the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality and the Auditor General.

3.3.3 Independence of the IEC

Permanency

The Constitution and the ECA establish the IEC as an independent and permanent body to support and strengthen constitutional democracy in South Africa. The Constitution provides for permanency since it has stringent amendment procedures.¹¹⁵ This ensures that the IEC, like any other constitutional body, cannot be disbanded easily. The constitutional protection is complemented by the ECA, which provides for more safeguards for the IEC's independence. Further safeguards for the independence of the IEC are to be found in section 181(2) of the Constitution, which states that the IEC is only 'subject to the Constitution and the law'. In this regard, the IEC can execute its duties according to the Constitution and the law without fear, favour, bias or prejudice.

Appointment of commissioners and composition

The IEC comprises five commissioners appointed by the President, one of whom must be a judge.¹¹⁶ The commissioners are recommended to a Committee of the National Assembly (the Committee) by a panel that consists of the President of the Constitutional Court, a representative of the Human Rights Commission, a representative of the Commission on Gender Equality and the Public Prosecutor. The Committee subsequently nominates the persons for approval by a majority of the members of the National Assembly.¹¹⁷ This mode of appointment is transparent, inclusive and stringent and prevents political appointments due to the number of actors involved in the process. As Kabemba has observed, the appointment ensures the independence of the IEC since the panel is composed of independent actors.¹¹⁸ Apart from the appointment process, the law also provides for the composition of the IEC. Accordingly, section 6(2)(b) of the ECA bars persons who hold high political positions from being appointed as commissioners. Likewise, the commissioners are not allowed to take up other positions outside the IEC. These measures are intended to ensure the impartiality of the commissioners hence the independence of the IEC.

¹¹⁵ Section 74(3) of the Constitution provides for the amendment procedure of this provision. A Bill must be passed in Parliament by at least two-thirds majority of the members and also by the National Council of Provinces with a supporting vote of at least six out of the nine provinces. An amending Act of Parliament can be contested before the Constitutional Court within 30 days by a member of the National Assembly with the support of at least two-thirds of the members.

¹¹⁶ Sec 6 of the ECA.

¹¹⁷ Sec 6(2) of the ECA. The panel must forward a list of at least eight persons to the Committee, which is comprised of a proportional number of members of the political parties in the National Assembly.

¹¹⁸ C Kabemba 'Election administration: Achievements and continuing challenges' in J Piombo & L Nijzink (eds) *Electoral politics in South Africa: Assessing the first democratic decade* (2005) 89.

Terms and conditions of work

The ECA provides for the terms of office, conditions of service and removal from office of the commissioners. The commissioners serve for a term of seven years and may only serve for two terms.¹¹⁹ According to section 7(2), the conditions of service, remuneration, allowances and other benefits of the commissioners are to be determined by the President from time to time in consultation with the Commission on the Remuneration of Representatives¹²⁰ taking into account the nature of engagement of a commissioner. Are there safeguards to ensure that the President does not abuse this power? The answer to this question may not be simple. In my view, this provision can affect the impartiality and independence of the IEC since the commissioners would be looking up to the President to review their conditions of service. It would be better if the terms are fixed by law and the review is left to a different body created specifically for that purpose.

Similarly, the provision regarding the re-appointment of the commissioners gives the President enormous powers to determine the period of extension. According to section 7(1)(c) of the ECA, the re-appointment period of a commissioner vests in the President on recommendation of the National Assembly. In my view, an action by the President can impair the independence of the IEC since the period is not predetermined by law.

Removal of commissioners

According to section 7(2)(3)(a) of the ECA, commissioners can only be removed by the President upon the recommendation of the Electoral Court¹²¹ and with the endorsement of a majority of the members of the National Assembly. The removal procedure of commissioners is thus stringent, transparent and inclusive. This makes the commissioners secure in their positions which in turn engenders the independence of the IEC.

Administrative independence

The Constitution states that the IEC is independent and only subject to the 'Constitution and the law.'¹²² The Constitution also requires other state organs to assist and ensure the IEC's independence, impartiality, dignity and effectiveness. Furthermore, the Constitution insulates the IEC from political interference by stating that no organ of the state or person may interfere with its functioning. The IEC

¹¹⁹ Sec 7(1) of the ECA.

¹²⁰ Established under section 2 of the Commission on the Remuneration of Representatives Act 37 of 1994.

¹²¹ Established under section 18 of the ECA to review the decisions of the IEC. It is composed of a judge of the Supreme Court as the chairperson and four other members appointed by the President on the recommendation of the Judicial Service Commission.

¹²² Sec 181(3) of the Constitution.

has a secretariat based in Pretoria, which is independent of the Government. The Chief Electoral Officer of the IEC appointed by the commissioners is the head of the administration of the IEC and is charged with the task of appointing the staff of the IEC in consultation with the other members of the IEC.¹²³ The conditions and terms of service of these officers are determined by the IEC. The Constitutional Court of South Africa has, in a landmark case, had an opportunity to determine the independence of the IEC and stated that the administrative independence of the IEC 'requires it to have control over matters directly connected with its functions' without direction from any quarter.¹²⁴

Financial autonomy

The budget of the IEC is approved by Parliament, which then releases funds to it.¹²⁵ Furthermore, section 181(5) of the Constitution stipulates that the IEC, as one of the six institutions supporting democracy, is accountable to the National Assembly and must report on its activities and the performance of its functions to the Assembly at least once a year. It must also submit an audited statement of income and expenditure annually. To ensure more financial autonomy, the IEC is empowered to expend money without authority from any quarter. The Chief Electoral Officer, as the accounting officer of the IEC, is responsible for the financial accounting of the IEC. In order to ensure financial probity, section 13(3) of the ECA provides for the auditing of the IEC's accounts by the Auditor-General whose office is constitutionally independent.

3.4 Conclusion

This chapter had set out to examine the independence of the EMBs of Kenya and South Africa. The examination has attempted to demonstrate that while both EMBs are permanent and independent, the IEC has relatively assured and stronger legal safeguards than the ECK. The ECK has, however, made strides by formulating rules aimed at sealing legal loopholes militating against its independence. With the proposed minimum constitutional changes currently taking place in Kenya, it is hoped that the ECK's full independence shall be achieved. In the next chapter of this study we will examine how the two EMBs can be further strengthened to promote democracy in the two countries.

¹²³ Sec 12(4,5) of the ECA.

¹²⁴ *New National Party case* (n 51 above).

¹²⁵ The financial and administrative autonomy of the IEC led to a turf fight between it and the Department of Home Affairs. The Department claimed that the IEC was politically accountable to it. This view was, however, rejected by the Constitutional Court which stated that the Government's action was an encroachment into the IEC's independence. See the *New National Party case* (n 51 above).

CHAPTER FOUR

TOWARDS FURTHER STRENGTHENING OF THE INDEPENDENCE OF THE ELECTORAL COMMISSIONS OF KENYA AND SOUTH AFRICA

4.1 Introduction

In the previous chapter we examined the independence of the EMBs of Kenya and South Africa. This chapter considers some of the challenges threatening the independence of the two commissions and suggests ways of further strengthening and assuring their independence.

4.2 Some of the challenges affecting the independence of the ECK and the IEC

The management of elections has presented EMBs all over the world with many challenges, some of which pose a threat to their independence. These challenges vary from country to country and depend on the historical, economic and political circumstances of every country. Indeed, some scholars have noted that:

The core challenge facing many countries in the 21st century is that while they have created electoral democracies, maintaining the essential conditions for deepening and consolidating the full panoply of democratic institutions remains a work in progress.¹²⁶

It is conceded that the statement rings true for the EMBs of Kenya and South Africa. The following are some of the challenges facing the two commissions.

4.2.1 Lack of adequate resources

The electoral process is an expensive undertaking and it requires resources for it to be successful.¹²⁷ Electoral processes such as voter registration, compilation of voters' roll, voter education and actual voting require a lot of resources. Given the fact that EMBs are the institutions mandated to manage the elections, they need adequate resources to function effectively. The examination of the two commissions in the previous chapter revealed that they experience the problem of resource allocation. The ECK is the most affected in this context since it lacks financial independence from the Government. In South Africa, the IEC has an independent budget, but cases of limited resource allocation have been reported.¹²⁸ Indeed, one commentator has commented thus:

¹²⁶ L Leduc et al *Comparing democracies 2: New challenges in the study of elections and voting* (2002) 1.

¹²⁷ L Piper 'Why democracy costs money: Lessons from administration' in L Piper (ed) *South Africa's 2004 elections: The quest for democratic consolidation* (2005) 24.

¹²⁸ J Hofmeyr 'How independent is independent? Critical challenges for South Africa's chapter 9 institutions' (2004) *Institute of Commonwealth Studies* London.

Money is clearly central to the effective administration of elections, exposing the IEC's key point of vulnerability in design. Election 2004 saw the IEC increasingly turning to business for financial support, but is this a real guarantee of future financial autonomy or simply a new creditor to whom election administration will be indebted?¹²⁹

4.2.2 Inadequate staff

The challenge of inadequate staff is closely related to lack of adequate financial resources. The discussion in the previous chapter showed that the two EMBs have the power to appoint staff independently. However, they are still faced with the problem of lack of adequate staff numbers to manage elections especially on the polling day resulting in the employment of civil servants to run the elections. For instance, Kabemba has noted that the IEC usually relies on local civil servants to carry out election duties since it does not have enough permanent staff to cover the whole country.¹³⁰ This raises the challenge of impartiality and independence of the civil servants. Indeed, Venter has noted that:

Quite problematical is the fact that, because a neutral civil service is not firmly rooted in African governmental practices, local government officials are usually perceived by the general public to be politically aligned to the government of the day. So for the electoral commission, having to appoint local government officials to high positions in election administration is often viewed as compromising the neutrality and integrity of the electoral process.¹³¹

4.2.3 Concentration of state power in the executive

Thomson has defined concentration of power as the 'process whereby power is drained from civil society and peripheral institutions of the state, and concentrated instead within the core executive.'¹³² According to Ndulo, concentration of power in the presidency is the antithesis of electoral democracy, which is usually manifested through the conduct of free and fair elections.¹³³ Rakner and Svåsand have also argued that the wide presidential powers in many African countries has negatively impacted on the institutional development in Africa.¹³⁴ It is conceded that this statement rings true for Kenya where there is concentration of power in the executive.¹³⁵ Kiai has aptly captured the Kenyan situation by stating that 'the presidents in Kenya's post independent era have been the *alpha* and

¹²⁹ Piper (n 127 above) 21.

¹³⁰ Kabemba (n 118 above) 101.

¹³¹ Venter (n 48 above) 13.

¹³² Thomson (n 21 above) 127.

¹³³ M Ndulo 'The democratic state in Africa: The challenges for institution building' (1998) 16 *National Black Law Journal* 85.

¹³⁴ L Rakner & L Svåsand 'Multi party elections in Africa's new democracies' CMI Report 7 2002 4.

¹³⁵ Chitere (n 105 above) 6.

omega of the social, political, economic and cultural life of the nation.¹³⁶ Due to the powerful presidency, the growth of independent institutions such as the ECK has been affected and this continues to be a threat to their development and independence.¹³⁷

4.2.4 Weak legal framework

The legal framework provides the foundation of an effective electoral system.¹³⁸ It creates an enabling environment for free and fair elections. It also provides for the establishment of institutions to manage elections and provides them with functions and powers. Where the legal framework is weak, then it would seem to be the case that the electoral system cannot function effectively. The discussion in the previous chapter showed that the ECK lacks adequate legal safeguards to guarantee its independence. For instance, the law does not provide for transparent and inclusive appointment and re-appointment procedures. It also fails to provide for the financial independence and nowhere are accountability mechanisms provided for the ECK. Moreover, some of the important aspects have been stipulated in the codes of conduct instead of statutes.¹³⁹

The legal regimes in the two countries also fail to provide a guarantee for government funding of the commissions. The result is the lack of legal obligation on the two governments to allocate adequate financial resources to the commissions. This weakness has been noted by one commentator regarding the allocation of financial resources to the IEC that:

In our view, the lack of legal guarantee of a certain threshold of government support is the most significant design flaw in the current electoral administration system. While Government currently has an interest in free and fair elections, should this change the IEC's dependence on Government goodwill for funding makes it more vulnerable to party political pressure than would be the case if funding was guaranteed.¹⁴⁰

4.2.5 Lack of clear line of accountability

Accountability of an EMB is one of the ways of securing its independence from the political process, hence they should be provided clearly by the law. The mode of accountability adopted needs to ensure the independence of an EMB. In this regard, it is important that EMBs be made accountable to

¹³⁶ Mugabi Kiai, 'Presidential directives vis-à-vis democracy, human rights and the rule of law: A paradox' cited in Hatchard (n 15 above) 59.

¹³⁷ See n 102 above.

¹³⁸ The electoral legal framework includes the constitution, statutes, regulations, rules and codes of conduct that provide for the conduct of elections.

¹³⁹ Eg, the provisions on the impartiality of the ECK staff and their ineligibility for political party positions during their tenure of office. In South Africa, however, these provisions are contained in the ECA. The inclusion of such provisions in a statute makes them more authoritative and enforceable than when they are stipulated in mere codes of conduct.

¹⁴⁰ Piper (n 127 above) 19.

parliament and not to the executive. The Kenyan law, however, seems to lack clear accountability arrangements. For instance, the law is silent on the mode of accountability and the institution to which the ECK is accountable. This has made the ECK to be considered as an institution under the MOJCA. This situation does not augur well for its independence. The South African Commission, however, has a clear accountability framework, which ensures its independence.

4.2.6 Political mistrust

Electoral democracy implies the conduct of competitive elections where parties and candidates compete for political power. An EMB as the referee in this competition can be affected by political mistrust between the competing parties and candidates. This is especially the case where some decisions made by the EMB are interpreted to mean party position. The weak legal framework is also a source of political mistrust, particularly, where it seems to favour one political side.

Both commissions are faced with this challenge especially in the case of Kenya where political mistrust is evident. The ECK has been accused many times by political actors for advancing the political interests of the opponents.¹⁴¹ Similarly, the legislature's attempt to usurp the ECK's functions in locating additional constituencies demonstrates the level of mistrust in the country. In South Africa, the IEC has been accused of assisting the ruling party by the opposition.¹⁴² As Kabemba has observed, such issues should not be taken lightly since they can affect the integrity and independence of an EMB.¹⁴³

4.2.7 Conventional conception of state institutions

Conventionally, the government was seen as the only state institution entrusted to manage state power.¹⁴⁴ It dominated state power and through it other institutions were established. The institutions that were created then were seen as part of the government. The modern trend, however, is that there are certain institutions that operate outside the government hence they are not subject to the traditional government control mechanisms.¹⁴⁵ This issue was considered by the South African

¹⁴¹ Eg, on 25 July 2007, some legislators accused the ECK of bias against the Government in the performance of its functions and called for the reduction of its powers. See 'Government plays guessing game with ECK' *The Standard* 9 August 2006 1.

¹⁴² Padmanabhan has noted that political mistrust between the political parties was replicated among their supporters, particularly on the employment of local government officials as local election officials since most of them were perceived as owing allegiance to the ruling party. See Padmanabhan (n 29 above) 1187.

¹⁴³ Kabemba (n 118 above) 94.

¹⁴⁴ See C Lewis & J Fleming 'The everyday politics of value conflict: External independent oversight bodies in Australia' in I Holland & J Fleming (eds) *Government reformed: Values and new political institutions* (2003) 167.

¹⁴⁵ Eg EMBs, human rights institutions, auditor-general and the ombudsman fall in this category.

Constitutional Court in the reported case of *Independent Electoral Commission v Langeberg Municipality*¹⁴⁶ where the issue was whether the IEC was an institution within the national Government of South Africa. The Court held, *inter alia*, but specifically at paragraph 31 that:

The Commission cannot be independent of national Government and yet be part of it...Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation, but are not subject to national executive control. The very reason the Constitution created the Commission – and other Chapter 9 bodies- was so that they should be and manifestly be seen to be outside Government. The Commission is not an organ of state within the national sphere of Government.

However, the conventional conception still holds sway in both countries, particularly in Kenya where the legal framework is not as strong and clear as that of South Africa. This perception has led to attempts by both governments to bring the commissions within the governments' jurisdiction.¹⁴⁷ The reasoning here is that there must be a ministry which is administratively or politically responsible for the commissions since elections have always been a governmental function. This approach without doubt has serious ramifications on the independence of the commissions and can erode their credibility and integrity.

4.3 The way forward

De Souza once stated that strengthening EMBs is necessary in the electoral process as it contributes to safeguarding the franchise hence deepening representative democracy.¹⁴⁸ This statement crowns the importance of strengthening the independence of the two EMBs under examination in this study. The successful achievement of the democratic governance in these two countries depends to some extent on strengthening of these bodies. What reforms should be made to further strengthen these EMBs? It is contended that the reforms should be comprehensive to cover all aspects that affect their independence and functioning. This is in line with the commitment of the AU on the strengthening of institutions of democracy in Africa.¹⁴⁹ The following are some of the measures which should be taken to further strengthen the independence of the two EMBs.

¹⁴⁶ 2001 9 BCLR 883 (CC).

¹⁴⁷ Eg, in 2003, MOJCA attempted to bring the ECK under its jurisdiction resulting in a turf war between the ECK and the Ministry. In July 2006, the Government stated its intention to change the law to bring hitherto independent bodies under its control since 'these bodies were established to serve Government interests'. See 'Mischief is fast getting the better of Kimunya' *The Standard* 21 July 2006. In South Africa, there was a protracted war of words between the IEC and the Department of Home Affairs on the political accountability of the IEC. See the *New National Party case* (n 51 above).

¹⁴⁸ De Souza (1998) 'The electoral commission and electoral reforms in India' quoted in Lopez-Pintor (n 27 above) 141.

¹⁴⁹ Eg CSSDCA Solemn Declaration of 2000, which requires African states to strengthen institutions of democracy as a way of enhancing the democratisation process in Africa.

4.3.1 Adequate resource allocation

Since the management of elections requires a lot of resources, the allocation of adequate resources is paramount in the operations of the two commissions under consideration. Resources in this regard would include financial and human resources. The allocation of resources needs to take into account continuous electoral activities such as voter registration and voter education. It also needs to enable the electoral bodies to appoint and train their staff independently.¹⁵⁰ In this regard, the following measures should be adopted to strengthen the financial independence of the EMBs, particularly the ECK. First, the EMBs need to have independent budgets which are different from the budgets of the governments. The approval and release of funds should be done by parliament. However, before the allocation is made, the EMBs should be able to defend their budgets before the relevant parliamentary committees. In this sense, the financial independence of the two EMBs would be enhanced and they would also be shielded from undue political interference.

Secondly, adequate financial allocation can be enhanced by providing for a minimum allocation of funds by the two governments. This can be done through a legal provision that puts an obligation on the governments to provide a certain percentage of the commissions' budgets. The legal provision is important since it makes it obligatory to provide minimum funding and at the same time it is enforceable. The economic constraints and the political culture in many African countries make the legal guarantee relevant and important. It is my view that the adoption of these legal measures can further strengthen the financial independence of the two EMBs under consideration.

4.3.2 Decentralisation of state power

Kew has observed that the balance of power among critical centres of power must be struck for democratic consolidation.¹⁵¹ This view finds support in Ake's comment that 'democracy would be improved by changing the distribution of power' which ultimately leads to institutional growth.¹⁵² The balance of power in a state involves the decentralisation of state power to other institutions. Decentralisation reduces the accumulation of power in one institution and also enhances the rule of law, which in turn leads to respect for the independence of state institutions. The concentration of state power in the executive in Kenya can thus be solved through the decentralisation of power to other institutions which would ultimately strengthen state institutions such as the ECK. One of the ways of doing this is through the involvement of parliament in certain processes which are undertaken

¹⁵⁰ Piper (n 127 above) 19.

¹⁵¹ D Kew 'Building democracy in 21st century Africa: Two Africas, one solution' *Whitehead Journal of Diplomacy and International Relations* (2005) 149.

¹⁵² C Ake *Democracy and development in Africa* (1996) 12.

by the executive. For instance, parliamentary vetting of commissioners appointed by the President can increase the effectiveness and independence of state institutions such as the ECK.

4.3.3 Law reform

The legal framework is the foundation of an electoral system. It is the foundation upon which EMBs' independence is grounded. As some commentators have observed, election laws are central to the success of the electoral process because they 'define the rules of the game.'¹⁵³ Due to this centrality, Venter has suggested that the election laws should always be redesigned to strengthen the institutions of democracy since they are central to democratic consolidation.¹⁵⁴

The above study of the two EMBs has revealed some flaws in the electoral laws in the two countries. These flaws can have negative effects on their functioning and independence. It is, therefore, important that the electoral laws be reviewed to further strengthen their independence. However, it is important to note that the reforms would depend on the status of the current laws in each country. In this regard, it is important to note that the electoral laws of South Africa are slightly stronger than the Kenyan laws. Thus, more extensive legal reforms need to be undertaken in Kenya than in South Africa. The reforms should clearly define the nature of the ECK and the general principles underpinning its operations. They should also provide for clear, transparent and inclusive appointment procedures. Furthermore, the reforms should provide for the financial independence and clear accountability arrangements of the ECK. A parliamentary accountability through annual reporting would suffice in this regard. In the case of South Africa, the reforms should aim at removing the role of the executive in determining the terms and conditions of the commissioners. An option might be to vest that power fully in the present Commission on the Remuneration of Representatives.

Similarly, the law in both countries should be amended to provide for adequate financial allocation by the governments. The law can, for instance, provide for the minimum percentage of the EMBs' budgets that the governments must provide every year to enable them function effectively. In this sense, the governments would be obliged by the law to provide adequate funds to the EMBs. This is likely to safeguard and further strengthen their independence.

¹⁵³ Massicotte et al *Establishing the rules of the game: Elections law in democracies* (2004) 3.

¹⁵⁴ Venter (n 48 above) 18.

4.3.4 Strengthening of stakeholders committees

Lopez-Pintor has stated that political mistrust is expensive and should be avoided at all costs.¹⁵⁵ It can erode the integrity and independence of an EMB and even lead to violence. The creation of a forum where the political actors can share ideas dispels political mistrust. This would involve the creation of a committee of stakeholders to discuss important issues that can create suspicion among the political actors. This is a mechanism for building trust in the management of elections and has the effect of strengthening the independence of an EMB.¹⁵⁶ It is, therefore, important that EMBs be supported by all the major actors in the electoral process.

The EMBs under this study have established party liaison committees in the respective countries. The committees, however, need to be strengthened through active participation in the electoral processes in both countries. One of the ways of doing this is by involving them in decision making processes such as the making of codes of conduct. This would create confidence of the stakeholders in the commissions and the electoral process.

4.3.5 Clear and transparent appointment and re-appointment procedures

Appointments and re-appointments of commissioners are important for the proper functioning of an EMB. These processes should be used to build confidence of the public and stakeholders in EMBs. Therefore, the appointments and re-appointment procedures need to be explicitly and clearly provided for by the law. They should be inclusive and transparent. As Venter has noted, clear, transparent and inclusive appointment procedures would lead to appointment of independent minded people with experience in electoral matters who enjoy the broadest support of the population.¹⁵⁷ The public participation in the process should be ensured.¹⁵⁸ It is, therefore, important that the appointment of commissioners be done in consultation with all the political parties and other stakeholders and approved by parliament. The transparent, clear and inclusive appointment and re-appointment processes ensure that the electoral bodies are seen as representative of society and that people with the right qualifications are appointed as commissioners.

This study has revealed that the appointment of commissioners in Kenya suffers from serious flaws. Therefore, the appointment process needs to be reviewed to strengthen the ECK's

¹⁵⁵ Lopez-Pintor (27 above) 126.

¹⁵⁶ Mozaffar and Schedler (n 53 above) 11.

¹⁵⁷ Venter (n 48 above) 12.

¹⁵⁸ The public may, for example, be afforded an opportunity to comment on the nominations, lodge objections to the appointment of certain people and to provide input into the interview questions.

independence. The first option Kenya may consider adopting is the South African approach of appointing commissioners which has been hailed as clear, transparent and inclusive.¹⁵⁹In this regard, an independent panel of experts can be established to receive nominations, conduct interviews and recommend candidates for appointment. The panel should consist of two judges of the superior courts,¹⁶⁰the chairperson of the national human rights commission, one law lecturer, a representative of the law society, two representatives of the civil society and the chief justice as the chairperson. The panel should conduct nominations based on one's integrity, knowledge of election processes, competence, public respect and impartiality.¹⁶¹The list of the selected candidates should then be forwarded to parliament for approval by a simple majority. The final stage should be the formal appointment of the commissioners by the President.¹⁶²An alternative option for Kenya is that of vetting of the presidential appointments by parliament. However, it is contended that this approach is not as transparent and inclusive as the first option.

The re-appointment of the commissioners should be automatic upon the successful completion of one's term. The panel should be mandated to consider the re-appointment of the commissioners before the expiry of the term of office based on their performance. The approved names should be forwarded to parliament for approval and subsequent appointment by the President. In this sense, the independence of the two commissions would be further strengthened.

4.3.6 Public accountability

EMBs are public institutions carrying out public service operations. As such they should be accountable to the public. The public must, therefore, be involved in their activities. This would give EMBs the confidence to act independently as referees in the electoral process. One of the ways of doing this is through constant scrutiny by the public. Public accountability can be achieved through the publication of the annual and quarterly reports, booklets, newsletters, and pamphlets. It can also be achieved through public assessment of their activities. This would involve collecting data from the public on their performance and can take the form of questionnaires. According to Lopez-Pintor, public assessment of EMBs' activities can be important for their public image.¹⁶³Holding of public

¹⁵⁹ See Kabemba (n 118 above) 100.

¹⁶⁰ The superior courts in Kenya are the High Court and the Court of Appeal.

¹⁶¹ See the Norms and Standards for Elections in the SADC Region, SADC Parliamentary Forum (2001) Windhoek, Namibia. Available at <<http://www.eisa.org.za>> (accessed on 23 August 2006).

¹⁶² Formal appointment of commissioners by the President is important since it enhances the status and profile of the appointees.

¹⁶³ Lopez-Pintor (n 27 above) 110.

events on elections such as workshops would also go along way to ensure public scrutiny. These activities are likely to reduce mistrust and create public confidence in EMBs. In my view, the adoption of these measures by the two commissions would make them more accountable and further strengthen their independence.

4.3.7 Co-operation with other institutions

The running of elections is a great task that requires mobilisation of resources in society. This requires the participation of every institution in society. As Piper has observed, 'the administration of an efficient and effective election is impossible without co-operation from the government and the civil society.'¹⁶⁴ Therefore, EMBs need to co-operate with other institutions such as state institutions and civil society. Co-operation with regional and international bodies particularly those dealing with electoral matters and the donors is also important. These are important groups in the electoral process and can ensure the delivery of efficient elections. The EMBs of Kenya and South Africa can ensure co-operation with these institutions in the administration of elections. Co-operation with regional and international electoral bodies is likely to lead to the efficient administration of elections due to the exchange of experiences, information and literature on elections. These measures are likely to increase confidence in the electoral process in the two countries and further strengthen their independence.

4.4 Conclusion

This chapter set out to consider ways of further strengthening the independence of the EMBs of Kenya and South Africa. The chapter also examined some of the challenges that threaten the independence of the two EMBs. Our examination showed that legal, political, economic and administrative challenges still threaten their independence. However, the challenges are not insurmountable and can be overcome by taking measures aimed at strengthening their independence.

¹⁶⁴ Piper (n 127 above) 25.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.2 Conclusions

The importance of elections in a representative democracy cannot be gainsaid. Through elections, citizens are able to participate in the governance of their countries. Leaders depend on elections for legitimacy. Due to this importance, elections have been recognised at the international, regional, sub-regional and national levels. The centrality of elections in contemporary world underscores the need for election management, which is a crucial aspect of the electoral process. The creation of EMBs to manage elections stems from this centrality. Due to the nature of activities undertaken by EMBs, they need to be independent from the government and other political actors. Their independence, as Mozaffar has noted, is likely to create confidence in the electoral process and increase their effectiveness.¹⁶⁵ In order to achieve this, the legal and institutional framework must provide for their independence, as discussed in chapter two of this study. If their independence is jealously guarded, EMBs can contribute to institutional development which is necessary for democratic governance and consolidation particularly in the new democracies.¹⁶⁶

The comparative discussion and analysis of the independence of EMBs of Kenya and South Africa in this study has demonstrated that strong legal safeguards are necessary for their independence. However, serious challenges that need legal, political, administrative and economic solutions are still present. As the two countries continue to conduct elections in the 21st century, their EMBs will definitely continue to play a crucial role in the democratisation processes in the two countries. This calls for further strengthening of the independence of these bodies to ensure that they remain the 'islands of integrity.'

5.3 Recommendations

- The laws in both countries should be reviewed to further strengthen the independence of the two commissions. In Kenya, the law should clearly state the accountability arrangements of the ECK, particularly, the relationship between the ECK, Parliament and MOJCA. The law should also provide for clear, transparent and inclusive appointment and re-appointment procedures. Preferably, Kenya should adopt the South African model of appointing

¹⁶⁵ Mozaffar (n 30 above) 85.

¹⁶⁶ See Pastor (n 20 above) 75.

commissioners. With regard to South Africa, the reforms should target the re-appointment of the commissioners and their terms and conditions of service.

- The terms and conditions of service should be determined by law and reviewed by a body that is specifically created for that purpose in both countries. For the ECK, the term in office of commissioners should be limited to a maximum of two terms and should go beyond that of an elected government. In this regard, Kenya should consider increasing the term of office to six or seven years.
- The two commissions should be adequately resourced at all times to enable them perform their functions efficiently and ensure their independence. In this respect, the laws should provide a minimum threshold for government funding. In addition, the financial independence of the ECK should be enhanced by providing it with an independent budget. In this respect, its budget should be approved by Parliament which should then release the funds, like in South Africa.
- The party liaison committees in both EMBs should be strengthened and enabled to play prominent roles as a way of building confidence in the management of elections. All the political actors should be represented and the EMBs should be able to discuss with them the 'rules of the game.'
- The removal of commissioners in South Africa should be approved by a resolution of two thirds of the members of the National Assembly to give the commissioners more protection. This would provide them with the same kind of protection that the Public Protector and the Auditor General enjoy in South Africa. This is necessary due to the importance of the activities of the IEC in the electoral process in South Africa.
- To further ensure financial accountability, the EMBs should submit their books and records of accounts for auditing by the Auditor General. The Auditor General should thereafter within three months after receipt of the books and records, submit his report to the relevant parliamentary committee for scrutiny and further submission to parliament for debate.
- The EMBs should report on their activities to parliament through the annual and quarterly reports. The annual report should be submitted to parliament within six months after the end of the financial year. The reports should provide the following details, among other things:

- i.) A statement on income and expenditure;
- ii.) A statement of their performance in meeting their objectives;
- iii.) A statement on their activities for the year including those not achieved;
- iv.) A statement on the challenges faced;
- v.) Projections on their future activities especially for the following financial year;
- vi.) The report of the Auditor General for the previous year; and
- vii.) Steps taken to enlist stakeholders support.

- Parliaments in the respective countries should be empowered to request for a report on any particular issue by the EMBs. For parliamentary scrutiny to have value in the reporting system, parliament should be obliged to debate the reports in detail. In this regard, it is recommended that the EMBs should first submit and defend the reports before a parliamentary committee. This would enable the committee to seek any clarification or further information on any issue in the reports. The committee would then introduce the reports in parliament for debate and approval by a simple majority of all the members of parliament.
- The EMBs should enhance public participation in their activities. They should, for instance, conduct regular public assessment of their activities in order to get the public perception about them. They should also involve the public through the publication of their materials such as the annual and quarterly reports, newsletter, brochures, booklets and pamphlets.
- A comprehensive constitutional review should be conducted in Kenya to decentralise state power and strengthen the independent state institutions. This is likely to decentralise power and ultimately lead to the strengthening of institutions of democracy in the country including the ECK. Amendments to the current Constitution might not achieve this goal because it fails in many respects to guarantee institutional independence from the executive. A constitutional review is thus preferable since it is likely to take a holistic approach to the issues of constitutional values and principles.

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