

Electoral commissions and their ability to oversee free and fair elections

It may at first glance seem overly legalistic to concentrate on the existence and independence of electoral commissions in a review of democracy commitments from a human security perspective. However – as discussed in Chapter One – among the most salient human security threats facing the African continent today are the insecurity, violence and upheaval resulting from disputes over how elections are conducted. This has also been the case in several of the countries studied in this review. For instance, electoral rules and procedures were at the centre of the political struggle in Senegal, especially in the late 1980s and first half of the 1990s, when flawed elections were accompanied by street battles and the arrest of opposition politicians. In Nigeria, elections still bring with them widespread violence, in some areas in the form of near-civil war, as the example of the Ijaws in Chapter Two showed.

The creation of an independent and strong electoral commission is a key measure with which election violence can be prevented. If functioning properly and if surrounded by the appropriate safeguards, such an institution takes control of how an election is held out of the hands of politicians and their supporters, and places it in the hands of impartial officials who are responsible to the constitution and electoral laws, not to the government. As a result, abuse and fraud becomes harder to instigate, and complainants have an independent authority where they can take their grievances. As a result, disputes over

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election results are less likely to occur, and if they do, they are less likely to lead to violence.

All of the countries under review have electoral commissions in one form or another, although their strength, independence and efficiency vary. This chapter will first describe the countries' organisational arrangements, and then discuss how well the commissions have fared in supervising and controlling elections in the last ten to fifteen years.

3.1 Electoral commissions: structure and legal roles

3.1.1 Independent commissions: Ghana and South Africa

Ghana and South Africa have independent commissions, protected by the constitution and with sufficiently strong mandates. Ghana's commission consists of a chairperson, two deputy chairpersons and four other members, who are appointed by the president, acting on the advice of the Council of State.³⁰ The chairman of the commission has the same terms and conditions of service as Justices of the Court of Appeal, which means he or she cannot be removed arbitrarily and has to retire at the age of 70. The chairperson can only be removed by the president if recommended to do so by a special committee set up by the Chief Justice, on the grounds of "stated misbehaviour or incompetence or on ground of inability to perform the functions of [the] office arising from infirmity of body or mind".³¹ The Electoral Commission is responsible for the organisation of elections, including the logistics of procuring and disseminating election materials, as well as for dealing with election-related complaints.

In South Africa, the constitution includes the Electoral Commission as one of six institutions supporting constitutional democracy.³² Unlike in

30 Ghana's Constitution (1992), art. 89, established the Council "to counsel the President in the performance of his functions". It has 25 members – eleven are appointed by the President, ten elected to represent the ten regions, and the last four are institutional representatives.

31 Ghana's Constitution, art. 146.

32 South Africa's Constitution (1996), Chapter Nine. See also The Electoral Commission Act 51 (1996).

Ghana, the five members of South Africa's electoral commission are nominated by parliament. The nominees are chosen from a list of candidates recommended 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. Nominees must be recommended by a resolution adopted by a majority of the members of the National Assembly. With so many actors involved, political appointments to the commission are near impossible. The commissioners' tenure is protected by the constitution.³³ They can only be removed by the president on the recommendation of the Electoral Court and with the endorsement of a majority of the members of the National Assembly.³⁴ The Electoral Court is tasked to "review any decision of the Commission related to an electoral matter".³⁵ Its chairperson, a judge of the Supreme Court, and its four other members are appointed by the president on the recommendation of the Judicial Services Commission.

3.1.2 Less independent commissions: Kenya, Uganda, Ethiopia, Nigeria

Kenya, Uganda, Ethiopia and Nigeria have slightly fewer safeguards for the independence of their electoral commissions. In all countries the government has too much influence over the appointment of commissioners.

In Kenya, the formal independence of the electoral commission has improved over the review period. The Electoral Commission of Kenya was created in 1991, the year when Kenya reverted to multi-party politics, and is tasked with overseeing the conduct of elections as an independent body.³⁶ In 1992, all commissioners were appointed by the president. That situation improved in 1997, when the Inter-Parties Parliamentary Group (IPPG) agreed that parties nominate commissioners according to their parliamentary strength. To remove a member of the commission, the

33 Independent Electoral Commission Act 150 (1993), section 8(1); Electoral Commission Act, 51 (1996), section 3(1).

34 Electoral Commission Act 51 (1996), section 7(2)(3)(a).

35 *Ibid*, section 20(1).

36 Kenya's Constitution, section 41 (9) and (11).

president has to appoint a tribunal to come up with a recommendation.³⁷ Thus, while a less political way of appointing commissioners would add to the independence of the Electoral Commission of Kenya, the constitution ensures that once commissioners are appointed it is difficult to unseat them for political reasons.

In Ethiopia, the National Electoral Board (NEB) was established under Article 102 of the constitution as “an impartial and autonomous agency (...) responsible for ensuring that all Federal and State elections shall be free and fair”. However, since commissioners are appointed by the House of People’s Representatives on the nomination of the prime minister, they are in practice subject to government control.

Similarly, in Nigeria, the president appoints the commission’s chairperson and members, subject to confirmation by the Senate.³⁸ The commission is in charge of running elections, announcing results and dealing with complaints. The chairperson can be removed from office by the president with the support of two-thirds of the members of the Senate and “shall not be subject to the direction or control of any other authority or person”.³⁹ Since one party is in firm control of the Nigerian legislature, the appointment and removal processes are under risk of being politicised.

In Uganda, the Electoral Commission (EC) is charged with the management of elections. The EC chairperson, deputy chairperson and five members are appointed by the president, with the approval of parliament. Members of the EC hold office for seven years, renewable once.⁴⁰ Although the constitution stipulates that the EC must be independent, in practice its members are appointed by the president without the input of opposition political groups.

3.1.3 Divided responsibilities: Senegal and Algeria

The two Francophone countries in this review have several institutions involved in organising and overseeing elections, rather than one electoral

³⁷ *Ibid*, section 41 (5,6,7).

³⁸ Nigeria’s Constitution, section 154.

³⁹ *Ibid*, section 158.

⁴⁰ Uganda’s Constitution (1995).

commission with broad authority. In both countries this formal arrangement has resulted in slightly less independent and powerful oversight mechanisms.

In Senegal, after turbulent elections marred by irregularities and violence in the late 1980s and early 1990s, and an outcry of protest from opposition parties regarding how elections were conducted, the president set up an Observatoire National des Elections (ONEL) in 1997. While the opposition wanted a strong electoral commission that arranged, observed and pronounced on the results of elections, the ONEL, as its name implies, is purely an observer body. It is a temporary institution, created shortly before each election, and dissolved afterwards. Article 3 of its founding law stipulates that the ONEL members must not “be solicited nor given instructions or orders by any public authority”, but this is undermined by its weak powers and the fact that the president appoints the head and nine-member steering committee of the body.

Several other government institutions are involved in the conduct of elections. The judiciary validates candidates, designates commissions in each voting centre, proclaims the results and makes judgments in cases of election disputes. The Direction Générale des Elections, a section of the Ministry of the Interior created in 1997, is in charge of the technical organisation of the elections. And local electoral commissions, including representatives from the political parties, are in charge of watching and counting the votes.

The Senegalese government has too much control over electoral oversight bodies. The leaders of ONEL are appointed by the president, and only keep their jobs for the duration of an election period. Also, while ONEL is allowed to set up structures in all regions, departments and Senegalese diplomatic missions, the composition and functioning of these structures are determined by decrees from the executive.

In Algeria, the institutional situation is even more complex. There are electoral commission at the commune and district levels dealing with local and district elections but not at the national level. Instead the Constitutional Council, established by the 1989 constitution, is tasked to pronounce on the legality of national parliamentary and presidential elections and referendums. It screens presidential candidates, adjudicates

appeals to election results and pronounces the outcome of national elections. Since its establishment it has made more than 350 legally binding decisions on contested election results in five elections and one referendum. Of the Council's nine members, three are appointed by the president, including the Council's president; two are elected by the lower house of parliament; two by the upper house of parliament; one by the Supreme Court; and one by the High Judicial Council.

In addition to the Constitutional Council, a National Independent Commission for Supervision of the Presidential Elections (CNISEP) was established in 1999 to organise and oversee presidential elections in Algeria. It consists of delegates from the 25 registered political parties in Algeria and 4 officials representing the Interior, Communications, Justice and Foreign Affairs ministries. The Algerian president appoints the presiding officer. Finally, in 2002, President Bouteflika set up an independent electoral panel to oversee national parliamentary elections.

The several bodies that organise and oversee Algerian elections have two important flaws that undermine their independence. First, the chairpersons and leaders of all the electoral bodies are appointed by the administration, without any restrictions on the government's choice (such as a shortlist provided, for instance, by a panel of judges of the high court). Second, although Algerian election laws allow political parties to post up to five observers at each polling station, neither the Constitutional Council nor the CNISEP can enforce that observers are in fact in place to monitor the voting and counting. Neither body posts their own independent observers. This means that, particularly in military barracks and in mobile polling stations in rural areas, there were often no observers present.

There are too many electoral oversight institutions in both Algeria and Senegal. In both countries, these institutions are also too weak. However, in Senegal the lack of legal safeguards has had less serious implications than in Algeria (or Ethiopia, Nigeria and Uganda). The next section will look at how electoral commissions have fared in practice, regardless of formal rules and safeguards.

3.2 Independence and power in practice

Two different factors impinge on the ability of electoral commissions to fulfil their task of ensuring that elections are free and fair. The first is lack of resources: it does not matter how many legal guarantees there are or how independent-minded the chair of the commission is if there are not enough resources to monitor and ensure that election conduct on the ground follows proper electoral standards. This includes having sufficient logistical and human resources to print and send out voting material on time, and to physically control ballot boxes, both during polling and vote counting. Second, in some of the countries under review, legal guarantees and resources (the latter often provided by overseas donors) matter less, since the parties or coalitions in power – and sometimes electoral officers themselves – do not sufficiently respect electoral laws and principles.

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3.2.1 Adequate resources?

South Africa, Ethiopia and Ghana have adequate financing of their electoral commissions. There is broad agreement that the South African Independent Electoral Commission (IEC) has enough resources to

41 In February 1999, the Commission had 178 full-time national staff, 142 full-time provincial officials, and 4,443 local electoral officers. Over 72,500 temporary staff did voter registration and 220,000 volunteers were used for the 1999 election. In 1998/1999, the IEC's budget was R640 million. B Bam and M Mchunu, Briefing by the IEC, 12 February 1999, www.polity.org.za/html/govdocs/speeches/1999/sp0212.htm (accessed 9 March 2004). The figures were also satisfactory leading up to the 2004 election, with R478m being allocated for 2004/05. See National Treasury, Revenue Trends and Tax Proposals, in *Budget Review 2003*, 2003, www.polity.org.za/pdf/NatBudgetReview2.pdf (accessed 9 March 2004).

organise and administer elections in a satisfactory manner.⁴¹ The Electoral Commissions Forum of SADC Countries found that, in 1999, there was no shortage of IEC personnel at the voting stations and that “the electoral staff opened and re-sealed the ballot boxes in full view of the political party agents, the international observers and the domestic civil society observers”.⁴² According to the Electoral Act of 1998 every registered party contesting an election can appoint party agents for all the voting stations and counting venues.⁴³ In 1994, the Inkhata Freedom Party was accused of tampering with the ballots in its stronghold KwaZulu-Natal. In 1999, there was less tampering with ballots even though party agents were not present in every station according to the Electoral Commissions Forum of SADC Countries.

In Ethiopia and Ghana, resources would have been short if it were not for overseas aid.⁴⁴ Due to generous donor assistance, both Ethiopia’s NEB and Ghana’s Electoral Commission appear to have had broadly sufficient resources to provide reasonably efficient administration of recent elections. In Ethiopia, the timing of elections to the different regional parliaments has been staggered to allow the NEB to concentrate its resources on each region in turn. In Ghana, there have been sufficient independent electoral officers to administer elections and physically control ballots, although the commission has had to rely extensively on the Public Service Commission to provide vehicles to transport election materials, and on the police and military for their protection. However, all parties have endorsed this involvement by the security agencies and no difficulties have been reported.

In Kenya, the funding of the electoral commission has improved during the review period. It has had its own secretariat since July 1998. By 2003, the commission had 600 staff members, with 4 in each district. The commission prepares a budget for approval by parliament.⁴⁵ The government seems to provide sufficient funds to the electoral commission during elections, but leaves it under-funded between elections. This

42 Electoral Commissions Forum of SADC Countries, *South African elections observer mission report – June 1999*, Electoral Institute of Southern Africa, Auckland Park, 1999, p 29.

43 Electoral Act 73 (1998), section 58.

44 See: National Governance Programme, *Funding of key governance institutions: A research report*, Accra, 2003, unpublished.

45 Electoral Commission of Kenya, *Towards free and fair elections*, Nairobi, 1999, p 10.

hampers functions such as voter education and voter registration. Apart from the government, the commission also receives funds from international and regional organisations, and overseas donors.

In Senegal, the ONEL relies heavily on state institutions for the financing and execution of its tasks. This is a weakness that can be abused. In 1999 the ruling party did indeed try to curb the ONEL by squeezing it financially but since then the body seems to have been adequately funded.

In Algeria, the different electoral oversight institutions have limited mandates that do not involve expensive activities such as election monitoring. Funding is therefore not a big problem. Instead, security problems (in some regions) and restrictive laws (in general) prevent these institutions from providing proper oversight over election activities.

In the last two countries the funding situation is less than satisfactory. In Nigeria, various observer groups reported that the electoral commission lacked sufficient human and material resources. There were inadequate logistic resources, including vehicles and other means of transport to take election materials to voting centres on election day. Similarly in Uganda, the commission is inadequately funded and resourced. The late approval and release of funds have compounded this problem. In addition the commission has been haunted by mismanagement, waste, irregular allowances, diversion of funds and double payments.

3.2.2 Respect for electoral laws

Resources aside, do political actors – and electoral officers themselves – respect electoral laws? Again the situation varies between broadly satisfactory (South Africa) to the broadly problematic (Algeria, Nigeria and Uganda).

In South Africa, the IEC is generally perceived as fair and impartial, with a couple of exceptions where it has been accused of adopting the governing party's line. In 1999, the IEC decided that voter registration will only take place within the country, thereby excluding citizens living abroad from voting. This decision benefited the ruling party since the demographics

of citizens abroad suggest that they are more likely to vote for an opposition party. Two opposition parties complained but the Electoral Court ruled that the commission had acted fairly.⁴⁶

Over the last decade, Ghana's electoral committee has made great progress both in its ability to ensure that elections are held according to proper standards, and in the public trust and support it commands. After a controversial 1992 election during which the electoral commission was accused of being biased towards the ruling regime, the commission took several measures to improve its standards. For the 1996 election, it introduced, with the support of all major political camps, translucent ballot boxes, picture voter identification documents and the counting of ballots at the polling station at the close of balloting. The improvement continued in 2000, and the transparency with which it ran the elections won the commission greater credibility, legitimacy and respect. It has successfully challenged government attempts to curb its authority, and there is now widespread agreement among the political parties, including the ruling party, and civil society that the government should not dabble in electoral matters.⁴⁷ In a 2002 survey, 82 per cent of an expert panel assessed the commission as "always or largely" impartial and transparent in its activities.⁴⁸

Kenya has not come as far as South Africa and Ghana, but there was a clear improvement in the electoral commission's ability to do its job during the 2002 elections. Since 1992, the occurrence of ballot rigging has decreased from election to election, with particular improvements in 2002 (although incidents still took place). An important reason for this was the heavier presence of observers, recruited from local NGOs and religious organisations, at polling stations.

Senegal and Ethiopia are examples of countries where the electoral oversight system is flawed but where the electoral commissions nevertheless have done a surprisingly good job. In Senegal, as in Ghana and Kenya, the situation has improved considerably over the last decade. The ONEL,

47 See B Atta-Quayson, Procurement of materials for Election 2004 – EC's Committee now in place, *Daily Graphic*, 9 December, 2003, p 1.

48 UNECA, Ghana Country Report in *African governance report: Measuring and monitoring progress towards good governance*, Executive Summary, forthcoming.

despite its weaknesses, did much better than expected during the 1998 elections, and gained considerable credibility. As a result of this, the ruling Parti Socialiste tried to circumscribe the ONEL ahead of the next election by changing eight of the nine members of its steering committee, including the leader, General Niang. This stirred bitter resistance from the opposition as well as from the ONEL itself, and the government's chosen new ONEL-leader was forced to resign. Thus, with the support of the opposition, the press and the civil society, the ONEL managed to gain and maintain its autonomy and legitimacy. The ONEL has been successful in ensuring the fairness of the electoral process, and the executive power now has little influence over how elections are run. Nevertheless, the ONEL remains very much dependent on the state. The current governing coalition, which used to support the creation of a more independent electoral commission rather than the current observer body, seems to have abandoned this idea since their coming to power in 2000. This is perhaps not a good sign.

In Ethiopia, the NEB is generally regarded as heavily dependent on the leadership of its General Secretary, Mr Assefa Birru, who is widely credited with doing an admirable job under difficult circumstances. The NEB has organised the logistical side of elections energetically and efficiently. Concerning its responsibility of ensuring the fair conduct of elections, it has been criticised for adopting an overly narrow and legalistic approach. This has favoured the ruling parties by discounting many accusations of unfair practices brought against them by opposition parties. However, the NEB did disallow the results of the 2000 elections in 14 constituencies won by the ruling coalition, and required new elections to be held. Nevertheless, many problems remain. For instance, local-level election officials are heavily recruited from the ranks of local government officials, who are of necessity members of the ruling party. This is hard to avoid, since state and government in Ethiopia have been closely linked for so long, and it is virtually impossible to recruit qualified officials who are not somehow linked to government.

In the end, it is not satisfactory to have an electoral oversight institution that relies heavily on the personal capabilities and characteristics of its leader. In Ethiopia, the NEB will continue to function relatively well only as long as its general secretary is on good terms with the prime minister

and only as long as its activities do not threaten the dominance of the ruling coalition of the Ethiopian People's Revolutionary Democratic Front (EPRDF) parties. Ethiopia has a considerable way to go before it has a sufficiently strong and independent electoral commission.

Algeria, Nigeria and Uganda's electoral bodies struggle with a weak perception of legitimacy among election observers, opposition parties and democracy groups. In Algeria, the dependence of electoral bodies on the executive is reflected in its actions and decisions. For example, despite the finding of a parliamentary commission of enquiry that the absolute victory of the National Rally for Democracy (RND) in the October 1997 local elections was obtained through fraudulent means – after they have been declared free and fair by district electoral commissions – there was no call by the Constitutional Council to cancel the results in those provinces where massive irregularities had taken place. As a result of such signs of deference to government, ordinary Algerians' trust in electoral oversight institutions has not improved.

In Nigeria, the members of both the original electoral commission appointed by the military in 1999 and the replacements named by President Obasanjo since he took office, were people with no obvious political affiliations. Yet the commission has been strongly criticised for its lack of independence from government.⁴⁹ In the 2003 election, monitors reported instances where election officials connived with partisans to hijack ballot boxes and stuff them with already thumb-printed ballots. Malpractices also continued during the counting process when electoral officials in some areas allowed thugs hired by dominant parties to bar representatives from other parties from the counting centres.⁵⁰ There were also reports that some election officials were threatened with the sack if the government in power in their particular state was not returned to

49 NDI, Statement of the National Democratic Institute (NDI) International Election Observer Delegation to Nigeria's April 19 Presidential and Gubernatorial Elections, NDI, 21 April 2003, www.ndi.org/ndi/library/1582_ng_statement_042103.txt (accessed 9 March 2004).

50 See reports of local and foreign election monitors at the website of the United Nations Electoral Assistance Project, www.unnigeriaelections.org/observer_reports/april/23/ (Accessed 27 February 2004).

51 From interview by Dulue Mbachu (see his country report on Nigeria at www.africanreview.org) with a civil servant who worked as an election official in Delta State.

52 IRIN News, Nigeria: president meets police chiefs over rising political killings, Banditry, *IRIN*, 9 March 2004.

office.⁵¹ In Nigeria, being an electoral commissioner can even entail life-threatening risks. In March 2004, Philip Olorunnipa, head of the electoral commission in Kogi State, was shot dead in his home just before he was due to oversee the local elections on 27 March.⁵²

The last of the three countries with seriously flawed electoral oversight mechanisms is Uganda. In the words of the country's Parliamentary Select Committee on Election Violence:

[T]he reality at the EC does not reflect the aspirations suggested in the constitutional and legal provisions of the constitution and the EC Act respectively. The apparent lack of independence of the Commission; the lack of clear, assertive and impartial leadership exhibited by the EC Chairperson; unclear recruitment procedures and methods; unethical and inappropriate social relations in EC; opaque funds management and suspicious contract tendering system all pose serious concerns to the great majority of Ugandans and leaders.⁵³

In addition, the work of the commission was impeded by the government's late enactment of electoral laws. All electoral laws and election programmes originate with the executive which then communicates them to parliament for approval.⁵⁴ In the run-up to the March 2001 election, the Presidential Elections Act was not passed by parliament until November 2000, and assented to by the president on 8 December 2000. This led to delays in the printing of voters' cards and made the display of the voters register within the prescribed period impossible.

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3.3 Conclusion

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⁵³ Republic of Uganda, *Report of the Select Committee on Election Violence*, Kampala, 2002.

⁵⁴ *Ibid*, p 19.

improved their electoral oversight mechanisms over the last ten to fifteen years. South Africa and Ghana have created robust systems that leave little to be desired, and Kenya and Senegal have made great improvements. In the remaining four countries, progress has mostly been confined to the formal creation of electoral oversight bodies, while the practical will and ability of these bodies to ensure that elections are free and fair have been circumscribed. Thus, it is important to keep in mind that the AU commitment to create independent electoral commissions must mean more than just setting up such an institution. Constitutional and legal guarantees respected by all parties, including the government; robust hiring and firing procedures that cannot be tampered with for political reasons; sufficient human and financial resources to enable the commissions to carry out their mandate in practice; and the independence and courage of the commission and election officials to protect the principles of free and fair elections are all crucial if electoral commissions are to do their jobs properly.