

CHAPTER 2



The Electoral Process

Electoral Reform

Changing a society that has been operating under a one-party system of government to a multi-party system is fraught with difficulty. While the process of constitutional reform is comparatively simple, the fundamental problems lie in reforming the administrative machinery of the state and in transforming the attitudes of civil servants, political leaders and party activists nurtured in the one-party system. If this process is to be successful, it is important that steps be taken by the Government and the ruling party on a timely basis to create a political climate hospitable to new and inexperienced political parties.

Recent Commonwealth experience suggests that at the political level two elements are of particular importance to the conduct of free and fair elections during the transition from a one-party to a multi-party system: the creation of a 'level playing field' for the lawful activities of all political parties and a thorough de-linking of government affairs, personnel and resources from those of the ruling party.

In the case of Kenya, we took note of the legal reforms permitting the lawful activities of opposition political parties, including the primary constitutional amendment in December 1991 which effectively ended the status of KANU as the only legal political party. Together with consequential amendments there was thus established a legal framework for political pluralism in Kenya.¹ This was followed by a further significant reform measure introduced in 1992 which amended the Constitution to empower the Electoral Commission to assume responsibility for the registration of voters, the maintenance and revision of the register of voters and the direction and supervision of the Presidential, Parliamentary and Civic (local government) elections.²

Other reforms, introduced to facilitate the holding of free and fair multi-party elections, included the adoption of new election regulations drawn piecemeal from existing electoral legislation in a number of Commonwealth

¹ Section 2A of the Constitution was repealed by Act 12/91 which also amended the following sections of the Constitution: 5(3)(a), 5(5)(a), 34(d), and 39(1)(b) (deleted).

² Section 42A of the Constitution.

countries. The new measures were aimed at improving procedures to prevent fraud in multi-party voting, for example, the stamping of the national identity card with an official stamp when the voter receives a ballot paper and the use of indelible ink.

Previously, ballot papers for all constituencies had been counted at District Headquarters. Proposals were made by the opposition parties that they be counted at polling stations to eliminate the need to transport each ballot box to a central location, with the inherent delays and possible risk of tampering thus engendered. The decision, eventually, was taken to count at a special centre in each constituency. This was considered to be an improvement since there were at least four times as many counting centres as there were District Headquarters and thus some decentralisation was achieved in the election process.

Other amendments permitted independent observers to follow closely the proceedings for nominations, as well as for the polling and counting. These were positive developments in the quest for openness in the electoral process, and potential confidence-building measures. Since the amendments applied to both international and local observers, the opportunity was created for observers to monitor the proceedings at a significant number of the 10,449 polling stations on polling day. Similarly, several counting centres could also be visited by an observer in the course of the count.

However, the opposition parties did not consider these and many other reforms to be adequate, particularly those relating to the Electoral Commission. They complained that the regulations did not empower opposition parties to nominate members to the Commission, and generally expressed strong reservations about most of those appointed to the Commission, including its Chairman.

We received several reports that the transition was marred by the failure of the ruling party to de-link itself from the government. That was aggravated by a seeming reluctance on the part of the Electoral Commission to keep the public informed of its activities or to participate vigorously in the process of educating the public about the anticipated reforms.

The lack of rapid progress in de-linking the ruling party from the government was most pronounced in respect of access to the state-owned media. The opposition parties enjoyed little or no positive media coverage, particularly by the electronic media. There were also allegations that the ruling party was using government funds and vehicles to run its election campaign.

Several of the opposition parties complained to us that the Government was reluctant to allow them free and fair campaigning. They cited the Government's refusal to issue permits for their political rallies in certain areas; where permits had been granted, they noted the failure to provide adequate security to minimise frequent disruption of rallies. On other occasions, permits were allegedly withdrawn arbitrarily and without adequate notice. They informed us, too, that for a long time the ruling party and the Government had refused to talk to the opposition parties.

A confrontation took place in early November between the Government and the opposition parties over steps, taken by the Attorney-General and the Electoral Commission, which considerably reduced the period elapsing between the date of the issue of the writ for the election and the date for the nomination of candidates. The sequence of events is reviewed in detail in Chapter 3. The confrontation led to a court decision in favour of the opposition parties, and the date of the election was consequently postponed. This incident had further fuelled opposition doubts as to the impartiality of the Commission.

The Electoral Administrative Framework

Responsibility for the organisation and conduct of elections resides in the Electoral Commission. The Chairman and members of the Commission are appointed by the President. Its full complement at the time of the elections was 11 (including the Chairman) but the minimum membership is set at five. The Commission elects a Vice-Chairman from among its members and prescribes its own rules of procedure. It takes decisions by the concurrence of a majority of all its members. Its functions include the supervision of national elections, registration of voters and maintenance and revision of the register of voters, determination of the number of constituencies, and the promotion of voter-education and awareness.

The Commission is established under the Constitution and is intended to be an independent body, free from the direction of any other person or authority in the exercise of its functions. Members are appointed for a fixed term of five years. A member can only be removed by the procedure prescribed by the Constitution. The question of removal must be referred by the President to a tribunal appointed pursuant to the Constitution. The tribunal hears and determines the charges laid against the member which are said to justify the member's removal. If the tribunal finds the charges established, it recommends to the President that the member be removed. A member can only be removed for misbehaviour or inability to perform the functions of the office.

We received several complaints from opposition political parties and other interested groups about the composition and performance of the Commission. A major complaint was that opposition parties were not allowed to propose nominees for membership of the Commission. They also contended that the Chairman, Justice Zachary Chesoni, and some members of the Commission were not suitable persons to serve on the Commission because they were perceived to be associated with or to be taking direction from the ruling party. Those allegations were vigorously denied by the Chairman and members concerned and we have not received information which would cast doubts on their denial.

Two particular matters, however, need to be mentioned. First, the Commission, as constituted at the date of the constitutional amendment permitting multi-party elections, was that which existed during the period of one-party

government. Although the reforms introduced entailed a significant change in its role, the Government did not take this opportunity to hold consultations to appoint a new Commission. This would have gone some way to increasing confidence in the process.

Second, public and judicial records revealed that there was reasonable ground for challenging Justice Chesoni's fitness for the office of Chairman of the Electoral Commission. At the date of his appointment the issue was not as crucial as Kenya was then a one-party state and the Electoral Commission would supervise the process by which members of the ruling party KANU were selected as members of Parliament. Little turned on the independence and impartiality of the body charged with the responsibility for the organisation and conduct of that type of election. With the change to a multi-party system, it became vital that the contestants should have the confidence that the Electoral Commission was indeed an independent and impartial body free from the direction and control of any other person in the exercise of its functions.

Not surprisingly, therefore, the opposition parties objected to Justice Chesoni continuing as Chairman of the Electoral Commission on the grounds that he was not fit for the office. It was public knowledge that he was financially embarrassed and that he had been removed from the office of an acting Judge of Appeal which he had held shortly before his appointment as Chairman of the Electoral Commission. The circumstances of his removal are set out in *Annex IX*

The retention of Justice Chesoni in the face of what were apparently justified opposition protests could reasonably be interpreted by the opposition parties as an unmistakable signal that the Government would use its powers to secure an advantage for the ruling party.

Justice Chesoni's initial lack of transparency, his unwillingness to meet the opposition parties and his apparent collaboration with the Attorney-General in improperly shortening the period between the issue of the writ and the nomination of candidates, confirmed opposition misgivings. These factors cast a cloud over the electoral process.

But we noted with satisfaction that the performance and credibility of the Chairman and his colleagues on the Commission had improved dramatically from the time of the Secretary-General's visit to Kenya in mid-November. Since then the Chairman had held regular press briefings and meetings with all political parties and was more accessible to the media and the public. By the time of our arrival in mid-December, the earlier widespread and sustained criticism of the Chairman, and of the Commission in general, had lessened considerably. Over the period of our stay in Kenya, the performance in office of the Chairman and the quality of the decisions made by the Commission under his leadership on difficult and controversial issues, improved noticeably.

At issue, however, was the extent to which the history of his appointment and his earlier performance might have undermined perceptions that the

election would be supervised in a manner that was free and fair. It is reasonable to require that the conduct of elections should not only be free and fair but that it should also be seen to be so.

Organisation of the Electoral Commission

Details of the functions of the operational personnel and an organisation chart is at *Annex X*.