

How to Implement the Recommendations of the Electoral Commission of Kenya (ECK)

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After the 2007 elections, Kenya was plunged into unprecedented violence resulting from perceptions of a rigged election. The violence was spontaneous though after a couple of days it assumed other dimensions such as planned and banditry.

Following the violence, it took the intervention of the African Union as well as the international community to work towards the restoration of calm. Calm returned soon after the signing a power sharing agreement on the 28th February 2008.

In order to assure Kenya of lasting peace, the National Dialogue and Reconciliation Team envisaged that there would be need to deal with some key and immediate issues. These particularly required further investigations beyond the facts that were known. The two most vital investigations were a) the *Independent Review Commission (IREC)* which was mandated to revisit and examine all matters related to the 2007 General Elections, particularly the Presidential elections, and b) the *Commission of Inquiry into the Post Election Violence (CIPEV)*.

The legal foundation of both these commissions was the Commissions of Inquiry Act, Cap 162, Laws of Kenya.

Under the said Act, the president has power to appoint a commission of inquiry to investigate a matter that, in the opinion of the President, is in public interest.

So, what was of significant public interest in the matters thus leading to the establishment of the IREC?

Kenya has had three multi party General Elections before that of 2007. This was the fourth. But the circumstances surrounding the election were such that there were great misgivings on the part of various actors, particularly the Electoral Commission of Kenya (ECK), as well as the incumbent leadership. This followed the partisan appointment of five ECK Commissioners disregarding the IPPG deal of which the incumbent President was a key midwife.

Secondly and more importantly, as a result of the election result more than one thousand people lost their lives. An estimated three hundred thousand people were left homeless and dispossessed of their property, land and means of livelihood. It is envisaged that there were many more that may have lost their lives as a consequence of the violence but who may never be known as it is difficult to document such.

Thirdly, since no party was admitting to any malfeasance, and the key players had hardened their positions, it was imperative that the matter be resolved somehow. There was need to know the truth about what exactly happened with the election, and even a greater need to bring to justice anyone found culpable of malfeasance as well as do justice to the hapless victims of the violence.

Kenya's for Peace Truth and Justice (KPTJ) therefore has continued tirelessly to seek the truth and justice because it sees these two interdependent components as being precondition to lasting peace and harmony.

On the 13th March 2008, President Kibaki appointed the Independent Review Commission. In the Gazette Notice the president explicitly says that he was "...of the opinion that it was in public interest to.....appoint a commission to ***inquire into all aspects*** of the General Election held on 27th December 2007, in Kenya ***with particular emphasis on the Presidential Election.....***"(Emphasis mine).

The president set the terms of reference for the Commission, led by Johann Kriegler, Judge. The TORs inter alia included ".....(e) ***investigate the vote counting and tallying elections for the entire election with special attention to the presidential in order to assess the integrity of the results and make recommendations for improvements or overhaul of the system.....***"(Emphasis mine).

The emphasis above is necessary to demonstrate, as has been made earlier, that the KPTJ does not believe that the Commission did all within its mandate to find the truth and to promote justice, despite that being the value that was in the public interest to find.

The foregoing notwithstanding, the IREC did make various recommendations that have certain implications on the law. There were recommendations that would affect the constitution, legislation, regulation and some, just discipline.

1. CONSTITUTIONAL

Under the constitutional theme, the commission makes various recommendations. These include:

- Recognition and declaration of the right to citizenship
- Right to Vote
- Right to contest
- The right to genuine periodic elections

- The right not to be discriminated against as in the case of section 34(c) of the Constitution of Kenya which explicitly discriminates against people with the disability of speech (dumb) from being nominated to stand for a parliamentary seat.
- Appointment of Commissioners to the Election Management Body (EMB) including composition and limit in numbers.
- Accountability of the EMB to the people of Kenya through Parliament
- Reorganization of some mandate currently held by the ECK. The commission recommends that the Constituency boundary reviews be taken away and be given to another body which will have to be created.
- Determination of the end of the term of office of the President so as to remove all doubt.

Under the foregoing, the Commission recognizes that without explicit declaration of the rights and regulations to guide elections, statute or practice can disenfranchise a category of citizens. Further, it recognizes that in having these declarations stated in the constitution, a duty is imposed on the Election Management Body to do all that is necessary to facilitate the enjoyment of electoral rights. Lastly, once the rights are properly stipulated in the Constitution, relief, in the case of violation or unsatisfactory facilitation, can be sought and obtained. Obviously, the case of section it seems to directly engender a principle that is a violation of one of the fundamental rights of the person. The right against discrimination for any reason cannot be gainsaid.

What comes out from the recommendations is the apparent awareness of the Commission that some of its recommendations are of the nature that will require attention in substantive constitutional reform while others may just need the reactivity of amendment. The debate on citizenship and the rights it confers has been going on before and through the Bomas Constitutional Conference. It will not be settled until the entire Constitution is overhauled so as to recognize, for instance, the right to dual citizenship as well as recognize the right of a Kenyan woman to confer citizenship by marriage to a foreign man, which is currently not the case.

However, with enthusiasm, the IREC seems in some cases to have gone an extra mile. Unsolicited may I add. A number of recommendations appear to be preferred opinions of the Commission, yet they ought to be subjected to the mandate of Kenyans. Examples abound. Regarding the nomination of members as special interest groups, the IREC lists a number of dos and don'ts. Regarding the appointment of the cabinet, IREC seeks latitude for the President to appoint people from outside of parliament. This particular attitude is repeated in various parts of the report. Without countermanding those opinions, they will be subjected to the views of Kenyans in an informed debate considering all options. More importantly, some of the opinions seem to make assumptions about the type of governance system and framework that will be adopted.

2. LEGISLATIVE

Under the legislative framework, the IREC makes various recommendations that will affect the legislative framework. These will include amendment of existing law, creation of new statute, and subject to a new constitutional order, consolidation of the legal framework that deals with elections.

Key among the various recommendations will include:

- Consolidation of all laws relating to elections (though the various laws affecting elections are so diverse that it may be difficult to consolidate all of them into a harmonized document. Perhaps the laws can be made into a compendium such as the "Grey Book" used by judges and magistrates whereby all election related statutes are bound together to ease reference). The laws are so diverse as to include such laws as the Kenya National Commission of Human Rights Act, The Police Act, The Political Parties Act and The Local Governments Act.
- New law to deal with election disputes (including party nominations)
- Establishment of an Election Dispute Resolution Court. **(If it has final jurisdiction on election matters, then it must be created under the constitution. Otherwise no statute, as the law stands, can oust the jurisdiction of the High Court).**
- Accountability to the people through parliament will need to be facilitated through a legislative framework which will safeguard the constitutional and operational independence of the Election Management Body.
- Regulation and discipline of political parties through the statute. Especially the allocation of symbols and limiting the time this may be done or, more efficiently, when it may not be done. This will require safeguarding the right to associate while tempering it with the functional efficiency and propriety of the election process.

Once again, the timelines for the execution of these legislative agenda is left to the imagination of the parties that are the greatest beneficiary of the malfeasance committed by the ECK. That therefore raises questions as to the commitment of the political elite and the wielders of power in continuing the reform agenda.

3. REGULATION

The IREC's recommendations also provide for a great deal of opportunity to create new regulations as well as amendment to the current regulations in the Code of Conduct; the regulations affecting the nomination process; regulations regarding party nominations, as well as regulations affecting political party nomination disputes.

The regulations need to be enacted with the help of stakeholder participation. They should be legislated vide subsidiary legislation.

The IREC makes this recommendations, however, without being categorical on citizen participation in drafting and enacting the regulations.

4. WHAT HAPPENS WITH THE ECK?

The IREC makes very damning recommendations on the Electoral Commission of Kenya. Indeed, it suggests that a new Election Management Body for Kenya needs to be established. This body will have a new image, probably a new name, fresh ethos, mandate, integrity and such others. This is based on the fact that the IREC found that the ECK has lost its credibility in the face of its clients, the people of Kenya.

However, it strikes one that in the rest of the recommendations, the IREC continues to refer to the ECK just as such. This is probably the reason ECK continues to imagine that it has some recognition which it is taking for credibility.

In order to facilitate the reform of the electoral process in Kenya's, the key actor, the ECK must be reformed. The Commissioners must out.

They can do so by either:

- Voluntarily resigning
- Being investigated by a tribunal and possibly recommended to vacate or
- Being convicted of offences.

In event of an investigation, the tribunal must investigate each of the commissioners for specific allegations related to either incompetence or misbehavior.

The key questions as to whether Kenya should wait for the comprehensive review of the constitution so as to deal with the ECK with finality begs comment.

It is imperative that the Election Management Body that we select as Kenya, should be one that commands respect as well as trust from the people of Kenya. It must be one that can be trusted to co-operate in the reform process and not one that takes self defensive hard-line positions such as the current ECK. Therefore, the current ECK must be disbanded and a new group of commissioners appointed with the help of the National Dialogue and Reconciliation team. This new commission will have to understand, by amendment to the constitution, that it will be transitional. Therefore, at the time of a comprehensive review of the constitution it must be prepared to give way to a new architecture dictated by Kenyans.

The continued participation in and management of the electoral system by the current ECK continues to purvey the false impression that there is confidence in its capacity. It needs to be reiterated that the only reason Kenyans are putting up with it is by compunction of the law and not faith or confidence. Therefore, the sooner they are out the better to facilitate the immediate review and reform of the electoral body as well as system.

5. CONCLUSION

In spite of all the shortcomings of the process and some of the conclusions of the IREC, it seems that there are, indeed, some useful recommendations that we must accept. One important and cross-cutting finding is that there is plenty of impunity in Kenya. In order that we start dealing with it, the ECK which is singularly most culpable of all actors, must face the consequences. Lest the impunity be entrenched more as a result of the bad ECK example.

Kenyans - private citizens, public servants or corporate entities - must work together to make the necessary sacrifices so as to achieve a constitutional and institutional framework that will promote fidelity to democracy, justice and fairness.

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