

# **Election Management Bodies in West Africa**

**A comparative study of the contribution of electoral  
commissions to the strengthening of democracy**

**By**

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**A review by AfriMAP  
and the  
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# Preface

Electoral management bodies (EMBs) have become a keystone of the process of democratisation in the countries of West Africa. Their composition, mandate and activities have attracted increasing public attention. In some countries, the EMBs and the rules of the electoral game are the focus of passionate interest and debate each time elections come around. In others, the debates around the EMBs are semi-permanent and attract attention even outside the electoral cycle. The lack of a clear understanding of the issues at stake in the design of these bodies has often led to the generation of more heat than light, while leading to proposals that do not address the real challenges at stake.

This report thus responds to the evident need for more knowledge about an institution that occupies a more and more important place in the political process in West Africa. It is an in-depth study of EMBs in six countries of West Africa – Benin, Cape Verde, Ghana, Nigeria, Senegal and Sierra Leone – based on documentary research and detailed interviews in each country. An introductory chapter, which draws also on a separate study by AfriMAP of election management in Uganda, provides a comparative analysis which highlights the similarities and differences in the structure and operations of each body, and attempts to establish the reasons for their comparative successes and failures.

Each of the country's study explores in detail the extent to which the EMBs fulfil their responsibilities, the degree to which they are independent of the executive, the effectiveness of their performance, and their contribution to the improvement of the quality of elections and consequently the quality of democracy in each country, as well as the systems for adjudicating electoral disputes. The study situates EMBs in their broader context, taking account of their status as a product of the struggle for democracy in each case, their anchorage in the constitutional traditions of each society, their place in the history of political reform and their interaction with the other institutions of each country.

As institutions that apply the rules governing elections, EMBs are at the heart of discussion and practice on the critical question of effective citizen participation in the public affairs of their countries. It is now two decades since EMBs independent of government under various guises first emerged in some countries of the region, or were the subject of serious reforms where they existed already. Since then, the way in which they are established and the effectiveness of their operations have continued to preoccupy those who

advocate for competitive elections, while reforms to the EMB have taken centre stage in more general political reforms. The demand – achieved in some cases – by citizens, political actors and members of the governing class to have the right to oversee the functioning of these bodies is a measure of the critical role that they play in translating into fact the principles of transparency in democratic government. Yet often this oversight goes no further than the adoption of the formal rules for the composition and mandate of the EMB. The issues that make the real difference to the independence and effectiveness of the EMB, beyond the level of formal guarantees, are left unexamined. As a result, the ordinary citizen, and all the other protagonists in the political contest, often have only a limited knowledge of the impact that the formal structures of the EMB have or could have on the quality of democracy in the countries concerned.

This study thus comes at an opportune moment for discussions of electoral reform. Its aim is to compare theory and practice of electoral management in countries with different traditions and political cultures. From this point of view, the study offers an interesting overview of the socio-historical, institutional, and political context that allows a deeper understanding of EMBs in the west African context. Thus, the study both provides a detailed account of current situation, opening up the debate on the bodies charged with management of elections in the countries concerned, and also offers to citizens, political actors, governments and international institutions an evaluation of the issues at stake and recommendations for reforms that are necessary. It aims to be a tool to increase understanding of the institutions and procedures governing elections and to encourage reforms in the management, oversight and credibility of the electoral process, to strengthen election observation, and to improve the management of electoral disputes.

## **Methodology and acknowledgments**

The idea of carrying out a critical study of electoral management bodies and to evaluate their role in the organisation of credible elections in West Africa came from a series of consultations carried out from mid-2009 by AfriMAP, the Africa Governance Monitoring and Advocacy Project of the Open Society Foundations. In August 2009, AfriMAP co-organised, with the Open Society Initiative for West Africa (OSIWA) and the Council for the Development of Social Science Research in Africa (CODESRIA), a consultative workshop on the elections and the role of civil society in West Africa. We would like to thank the following persons who represented at this meeting the bodies most active in electoral observation and electoral reform in West Africa: Aliyu Ahmadu of the Centre for Democracy and Development in Nigeria (CDD-Nigeria), Emmanuel Akwetey of the Institute for Democratic Governance in Ghana (IDEG), and Aboubacry Mbodj of the *Rencontre africaine pour la défense des droits de l'homme* in Senegal (RADDHO), as well as Achieng Akena and Ibrahima Kane, both of the AU advocacy programme of the Open Society Foundations.

This meeting noted that despite their differences in political traditions the countries of the west African sub-region shared many similar challenges in relation to the holding of credible elections. Participants at the meeting noted that among the characteristics

of elections in West Africa is the weakness of the institutional framework for their organisation, their vulnerability to open or hidden interference from political actors or the executive, and the inability to take action against electoral malpractice. The meeting concluded that a systematic study of the institutional framework for the organisation of elections in comparative perspective would allow an examination of the reasons for these weaknesses and give decision-makers and activists a tool for reform of electoral practice based on reliable research.

Drawing on the recommendations of this consultative meeting, in October 2009 AfriMAP organised a further consultation aimed at developing a methodological framework for a comparative study of Electoral Commissions in the sub-region. In addition to the authors of this volume, the meeting also benefited from the participation of the following persons, whom we thank for their contribution: Hawa Ba, Senegal programme officer at OSIWA; Idiatou Bah, political governance programme officer at OSIWA; Maurice Enguéléguélé, programme coordinator of the African Governance Institute (AGI); Kango Lare-Lantone, consultant and former adviser to the United Nations Development Programme (UNDP) on governance reform; Bernard Lututala, deputy executive secretary of CODESRIA; George Nzongola-Ntalaja, interim executive director of AGI; and Ebrima Sall, executive secretary of CODESRIA.

Individual country research for the study was carried out by the named researchers on the basis of documentary research and one or more field trips to the country concerned, in late 2009 or the first half of 2010. In each country, the researchers interviewed leading players in the management of elections, including representatives of the electoral management bodies, political parties and civil society. At least one focus group was also organised where a variety of players discussed the challenges of election management in their country. The information presented in this report aims to be up to date as of late 2010.

None of these meetings could have been organised without the help of Yaye Helene Ndiaye, administrative assistant to AfriMAP, who also gave important support for the field research for this study by programming and coordinating the visits of the authors to the various countries. Hawa Ba and Idiatou Bah have read and commented on several chapters of the studies. Bronwen Manby, senior programme adviser with AfriMAP, has read and commented on the complete study and made a substantial contribution to its final version. The study was led and finalised under the editorial direction of Pascal Kambale, deputy director of AfriMAP.



# 1

## Overview: The contribution of electoral management bodies to credible elections in West Africa

**Pascal Kambale**

### **A.** Introduction

Electoral competition has progressively come to occupy a central place in the political life of almost all the countries of the west African sub-region since the beginning of what has been called the ‘second wave of democratisation’ at the beginning of the 1990s. The Protocol on Democracy and Good Governance adopted by the Economic Community of West African States (ECOWAS) in 2001 states that among the principles to ‘be declared as constitutional principles shared by all Member States’ is that ‘Every accession to power must be made through free, fair and transparent elections’ (Article 1[b]). It also provides that ‘The bodies responsible for organising the elections shall be independent or neutral and shall have the confidence of all the political actors’ (Article 3). Among the reforms introduced in the last 20 years to consolidate the (re)nascent practice of democracy, those aiming at improving electoral management have both led the way and attracted the most passionate debates. One of the general traits of the reforms introduced in this area in the countries studied have been efforts to reinforce or initiate mechanisms to separate, even insulate, electoral management from the normal administrative responsibilities of the executive. The direct consequence has been the creation of electoral management bodies (EMBs)

described as ‘independent’ of the executive in almost all the countries of the sub-region. This has resulted in the need to equip electoral management bodies with competent personnel, whose need for expertise has increased each time the electoral rules and procedures became more complex.

This collection of studies asks the question whether, and if so to what extent, the achievements in building institutions and expertise have in fact had a positive impact on democracy in the countries of the sub-region. It aims to judge the impact that the evolution of the structures and procedures for electoral management has had in practice on the quality of citizen participation in the running of their countries. The main findings of the different studies show that even if the problems are similar in each country and the responses to these problems have taken the same institutional and procedural route, the effect that the responses have in turn had on the credibility of elections and the quality of political participation varies considerably from one country to the next. The reasons for these differences are often located in historical factors and the general political context, rather than the institutional form of the EMB or the legal status of its members – even though these factors are not without consequences for electoral governance.

## **B. Colonial legacy**

In all the countries included in this collection, with the exception of Cape Verde, the experience of elections dates from the colonial period. The system of election administration and the political context during the colonial period – and in particular during decolonisation – thus had a huge influence on the electoral politics of each country at least during the first decades of independence.

Although the civil service directly administered elections in both Britain and France at the time, Britain took the choice of establishing semi-autonomous electoral commissions to administer the pre-independence elections in the 1950s, in the interests of moderating the internal tensions brought by the introduction of party politics. The standard constitutional provision established an electoral commission which ‘shall exercise its powers, functions and duties independent of any direction or influence by any other person or authority’. More or less autonomous electoral commissions are thus a tradition since independence in most anglophone countries (including Ghana and Nigeria in West Africa, though not Sierra Leone); whereas electoral commissions are a relatively new innovation in the francophone and lusophone countries (Benin, Cape Verde, Senegal; and also in Sierra Leone, where one was created by the 1991 constitution).

The idea that electoral management should be carried out by a body of honest and competent public servants, outside the influence of politics, also dates from the colonial period. But there are again different trajectories. In some cases, the public servants were recruited from among the colonial administration itself; in others, it was rather eminent personalities independent from the administration who led the process. In the francophone countries during the last years of empire, elections were carried out within the framework

of the colonial project, with the aim of consolidating its legitimacy (Benin, Senegal). In the anglophone countries, by contrast, the elections organised in the last years of the colonial period took place within the context of a challenge to colonisation and/or of preparing the African elites for independent government (Nigeria, Ghana, Sierra Leone). These differences also partly explain how in the francophone countries the electoral management systems in place during colonisation were maintained following independence, consolidating the new regimes. In the anglophone countries, on the other hand, the role of the electoral management bodies was among the issues contested in the political turmoil of the first years of independence.

The difference in trajectories also may account for the difference in the history of electoral violence in (most of) the anglophone versus (most of) the francophone countries. The fact that early elections in the immediate pre-independence period were part of the decolonisation process in the anglophone countries partly explains the largely violent nature of elections in these countries; while in Benin and Senegal, as in the rest of pre-independence territories of *Afrique occidentale française* (AOF), elections bordered on a routine administrative formality and contests were for colonial offices among African candidates who were already part of the colonial elite. Thus electoral violence is in most francophone countries a relatively new phenomenon which came with the second wave of democratisation in the early 1990s. Even in Senegal, where democratisation started much earlier than in most francophone countries, electoral violence in its most brutal form became a chronic feature in electoral contests only after the restoration of unrestricted multi-party politics in the late 1970s.

### C. Elections and constitutional reforms

As an integral part of the political history of these countries, the EMBs have been a focus of efforts to consolidate democracy. Whichever trajectory they followed, the reform of EMBs – their status, powers and functions – has been an important aspect of the broader constitutional and political reforms that have taken place in all the countries studied. In certain cases (Ghana, Sierra Leone), electoral reforms were at the heart of efforts to adopt a new constitution and give the country a new more democratic institutional framework. In other cases (Benin, Nigeria), the reforms in the electoral system were the logical consequence of efforts to put in place more stable institutions that were more representative of the regional diversity of the country. The countries that have not seen such turbulent institutional restructuring (Cape Verde, Senegal) – and have therefore hardly seen any fundamental institutional reforms making a break with the historical format – have also undertaken relatively few reforms in electoral management and procedures. The executive has therefore continued to play an important, indeed leading, role in the management of elections.

## D. Membership of EMBs and appointment of Electoral Commissioners

The countries in this study currently use one of three institutional models for electoral management:

- The hybrid/governmental model, in which the core functions of the election process are carried out by the civil service but under the supervision of an independent body (Senegal, Cape Verde);
- The political model, in which election management is carried out by an institution that is independent of government but mainly or fully composed of party political representatives (Benin); and
- The expert model, where the management of elections is carried out by an independent body whose members are (at least in theory) chosen for their personal qualities, their professional experience and their integrity (Ghana, Nigeria, Sierra Leone).

In all three models the appointment system for the members of the autonomous commission that either supervises or conducts the elections varies quite significantly both in law and in practice. In Senegal members of the *Commission nationale électorale autonome* (CENA) are appointed by the president after consultation; in Cape Verde the five members of the *Comissão nacional de eleições* (CNE) are elected by the national assembly, each one with a two-thirds majority in a secret ballot. In Benin, commissioners are nominated by political parties themselves; in Ghana, commissioners are appointed by the president after consultation with an advisory body; in Sierra Leone, consultation with parties is followed by parliamentary approval. There is also still significant fluidity in the way that EMBs are constituted: important reforms have recently been enacted in Senegal and Sierra Leone, while reforms are actively under debate in Nigeria, Benin, Senegal, and elsewhere. These different models for electoral management have, however, rather less bearing on the independence of the EMB than the way that the members of the EMB are chosen, their security of tenure, their control over finances and the extent of their mandate.

## E. Independence and effectiveness

In all the countries studied, either the constitution (Ghana, Nigeria, Sierra Leone) or the electoral law or law establishing the EMB (Benin, Cape Verde, Senegal) provide that the EMB shall not act according to the instructions of any other institution in the conduct of its business and the fulfilment of its responsibilities. These formal guarantees do not in practice provide a criterion for an effective comparison between the institutions, given that the EMBs studied have almost identical legal provisions protecting their independence, yet have widely differing degrees of independence in practice.

The case studies assembled here show that pro-democracy activists and opposition parties across the region have a widely shared sense that the way in which of the members of

the EMBs are chosen has the most important impact on their independence. Among the questions debated in the course of recent or ongoing reforms to increase the independence of the EMB, the need to change the way in which members of the EMB are chosen has taken a leading place. In Nigeria, an electoral reform committee put in place following the debacle of the 2007 elections proposed a role for the National Judicial Council in the system for nominating members of the Independent National Electoral Commission (INEC). In Senegal, the debate is focused on expanding the number of institutions that have a role in nominating members of the CENA, to break the monopoly currently held by the president in this process. In Sierra Leone, it is the power of the president to dismiss members of the National Electoral Commission (NEC) for bad conduct or other reasons that has been challenged as likely to undermine the independence of NEC members, given that this power is subject to no parliamentary oversight.

However, EMBs made up of political party representatives are adversely affected by the clear political loyalties of their members. Although opposition parties often advocate this system, the reality is that it can lead to impaired performance and criticism of the commission's work. This has been particularly clear in Benin.

But while the different systems of appointment and compositions of the various EMBs does have an impact on their performance, other factors often play at least as important and sometimes a more important role. A political party commission like the CENA in Benin, whatever its defects, has sometimes conducted elections with more independence and competence than an expert commission such as those in Nigeria; while the governmental model in Cape Verde has a longer tradition of effective performance and independence in action than the system of the same type used in Senegal. Issues such as the size of the country (Nigeria vs Cape Verde at the most extreme), the relative balance of powers among political parties (Benin vs Sierra Leone), and the strength of other institutions (the courts, the civil service in general) are all critically important. Nevertheless, the configuration of the EMB can make an important difference.

Among the more important criteria that can affect the independence and effectiveness of an EMB are the following:

- The strength of character of the members, especially the chair of the EMB. For example, in both Ghana and Sierra Leone the chair of the commission is credited with ensuring the quality of elections and resisting pressure from parties; by contrast in Nigeria, at least until the appointment of a new chair in 2010, there was no trust in the leadership of the commission, which was regarded as being in the pocket of the ruling party. The strength of character of an individual is a personal characteristic that is difficult, even impossible, to guarantee in advance; and so none of the country studies recommend it as specific qualification for nomination as a member of an EMB. The quality of moral integrity, common to all the national laws on EMBs, approaches this idea most closely, but the element of 'confidence of all the political actors' added by the ECOWAS Protocol on Democracy and Good Governance – but not taken up by the law in any of the countries

studied – could be a useful supplementary provision. Cape Verde perhaps gets closest to fulfilling the idea behind the article with its process for approval of CNE members by a two-thirds majority in parliament.

- The security of tenure of the members of the EMB appears to be more important than the process for appointing them. In Ghana, for example, the appointment of the chair and two vice-chairs of the Electoral Commission (EC) is at the more or less complete discretion of the president, but is for life – they have the same security of tenure as judges. In Benin, the fact that the EMB is recreated for each election and is in place for only a few months, creating instability and the possibility of manipulation, is to some extent countered by the absence of any provision in the law for removal of the members of the EMB during their mandate. In Senegal, however, legal guarantees of security of tenure did not prevent the president from dismissing the chair of the CENA on the grounds that the chair had ‘lost his confidence’. Similar situations have arisen several times in Nigeria, where, for example, military President Ibrahim Babangida removed the chair and some members of the country’s Electoral Commission in 1989, before the end of a planned transition programme, and again following the annulment of the presidential elections of 12 June 1993 removed the chair and all the members of the Electoral Commission before the end of their mandate. In Sierra Leone, after the presidential and parliamentary elections of 2007, the president removed some members of the country’s Electoral Commission, without due process. However, in none of these cases did the chair and members of the commission seek redress in court. In reaction to this abuse of presidential powers, in the case of Nigeria, the 2008 report of the electoral reform committee reaffirmed the provision of the 1999 constitution that the chair and members of INEC should not be removed by the president except for inability to discharge the function of their office or for misconduct and acting on the advice of two-thirds majority vote in the Senate.
- The stability of administrative personnel. The more temporary staff that have to be recruited at election time the worse for the competence of electoral management and the greater the opportunity for influencing them. In Benin, this is particularly extreme, since the commissioners themselves are only in place for a few months and there is little continuity from one commission to the next. This can be an advantage of administration by standing government structures, as Cape Verde demonstrates.
- The security of funding for the EMB. Whether funding comes from central government or directly from international donors, the lack of guaranteed and predictable funding insulated from political interference by the regime or the instability of donor preferences creates huge challenges. For example, the role of the minister of finance in the process of preparing a budget for elections is more significant in Senegal than Cape Verde; as a consequence, the CNE in Cape

Verde has a greater degree of control over its budget and also a greater degree of independence than the CENA in Senegal.

- The degree to which the EMB has effective control over all the tasks that must be completed in the electoral process; or at least the extent to which the tasks of the various bodies are clearly delimited and understood by all, so that there is no attempt at duplication or challenge to the authority of a particular institution to carry out a task. EMB performance is often proportional to the extent to which it controls the complete chain of events in the process. This often goes hand in hand with the degree to which the EMB controls the logistical and financial aspects of the electoral process (not just the management of the actual elections themselves): the more directly the EC is involved in the procurement process, the recruitment of personnel, the allocation of resources and the development of the election budget, the less risk there is of political interference by other actors (as shown in Ghana and Sierra Leone). In Benin the fact that the decentralised structures of the CENA are separately appointed and not hired by their head office means that there is no clear hierarchy of control and the head office of the CENA cannot ensure that its instructions are followed. On the other hand, the sharing of electoral tasks with other institutions increases the risk of poor performance and dependence on these institutions. The *Direcção-Geral de Apoio ao Processo Eleitoral* (DGAPE) of Cape Verde for example, which is a department of the ministry of the interior, takes charge of a much wider set of duties than the CENA of Benin and, even though it is government controlled, it performs better. On this issue, Nigeria is an interesting special case. Although the tendency in other countries is to enlarge the set of responsibilities given to EMBs, the electoral reform committee in Nigeria recommended that certain tasks given to the INEC should be given to a set of new institutions that should be established, including a political parties registration and regulatory commission, an electoral offences commission, a constituency delimitation commission, and a centre for democratic studies to undertake civic education.
- The extent to which the EMB has a mandate in relation to political parties – and exercises it – is particularly important. In the francophone countries it is rare for an EMB to have a role in the internal management of political parties. In Ghana, by contrast, the EC has fully taken on board its role of supervising internal party elections, and has on its own initiative set up the Inter Parties Advisory Committee (IPAC), a trust-building institution without a formal role in the electoral process, in which all the parties contesting an election regularly meet with the Electoral Commission and other relevant stakeholders, from civil society to representatives of the security forces responsible for policing elections, to resolve issues as they arise. The IPAC has played a very important role in the consolidation of democracy in Ghana, even though it has no legislative or constitutional backing. In Nigeria, the 1999 constitution gives INEC the power to oversee internal party operations, and these powers were initially expanded in the 2010 Elec-

toral Act to allow INEC to play a more active role – but an amendment at the end of the year removed this provision. In Sierra Leone the Political Party Registration Commission (PPRC) specifically established to oversee parties has been less successful than hoped in exercising its mandate – perhaps because it is seen as the junior partner of the two EMBs – and is significantly less resourced and carries less weight.

- The quality of the collaboration between the EMB and the other institutions and stakeholders in the elections. For example, the generally good relationship between the Electoral Commission and the PPRC in Sierra Leone or the DGAPE and the CNE in Cape Verde; compared to the dysfunction of the relationship between the interior ministry and the CENA in Benin or Senegal, which has led to confusion even over the basic management of electoral materials.

## F. Common challenges to electoral management

Country studies included in this collection show that all the EMBs, whatever their level of independence and effectiveness, are confronted by a similar set of problems in their management of elections. Among the most important of these problems are the creation and maintenance of a credible electoral roll, the high cost of elections, the lack of powers to sanction misconduct, and the low level of involvement of EMBs in the management of electoral disputes.

*Voter registration:* Some countries are still on manual systems; but even those with fully computerised systems face real challenges in the reliability of the electoral roll (Nigeria above all, but even in Ghana). Even in Cape Verde, the best organised of all the systems, the right to vote of the diaspora creates significant problems for the register. The main problem in this area is the absence in almost all the countries studied of a civil register capable of generating credible demographic statistics. The link between credible population data and credible elections is clearly stated by the ECOWAS Protocol which provides that ‘Each ECOWAS Member State shall ensure the establishment of a reliable registry of births and deaths’ (Article 4). Other problems relate rather to logistical difficulties, such as the poor coverage of the national territory by registration and polling stations (Sierra Leone) and the lack of a consistent and uniform system for voter registration (Nigeria, Benin).

*Power of sanction:* A weakness of all of the EMBs is their ability to enforce the rules in their own name. In Benin, the CENA can only report electoral irregularities to the judicial system; the CENA has no power of sanction itself. In Sierra Leone, the NEC can adopt regulations that, for example, allow it to declare invalid any result with more than 100% turnout, but its ability to apply this rule has been challenged in practice: neither the NEC and the PPRC have powers to enforce their authority, and in particular to prosecute electoral offences in their own name, relying instead on the police to do so. In Senegal, the CENA has some limited powers to act against cadres of the interior ministry and can

be a direct party in court action, though prosecutions are in the hands of the regular prosecution service. In Ghana, the EC has the power to invalidate election results if they have not yet been published or announced (after publication only the courts can intervene) but lacks the ability to enforce election laws short of declaring results invalid, for example to take steps to enforce the code of conduct for political parties.<sup>1</sup>

*Cost of elections:* The cost of elections and the proper management of finances is a major issue across all EMBs. There are real questions about how to rationalise expenditure to reduce the cost of elections in countries where resources are scarce. This is particularly true where, rather than relying on the civil service, large numbers of temporary staff must be recruited and equipment purchased, often through a procurement process that must be conducted under extreme time pressures.

*Electoral dispute resolution:* Electoral dispute resolution is a major problem almost everywhere, independently of the performance and independence of the EMB. There is a need to clarify the different roles and powers of the EMBs and the courts in many countries – which level of complaint can be dealt with by the EMB and which must go to court. Even though the EMBs can take steps to improve management of election disputes without further legal powers (such as by developing trust with and among political parties, candidates and civil society actors through informal frameworks of permanent consultation, as in Ghana and Cape Verde), there is a need for a reform of election dispute resolution laws in all the countries studied. In particular the law should enhance the powers of the EMBs to sanction some violations of the electoral laws directly, simplify and rationalise the rules of procedure, and reduce delays in the finalisation of results.

## G. Conclusion

The central role that electoral competition is now playing in the political life of an increasing number of African countries means that the management of elections is now also centre stage. The institutions responsible for electoral management have thus also emerged as leading actors, on whose performance depends the extent and quality of citizens' participation in the government of their country. The institutional framework for these bodies, and their endowment with adequate human and financial resources, has thus become an important concern in the constitutional reforms that have accompanied the second wave of democratisation in West Africa. These reforms have focused on the need to give the EMBs greater legal and institutional independence, but this collection of country studies shows that the performance of the EMBs and their contribution to a higher level of citizen participation depends on much more than only formal guarantees of independence and adequate resources. Nonetheless, the struggle for such reforms is also shown to be a critical part of the process of institutionalising democratic practices. Although

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<sup>1</sup> In Uganda, the subject of a separate study by AfriMAP, there is a demand for the Electoral Commission to have the power to disqualify candidates against whom there are findings of malpractice. See *Uganda: The Management of Elections*, AfriMAP & OSIEA, 2010. Available at <http://www.afriMAP.org/report.php#Uganda>.

the wording of the law may be very similar whether or not an EMB is functioning as it should – that is, with independence and courage to face up to executive interference – the fact that a particular wording represents the outcome of a process of struggle, debate and consensus-building is itself of great importance in establishing the legitimacy and ability of the EMB to fulfil the role intended for it. In the creation of an effective EMB, as in the acceptance of a legitimate election, the key is process.

## H. Recommendations

### **Independence of electoral management bodies**

Among the measures to put in place to ensure the independence of EMBs, states should at minimum ensure that:

- The appointment system for the EMB guarantees a broad consensus among politicians, civil society and ordinary citizens on their independence and fitness for the job. In particular, it is not desirable for EMBs to be made up of representative of political parties; where this is nonetheless the model used, it is even more important that the system for their appointment guarantees the broadest possible consensus on their nomination; and
- The members of the EMBs enjoy security of tenure equivalent to that enjoyed by the most senior judges of the country.

### **Powers of electoral management bodies**

States should give EMBs the powers and resources that enable them to manage or oversee the widest possible set of tasks associated with the proper preparation and effective conduct of the electoral process, whether the EMB is responsible for organising the election itself or is overseeing the conduct of an election by members of the civil service. This includes the powers and resources to undertake or oversee every stage of the preparation of elections, from procurement of materials, to identification of registration and polling sites, verification of the electoral roll and collation of results. In particular, in addition to the usual tasks given to them in almost all countries, EMBs should have:

- The regulatory power to create permanent mechanisms to promote cooperation among political parties, relevant civil society organisations and candidates for elections, with the aim of creating or maintaining trust among those participating in the electoral process and of preventing electoral disputes;
- The power to punish violations of the electoral code that are not within the jurisdiction of the normal courts or election tribunals; and
- The regulatory power to ensure that the political parties competing in elections respect the laws governing elections, the registration and activities of political parties, and campaign finance, and the code of conduct for political parties where one exists.

## **Electoral disputes**

States should put in place clear and simple rules that ensure:

- A clear differentiation of the respective roles of EMBs and the normal courts or election tribunals in the area of electoral dispute resolution; and
- The shortest possible delay for the resolution of electoral disputes by the courts, in particular by ensuring that there is a sufficient number of election tribunals to handle electoral complaints, and that the rules of procedure do not allow cases to drag on unnecessarily.

## **Regional standards**

The Electoral Assistance Division of the Economic Community of West African States should work with the Democracy and Electoral Assistance Unit of the African Union to draft and adopt a set of guiding principles on the independence, operations and status of EMBs, based on the 2001 ECOWAS Protocol on Democracy and Good Governance and the African Charter on Democracy, Elections and Governance.

# 2

## Benin

**Mathias Hounkpe**

### A. Summary

Since 1994, elections have been organised in Benin by a body independent of the government, the Autonomous National Electoral Commission (*Commission Electorale Nationale Autonome* – CENA). This was a direct consequence of a growing distrust of the management of elections by the government and has been a major positive development in the evolution of democracy in Benin.

Over time, however, the CENA has progressively proved to be more problematic than beneficial for the credibility of the electoral process. The legal framework governing the composition of the CENA changes at every election cycle, causing an instability that does not favour the adoption of rules that are known in advance by those who should follow them. The administration of elections is itself characterised by a multitude of laws passed, amended and revised on the eve of each election cycle, an uncertainty that puts the management of the electoral process at the risk of constant political manipulation.

CENA is not a permanent body. It is formed on the eve of each election and is dissolved at the end of the election cycle for which it has been established. As an ad hoc and temporary body the CENA cannot therefore develop technical expertise. The resulting institutional instability prevents the CENA from capitalising on past experiences.

The composition of the CENA is another weakness of the Benin electoral management system. The appointment of its members, mainly by political parties, makes them representatives of political interests. It is becoming increasingly urgent to change the composition of the CENA to make it smaller, less politicised and more flexible. It is also important

to change the electoral law to make the Commission members' mandate more permanent. The experience gained by the commissioners during an election should be used to improve the quality of the elections.

Election management in Benin has a further weakness in the low reliability of the voters' register. A permanent computerised voters register (*Liste Electorale Permanente Informatisée – LEPI*) was finally put in place in early 2011 after numerous postponements. However, LEPI faces important technical shortcomings which led political parties to question its credibility during the March 2011 presidential elections when it was used for the first time. These technical challenges should be addressed as quickly as possible.

The financing of elections is a growing concern. Expenses incurred by the CENA for the organisation of elections are experiencing a continuous increase at a rate that in the long run will become unsustainable for state finances. There is a need to rationalise election expenses in a way that ensures national sovereignty. Some useful measures to rationalise expenses are contained in the recommendations proposed by the Commission of Independent Jurists on the electoral system in the Republic of Benin (*Commission de juristes indépendants sur le système électoral en République du Bénin*) established in April 2007 by the President of the Republic. These include, for example, the establishment of one polling station for every 500 voters instead of 300, the linking of elections and the provision each year for an allocation from the state budget to be paid into a special bank account opened for the CENA.

The electoral dispute resolution system also needs review in order to establish a clearer division of responsibilities between different supervisory bodies. The confusion of powers between the CENA and the Constitutional Court, in particular, must be ended. It is important to clarify the responsibilities of each of these institutions, for example by entrusting the electoral process, including the publication of provisional results, to the CENA and electoral disputes to the Constitutional Court. The respective competence of the CENA and the Supreme Court must also be clarified regarding local elections. The electoral law should allow the CENA to announce provisional election results. Then the Supreme or Constitutional Court would only intervene to deal with electoral disputes and announce final results.

## **B. Historical background**

### **Benin's political evolution**

Though politics in the former French colony of Dahomey go back much further than 1946, it was on that date that elections were held for the first time to select members of a representative territorial assembly. Previously, elections were held to choose delegates to represent Dahomey in the French Parliament. Since then, politics have never ceased to be a favourite sport for the country's elite and ordinary citizens. Even under colonial rule, political and citizen activism were very intense and destabilising for the various political authori-

ties that succeeded each other in the country. Indeed, 'Dahomey is, with Senegal, the only territory of French West Africa [*Afrique Occidentale Française* – AOF] to have had under colonial rule its own political life and activism'.<sup>2</sup> One of the manifestations of this political dynamism was the constant turnover of colonial governors: the colony of Dahomey had 26 governors from 1894 to 1947, averaging one governor every two years. The longest staying was Governor Gaston-Léon Joseph Fourn who ruled the country for 11 years, while the shortest lasted only a few months.

The political turbulence of the Benin elite has also manifested itself through extreme variability in the way that national politics has been organised. State institutions, including the executive and legislature, have been repeatedly restructured, while public opinion on political issues also been in constant flux. The consequence of this situation has been and remains the instability of political coalitions, and therefore a kind of permanent uncertainty over the configuration of national institutions, especially parliament, and the country's political landscape.

### **Ethnic and social fragmentation**

Benin is a multi-ethnic country, and long before independence the national elite saw the advantage that the ethnicisation of politics could represent. Indeed, Benin society is not only multi-ethnic, it is ethnically fragmented. For a population of about eight million inhabitants, Benin has at least fifty ethnic groups, none of which exceeds 20% of the national population. In other words, from a political point of view, no ethnic group can on its own gather a majority to govern the country.

This ethnic heterogeneity structured the political parties, and by the late 1940s ethnicity was already being manipulated by the political elite. Thus the first disagreements that struck the Dahomey Progressive Union (*Union Progressiste du Dahomey* – UPD), the first organised party, formed in 1947, led to the regionalisation and ethnicisation of political parties in Benin. This trend began with the political subdivision of the country into three major political regions: North, Central and South. But the trend increased over time to a point where today (in the Benin of the post-1990 democratic renewal era) all the nuances of ethnic subdivision have been exploited for political gain.

Beyond ethnic divisions, Benin is also a society of social inequalities. In the early 1960s, the gap between North and South was striking. Whether in relation to birth rate, death rate, natural growth rate and other indicators of the same nature, there was a clear inequality in favour of the South. As shown in Table 1, for the 1961–1962 academic year, the school enrolment rate (which has increased considerably since that time) is an indicator in which the disparity between north and south has always been visible.

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<sup>2</sup> Statement by Mr Gabriel d'Arboussier at the Rally of RDA Youth (African Democratic Rally) in Cotonou in 1957, in Maurice A-Glèlè, *Naissance d'un Etat noir : l'évolution politique et constitutionnelle du Dahomey, de la colonisation à nos jours*, Librairie générale de Droit et de Jurisprudence, Paris, 1966.

Table 1: Enrolment rate by Department for the 1961–1962 academic year

Departments	Rate (%)
Northeast (Parakou)	18.0
Northwest (Natitingou)	14.0
Centre (Abomey)	23.0
Southwest (Lokossa)	19.0
South (Cotonou)	39.5
Southeast (Porto Novo)	25.5

### A society of citizen activism

Benin also has another strong characteristic with implications for political and electoral governance. Citizen activism has been prominent even in the most hostile political conditions of repression of citizens' fundamental rights and freedoms. This was observed both during colonisation and under the one-party Marxist military regime that governed the country between 1972 and 1990. An important channel of citizen participation in Benin is the press, which is regarded, and used, as a tool for political struggle. Although there had been efforts to form national printed press from 1900, the first newspaper edited by a Beninese, *Le Guide du Dahomey*, appeared in December 1920 and was presented as a 'political and economic newspaper' – an organ for the defence of national interests. Around 1936, about a dozen newspapers were published in Benin, the most popular of which had a circulation of about 2000.<sup>3</sup> Even during the revolutionary period of Marxist-Leninist dictatorship, clandestine publications were distributed.

Citizen activism on the Benin political scene was also expressed through strong unions. Trades unions, especially since the country attained independence in 1960, have traditionally been leaders of political protest in Benin. Between 1960 and 1972, trade union activism expressed itself through strikes blocking government activity, which greatly contributed to political instability. This dynamic trade-unionism still exists today and is still one of the influential forces on the national political scene.

Citizen activism has often served as an incubator to party politics in Benin. Before independence, media companies gradually turned into election committees and then into political parties. After independence, it was development associations and other citizen and political movements which turned into political parties.

3 We might cite, among others, *La Voix du Dahomey*, *Le Phare du Dahomey*, *L'Etoile du Dahomey*, *La Presse Porto-Novienne*, *Le Messager du Bénin*, *Le Cœur du Dahomey*, *L'Eclairer*, *La Suprême Sagesse* and *La Bataille*.

## The evolution of political party and electoral management frameworks

### *The colonial period*

The year 1946 may be considered to mark the beginning of political party and electoral history in Benin. This was the year when elections were held in Benin for the first time to select members of the Territorial Assembly.

From 1946 to 1960, although it was not yet an independent country, Benin experienced two types of political system. From 1946 to 1958, there was an evolution in the association of the national elite with the management of national affairs. In 1946, regional representative assemblies called regional councils were established in French West Africa.<sup>4</sup> These territorial councils in turn sent representatives to the AOF High Council (*Grand Conseil de l'AOF*) in Dakar. In 1958, the status of Benin underwent a new development that lasted only two years before the country became independent in 1960. On 28 September 1958, Benin approved General de Gaulle's draft constitution for the French 5th Republic by referendum and confirmed its status as a member state of the Franco-African Community, a phase that turned out to be only a brief transition before the final end of French colonial control over its territories in Africa in 1960. The state of Benin then became a republic, and the first constitution of 28 February 1959 provided for national institutions including an executive, a legislative assembly and a judicial authority.

Throughout this phase – that is to say, from 1946 to 1960 – elections were organised by the different administrative authorities. The evolution of political systems in Benin had implications for the configuration of political parties. From just one organised party in 1945, Benin had at least three parties on the eve of independence in 1960. However, the fact that there were only three competing political parties in these elections was misleading. From 1946 to 1960, multi-party coalitions and political parties were created, as alliances formed and re-formed on the basis of the political ambitions of political leaders at the time. So, after the first political party, the UPD, was created in 1946, many other parties or alliances of parties were created before the country attained independence in 1960, including the RDD (*Rassemblement démocratique dahoméen*), UDD (*Union démocratique dahoméenne*), PRD (*Parti républicain du Dahomey*), FAD (*Front d'action démocratique*), PPD (*Parti progressiste dahoméen*), and PND (*Parti des nationalistes dahoméens*). The only permanent feature in that unstable political environment was the gradual regionalisation of political competition. All the alliances that were formed or re-formed were based on the division of the country into three major regions: North, South and Centre. On the eve of independence, three leaders had also emerged, each controlling a region of the country: Justin Ahomadégbé for the Centre, Hubert Maga for the North and Sourou Apithy for the South and the Southeast.

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4 AOF Official Gazette, No. 2255 of 3 November 1946, p.1339; and following in Pierre G. Mêtinhoué, *Acquisition, gestion et perte du pouvoir d'Etat au Dahomey-Bénin (1960 à 2009)*, Cotonou, October 2009.

### *Independence and the regionalisation of party politics*

The second phase, from 1960 to 1972, the first years of Benin's independence, was marked by the strengthening of the ethnicisation and regionalisation of party politics in Benin, remarkably frequent changes of political system, and an inability to build solid experience in the operation of democratic institutions (including electoral governance). During this period the Beninese elite tried to implement various liberal democratic systems. The ethnic trend observed toward the end of colonisation was consolidated, creating a de facto division of the country into three regions controlled by one of the three major leaders of the Benin political scene at the time. As shown by the results of the 11 December 1960 presidential election (Table 2), each leader took almost all of the votes of his territorial stronghold.

Table 2: Presidential election of 11 December 1960

REGION	PDU (Apithy Maga)			UDD (Ahomadégbé-Sacca)		
	Strong-hold	% votes / region	% votes / national total	Strong-hold	% votes / region	% votes / national total
Southeast	X	87.55	25.93		12.45	8.18
South		38.29	8.46		61.71	30.26
Southwest		50.24	8.07		49.76	17.74
Centre		28.80	7.61	X	71.20	41.77
Northeast	X	95.86	19.91		4.14	1.90
Northwest	X	98.07	30.00		1.93	1.30

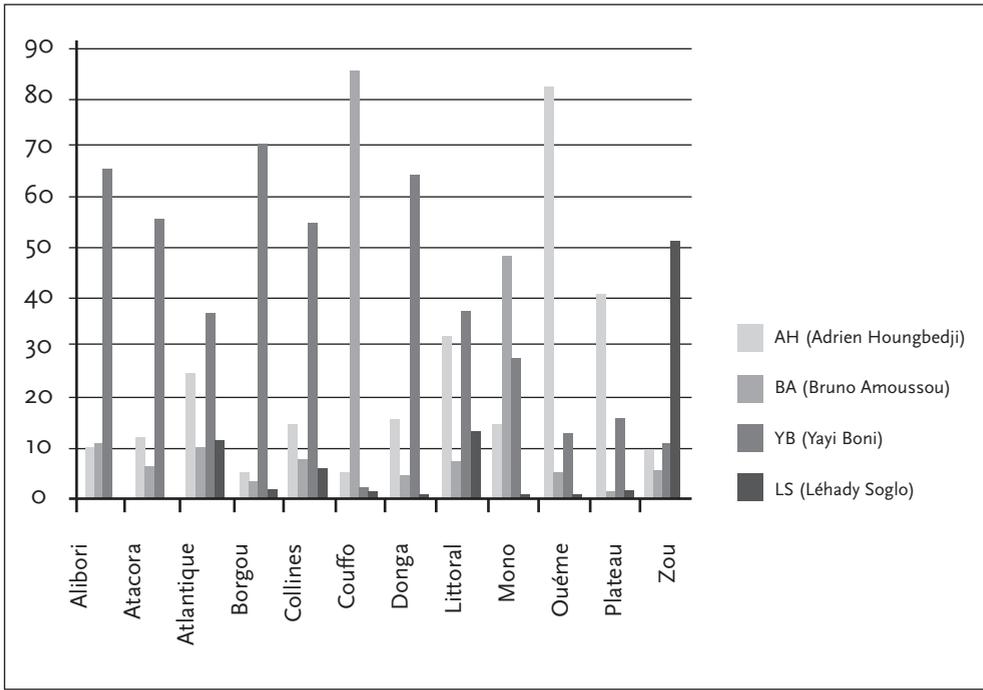
Source: Maurice Glele Ahanhanzo – *Naissance d'un Etat Noir: l'évolution politique et constitutionnelle du Dahomey de la colonisation à nos jours*, Paris, 1966.

Notes: Acronyms of political parties represent Apithy's *Parti Dahoméen de l'Unité* (PDU) and Ahomadégbé's *Union Démocratique Dahoméenne* (UDD).

The regional trend resurfaced and even strengthened after the 17 year one-party interlude which was experienced during the revolutionary period. As shown in Figure 1, except for the current president, M. Thomas Boni Yayi, all the other candidates in the 2006 presidential elections were regional leaders who controlled almost all the voters in their regions of origin.

1960–1972 was also a period of great political turbulence with several changes of political systems. Thanks to the creation of new political parties, the formation and breakup of political alliances, the management of the institutions of the republic had become extremely difficult. Therefore, there was frequent paralysis of the state institutions, aggravated by trade union actions. These events were used just as frequently as an excuse by 'men in uniform' to interrupt the democratisation process.

Figure 1: Departmental distribution of votes for the four leading candidates during the 1st round of the 2006 presidential elections



Source: Decisions of the Constitutional Court on the results of the 2006 presidential election.

Benin experienced six successful coups and at least as many failed attempts from 1960 to 1972. After the adoption of the November 1960 Constitution, Benin was ruled under several other constitutional laws until 1972. Thus there was a Second Constitution in 1964, a Charter in September 1966, a Third Constitution in 1968, a constitutional ordinance in 1969 and a second constitutional ordinance in 1970. These different constitutional texts allowed the people to experience several types of system. From 1960 to 1972, Benin tried a presidential system, a parliamentary system and a semi-presidential system. The last political system tried was a ‘presidential council’ where the three leaders controlling the three regions formed a collegial executive and each one of them was to run the country for two years.

The major consequence of all these experiences was the inability of the country and its elite to learn how to govern the country democratically. Indeed, between 1960 and 1972, no legislature completed its mandate. Similarly it is hard to talk of any experience in electoral governance, since the administration was in charge of managing elections, and most of the time it was under the control of a military government. In those circumstances, the military intervened one last time in October 1972 and three years later established a one-party Marxist-Leninist regime which ruled the country until the coming of the ‘democratic renewal’ in 1990.

### *The one-party Marxist system*

The third phase, from 1972 to 1990, was instituted by the military to end what they called the civilians' inability to lead the country. This stage was mainly characterised by a forfeiture of basic citizen rights and freedoms, the creation of a single party and a single trade union movement. Even civil society, that is to say youth and women's movements, were organised into single bodies.

The Marxist-Leninist regime thus installed offered no possibility of learning about electoral governance. Even if elections were periodically held, results were known in advance and the scores were in the range of 99.99%. The only constant feature in relation to past regimes, which continues to this day, was the recognition of the country's ethnic pluralism in its political management. Indeed, although it is not a legal requirement (as is the case today for certain institutions in Nigeria, for example), the requirement of regional balance – i.e. making sure that all regions are represented – was scrupulously respected in the distribution of political and administrative positions.

By the late 1980s that regime ended in total political, social and economic bankruptcy. This, added to citizen pressure and developments at the international level (the fall of the Berlin Wall), led the authorities to liberalise the national political space. The organisation of a national conference in February 1990 gave birth to the period of democratic renewal (*Renouveau démocratique*) that continues to this day.

## **C. The Autonomous National Electoral Commission (CENA)**

### **Political and historical background**

Delegates to the historic national conference (*Conférence des Forces Vives de la Nation*) held in Cotonou from 19 to 28 February 1990 opted, among other key decisions on the governance of the country, for the establishment of a democratic system based on the rule of law. Following the recommendations of the national conference, a new constitution was drawn up and adopted by referendum on 11 December 1990.

The 11 December 1990 Constitution provides for a system with a separation of executive, legislative and judicial powers and credible mechanisms for the protection of citizens' fundamental rights and freedoms. The constitution established a full multi-party system and made elections the only legal means of accessing state power in Benin. Thus, since the advent of the democratic renewal, elections have become routine in Benin. Since 1991, more than a dozen elections have been held in Benin for the selection of officials at both national and local levels, including five presidential elections (1991, 1996, 2001, 2006 and March 2011), five legislative elections (1991, 1995, 1999, 2003 and 2007) and two local elections (2002 and 2008).

The first two elections after the democratic renewal, i.e. the February 1991 legislative elections and March 1991 presidential elections, were entirely managed by the Ministry of the Interior and its representatives at local level. Although the names of these bodies were similar to the current ones, they were entirely controlled by the Ministry of the

Interior. For example, the local Electoral Commission was composed of a chairman, a vice-chairman and two assessors appointed by the departmental prefect, or by the sub-prefect or chief of the urban district on explicit delegation by the prefect of the district concerned. Each departmental Electoral Commission was chaired by a magistrate, the presiding judge of the court in the department concerned, or his representative. It also included a representative of the prefect, the departmental commander of the gendarmerie or his representative, the police commissioner and the departmental director of planning and statistics.

However, this model for management of competitive elections in a country that had experienced a long period of single-party political system quickly clashed with rising distrust of the government by newly created political parties. Only three years after the beginning of the democratisation process, Parliament decided in 1994 to remove the government's exclusive management of the electoral process through the Ministry of the Interior under a law adopted in 1990.<sup>5</sup> Parliament then established an independent electoral management body, the Autonomous National Electoral Commission (*Commission Electorale Nationale Autonome* – CENA).<sup>6</sup>

## Composition

All elections held in Benin since 1994 have been managed by the CENA. However, the composition of the body has changed over time. CENA members generally come from three sources: the legislature (in line with its party-political configuration), the executive and civil society. The number of CENA members increased from 17 in 1995 and 1996, to 23 in 1999, and 25 in 2001, 2003 and 2006, and then returning to 17 in 2007, before dropping to 11 in 2011.

According to various versions of the law on general rules for elections in the Republic of Benin<sup>7</sup>, CENA members are formally appointed by the President of the Republic after nomination by various other bodies. While maintaining some consistency, the list of organised authorities entitled to nominate members for appointment to the CENA has evolved over time.

The first CENAs were composed of members appointed by Parliament, the executive, the judiciary and civil society, represented by the Benin Human Rights Commission (*Commission béninoise des Droits de l'Homme* – CBDH), a body established by the executive.

The first two CENAs, those created for the 1995 legislative elections and the 1996 presidential elections, were composed of 17 members:

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5 Law No. 90-034 of 31 décembre 1990, *portant règles générales pour les élections du Président de la République et des membres de l'Assemblée nationale*.

6 Law No. 94-013 of 17 January 1995. It is important to note that this model was chosen against the will of the President of the Republic at the time. Indeed, the Head of State at the time, President Nicephore Soglo, had exhausted all legal resorts (request for a second reading, resort to the Constitutional Court) in his power to prevent the withdrawal of election management from the Ministry of the Interior. CENA was only adopted as the Electoral Management Authority in Benin thanks to the opposition that had a majority in Parliament and especially thanks to the Constitutional Court that decided that the CENA should contribute to the credibility of the electoral process in Benin.

7 This law, whose first version was adopted in 1991, is amended practically on the eve of each election cycle.

- 7 nominated by the government
- 7 nominated by the National Assembly
- 1 nominated by the judiciary
- 2 nominated by the CBDH.

The third CENA, which managed the 1999 legislative elections, was composed of 23 members including:

- 3 nominated by the government
- 15 nominated by the National Assembly
- 4 nominated by the judiciary
- 1 nominated by the CBDH.

The following three CENAs, which organised the 2001 presidential election, the 2002 local elections and the 2003 legislative elections, were composed of 25 members:

- 3 nominated by the government
- 19 nominated by the National Assembly
- 2 nominated by the judiciary
- 1 nominated by the CBDH.

From 2006, the composition changed slightly and included members who were appointed by Parliament, the executive, the CENA Permanent Administrative Secretariat (*Secrétariat Administratif Permanent – SAP/CENA*) and civil society (but no longer represented by the Benin Human Rights Commission).

The 2006 presidential election and the 2007 legislative elections were managed by a 25-member CENA made up as follows:

- 2 nominated by the President of the Republic (and no longer the government, even though there is no real difference)
- 18 nominated by the National Assembly
- 1 nominated by civil society, chosen on a self-organised basis
- 4 members of SAP/CENA (which was created in 2006).

The 2007 CENA, which organised the 2008 local and municipal elections, was, like the first CENA, composed of 17 members:

- 2 nominated by the President of the Republic
- 13 nominated by the National Assembly
- 1 nominated by civil society
- 1 representing the CENA Permanent Administrative Secretary (so one member of the SAP/CENA is now a member of the CENA itself).

The most recent CENA, tasked with organising the 2011 presidential and legislative elections, has 11 members:

- 1 nominated by the President of the Republic
- 9 nominated by the National Assembly, taking into consideration the political makeup of Parliament
- 1 nominated by and from civil society organisations (CSOs) with at least five years of experience in the field of governance and democracy – this was the first time an attempt was made to restrict the nature of CSOs qualified to nominate representatives in the CENA.

After they are selected as the representatives of each body, CENA members are designated by the President of the Republic and formally appointed by the Constitutional Court, before which they take the oath. Of all the CENAs put in place since 1995 (nine in total), only three (1995, 1999 and 2008) were led by a civil society representative. All the others were chaired by representatives of political parties.

#### *Term of office of CENA members*

The CENA in Benin is an ad hoc institution that is installed in advance of each election and disbanded a few weeks after the announcement of final results. Under the law, the term of office of CENA members cannot be precisely specified, but may not be less than four and a half months, or from at least 90 days before election day and up to at most 45 days after the announcement of final results.<sup>8</sup> However, even though the law precisely specifies the time of termination of office (i.e. 45 days after the announcement of final results), nothing prevents the installation of the CENA six months or more before election day (this would still respect the 90 day minimum).

For the quality of electoral management, the most important time limit is related to the operating time of the CENA from its installation to the date of the election. Unfortunately, despite the legal provisions mentioned above, almost all the CENAs put in place to manage elections had less than three months in which to prepare for elections, including the registration of voters.<sup>9</sup>

The mandate of the CENA's local branch offices, according to the Commission's rules and regulations, starts from their installation and ends with the completion of their activities as recorded by the CENA executive committee with the signing of a receipt for the return of their electoral materials.

The consequences of the very short period in which the various CENAs have had to organise elections are numerous. According to reports from almost all CENAs, they include the incomplete training of election officials, the failure to establish the voters register according to official regulations, and insufficient voter education.<sup>10</sup>

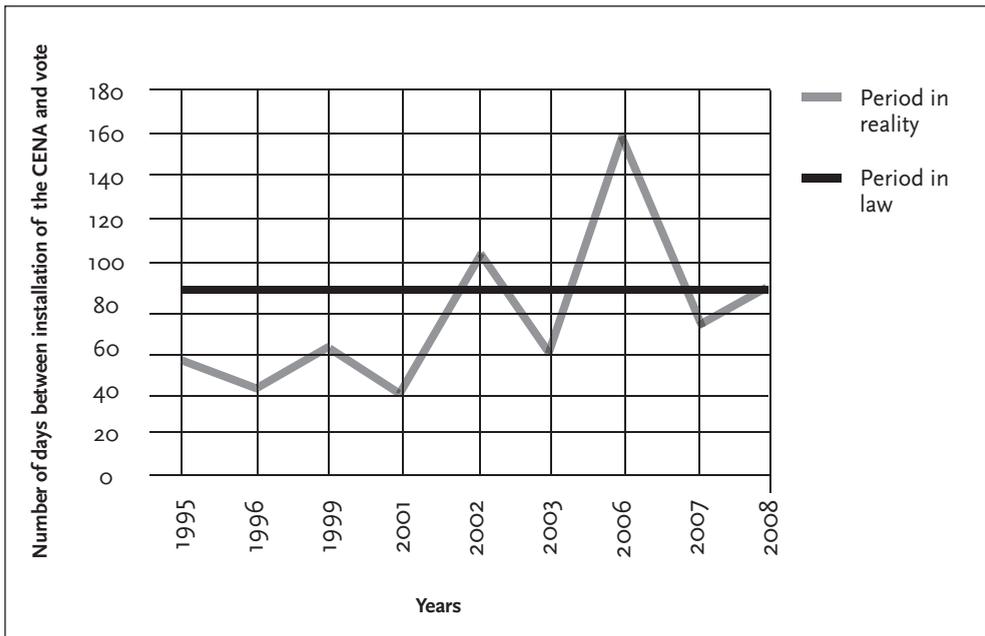
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8 For the 2006 presidential election, the act on general rules for elections had ordered the installation of the CENA six months before the poll. In all other cases, the deadline is less than 90 days before the ballot.

9 As shown in figure 2 below.

10 See CENA reports of 1995, 1996, 1999 and 2003 as examples.

Figure 2: Number of days for the management of elections by the CENA



Source: CENA (SAP/CENA) Permanent Secretariat.

### *Conditions for the dismissal of CENA members*

The electoral law does not include a general provision on reasons for dismissal of CENA members (which is a deficiency of the law). CENA rules and regulations provide for:

- The usual reasons for early termination, including physical incapacity to carry out the term (because of death or illness) and resignation; and
- A member's absence for more than fifteen consecutive days. In this case, the position is declared vacant by the CENA executive committee which installs the person's alternate.

### *The CENA's technical committees and branch offices*

The CENA is internally organised into technical committees. The names of technical committees have changed over time and their number increased from two to five since 1995.

- In 1995, there were three committees: the administration and security committee; the organisation and communication committee and the finance committee.
- In 2001, four technical committees were established within the CENA: the organisation committee; the administrative affairs and human resources management committee; the financial affairs and election materials committee and the communication and external relations committee.
- In 2002, five technical committees were set up in the CENA: the organisation committee; the administrative affairs committee; the financial affairs and election

materials committee; the communications and public relations committee; and the results collation and processing committee.

Each of the laws on general rules for elections in Benin has provided for the CENA to have branch offices around the country. Before the implementation of the general policy on decentralisation in Benin, i.e. until the 2001 CENA, CENA branch offices were at two levels: departmental and local. Since the organisation of the first local and municipal (*communal*) elections in 2002, divisions are on three levels: departmental, municipal and district (*arrondissement*).

The system for appointing members of the CENA branch offices has evolved over the years in the same way as the system for appointing CENA members at national level. In early years of experimenting with this way of managing elections, members of departmental Electoral Commissions (*commissions électorales départementales* – CED) were appointed by the same bodies as CENA members; while members of local Electoral Commissions (*commissions électorales locales* (CEL), the second level, were appointed by the CENA after being nominated by the CED. Since the advent of decentralisation, CENA and CED members are appointed by the government, parliament and civil society, while those of municipal Electoral Commissions (*commissions électorales communales* – CEC) and district Electoral Commissions (*commissions électorales d'arrondissement* – CEA) are appointed only by Parliament and civil society.

### *CENA Staff*

The CENA has administrative and technical staff, some of whom come from the CENA permanent administrative secretariat (*Secrétariat Administratif Permanent de la CENA* – SAP/CENA), and the rest are directly recruited by the CENA once it is installed, according to its needs. However, for various reasons including distrust of the SAP/CENA staff or the practise of patronage, CENA members sometimes choose to work as little as possible with available staff at SAP/CENA because they prefer their own staff that they have personally recruited.

## **Powers and functions of the CENA**

The CENA in Benin is autonomous both vis-à-vis state institutions (the executive, National Assembly, Constitutional Court, Supreme Court, High Court of Justice, Economic and Social Council, Broadcasting and Communication Authority) and in the management of its budget. It establishes its own rules and regulations for how it is organised and how it works, in accordance with basic principles set by the laws on general rules for elections.

The role of the CENA is strictly confined to managing one election. In this context, it is responsible for preparing, organising, operating and overseeing polls and collating results, which it passes on to the Constitutional Court for validation in case of legislative and presi-

dential elections, and to the Supreme Court for validation in case of municipal, communal and local elections. It has full investigative powers to verify the correct conduct of the poll.<sup>11</sup>

The CENA is involved in the fixing of the election date by the government, although it is a decree of the Council of Ministers which formally sets the date and informs people of this decision. In practice, it is the CENA that proposes the election date to the government according to deadlines set in law for organising elections. Generally, the decree setting the election date follows the CENA's suggestion.

The CENA is responsible for voter registration, and controls and keeps custody of the voters register. It determines the details for installation of polling stations, taking into account demographic and social data to set the location of polling and registration stations. The CENA is responsible for printing ballots papers and training election officials, i.e. registration and polling team members – who are appointed by political parties and independent candidates taking part in elections. This training, provided by the CENA, is often supported by civil society organisations and international institutions present in Benin.

The CENA plays a part in the logistics of elections, specifically in physical operations such as the transportation of ballots. This transportation is effected under the supervision of members of the various CENA divisions – the departmental, municipal and district Electoral Commissions – and national coordinators whom the CENA entrusts with the responsibility for overseeing the election in a department. The CENA has the power to accredit national and international observers.

However, the CENA does not have the authority to rule on who is or is not a voter. Disputes concerning this matter are taken either to the Constitutional Court or the Supreme Court, depending on the election. Neither does the CENA have the authority to determine the size of constituencies (seats to be allocated to a given portion of the national territory) which is more a matter of law and thus depends on the National Assembly.

The results are collated by the CENA. However, the CENA does not always announce the results, since the law distinguishes according to the election involved. Under Article 45 of the November 2007 law on the general rules for elections in the Republic of Benin (in force as of 2010), 'The Autonomous National Electoral Commission (CENA) announces the final results of local elections. ... The Autonomous National Electoral Commission (CENA) collates the results of legislative and presidential elections. After collating the results of legislative and presidential elections, the Autonomous National Electoral Commission (CENA) transmits them to the Constitutional Court to check their validity, hear challenges and announce final results'.

When the CENA finds irregularities, either when monitoring the preparation of the voters register or on election day – that is, fraudulent acts by individuals or groups – it can only report them to the competent judicial authorities. Thus it is the Constitutional Court

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11 Art. 45 of Law No. 2007-25 of 15 November 2007 on the general rules for elections in the Republic of Benin (*portant règles générales pour les élections en République du Bénin*). This law was in force as this research was being completed. It has since been replaced with Law No. 2010-33 of 3 January 2011 with no substantive change.

and the Supreme Court – according the type of election – that are able to punish irregularities. This means that the CENA in Benin, unlike the Ghana Electoral Commission for instance, has no power of sanction, strictly speaking.

Once it has accomplished its tasks in the electoral process, the CENA writes and submits a report to the President of the Republic. This report is submitted at the latest 30 days after the announcement of final results.<sup>12</sup> Finally, CENA members pass their records to the CENA Permanent Administrative Secretariat, which is the custodian of electoral archives.

The CENA has no other jurisdiction outside the strict framework of the elections. In particular it cannot (unlike the Ghana Electoral Commission), exercise any power whatsoever on the life or functioning of political parties or intervene in the creation of constituencies.

### **Relationship between the CENA and other actors in the electoral process**

Relationships between the CENA and other major players in the electoral process are neither confrontational nor collaborative. Since 1995 when the CENA experiment started, there have been almost no conflicts between the Commission and some of the other key players in the Benin electoral process. There have been a few cases of disagreement between the executive and the CENA on the management of resources without these resulting in real conflicts.

The relationships between the CENA and other election players are of two types. There are organs with whom the CENA maintains necessary relationships because these are indispensable for the fulfilment of its mission. These include, for example, the Constitutional Court and necessary ministerial departments such as finance, the interior and defence. The CENA's relationships with the other actors in the electoral process are minimal. The Electoral Commission has no special or systematic relationships with political parties and candidates, civil society or the media.

A distinction is however necessary regarding the relationship between the CENA and political parties since the Electoral Commission is highly politicised, from the national level down to the polling stations. Political parties and candidates, already strongly represented in the electoral management apparatus, may therefore not feel the need to establish other channels of communication with the electoral management body. Political parties as entities maintain no direct relationship with the CENA, although some of them (generally the largest ones) are represented in the Commission and can therefore be considered as participants in its decision-making.

As for civil society and the media, their relations with the Commission are very opportunistic and essentially follow the needs of the moment. Relationships are created according to the specific needs of each election between the CENA and other bodies or individuals

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12 This deadline was 45 days until the passing of Law No. 2007-25.

whose cooperation is needed. This situation leaves part of the management of the electoral process open to risks and uncertainty.

An effort to systematise relationships between the Electoral Commission and other stakeholders in the electoral process, even in an informal framework, could therefore help improve the management of elections. Indeed, each entity possesses information useful to others and in turn needs information that others possess for the better management of elections. The lack of systematic and frequent contacts between the CENA and other stakeholders reduces the possibility of sharing information and increases the risk of making decisions that are not sufficiently informed.

The relationship between the Electoral Commission and the security forces, recognised by all as essential for the proper management of the electoral process, are no better organised. The first weakness results from the legal framework, which is quite minimal and vague as regards the involvement of security forces in the electoral process.

Law No. 2007-25 of 15 November 2007 on the general rules for elections in the Republic of Benin only has two articles on the role of the security forces in the electoral process. The first (Art. 147), provides that ‘the Ministry in charge of public security ensures the security of citizens and operations during the elections from the electoral campaign to the final announcement of results’. It is silent on how the Ministry carries out this task and the relationships that should exist between it and the Electoral Commission. In addition, it only mentions the period from the electoral campaign to the announcement of final results, while security issues related to elections may occur outside that period. The period for the establishment or updating of the voters register (usually earlier than the campaign period) and the phase between the announcement of results and the transfer of function between the newly and the formerly elected may experience election-related insecurity issues. The second article (Art. 79) provides that: ‘no armed force can be placed in a polling station without the permission of the polling station chairman’.

In practice, there are no formal rules regarding the relationships between the CENA and security forces for election security. Generally, when the CENA is installed, the chair contacts the Ministries of the Interior and Defence to discuss issues related to election security. According to former CENA chairs, the security forces are expected to be invited to all CENA meetings relating to the security of the electoral process.<sup>13</sup> But security force members say they do not wait for instructions from the CENA; they have their own usual lines of command and responsibility and work based on these existing processes. They think they can intervene effectively based on information they collect on the ground when necessary, whether it is requested by the CENA or not.<sup>14</sup>

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13 Interview with former CENA chairmen.

14 Interview with Special Forces managers.

## Independence – and politicisation – of the CENA

As its name suggests, the CENA is designed as an independent structure and has so far endeavoured to function as such. Although it is called ‘autonomous’ not ‘independent’, in Benin autonomy is seen as a means to access independence. This independence, however, is negatively affected and threatened by the CENA’s excessive politicisation, its temporary nature, and its composition. On the other hand, the support that the CENA enjoys from politicians, civil society and the Constitutional Court is an important asset for its independence.

### *Excessive politicisation of the CENA*

The extent of the politicisation of the CENA can be seen in the percentage of members representing political parties; that is, nominated by political institutions. This percentage went from 70% in 1995, to 88% in 2000 (with 22 of the 25 CENA members appointed by politicians), and 94% in 2010 (16 of 17 members appointed by politicians).

This politicisation of the CENA has been endorsed by the Constitutional Court, which established a formula for membership of the Commission based on a quota attributed to each parliamentary caucus, taking into account the political configuration of the National Assembly. For example, in a 2001 decision, the Court noted that ‘political configuration is to be taken into account to ensure the participation of all political forces represented in the National Assembly and to ensure transparency, a constitutionally-valued principle in the management of elections’, before proclaiming that ‘political configuration must be understood as the totality of political forces represented in the National Assembly and organised into parliamentary groups and/or independent members, which the National Assembly clearly understood in taking [this division] into account when appointing members of the Autonomous National Electoral Commission (CENA) and departmental Electoral Commissions (CED) in its session of 21 January 1999 for the March 1999 legislative elections by assigning to each parliamentary group a number of members to be appointed in proportion to the number of deputies in each group’.<sup>15</sup>

This politicisation of the CENA extends also to the CENA branch offices and to election officials, i.e. registration officers and polling station officials. Indeed, in Benin, it is political parties and independent candidates who propose to the election commission, under conditions defined by the law, persons to be appointed as polling station officials. The only thing required of the CENA is that it ensures that the composition of registration and polling station teams is multi-party.

The almost entirely party-political composition of the CENA weakens the independence of the Commission and makes it an instrument of partisan interests. Instead of nominating members according to criteria of integrity, competence and impartiality set by the law, political parties propose activists to represent and defend their interests. Thus, in the past, there have been attempts to block the electoral process by the mass resignation from the CENA by members of a political coalition. For example, in the lead-up to the

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<sup>15</sup> Decision DCC 01-011 of 12 January 2001, on the constitutionality of appointments by the National Assembly of members of the CENA and departmental Electoral Commissions.

2001 presidential election, nine of the 25 members of the commission, representing the opposition parties at the time, resigned en bloc from the CENA claiming they were excluded from its management.

From the first years of the CENA experiment, the mode of appointment of local branch members has always weakened the independence of the institution. CENA members and all or some of the members of its branch offices are currently appointed by the same institutions. Until 2001, the CENA and the CED (departmental level) members have been appointed by the same organs (Parliament, the executive, and the CNDH – the statutory, independent human rights commission), while members of lower levels (district offices and election officials) were appointed by the CENA after nomination by the CED or CEL (departmental or local commissions). But since 2003, all members down to the district level have been nominated by exactly the same bodies.

This results in the weakening of the hierarchical authority that should exist between higher and lower levels of the electoral management body. A CEA member will not necessarily feel obliged to obey a CEC, a CED or even a CENA member since they all have the same basis in partisan political support. The fact that election officials and registration polling station officials are also appointed by political parties adds to this situation.

#### *The term of office of CENA members*

The fact that the CENA is temporary and is installed to manage a single election is also a threat to the independence of the Commission. The brevity of the term of the CENA can encourage commission members to look for some sort of security by sacrificing its independence to defence of the parties that appointed them. It is a fact that candidates for appointment to CENA are often forced to promise fidelity to party interests before they are appointed. Others are promised reappointment or a share in the fruits of victory if they are members of the winning coalition, all of which are factors that have an influence on the CENA's independence.<sup>16</sup>

#### *The support of politicians*

Despite shortcomings and weaknesses in the CENA's management of the electoral process in Benin, an overwhelming majority of politicians still show preference for this model. There are just a few dissenting voices of individuals who, in the face of difficulties created by the way that the CENA works and especially the strategic behaviour of members appointed by politicians, call for a return to the government model. This support of politicians for the CENA could have been a favourable element for its independence if it was justified by confidence in the institution. Nevertheless, there are reasons to believe the contrary: politicians prefer the CENA to a government structure insofar as they hope to maintain their influence on the functioning of the CENA through the appointment of its members.

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16 Interview of former CENA members who wished to remain anonymous.

### *The Constitutional Court*

The Constitutional Court, despite decisions that have strengthened the politicisation of the Commission, is also one of the factors that has upheld the CENA's independence. At the time of the creation of the CENA, the Court ruled against the government that the 'CENA is an autonomous administrative authority, independent of the legislative and executive power' and its 'establishment ... is linked to the search for a formula to insulate within the public administration a body with real autonomy ... for the exercise of powers regarding the sensitive area of civil liberties, in particular fair elections: regular, free and transparent'.<sup>17</sup>

The Constitutional Court has also supported the CENA through decisions which create a favourable environment for the management of elections and facilitate the functioning of the Commission. For example, one can cite a 2005 ruling by the court that instructed the government to make resources available to the CENA within 24 hours to start operations related to the management of the 2006 presidential election.<sup>18</sup> In another 2005 case, the Constitutional Court held that the government could not unilaterally reduce CENA members' salaries without consulting them.<sup>19</sup>

The Constitutional Court also supports the CENA in case there is a need to clarify legal provisions or when situations occur that are not provided for by law. Thus, for example, the Constitutional Court supported a request from the CENA chairman to organise the 2001 presidential election's 'second round' after the constitutional deadline.<sup>20</sup>

### *Civil society support*

Civil society support has contributed more effectively to strengthening of the CENA's independence. Civil society has several times advocated for the executive to facilitate the CENA's management of the electoral process by putting the means it needs at its disposal. Civil society has also demonstrated in favour of the CENA – through marches and other mass actions – when its independence and/or normal functioning were threatened by the tactical behaviour of politicians.

One of the most recent illustrations of civil society support for the CENA's independence was during the 2006 presidential election. The then head of state, President Mathieu Kérékou elected in 1996 and re-elected in 2001, had completed his two terms and, in accordance with the constitution, was no longer allowed to run for election. But as the election drew closer, there were manoeuvres to postpone the date and/or change the constitution to keep President Kérékou in power. To counter these manoeuvres and to ensure that the CENA had favourable conditions for the proper management of elections, civil society organisations organised a campaign against the amendment of the constitution, initiated and mainly led by the NGO *Association ELAN*. They also supported the Constitutional

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17 Constitutional Court, Decision DCC 34-94 of 23 December 1994.

18 Decision DCC 05-139 of 17 November 2005.

19 Decision DCC 05-144 of 29 November 2005.

20 Constitutional Court, Decision EL-P 01-053 of 17 March 2001.

Court's decision on funds, pressuring the government to release the resources needed for the CENA's operation. ELAN even opened a bank account to collect voluntary subscriptions from citizens for the CENA to circumvent the government's failure to allocate funds for the CENA.<sup>21</sup>

The other category of civil society organisation whose contribution deserves to be emphasised here is trade unions. In the political history of Benin, at least since independence in August 1960, trade unions have been a force all governments have always paid close attention to, and no government could afford to neglect. The situation during the 2006 presidential election was no exception to this rule. Indeed, while the government resisted the orders of the Constitutional Court and pressure groups such as ELAN, threats by trade unions to paralyse the country with strikes as protest was sufficient for the government to release financial resources for the CENA in less than 72 hours.

## D. Funding of elections in Benin

### The growing contribution of state funds to elections

The share of the Benin state's contribution to the national budget for election expenses has increased over the years.<sup>22</sup> Although it requests support of technical and financial partners (external donors), the government is more and more financing the biggest part of the election budget in Benin. For example, for the 1999 legislative elections, the Benin government via the Ministry of Finance allocated FCFA 3 547 262 200 (*Communauté Financière Africaine* Francs; around US\$ 7.5 million) for election expenses, although development partners still provided significant assistance to the democratic process. For the 2001 presidential election, the Benin government allocated a budget of FCFA 6 512 238 400 (US\$ 13.7 million). The UNDP gave the CENA FCFA 25 500 000 (US\$ 53 910) for counting (payment of data entry operators and purchase of office equipment), while assistance from the *Agence de la Francophonie* amounted to FCFA 10 693 138 (US\$ 22 606) to acquire equipment (fax machines and photocopiers). The governments of Ghana and Nigeria gave the CENA 20 000 bottles of indelible ink for the first and second rounds on condition that: (i) empty bottles will be returned to the Ghana Electoral Commission, (ii) assistance of the National Commission of the Republic of Nigeria is a loan, repayable in kind or in the corresponding financial value.

### Increasing cost of elections

The Republic of Benin is one of the new democracies in West Africa where the increase in costs of elections is a concern and brings fears for the future if nothing is done. Election

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21 While largely symbolic (since, according to the CENA's 2006 report, it generated only FCFA 7 093 100 for the CENA), this action resulted in pressure on the government to make resources available for the elections.

22 The following information is essentially taken from AfriMAP-OSIWA, *Benin: Democracy and Political Participation: An evaluation of 20 years of 'Democratic Renewal'* (French edition), Open Society Institute, 2010, pp.112–113.

costs increased exponentially in the last years, to the point of becoming a major concern and causing some of the key players to question the reliability of election management by the CENA. The CENA's budget has increased as follows:

**Presidential elections:**

1996	FCFA 1 704 115 300 (US\$ 3.6 million)
2001	FCFA 6 832 780 000 (US\$ 14.5 million)
2006	FCFA 12 285 786 000 (US\$ 26 million)

**Legislative elections:**

1995	FCFA 1 144 946 900 (US\$ 2.4 million)
1999	FCFA 3 547 262 200 (US\$ 7.5 million)
2003	FCFA 6 668 200 000 (US\$ 14 million)

The Commission of Independent Jurists expressed concern about this staggering increase in election costs and called for a rationalisation of election expenses.<sup>23</sup>

Without wishing to assign all causes of the exponential increase in election costs to the CENA, there is some indication that it has considerable responsibility for this inflation. For example:

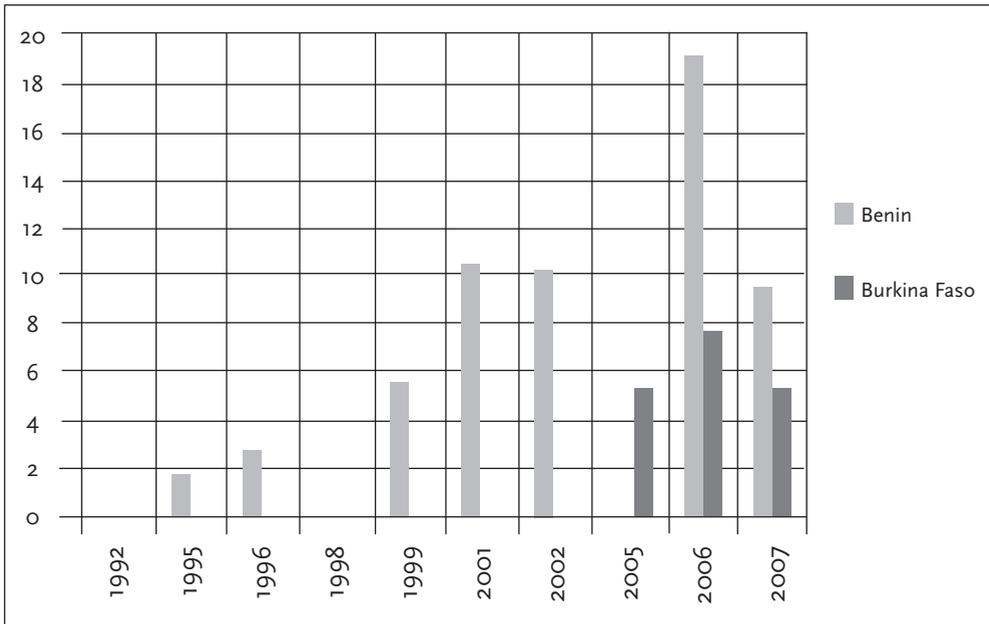
- Political party representatives have a tendency to turn the CENA into a mechanism for extracting public resources. This is easily observed through the serious disputes within the institution about the selection of service providers such as car rental, purchase of perishable goods, catering, preparation of electoral documents (ballot papers, tabulation papers, etc.);
- CENA's total lack of mechanisms to guarantee the return and storage of election materials, i.e. both the equipment used for voting and that used for the operation of the CENA and its branch offices – computer hardware and others;
- The absence of any kind of official price list for procurement of electoral materials;
- The absence of a clear and relevant document setting out the compensation rates for the CENA members and election officials.

This worrying evolution of election costs in Benin is even more visible when compared to election costs in some countries in the sub-region. A comparative chart between Benin and Burkina Faso (Figure 3) shows very clearly the disparity in Benin as compared to Burkina Faso.

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23 Ahanhango Maurice Glele (chair), Theodore Holo (rapporteur) and others, *Report of the independent jurists commission on the electoral system in the Republic of Benin*, Cotonou, 27 April 2007.

Figure 3: Comparison of costs of elections in Benin and Burkina Faso



### Control over the CENA budget

By law, the CENA has autonomy to manage its budget, which should be initially integrated into the general state budget after being prepared by the CENA Permanent Administrative Secretariat (SAP/CENA). In practice, the draft budget for elections is drawn up and adopted by the CENA once it is inaugurated for the elections, often regardless of the preliminary draft prepared by SAP/CENA in accordance with the law. This draft budget is then forwarded to the Minister of Finance who, after consultation with the CENA executive committee, adopts the final budget and authorises its execution. It is also the government that determines by decree the financial regulations of the CENA.

The fact that the minister responsible for finance adopts the final budget for elections, even though it is after consultation with the CENA, can serve as an excuse for trying to influence the commission. This has happened several times in Benin, as in the 2006 presidential election, when the CENA had to wait two months after its installation on 23 September 2005 before receiving the funds for its work from the government. As noted above, the funds were only released following a decision of the Constitutional Court, on complaint from a citizen, that ‘the government has to give, within 24 hours of this present decision, a substantial advance in funds to the CENA to ensure the immediate start of its activities’.<sup>24</sup>

The power granted to the executive to set the CENA’s financial regulations is also a channel for the government to influence the functioning of the Commission. The government

24 Constitutional Court, Decision DDC 05-139 of 17 November 2005.

may also exploit the prescribed procedures for expenses and audit mechanisms in order to slow down the management of the process and thus influence the quality of results. During the 2006 presidential election process, for example, the government reacted to the decision of the Constitutional Court that instructed it to make financial resources available to the CENA by decreasing CENA members' salaries.<sup>25</sup> It took another judgment to declare that the government violated the constitution by not having consulted CENA members before setting their premiums and allowances.<sup>26</sup>

During the 2008 local and municipal elections, the government pressured the CENA to demand compliance with legal procedures for procurement related to elections. Through statements in the media, the government reminded all service providers that they would not be reimbursed if the procedures were not complied with. Although more rigorous financial procedures would be desirable, this requirement has had adverse consequences on the quality of elections management, especially when the actual deadlines for the organisation of elections does not allow for enough time for compliance with public procurements procedures – as is often the case in Benin.

## E. Electoral disputes in Benin

In Benin, disputes at all stages of the electoral process are decided by the Constitutional Court for legislative and presidential elections and by the Supreme Court for district and municipal elections.<sup>27</sup> Indeed, contrary to what happens in many French-speaking countries, there is no distinction between management of different types of disputes, for example, those related to the voters register and those related to the election results. This peculiarity derives from Benin's constitution which in Article 117 stipulates that the Constitutional Court:

- Ensures the validity of presidential elections;
- Investigates challenges, rules on any irregularities it finds, and announces election results;
- Rules, in case of challenge, on the validity of legislative elections; and
- Rules without appeal on the validity of the election of deputies.

The electoral law currently in force stipulates in addition in its Article 106 that 'all election disputes related to presidential or legislative elections are brought before the Constitutional Court ... [And] all electoral disputes regarding local elections are brought before the Supreme Court'. The procedure before the Constitutional Court regarding disputes over presidential or legislative elections is as follows:<sup>28</sup>

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25 Decree No. 2005-718 of 23 November 2006.

26 Constitutional Court, Decision DCC 05-144 of 29 November 2005.

27 This section is essentially taken from Gilles Badet, *Benin: Democracy and Political Participation: An Evaluation of 20 years of 'Democratic Renewal'*, AfriMAP and OSIWA, 2010, pp.116–119.

28 Art. 99 of Law No. 2007-33 of 3 January 2011.

- The matter is brought before the Constitutional Court by a written request to the court registry, or to a mayor, prefect or the minister of the interior.
- The mayor, prefect or minister of the interior notifies the court registry by telegram or any other appropriate means, and immediately transmits the request that they have received.

In the case of district and municipal elections:<sup>29</sup>

- The matter is brought before the Supreme Court by a written request to the court registry, the registry of the court of first instance with jurisdiction in the area, the district head, the mayor, the prefect or the minister of the interior.
- The registry of the court of first instance with jurisdiction in the area, the district head, the mayor, the prefect or the minister of the interior, notifies by telegram or any other appropriate means of communication, the registry of the Supreme Court and immediately transmits the request that they have received.

If the Constitutional Court or the Supreme Court considers the appeal well-grounded, it may either cancel the challenged election, or revise the record of results and declare the candidate duly elected. In case of cancellation of the presidential election, there shall be a new ballot within 15 days following the decision.<sup>30</sup>

The legal framework is clear enough about procedures to be followed for the resolution of disputes related to the electoral process. These procedures are generally followed and decisions of various courts involved in settling electoral disputes are generally complied with by all players. However, procedures are not fast enough, especially regarding district and municipal elections, so that disputes are only settled at the end of the term of one of the two litigants.

That was the case during the first term of municipal councillors elected in 2003, whose elections were invalidated only around the end of the term. The situation is somewhat more serious with the second term of district and municipal representatives. Indeed, since the end of elections in May 2008, re-elections decided after an invalidation decision by the Supreme Court continued to be held until 2010, i.e. two years after the elections.<sup>31</sup>

The way litigation on presidential election results is organised creates a situation of confusion around the Constitutional Court's powers. According to the current legal framework, the Court announces provisional results for the presidential election and then processes challenges before the announcement of final results. The Court thus finds itself in a position where it could be called upon to rule on its own judgments. Note that this incongruous situation is due to the fact that when the texts were written, Benin did not yet have a CENA.

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29 Ibid., Art. 101.

30 Ibid., Arts. 104–105.

31 Statement by a Supreme Court official at the launch of the AfriMAP report on democracy and political participation in Benin, Cotonou, March 2010.

## F. Critical assessment of the CENA's performance

### **The CENA's strengths and weaknesses in managing the electoral process**

Since 1995, the CENA has organised 11 elections: five legislative, four presidential and two local. These elections were held within the constitutional deadline and in a peaceful manner without major protest about the results and have undoubtedly contributed to improving the image of Benin, which in the West Africa sub-region and even beyond, is seen as one of the new consolidating democracies. However, the management of elections by the CENA has shown gradual but steady and growing signs of quite serious weaknesses and shortcomings. These weaknesses and shortcomings have affected all major aspects of electoral process management: the CENA's organisation and functioning, the competence of its members, the credibility of the management of the electoral process and confidence in the results.

#### *Weak organisational capacity*

Many organisational weaknesses affect the CENA's functioning and explain its poor performance. After their appointment and official swearing-in by the Constitutional Court, Commission members establish their internal structures, that is the executive and technical committees. For several years, this work (especially the formation of the CENA executive committee) has often led to disputes between Commission members that take several days to resolve, meaning that the Commission is already behind schedule when it begins its work.

Disputes are usually caused by disagreements between members about the positioning of political views represented in the CENA and/or the division of roles between them in the Commission's daily operations; as in the 2001 situation cited above when nine of the commission's members resigned. Disputes also occurred during the 2006 presidential election about whether the political configuration of the executive committee of the Electoral Commission should reflect that of the commission itself. Political parties represented in the CENA then spent several days or even weeks before they could agree on the way to distribute posts within it, even though the Commission had already been installed well after the legal deadline.

According to the report of the Commission of Independent Jurists on the electoral system in the Republic of Benin<sup>32</sup>, 'far from being a technical management body for the electoral process, the CENA has become an instrument of partisan interests. Instead of appointing its members according to criteria established by the law, namely, honesty, competence, impartiality and patriotism, some political parties send activists to represent and defend their interests'.<sup>33</sup>

In almost all cases, Commission members fail to resolve disagreements occurring

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32 This commission was created by Presidential Decree No. 2007-171 of 18 April 2007. Its mandate was to evaluate the electoral system in Republic of Benin and make recommendations to improve it.

33 Ahanhanzo Maurice Glele (chair), Théodore Holo (rapporteur) and others, *Rapport de la commission de juristes indépendants sur le système électoral en République du Bénin*, Cotonou, 27 April 2007.

within the CENA during the management of electoral processes, including in some of the cases mentioned above. Very often they are forced to turn to the courts to decide between them or show them the way forward. Thus in the last ten years, there has been virtually no election in which the Constitutional Court or the Supreme Court has not intervened to help resolve an issue related to the organisation and/or functioning of various successive CENAs. During the 2001 and 2006 presidential and 2003 and 2007 legislative elections, for example, the Constitutional Court had to intervene to decide disputes between members about the distribution of positions or about difficulties related to its functioning.<sup>34</sup>

The management of legislative elections in 2007 provides some examples of Constitutional Court intervention in settling disputes between CENA members. On 20 February 2007, a member of the CENA lodged a complaint with the Constitutional Court against the CENA chairman on the grounds that the latter had started the electoral registration process before the necessary practical arrangements were fully in place. The other example is the complaint for unconstitutionality filed on 21 March 2007 by the CENA chairman against a vote for his dismissal by some of his peers at the CENA session of 19 and 20 March 2007.<sup>35</sup>

The training of election officials has always been defective. Indeed, the training of the various agents – members of the CENA and its branch offices, registration and polling station officials – is generally poorly organised and not timely.

#### *Poor management of the voters' register*

CENA is also criticised for mismanaging the voter registration process during the pre-election phase. Indeed, it is widely acknowledged – by politicians, civil society organisations and the public – that since the beginning of democracy, voters' registers in Benin have been subjected to manipulation. According to many accounts, registration on voters' lists provides numerous opportunities for fraud that political actors, sometimes with the complicity of CENA members, do not hesitate to seize.<sup>36</sup> Worse, mechanisms to reduce at least some of the manipulation (for example, the display of registers in towns or villages for a few days) have for several years no longer been implemented.<sup>37</sup>

In Benin, until the 2011 electoral cycle, voters registers, which were directly entered by registration officials, were still manually managed and became obsolete six months after they were established. Since 2001, when the CENA had only 40 days to manage a presidential election, the Electoral Commission has rarely had the time to compile a voters register and give the time for its verification. Beyond the question of time, the reality is that since 2001 almost all CENAs have experienced a rebellion (strike) of some registration officials that

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34 Gilles Badet, *La Cour constitutionnelle du Bénin en fait-elle trop? Bilan et perspectives jurisprudentiels et organiques*, paper presented at a seminar organised by OSIWA on constitutionalism in West Africa, Dakar, November 2007 (copy on file with the authors).

35 A detailed list of Constitutional Court decisions related to the 2007 elections is available at <http://www.cour-constitutionnelle-benin.org/courconsbj.html>.

36 Interventions of former CENA members during discussions in focus groups organised for this report.

37 Ibid.

has delayed the establishment of the register and therefore the implementation of the legal mechanisms for its verification.

Until recently, the voters register was still manually managed even though the legislature prescribed in 2001 that from then on ‘the voters register is permanent and computerised’ (the *liste électorale permanente et informatisée* – LEPI).<sup>38</sup> Although this provision has been included in all election laws since 2001, LEPI was only established on the eve of the 2011 election cycle, amid disagreements on the process of its establishment and strong debate over its credibility. Opposition parties believe that obvious shortcomings of LEPI explain in part President Boni Yayi’s electoral landslide in the first round of the March 2011 presidential election. There is a growing consensus on the need to overhaul the LEPI.

### *Voter education*

The CENA’s performance in voter education is also poor. Despite the formal existence in the CENA of a special technical committee in charge of communications, none of the technical committees are specifically dedicated to voter education and the Commission therefore does little to inform citizens about elections. This task usually falls to civil society organisations who seek their own means to carry it out. Neither does the CENA inform anyone about its management of the electoral process.

### *Management of the vote*

The electoral phase, i.e. the election day itself, is probably the one in which the CENA is the most successful. Except for a few cases of lack of equipment and delay in starting elections in some places, operations generally go well on election day. This is a real achievement given the unfavourable conditions (short deadline, lack of resources, political disturbances, etc.) under which all CENAs have operated so far.

Only one point causes serious problems on election day: misconduct and fraud. To this day, the Electoral Commission has never succeeded in managing violations of electoral legislation, even though, under the law in force, the CENA ‘has all the investigative powers to ensure the validity of the vote’.<sup>39</sup> Thus on election day, in several locations across the country, cases of voter card buying, campaigning at polling places, misconduct, corruption etc. can be observed. Only in a few cases has the CENA been able to take action leading to the arrest and prosecution of the perpetrators of such misconduct.

Several problems characterise the CENA’s management of the post-electoral period. First, the collection of electoral documents is generally slow, taking several days. This slowness results in speculation regarding possible manipulations that could take place from the time the documents leave the polling stations after they are closed to the time they arrive at CENA headquarters in Cotonou. Such suspicion seems confirmed by the discrepancies sometimes noted between the content of the different envelopes containing electoral documents sent to the various institutions involved in counting. The mismatch between statistics

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<sup>38</sup> Art. 11, Law No. 2000-18 of 3 January on general rules for elections in the Republic of Benin.

<sup>39</sup> Art. 45 of Law No. 2007-25.

can sometimes reach the level of hundreds of thousands. For example, during the 2001 presidential election, a difference of more than 200 000 voters emerged between the number of registered voters in the Constitutional Court documents and the number in the CENA documents. The Constitutional Court reached a figure by ‘totalling the figures written before the words ‘*registered voters*’ in the electoral documents<sup>40</sup> filled in by members of polling stations and certified by the Constitutional Court’.<sup>41</sup> As for the Electoral Commission, it relied on the electoral law which defines the number of registered voters as ‘the total number of people registered in the registration offices during the registration process’.<sup>42</sup>

Although it is possible, even probable, that there could be a genuine difference between these two figures, the discrepancy in 2001 of more than 200 000 voters suggests there may have been some manipulation of electoral documents as they were moved from voting sites to CENA in Cotonou. This poses the problem of the ability of the Electoral Commission to ensure the integrity of the transmission of results from polling stations to the relevant institutions in Cotonou.

### *Relative political success*

However, these weaknesses are far outweighed by the CENA’s numerous achievements. The equitable treatment of political parties and candidates during the electoral period is undoubtedly a positive aspect which can be credited to all CENAs since 1995. This equal treatment is reflected both in determining positions on the single ballot paper and in equitable access to public media. There have never been any major complaints of favouritism since the CENA has been managing elections in Benin. The same applies when it comes to involving political parties and/or candidates in the management of elections as provided for by the law. In the few times when protests have occurred, solutions have been promptly found, generally to the satisfaction of the protesters.

Another CENA achievement is the peaceful management of elections, i.e., without major protests. Indeed, despite the many shortcomings described above, contestants in the elections, both political parties and candidates, have generally accepted the results of the polls so far. The 2008 municipal and district elections and the 2011 presidential elections are an exception. Electoral dispute management lasted for nearly two years following the 2008 municipal and district elections, and, for the first time in Benin’s recent history, results announced by the Constitutional Court for the March 2011 presidential election were rejected by a candidate whose partisans staged public demonstrations. Furthermore, since the CENA experiment was begun, it has successfully managed elections to ensure the respect of constitutional deadlines in transferring power from one mandate to the next: despite tight deadlines set for the different Electoral Commissions to organise elections since 1995 (sometimes less than 45 days to prepare the voters register and hold the vote),

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40 That is, the polling station records and collated results.

41 Decision EL-P 01-049 of 16 March 2001.

42 Ibid.

constitutional deadlines for the transfer of authority have never been missed, most importantly at the level of the Presidency of the Republic.

The CENA's relatively positive record in these respects can be explained by the legal electoral framework in Benin, which involves politicians and political parties in the management of essential electoral tasks. Although the disadvantages of this system for the independence of the commission have been described above, the involvement of politicians in the management of elections has greatly helped reduce the risk of individuals challenging election results. Indeed, not only is the Electoral Commission almost totally composed of members appointed by political parties, but electoral officials – census takers and members of polling stations – are also representatives of political parties.

One must also mention that the people of Benin generally have an obsessive fear of a paralysis in the functioning of national institutions. One of the lessons learned by the people of Benin from their political history, especially from 1960 to 1972, is that a paralysis in the functioning of national institutions can cause military intervention in politics. This fear leads most political players involved in the electoral process to know when to stop, whatever their personal interests and concerns, to allow the continuation of the democratic experiment.

The CENA's success is also due to the fact that generally, each one of the electoral process institutions tries to play its role in a successful election. Indeed, the Constitutional Court, the Broadcasting and Communication Authority (*Haute Autorité de l'Audiotvisuel et de la Communication*), ministerial departments and public security forces, and other categories of actors have all so far endeavoured to contribute to the success of elections. Despite the imperfection of the legal framework, the lack of appropriate coordination between actors, everyone's eagerness to play their part has significantly contributed to the successful management of elections since the 'democratic renewal' in Benin.

Citizen vigilance and civil society activism in Benin and their commitment to the consolidation of democracy constitute a final major strength mentioned by focus groups participants. Several times civil society determination substantially contributed to compliance with constitutional deadlines in the management of electoral processes. As noted above, this was particularly the case on two occasions when the executive attempted to take advantage of the fact that it holds the purse-strings to influence the quality of election management.

### *Debate on the CENA model*

Nevertheless, the above-mentioned shortcomings and weaknesses, whose magnitude and severity have continued to increase over time, fundamentally explain why more and more people are calling for a change of model for election management in Benin and wish to return to the government model, i.e. the management of elections by the government through the Ministry of the Interior.<sup>43</sup> Proponents of this proposal base their preference on two major arguments. The first

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43 For example, Alao Sadikou Ayo, President of the *Groupe d'Etude et de Recherche sur la Démocratie et le Développement Economique et Social* (Gerdde-Afrique, a research institution on democracy and economic and social development).

argument is that in a normal environment, i.e. a country where institutions function properly, the management of elections is entrusted to the civil service. Therefore, resorting to a CENA can at best be only regarded as an expedient and that the long-lasting solution should come from support to the civil service so that it can properly manage electoral processes. The second reason put forward by the proponents of the return to the government model is purely financial. They consider that using an independent commission for the management of elections in Benin contributes to increasing the cost of elections. This is because the use of a CENA requires the creation of a separate administration and therefore additional operational costs, which results in a waste of resources – related to the fact that political parties represented in the CENA are looking for financial profits through the management of funds destined for electoral process management. The return to the governmental model should help reduce the cost of elections in Benin.<sup>44</sup>

For the vast majority of Benin's political players, including party leaders, parliamentarians and members of the government, the above-mentioned arguments need some qualification. They argue that the real problems resulting from the use of the CENA can be solved without necessarily returning to the government election management model. Indeed, regarding the first argument, the civil service is still far from having the fundamental values to inspire all players with confidence concerning the management of elections. As regards the second argument about increasing election costs, which is probably true as shown in Figure 3 above, it is possible to find solutions within the framework of the management of elections by the CENA.<sup>45</sup>

## Public perceptions

Despite its weaknesses, the CENA has traditionally enjoyed strong public confidence. According to almost all participants in various focus group discussions held for this study, the current model for the electoral management body, i.e. the use of an Autonomous National Electoral Commission, must be maintained. Since the conditions in which this choice originated – i.e. the undermining of the neutrality of the civil service and the lack of trust among politicians – are still the same, they thought it important to maintain the CENA's current form.

According to participants, the Electoral Commission has since its advent shown many strengths in managing elections in Benin. This favourable judgment is justified by the fact that despite difficult conditions in managing election, especially very limited deadlines for organising elections and limited funding, the Commission succeeded in finalising electoral processes without too many challenges. Participants also appreciate the quality of elections in Benin in relation to the quality of electoral processes implemented in other countries in the sub-region.

The quality of elections in Benin has nevertheless gradually decreased over time since the first CENA experiment in 1995. For about a decade, protests have not stopped rising, though still within reasonable limits. Suspicion of fraud and of the results announced by the Commission have never been so evident as they are today. The most obvious cases

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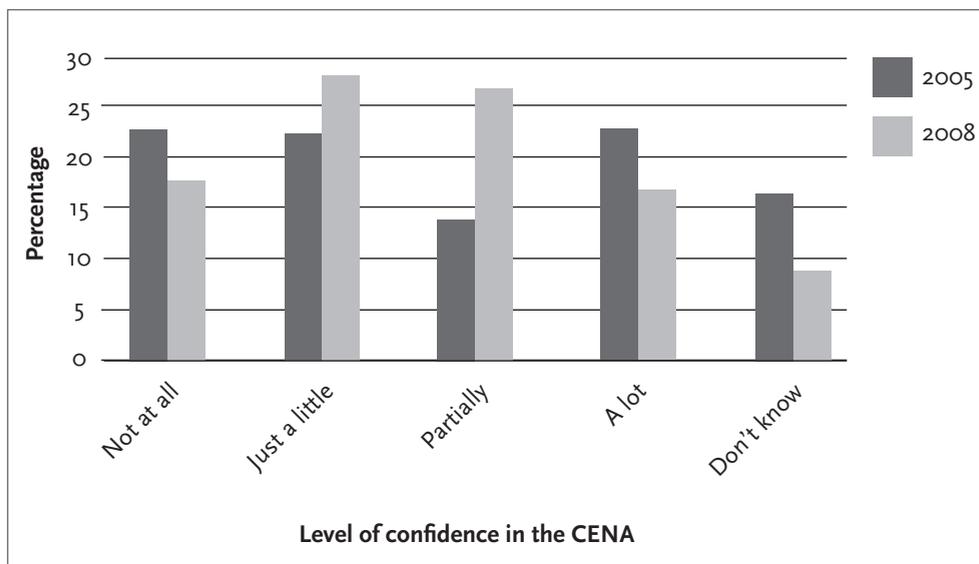
44 This position is defended during television and radio debates but also through print press. This position is also defended in forums organised in the sub-regions on election management.

45 This point is noticed in almost all CENA general reports on elections.

were observed during the last two elections, i.e. the 2007 legislative election and the 2008 municipal and district elections, when prominent politicians – including the National Assembly speaker, political party leaders and some government members – denounced electoral fraud and expressed suspicions toward the management of elections by the CENA.<sup>46</sup> The level of disruption was such that several results of the 2008 municipal and district elections had to be cancelled by the Supreme Court. These cancellations caused repeated re-elections for at least two years i.e. until early 2010.

This probably explains the fact that, while maintaining their support for the current model of management by an independent body, the commission has for some years gradually lost the confidence of almost all players in the Benin electoral process. Disputes between politicians over the control of the Commission when each election day draws close largely reflect how little they trust it. Regarding ordinary citizens, Afrobarometer data (Figure 4) show that they too have less and less trust in the Electoral Commission.

Figure 4: Level of confidence in Benin's CENA



Source: Afrobarometer round 4, May 2009.

One of the factors explaining such an erosion of trust in the CENA is about its decreasing degree of autonomy. Indeed, as CENAs follow one another, reasons pile up for reducing public trust in the Commission's autonomy. Both the behaviour of CENA members and the behaviour of political players who choose them suggest that everyone goes there to defend the group he or she represents in the Commission. A chair, a vice-chair or ordinary CENA members have been seen to publicly defend the interests of a political party.

46 For example, as expressed in the farewell speech of the outgoing National Assembly speaker in April 2007.

One should also mention the general lack of competence among CENA members. In selecting members for the CENA and its branch offices, politicians rarely care about continuity or competence. On some occasions, all CENA members are simply renewed from one Commission to the next, at other times the criteria for the qualifications needed to join the CENA or its administrative staff are ignored. This is all the easier for politicians since the law is almost too lenient concerning the criteria to join the Electoral Commission.

The Benin Electoral Commission is also weakened by the inability of the entire system to learn from experience. Since 1995 when Benin initiated the CENA experiment, its election reports, one after the other, systematically talk about the same shortcomings that mostly remain unchanged and un-corrected. Therefore the Electoral Commission has been carrying the same shortcomings for over a decade, and these may worsen over time and reduce the quality of election management in Benin. This is explained both by the ad hoc nature of the CENA and by the lack of links between the CENA and other institutions (especially Parliament) which would lead to the integration of recommendations from the various CENAs into the national legal framework.

Mismanagement and poor storage of election materials is a consequence of this inability to learn from experience. The Electoral Commission struggles to ensure the proper management of election materials between elections, whether the issue is vulnerable goods such as computer hardware, or more durable equipment such as ballot boxes and polling booths. The main consequence of this is an increase in election costs, because it is necessary practically to start all over again at each election for the procurement of some electoral ingredients, in the absence of proper storage of existing material.

## **The debate on electoral reform**

Since he was elected in 2006, President Yayi Boni has included issues related to electoral and constitutional reforms in his government's priorities. In April 2007, about one year after assuming power, he established a Commission of Independent Jurists which he entrusted with suggesting ideas on reforming the electoral system.<sup>47</sup> The Commission of Independent Jurists focused most of its reflections on electoral governance, and especially on the CENA, the organ in charge of election management. Commission members identified the CENA's major shortcomings and made a series of recommendations to reform the electoral management system and the legal framework for elections in general. In particular, they suggested the establishment of a mixed electoral system combining a majority system with a proportional system, instead of the proportional list system currently used to elect deputies.

The president of the republic also initiated a constitutional review process in 2008. To that end, he created an ad hoc technical committee to review the 11 December 1990 Constitution in order to correct shortcomings observed in nearly two decades of practice.<sup>48</sup> The technical committee submitted its report and an excerpt from this report was made the

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47 Decree No. 2007-171 of 18 April 2007.

48 Decree No. 2008-525 of 13 February 2008 and modified by decree No. 2008-597 of 22 October 2008.

subject of a bill on reviewing the Constitution of the Republic of Benin introduced to Parliament by Decree No. 2009-548 of 3 November 2009.

Although these two review initiatives were taken separately, the timeline for their implementation led to a sort of synergy between their respective results. Indeed, most of the amendments on electoral governance recommended by the commission in charge of reviewing the constitution in Benin were strongly inspired by recommendations of the Commission of Independent Jurists which evaluated the electoral system. In both cases, these commissions' reports led to a national debate on the need to reform the legal and institutional framework for elections in Benin. Among the points in discussion is the composition of the CENA, the too frequent amendment of electoral legislation and the place and role to be played by civil society organisations in managing the electoral process. Issues related to the reform of political parties and of the electoral system are also discussed.

### *The composition of the CENA*

Based on difficulties encountered in recent years in the organisation and functioning of the CENA, actors in the electoral process, especially politicians, suggest amendments in relation to two main points. First, there are problems stemming from the fact that according to the law, representatives of parliament in the CENA are appointed in proportion to the weight of political groups in the National Assembly. This causes an automatic imbalance in the CENA whenever a political side has a relatively large majority in parliament. The second point is related to Commission members' lack of expertise. It is important to note that to this day no evidence of proficiency is required for the selection of CENA members.

Among the suggested solutions is the proposal to adopt a procedure for the appointment of CENA members which ensures a balance between opposition and majority in the Commission, regardless of the respective weights of each of these political groups. The second category of proposals suggests what is called the professionalisation of the CENA in Benin, a sort of 'technicalisation' of the multi-party model. Thus the group of experts established by the President to reflect on improving the electoral system suggested that representatives of political parties in the CENA should be chosen according to clearly defined technical profiles, which would contrast with the current model in use since 1994 in which no criteria based on qualifications are used for the selection of political party representatives in the Commission at the national level.

It is important to note here that in spite of all the shortcomings of the current electoral management body model, politicians in Benin do not seem ready to replace it by another. Indeed, with few exceptions, everybody is against the government model. At the same time, Benin's politicians resist the adoption of the 'expert model' or 'judicial model' for the simple reason that they do not believe in non-partisan experts or judges.<sup>49</sup> In Benin today, the dominant idea among politicians and even beyond is that there are no objective and neutral men and women in the country and therefore they do not believe in the

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49 Opinions expressed during focus groups held in Cotonou and Parakou.

impartiality of experts or judges who would be responsible for leading such an Electoral Commission.

#### *The instability of the legal framework for election management*

The management of elections in Benin is also characterised by an instability of the legal framework. In Benin, unlike in other countries in the sub-region, there is no electoral law for the long term. Elections are regulated by a series of laws including a law on general rules for elections and laws on rules for each presidential, general and municipal and district elections organised in the country. These texts are regularly changed on the eve of each election day, so the legal framework for elections has been amended two dozen times since the first elections of the 1991 democratic renewal. Consequently, most of those involved in the electoral process do not have a good command of the texts governing elections in Benin.

Therefore it is strongly suggested that Parliament adopt an electoral code that combines all laws related to elections in Benin and takes into account the recommendations of the Commission of Independent Jurists on the electoral system in the Republic of Benin.

#### *Place and role of CSOs*

Since 2005, a group of CSOs formed a network named the Civil Society Organisation Front for Elections (*Front des Organisations de la Société Civile pour les Elections – FORS*). As the most structured citizens' initiative, with more than 150 civil society organisations (CSOs) and associations, FORS re-forms itself before each election to contribute to the management of the electoral process.<sup>50</sup> Thus, there already have been a 2006 FORS for the presidential election, a FORS-LEPI for advocacy on a computerised permanent voters register, and most recently a FORS for the 2011 election. On 21 June 2010, the 2011 election FORS innovated by establishing for the first time in Benin an Alternative Citizen Electoral Commission (*Commission électorale citoyenne alternative – CECA*). CECA's main objective, according to leaders of the 2011 election FORS is to monitor the management of the 2011 electoral process.

In spite of considerable contributions by FORS, the place and role of CSOs is also a subject of the ongoing debate in Benin about electoral management. Until now, CSOs have been usually expected to play two roles in the electoral process: nominating representatives to be members of the CENA and its branch offices, and contributing to voter education and the monitoring of electoral management.

If there is consensus on the second role for civil society – i.e. voter education and election monitoring, questions are still raised about the first role, namely representation in the Electoral Commission. The issues raised about this first role usually given to civil society in Benin are twofold. First, CSO representation in the CENA and its local branches is insignificant: there is only one civil society representative in the 11-member CENA and in each

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<sup>50</sup> From the daily *Matinal*, 22 June 2010, reporting CECA installation ceremony.

of its branches. The question is what use is a civil society representative in such a context. Secondly, the appointment of CSO representatives to the CENA has created dissent among them over many years. The fact that the electoral law is not specific enough on the issue – for example by referring only to CSOs that are engaged on issues related to elections and not to all CSOs whatever their focus, as is currently the case – increases the difficulties. In recent years, CSO representatives in the CENA have been chosen only after court decisions to decide between disagreeing groups.

Some in civil society therefore suggest the outright withdrawal of CSOs from the CENA and its branches in order to focus solely and completely on monitoring the management of the electoral process.<sup>51</sup> Others, on the other hand, want to maintain the status quo and improve procedures for appointing civil society representatives in order to avoid appeals to the courts responsible for electoral disputes. This position is the one adopted by actors in the ‘civil society consultative framework’ (*Cadre de concertation de la Société civile*), a grouping of civil society organisations. Politicians also (this includes all political parties) wish to maintain civil society representatives in the electoral management bodies.

### *Reforming the institutional framework and financing of political parties*

The debate on reforming the political party system was initiated in Benin when, five years after political liberalisation, the number of political parties began an exponential increase to more than 150 political parties (by late 2010) for a population of about eight million. In spite – or because – of this number, political parties in Benin have neither ideological positions nor political programmes worthy of the name. Their mode of internal management also causes many problems. Indeed, political parties in Benin are considered as the private property of their founders, who are also their main donors, and they are organised and function as such. Therefore, the issue of financing political parties has remained a major concern for several years.

One of the issues discussed today is around the search for ways and means to reduce the number of political parties to a reasonable level and strengthen their programmatic and ideological positions. The tightening of conditions for the creation and maintenance of political parties through the revised Charter for Political Parties adopted in 2001<sup>52</sup> does not seem to have been effective, since the number of parties is even higher today than in the early 2000s. Another concern relates to the financing of political parties. Suggestions on this issue tend towards the creation of appropriate public funding mechanisms for political parties in order to increase oversight over their internal functioning and reduce the personal management of parties by those who fund them.

Initiatives are currently underway at several levels in the search for approaches to solutions through improving the political parties’ legal framework. Discussions are indeed underway on the laws establishing the Charter for Political Parties and the Status of the

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51 For example, in a communiqué published in newspapers in June 2010, FORS suggested the withdrawal of CSOs from the CENA and declares it is no longer interested in participating in the CENA in the future.

52 *Charte des Partis Politiques*, Law No. 2001/21 (replacing Law No.90-023 of 13 August 1990).

Opposition<sup>53</sup> to improve the contribution of political parties to the consolidation of Benin's young democracy.

Discussion of the various proposals mentioned above are being conducted both at government level and in the National Assembly. At government level, the ministry in charge of relations between the government and other institutions (MCRI) has initiated discussion on improving the role of political parties in Benin. In the National Assembly, it is the Unit for Analysis of Development Policies (*Cellule d'Analyse des Politiques de développement de l'Assemblée Nationale* – CAPAN) which, on instruction from the deputies, conducts studies with the aim of amending the text in question. The two institutions (MCRI and CAPAN) organised a workshop in July 2010 on the theme of the legal framework for political parties in order to improve the relevant legislation.

These initiatives are mainly supported by members of relatively large political groups who are today gathered in the opposition coalition called 'Union makes the Nation' (*l'Union fait la Nation* – UN). These politicians are mainly concerned with reducing the hyper-fragmentation of national political parties which makes it difficult to manage national institutions and the stability of political coalitions. In the electoral texts now under consideration in parliament, the possibility is also under discussion of setting a threshold (whose level is not yet determined) of votes necessary in order to be allocated a seat in legislative elections.

## G. Recommendations

### Constitutional/legal provisions

#### *Status and membership of the electoral management body*

- Change the system for appointing the EMB members in order to transform the current multi-party model into an expert model. Alternatively, if the multi-party model is maintained, adopt a balanced representation of the majority and the opposition, and a system for ensuring maximum consensus on appointments, rather than proportional representation, which has been practised so far.
- Amend the electoral laws to ensure that the system for appointing the EMB branch office members and the relationship between the EMB and its branches ensure the authority and hierarchy necessary for the proper management of elections.
- Amend the electoral laws to change the ad hoc nature of the CENA and make it a permanent commission.
- Amend the electoral laws to define clearly the tenure and terms of service of EMB members in order to increase their independence from politicians and the government.

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53 Law No. 2001-36, *portant Statut de l'opposition*, which spells out specific rights and obligations of the legal opposition.

### *The process of making resources available for the CENA*

- Amend national legislation in order to create a system for the public financing of elections that reduces the risk that the government may abuse its power as the national treasurer. More specifically:
- Accentuate the a priori oversight (when preparing the budget) and a posteriori oversight (after the execution of the budget) of the EMB's finances, in addition to concurrent oversight currently applied.
- Ensure automatic provision of resources defined in the EMB budget (for the management of a given election) as soon as the budget is adopted, and thus take this provision away from dependence on the Ministry of Finance's discretion.

### **Improvements in managing electoral disputes**

- Amend the law so that the EMB announces preliminary results and the Constitutional Court the final results for presidential and legislative elections.
- Adopt a special mechanism for settling electoral disputes instead of using the normal judicial system, whose slow and cumbersome procedures do not seem suitable for the settlement of electoral disputes. The creation of an electoral court could meet this need.

### **Creation of institutional frameworks for collaboration between the EMB and key players in the electoral process**

- The EMB should consider the creation of forums for formal or informal exchange among political parties and candidates, civil society, security forces and representatives of relevant ministries, in order to create and maintain trust between actors in the electoral process and exchange the information necessary for proper election management.

### **Resolving EMB staff and infrastructure issues**

- The EMB should improve recruiting and training procedures for election officials to ensure sufficient numbers, independence and qualifications of the temporary staff.

### **The issue of electoral fraud**

- Require the systematic evaluation of each election and the implementation of the resulting recommendations, especially those aiming to increase the chances of detection, prosecution and punishment of those who violate election laws.

# 3

## Cape Verde

**Ismaila Madior Fall**

### **A. Summary**

Cape Verde gained its independence on 5 July 1975 from Portugal. The African Party for the Independence of Guinea and Cape Verde (*Partido africano de independência da Guiné e Cabo Verde* – PAIGC) immediately established a one-party political system. Cape Verde then lived under a socialist-inspired system until 1990, with the PAIGC and then the *Partido Africano da Independência de Cabo Verde* (PAICV), established in 1980 following a split with the PAIGC, as the single permitted party. The country subsequently opened up to a multi-party system in 1990.

The Cape Verde constitution adopted in 1980 and substantially revised in 1992 and 1999, laid the foundation of the political system. A constitutional amendment in 1990 introduced a semi-presidential form of government influenced by the Portuguese political system and by the French Fifth Republic. This constitutional choice was confirmed by the second complete revision of the constitution in 1992, which laid the foundations for a social democratic state. The system combines a president elected by direct universal suffrage and a government headed by a prime minister with extensive powers but answerable to the National Assembly. Because of the semi-presidential nature of the political system, Cape Verde organises presidential and legislative elections simultaneously, after which a prime minister is appointed and shares a great deal of executive powers with the president of the republic. The constitution prescribes that the executive is ‘the body which defines, leads and executes the nation’s general domestic and foreign policies’ and is accountable to the National Assembly.

The current electoral system favours a bipartisan system dominated by two parties, the PAICV and the Movement for Democracy (*Movimento para Democracia* – MPD). The

PAICV led the country under a communist one-party system from independence until 1990. The MPD emerged between March and September 1990, introducing political pluralism whilst also advocating for a multi-party system.

The election of National Assembly deputies is held every five years. The legislative elections are held under a proportional voting system, with party lists presented at the municipal level. Each municipality must have at least two seats. Change of government through elections has become routine in Cape Verde and the political system is deemed stable and generally democratic. Elections are deemed free and fair, there is a free press, and the rule of law is generally respected by the state.

After the political liberalisation of the country in 1991, the Cape Verde endeavoured to develop electoral management bodies on the basis of consensus between political parties. The electoral system has, in essence, two bodies dealing with the electoral process: the Ministry of Internal Administration through its Directorate-General for Electoral Process Support (*Direcção-Geral de Apoio ao Processo Eleitoral – DGAPE*), which deals mainly with the organisation of elections and the National Electoral Commission (*Comissão Nacional de Eleições – CNE*) in charge of monitoring, supervising and auditing elections.

Cape Verde is one of few African countries where the population is satisfied with the political system in general and the electoral system in particular. Cape Verdeans' democratic ideals are reflected in its political and social make up, and are especially apparent in the choice of governance institutions, a culture of accountability, and a demand for transparency.

Election results are generally accepted by all parties, although among political parties a culture of litigation still persists, characterised by mutual accusations of bribery and other electoral malpractices. This is sometimes followed by legal challenges to the election results. However, these allegations do not usually bring major crises in their wake, since there is general respect for the decisions of the institutions responsible for adjudicating electoral disputes, including the Constitutional Court. Most members of the various electoral management bodies display exemplary behaviour that commands respect and confidence among the candidates. Finally, practical mechanisms, such as the participation of representatives of political parties in CNE deliberations, result in increased transparency of the electoral process.

The electoral process is nevertheless distorted by practices that violate the principle of a level playing field among candidates. Among these practices are the misuse of state resources during campaigns, and an imbalance in access to media for opposition parties, especially on national television, whose airtime is mainly dominated by the ruling party. It would be important to impose more stringent rules on access to public media especially during elections. Representatives of opposition parties and civil society organisations consider that the financial autonomy of the CNE must be strengthened and that the government's influence on resource-mobilisation should be reduced.

## B. Constitutional development, party politics and electoral history

### Historical background

Cape Verde is an archipelago located 500 km off the Senegalese coast. A former Portuguese colony, it was one of the first countries in sub-Saharan Africa to move from a one-party political system to a multi-party democracy. The small west African country, whose capital is Praia, has an area of 4 033 km<sup>2</sup> and a population of 470 000 inhabitants. The country's official language is Portuguese. Its literacy rate is 75% and its population is predominantly Christian with 93% being Catholics and 7% Protestants. The unemployment rate is fairly high and is estimated at 25% of the workforce.<sup>54</sup>

The human history of Cape Verde began in the fifteenth century, in the early 1460s.<sup>55</sup> The islands of Cape Verde were uninhabited until the arrival of Portuguese explorers in 1456 and the foundation of Ribeira Grande (Cidade Velha) in 1462 on the island of Santiago.<sup>56</sup> The archipelago was an important acquisition for the Portuguese crown, as its geographical position placed it in an ideal position to support the expansionist strategy of Portugal. In an era of overseas exploration and conquest, Cape Verde was an important stopover point for navigators, giving it great geostrategic value. Cape Verde's history and development was marked by two periods of prosperity: in the seventeenth century through the slave trade; and then at the end of the nineteenth century which saw the opening of the transatlantic routes. Nonetheless, chronic droughts due to deforestation brought on famines, exacerbated by an absence of food aid.<sup>57</sup> Activists for independence in Cape Verde and Guinea-Bissau (another Portuguese colony), joined forces in 1956 and formed the *Partido africano de independência da Guiné e Cabo Verde* (PAIGC). The founder, Amílcar Cabral, was the son of a Cape Verdean father and a Guinean mother. He died in 1973, leaving a void within the PAIGC. His death immediately resulted in the collapse of the coalition project. The coup of 25 April 1974 in Portugal, which brought down the Salazar-Caetano government, also brought the war against the Portuguese (as far as the PAIGC was concerned, largely fought in Guinea) to an end, making it possible for the Portuguese colonies to gain independence through negotiation. Guinea-Bissau, which had already proclaimed its independence in 1973, was recognised a few months after the Portuguese 'Carnation Revolution' (a term used by the armed forces during the years following the coup); Cape Verde gained its independence on 5 July 1975, after lengthy negotiations between the PAIGC and Portugal.

Like most liberation movements on the African continent, the revolutionary Marxist-Leninist inspired ideals of the PAIGC were chosen for the opportunities for leadership

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54 Most of the figures in this paragraph come from World Bank and UNDP 2004 and 2005 documents.

55 Praia, Ahn, *Découverte des Iles du Cap-Vert*, Sépia, Paris, 1998.

56 Instituto de Investigação Científica Tropical (Portugal) e Direcção Geral do Património Cultural (Cabo Verde), *Historia Geral de Cabo Verde Vol. 1*, Coordinated by Luis de Albuquerque and Maria Emilia Madeira Santos, Lisbon, Praia, 1991.

57 Ferreira, D. Bruno, 'Etude sur la Sécheresse dans l'île de Santiago (Cap-Vert)', *Ligne d'action de la géographie physique*, Rel. No. 23, Centre d'Etudes Géographiques, INIC, Lisbonne, 1986, p.112.

training and support for the struggle against post-war colonial domination. When the two countries became independent, there was talk of unity between them, a project abandoned after the coup in Guinea-Bissau in 1980. The PAIGC then became the *Partido africano da independência de Cabo Verde* (PAICV), following the political separation between Cape Verde and Guinea Bissau. As they obtained independence, each party implemented a system of planned economy based on a socialist ideology, though adapted to its own methods of governance and circumstances. Cape Verde opted for a very tolerant politics of national revolutionary democracy.<sup>58</sup>

## Post-independence development

Cape Verde is a small country with little arable land and water. The country has no mineral resources, basic infrastructure is lacking and poverty is high.<sup>59</sup> Immediately after independence, urban centres had to accommodate an exodus of the rural population fleeing water scarcity and the uneconomic size of their farms. Regional disparities worsened and caused serious social problems in the city of Praia, the capital.

Initiatives taken by Cape Verde to combat desertification, increase growth and lay the foundations for good governance struck a chord with international organisations and donors willing to support the country. Although Cape Verde set out in 1980 with a development framework based on a planned economy in which the state controlled the key sectors of production, the country soon deviated from revolutionary orthodoxy, even though it continued to refer to it until 1990.

In the late eighties, facing the imminent bankruptcy of a policy centred on state-run economy, a cautious opening to the private sector was outlined, this 'reorientation of the economy' aimed to allow engagement with international markets. The radical change was brought on the one hand by the civic pressure exerted mainly by young professionals trained in the years after independence, and on the other by the rapid changes then underway in Eastern Europe.<sup>60</sup>

January 1991 was a key turning point for Cape Verde. Much as in Eastern Europe, the winds of change blew through the country, prompting a shift in economic policy and political ideology. Socialist African countries who had been dependent on the Eastern European states were obliged to open themselves up to multi-party democracy, starting with São Tomé and Príncipe, and immediately followed by Cape Verde.

The new government elected in 1991 opted clearly for a market economy, and focused its policies on improving communications, especially the infrastructure of roads, sea and airports. The state became merely the arbiter in economic activities, leaving to the private sector the dynamics of promoting development. Fisheries, industry, tourism and services were classified as key development sectors. Outside investment was encouraged through

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58 Correia, Claudia, 'La société cap-verdienne : formation et évolution', in *Découverte des Iles du Cap-Vert*, Ahn Praia, Paris, 1998, p.51.

59 dos Santos Carvalho, Ignacio, 'Introduction à l'histoire du Cap-Vert', *Ibid.*, p.15.

60 Semedo, José Maria, 'Le Cap-Vert, un archipel du Sahel', *Ibid.*, p.25.

franchises; as a result, telecommunications and transportation between islands were greatly improved.

With independence and subsequent democratisation, Cape Verde made significant progress in social and economic development. The political opening of 1991 created high hopes for accelerated economic development in the context of the general global restructuring. Poor, but relatively well supported by international aid, Cape Verde is now considered a success story by international institutions and development agencies.

## The emergence of multi-party democracy

### *The constitutional system*

The first constitution, adopted in 1980, was amended in 1981 to establish the primacy of the new PAICV party as the only legitimate entity to lead the nation. This was the period of one-party rule. Aristides Pereira, the secretary general of the PAICV, was the head of state from 1975 to 1990, re-elected three times by the National Assembly (*Assembleia Nacional Popular* – ANP).

The third PAICV party congress in November 1988 marked a watershed in the post-colonial history of the country. Important decisions were taken to liberalise the system. In April 1990, a group of intellectuals created the Movement for Democracy (MPD) and openly called for a multi-party system. On 4 April, the PAICV National Council decided in favour of political pluralism, the adoption of a new Electoral Law and the election of the President of the Republic by universal suffrage. In September 1990, a round table brought together the government, the PAICV and the MPD to determine the organisation of elections. Finally, on 28 September, the ANP adopted a revised constitution: Article 4 of the 1980 constitution establishing the supremacy of the party was repealed. The state and the ruling party were separated and political pluralism became effective. Prime Minister Pedro Pires (in office since 1975), succeeded Pereira as PAICV secretary-general.

The transition to a multi-party system was faster than expected, even for the PAICV, which had already scheduled elections for 1990 under the one-party system as well as the establishment of a constituent assembly to consider the possibility of a new system.<sup>61</sup> The 1990 constitutional reform introduced a semi-presidential political system inspired by the Portuguese and the political regime of the French Fifth Republic.<sup>62</sup> This constitutional system was confirmed by the second revision of the constitution made in 1992, which laid the foundations for a social democratic state, and by the current constitution, adopted in 1999. The system combines a president elected by direct universal suffrage and a government headed by a prime minister with substantial powers, accountable to the National Assembly. Because of the semi-presidential nature of the political system, presidential and legisla-

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61 Correia e Silva, E., Antonio, L., 'O processo cabo-verdiano de Transição Para a Democracia', Dissertação de Mestrado, Centro de Estudos Africanos, ISCTE, Lisbon, 1997.

62 Costa, D., 'O semipresidencialismo em Cabo Verde (1991–2000)', Dissertação de Mestrado, IUPERJ, Rio de Janeiro, 2001.

tive elections are held simultaneously, after which a prime minister is appointed and shares a great deal of executive powers with the president.

The constitution states that the government is 'the body which defines, leads and executes the nation's general domestic and foreign policies' and is accountable to the National Assembly.<sup>63</sup> The prime minister is the head of government and therefore appoints the other ministers and secretaries of state. Members of the National Assembly are elected by universal suffrage for a five-year term. All citizens of Cape Verde 18 years old and older are eligible to vote. The prime minister is nominated by the National Assembly and his appointment confirmed by the president, who is head of state and is also elected by universal suffrage for a five-year term.

The judicial system consists of a Constitutional Court (*Tribunal Constitucional*), whose members are elected by the National Assembly; a Supreme Court (*Supremo Tribunal de Justiça*), whose members are appointed by the president, the National Assembly and the Supreme Magistracy Council (*Conselho Superior da Magistratura Judicial*, the governing body for all magistrates and judges); regional courts of justice and other specialised courts.<sup>64</sup> Judgments on crimes and offences rendered by lower courts are subject to appeal before the Supreme Court.

The 1999 Constitution defines the country as: 'a sovereign, unitary and democratic republic, which guarantees respect for human dignity and recognises the inviolability and inalienability of human rights as the foundation of the entire human community, of peace and of justice'.<sup>65</sup> This same constitution recognises freedom of the press, movement, migration, association, assembly and demonstrations.

### *The party system*

The political system of Cape Verde is in practice bipartisan, with two major parties occupying the political centre stage, thanks to an electoral system that favours this outcome.<sup>66</sup> It is extremely difficult for a party other than these two to gain influence, as illustrated by the results of different legislative elections.

- The *Partido africano da independencia de Cabo Verde* (PAICV) was born from a split in 1980 with the *Partido africano de independência da Guiné e Cabo Verde*, after a coup in Guinea-Bissau overthrew President Luis Cabral, brother of Cape Verde's independence hero Amilcar Cabral. The PAICV is a member of the Socialist International. After the independence of Cape Verde in 1975, the PAICV ruled the country under a one-party communist system until 1990, and then again under the multi-party system since 2001.
- The *Movimento para Democracia* (MPD) emerged between March and September 1990, and sought to represent all the advocates for regime change, even as the exact nature of

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63 'Constituição da Republica de Cabo Verde' (Law No. 1/V/99, of 23 November), Arts 184 and 185.

64 1999 Constitution, Arts 213–219.

65 1999 Constitution, Art. 1.

66 'Assembleia Nacional de Cabo Verde: Democracia, Sistemas Eleitorais, Economia Social', Friedrich Ebert Stiftung, 2002.

the change was yet to be clarified beyond the agitation for multi-party system. The MPD was in power from 1991 to 2001. It is a centre-right liberal party, a member of the Centrist Democrat International, and a supporter of free trade and an open economy, and increased cooperation with international economic organisations such as the World Trade Organisation and the Economic Community of West African States (ECOWAS). The MPD has traditionally enjoyed the support of the Barlaventos (Windward) islands in the north of the archipelago. In recent years it has also received votes in smaller cities of the Sotaventos (leeward) islands in the south. Its positions on agricultural policy have been argued to impact negatively on the fragile local agriculture, making it unpopular in rural areas.

While bipartisan, the political system of Cape Verde includes other parties with limited influence. Among other parties have been the People's Union for the Independence of Cape Verde Renewed (*União do Povo para a Independência de Cabo Verde-Ressusitação* – UPICV-R), which was banned by the PAICV in 1975, and the Cape Verdean Independent and Democratic Union (*União Cabo-Verdiana Independente e Democrática* – UCID), a party formed in 1978 by Cape Verdeans in the diaspora but without a significant base in the country itself. UCID failed to adapt to the rapid changes that took place in the country in 1991 and was unable to run in the first multi-party elections.

Between 1991 and 2000, several new political parties were created. In 1992, after a split within the UCID following the first National Assembly elections, the Social Democratic Party (*Partido Social Democrático* – PSD) was created. Subsequently, following a crisis within the ranks of the MPD in 1993, the Party for Democratic Convergence (*Partido da Convergência Democrática* – PCD) was born. The year 2000 saw the birth of two parties: the Labour and Solidarity Party (*Partido de Trabalho e Solidariedade* – PTS) and the Democratic Renewal Party (*Partido da Renovação Democrática* – PRD). These two parties were also splinter groups from the MPD.

## The electoral system

Overall, Cape Verde has a functional electoral system which guarantees the stability of the political system. During the transition to a multi-party system in 1990, ad hoc legislation was passed to govern the 1991 elections.<sup>67</sup> It was amended later on to set a more permanent framework for conduct of the electoral process.<sup>68</sup> The most recent version of the electoral law was adopted in 2007, amended in 2010.<sup>69</sup> The election of the 72 National Assembly deputies is held every five years.<sup>70</sup> The elections are governed by proportional representa-

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67 Official Gazette of the Republic of Cape Verde, Law No. 87/111/90.

68 1994 Electoral Law, Law No. 116/IV/94 of 30 December 1994.

69 Law No. 17/VII/2007 of 22 June, 'Lei da revisão do código eleitoral'; Law No. 56/VII/2010 of 9 March, 'Altera o código eleitoral'.

70 On the electoral system, the main source of information is: Ministério da Administração Interna, Direcção Geral da Administração Eleitoral, *Sociological Study on 2001 and 2006 Legislative and Presidential Elections*, DGAE, January, 2007.

tion with party lists presented at the municipal level. Each municipality must have at least two seats. At every election, the conversion of votes into seats is carried out according to the d'Hondt<sup>71</sup> method of the highest average.<sup>72</sup>

Cape Verde is a nation of emigrants with a diaspora equivalent to its resident population.<sup>73</sup> In addition to the five regions in the country,<sup>74</sup> three other regions have been created to represent the diaspora, namely Africa; countries of the American continent; and Europe and the rest of the world.<sup>75</sup> Members of the diaspora who register on the electoral list of these regions have the right to vote, and Art. 153 of the 1992 constitution gave them representation by six deputies out of the 72 members of the National Assembly. The definition of electoral districts abroad and the distribution of seats between electoral districts was left to be determined by legislation. The electoral laws for successive elections to the National Assembly – up to the 2011 elections – retained the definition of the electoral districts abroad provided for by the 1991 electoral legislation and 1992 constitution and gave them two seats each.<sup>76</sup>

The proportional representation system is considered the system that provides better representation than the majority list system. However, in some cases, this method of proportional representation has not produced the representation desired. Indeed, in practice, the effectiveness of proportional representation is largely a function of the combination of the method used for the distribution of seats and size of constituencies.

### *Election results*

The main opposition party, the MPD, won the elections on 13 January 1991, getting two-thirds of the votes (a majority of 70.9% of parliamentary seats) and formed a government. This was the first competitive election held in Cape Verde. The following month saw the MDP candidate, Antonio Mascarenhas Monteiro, win the presidential election against the PAICV candidate. The former single party, the PAICV, went into opposition. The political transition took place peacefully, without violence.

The second legislative elections were held in December 1995. The parties that participated in these elections are: the MPD, PAICV, PCD, PSD and UCID. The MPD, PAICV, PCD had candidates in all 19 districts (*conselhos*) at that time. The UCID fielded candi-

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71 This is a proportional voting system conceived by the jurist and mathematician Victor d'Hondt and described in 1878 to allocate seats to candidates from different parties in proportional elections. His method has been adopted in many countries, including Belgium, Spain, Japan and the Netherlands.

72 Cape Verde Constitution, revised in 1999, Art. 149; Electoral Law revised in 2000, Art. 405; see also Mario Ramos Pereira Silva, *Código Eleitoral Anotado*, 2nd edition, 2007.

73 According to statistics from the last electoral register in Cape Verde, on the basis of which presidential and legislative elections were held in 2006, the total number of registered voters residing abroad was 28 000, representing 10.76% of the 260 126 registered voters on the archipelago. PANA, 11 February 2010.

74 These are Santiago, Maio, Central Ribeiras do Este and Northern regions.

75 Andrade, J., 'Les migrations cap-verdiennes', in *Découverte du Cap-Vert*, op. cit., p.63.

76 Law No. 116/IV/94 of 30 December 1994; see Nuias Silva and Arlinda Chantre, 'Cape Verde: A Large Diaspora and Low Turnout by External Voters', in *Voting from Abroad: The International IDEA Handbook*, 2007.

dates in only 12 districts and the PSD in only seven districts. The MPD retained a qualified majority of 69.4%. The PAICV, with 29.2% of the vote, remaining with the main opposition party. PCD only received 1.4% of the vote. At the January 1996 presidential elections, Antonio Mascarenhas Monteiro was re-elected unopposed.

In the 2001 legislative elections, the protagonists were the MPD, PAICV, PRD, DSP, and the Democratic Alliance for Change (*Aliança Democrática para a Mudança* – ADM), a coalition of PCD, PTS, and UCID. These elections were, without doubt, the most competitive elections since those of 1991. In most electoral regions, various political parties took part in the elections, individually or as members of a coalition. The two major parties, the MPD and the PAICV, were present in all regions. Their monopoly of representation could be seen even among the diaspora. Following the elections, the PAICV was declared the winner with an absolute majority of 55.5% in the National Assembly, beating the MPD, which became the main opposition party with 44.02% of the vote and 29 of 72 seats in the National Assembly. The ADM won 2.8% of the vote. These elections marked the first time a change of incumbency was registered in Cape Verde's history of multi-party politics. In the 22 January 2006 legislative elections, the PAICV won again with 56.9% (41 of 72 parliamentary seats) against 40.2% for the MPD (28 seats) and 2.7% for the UCID (2 seats).

The 2001 presidential elections, like the legislative elections, witnessed the highest level of participation in Cape Verde's history. In all, five candidates contested for the highest office: Pedro Pires supported by the PAICV; Carlos Veiga, supported by the MPD; Jorges Carla Fonseca, supported by the PCD; David Hopffer Almada, backed by several sectors related to PAICV and several civil society organisations; and Onésino Silveira, supported by the PTS and some civil society leaders. The presidential election results of 11 and 25 February 2001, showed the PAICV candidate Pedro Pires elected with 49.43% of the vote, against 49.42% for the candidate Carlos Veiga, a difference of only 12 votes.<sup>77</sup> In the presidential elections of 12 February 2006, Pedro Pires won the presidency again (as in 2001) by obtaining 50.98% of the vote against 49.02% for Carlos Veiga.

The presidential elections were separated from the legislative elections by a short period of only a few weeks. The expression of the electorate's will thus allowed for better coordination between the president and the prime minister, which is required under the Cape Verdean political system.<sup>78</sup>

### *The political polarisation of Cape Verdean opinions: The two-party system*

In Cape Verde, the d'Hondt method, as seen through the results of the various legislative elections, essentially favours the two major political forces.<sup>79</sup> The two-party system is also favoured by social homogeneity, the strong presence of the two major parties in the regions and the prevalence of tactical voting which induces voters to vote for one of the two large

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77 'Ministério da Administração Interna, Direção Geral da Administração Eleitoral', *Sociological Study on 2001 and 2006 Legislative and Presidential Elections*, DGAE, January 2007, p.22.

78 *Ibid.*, p.35.

79 Mario Ramos Pereira Silva, *Código Eleitoral 2.*, Edição 2007.

parties. Since 1991, the two-party system has been steadily reinforced. Only the two major parties, the PAICV and the MPD, contest seats in all regions. By way of illustration, the 2006 legislative elections show the consolidation of the two-party system: out of 72 members, 70 were elected on PAICV and MPD lists. The question is whether this two-party system configuration of the political game may ultimately cause disaffection among citizens who do not identify with the ideology and programmes of the two major parties.<sup>80</sup>

### C. Election management bodies: Legal and institutional frameworks, powers and independence

After the 1991 political liberalisation of the country, the Cape Verde electoral system endeavoured to develop electoral management bodies designed by consensus among political parties. The practical management of the electoral process is conducted jointly by three bodies involved in the organisation of elections in the country. These are the National Elections Commission, the Directorate General for Electoral Process Support (*Direcção-Geral de Apoio ao Processo Eleitoral* – DGAPE) within the Ministry of Internal Administration and the electoral registration committees. The DGAPE is the structure that organises elections from a technical point of view; it also provides support in terms of electoral expertise to the other two structures when necessary. The registration committees carry out the actual implementation of elections on the ground and the CNE has the responsibility for general oversight of all processes.<sup>81</sup>

#### **The Directorate General for Electoral Process Support (DGAPE) of the Ministry of Internal Administration**

Decree-Law No. 29/2007 of 20 August 2007 established the powers of the Directorate General for Electoral Process Support.<sup>82</sup> The DGAPE is a structure under the hierarchical control of the executive, as a department of the Ministry of Internal Administration, whose role is to technically support the organisation of elections in Cape Verde.<sup>83</sup>

The DGAPE is responsible for the technical and logistical organisation of elections in the Republic of Cape Verde. The DGAPE is headed by a director-general and comprises two departments: the election administration and logistics department (*Direcção de Administração e Logística Eleitoral*) and the IT and electoral register department (*Direcção de Informática e Cadastro Eleitoral*). The directors of these three organs – the DGAPE itself, and its logistics and IT departments – are appointed by the government after being nominated by the Ministry of Internal Administration. The DGAPE employs regular civil servants but may resort to external expertise through contracts with private organisations, especially

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80 Ministério da Administração Interna, op. cit., p.30.

81 Hounkpe, M., Madior Fall, Ismaila, *Les Commissions électorales en Afrique de l'Ouest. Analyse comparée*, Friedrich Ebert Stiftung, 2010.

82 Boletim oficial, Segunda feira, 20 August, 2007, I, Série No. 31.

83 Friedrich Ebert Stiftung, Assembleia Nacional de Cabo Verde, *Reforma do Estado, Teoria da Legislação e regulação*, Praia, 6–8 May 2003.

during the election period. As of 2010, the DGAPE staff had fifteen permanent members, which is generally considered inadequate.<sup>84</sup>

Under Article 2 of the Decree-Law above, the DGAPE provides technical, administrative and logistical support as required by the Electoral Law. It is responsible for:

- Monitoring the functioning of the electoral system and preparing draft texts for its improvement;
- Ensuring the implementation of voter registration;
- Collaborating with the National Electoral Commission in the decision-making process relating to elections;
- Collecting and processing all information relating to election materials;
- Developing legal, statistical and electoral sociology studies to improve the electoral process and promote full and effective participation;
- Organising training sessions on the texts relating to the electoral process;
- Taking charge of the preparation and distribution of ballots according to law;
- Planning and coordinating the technical, financial, administrative and material aspects of support to the electoral process.

In addition, the DGAPE in collaboration with the CNE ensures:

- Technical support for the local electoral registration committees;
- Approval of the budgets of the electoral registration committees and their integration into its own budget<sup>85</sup>;
- Establishment of the schedule for the electoral process;
- Budget preparation for elections (including the budgets for the electoral registration committees);
- Identification of needs for election materials and managing the procurement process for purchases;
- The deployment of election material (for both the registration and voting processes) on the ground.

From a financial perspective, the DGAPE has two budgets for the organisation of elections: a normal operating budget renewed each year, and a specific budget allocated during election years. Budget implementation follows the procedures of public accounting with a few exceptions and flexibility granted by the Ministry of Economy and Finance.<sup>86</sup> For its operation, the DGAPE must account to the Minister of Internal Administration, to the courts and to the National Assembly.

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84 Interviews with CNE members, Praia, December 2009.

85 In the 2007 Electoral Law, the local commissions send their budgets directly to the Ministry of Finance.

86 Quoted texts confirmed by the interview with the Director-General of DGAPE.

## The National Electoral Commission (CNE)

As the overseeing and monitoring body for the electoral process, the National Electoral Commission (*Comissão Nacional de Eleições – CNE*) is an important link in the system of institutions dealing with elections in Cape Verde.<sup>87</sup>

### *The appointment of the National Electoral Commission members*

The CNE is composed of five members elected by the National Assembly by secret ballot by a two-thirds majority. First the chairperson is elected, then the other members. Although the fact that members of the CNE are elected by members of the legislature is not a specifically Cape Verdean feature, it is interesting to note that unlike in many countries in the sub-region, no reference is made to the political configuration of the National Assembly or the national political scene in general. This is because CNE members do not represent political parties, but enjoy the confidence of a large range of the political parties represented in the National Assembly. Thus, although there is no requirement to take into account the political configuration of the National Assembly in the selection of CNE members, the opposition has always been taken into account (even when the majority party had 2/3 of the seats). The current CNE chairwoman is one of the members appointed by the opposition, as at the date of this report.<sup>88</sup> This method of having CNE members appointed by the legislature is by contrast to French-speaking countries where the tradition is that the members are appointed by the president, although in some francophone countries the president merely endorses the appointment made by other institutions. This unique Cape Verdean system strengthens the powers of parliament in the appointment of Commission members and over the executive secretariat to the CNE, which is the permanent organ.

The appointment of CNE members is an occasion for sharp disagreement in the legislature between the government and opposition. The political class in general would prefer that the appointments were made in a calmer atmosphere, focusing on competence rather than political considerations. The overall concern is to ensure that the CNE is not dominated by one political party.<sup>89</sup>

### *Qualifications required in order to be a member of the Electoral Commission*

In general, the requirements for membership of the Electoral Commission are not excessively rigorous. The primary criterion is to have commissioners who can guarantee neutrality and uphold the integrity of the process, although these are not explicitly spelt out, since nothing is said about the capabilities of the commissioners.

Although gender balance is not clearly specified in law, parliamentarians generally take it into account in practice: the previous CNE included two women and three men; and the

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87 Boletim oficial (Official Gazette) of 14 January 2008, I, Series No. 2, No. 2.

88 See in this respect, Dr José Luiz Quadros de Magalhaes, 'Orçamento participativo e democracia dialogica', in Assembleia Nacional de Cabo Verde, *Reforma do Estado, Teoria da Legislação e regulação*, Friedrich Ebert Stiftung, Praia, 6–8 May 2003, p.51.

89 Opinions expressed in a focus group held on 11 December 2009 in Praia for this study.

current one had the reverse, i.e. two men and three women including the chairwoman. Efforts are made to reflect gender balance in the devolution of duties of political governance in general and in the electoral system in particular. At all levels, women are integrated into decision-making bodies. In this regard, the constitution and electoral law provide that for legislative and municipal elections, the lists must be balanced.<sup>90</sup>

#### *Tenure of office of members of the Electoral Commission*

Members of the CNE are elected for a six-year term, renewable once. But only two of them (including the chair and the secretary) are full-time. The others are appointed as the elections approach and cease their Commission activities a few weeks after the elections. It is provided for that members of the Electoral Commission cannot be dismissed.

#### *The powers and activities of the CNE*

The law of 22 June 2007 on the National Election Commission entrusts the CNE with:

- Ensuring openness, freedom and fairness of the elections, fair treatment of candidates and compliance with the fundamental principles contained in the constitution, the Electoral Law and all relevant legal texts on the subject;
- Ensuring equal treatment of citizens and the impartiality and objectivity of public officials involved in the management of elections;
- Supervising and ensuring the regularity of elections, including the establishment of polling stations and counting;
- Assisting the electoral registration committees in interpreting election texts;
- Overseeing census and voting operations and taking all necessary actions to ensure their regularity;
- Providing training for citizens at election time;
- Creating a pool of election workers (especially members of polling stations) both inside and outside the country;
- Providing and ensuring good quality relevant training for all agents involved in the electoral process;
- Publishing all legal provisions related to election dates;
- Resolving all complaints and claims within its jurisdiction;
- Punishing electoral misdemeanours within its jurisdiction;
- Transmitting to the Public Prosecutor all electoral misdemeanours brought to its attention and which do not fall within its jurisdiction;
- Assessing the regularity of election accounts submitted by candidates at the end of each election;
- Ensuring the declaration of results; and
- Performing any other function under this election code or any other legal text.

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<sup>90</sup> Arts 404 and 420 of the 2007 electoral law.

## The Electoral Commission's operations and staff

The CNE is primarily responsible for overseeing the entire electoral process and settles any disputes brought to its attention. To properly play its role, the CNE is assisted by three permanent advisers:

- A Ministry of Foreign Affairs adviser for the management of issues relating to citizens of the diaspora;
- A Ministry of Communications adviser for the management of issues relating to awareness campaigns and management of air time; and
- A permanent adviser from the Directorate General for Electoral Process Support.

The CNE holds a weekly meeting involving representatives of all political parties. Until the adoption of the June 2007 electoral law, party representatives were entitled to seek clarification on some grey areas, but they were not allowed to participate in the discussion or decision-making process.<sup>91</sup> Following the 2007 law, they may participate in the debates but without the right to vote.

As regards overseeing the practical management of elections and the registration of voters, the CNE sends a delegate to each of the electoral districts (of which there are currently 22). These delegates are chosen freely by the CNE from among persons of good moral character and integrity. However, the possibility is left to political parties to challenge a proposed personality because he/she does not possess the qualities required of a CNE-appointed delegate.

Until the present Commission was installed, CNE permanent staff consisted of only five members including a driver, a secretary, an IT specialist and an accountant.<sup>92</sup> Consequently, the Commission extensively resorts to outside expertise through contracts for the provision of services, especially during elections.

## CNE relationships with other institutions

Relationships with other institutions must be understood here as those between the CNE and other institutions involved in managing elections in Cape Verde. The institutions in question include the government (through some departments), the supreme audit institution (the *Tribunal de Contas*), the Constitutional Court, the National Assembly, the media and development partners.

The relationship between the CNE and the government is mainly through the Commission's collaboration with three departments: the Foreign Ministry, which appoints a permanent adviser to the CNE to manage the participation in the elections of the Cape Verdean diaspora (whose numbers are believed to be greater than the citizens living in the country); the Ministry of Communications, which also appoints a permanent adviser to the CNE to assist it in managing the communication component in the organisation of

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91 Correia, F., 'L'expérience du Cap-Vert', in *Le rôle des commissions électorales indépendantes : expériences en Afrique de l'Ouest*, Fondation Friedrich Ebert, 1997, p.31.

92 No information indicating a change of the situation was available to the author by the time of writing.

elections (especially voter education); and finally, the Ministry of Internal Administration, which works with the CNE indirectly through the permanent adviser to the CNE appointed by the Directorate General for Electoral Process Support (DGAPE), who assists the Commission in monitoring the process of preparation of electoral materials (logistics) by the DGAPE. These collaborative relationships with various government departments are not likely to cause difficulties because they do not directly influence resource management or election outcomes.<sup>93</sup>

The National Assembly is probably the institution with which the CNE is the most linked. Indeed, the CNE budget is an integral part of the National Assembly's budget and it is obliged to report annually to legislature on its activities. In fact it is treated as a parliamentary committee. Despite this institutional proximity and even such apparent financial dependence, the previous CNEs never felt influenced by the National Assembly, at least according to the opinion of their chairs.<sup>94</sup>

Security forces (the police) monitor the electoral process. They fall under the responsibility of the Minister of Internal Administration. The police ensure the freedom and transparency of the electoral process, as well as the distribution of ballots. If there are problems, the Electoral Commission can summon the police. At each election, the security forces undergo training to sensitise them about the electoral process. In principle, they are positioned at a location at a distance from the polling station, but are requested to secure the polling station and accompany the agents responsible for the delivery of election and voting materials.

The media and civil society organisations (CSOs) have no formal relations with the CNE. However, they intervene in their own way in the management of elections and may be called to order and even prosecuted by the CNE in case of a departure from the correct procedures. CSOs are involved in advocacy and monitoring of the elections. But their involvement is deemed insufficient and barely noticeable.<sup>95</sup>

## **How the CNE regulates the media**

The media works with the CNE at two levels. Public media – primarily radio and national television (since there is no longer any state print media) – allocate, in collaboration with the CNE, airtime to candidates or political parties participating in elections. The private media for their part have no special relationship with the CNE and in the absence of a media regulatory body they manage their own participation in elections. The Journalists Association of Cape Verde (*Associação dos Jornalistas de Cabo Verde – AJCV*), a network of independent journalists with more than 150 practitioners, sometimes organises training in electoral matters for its members (and all journalists).

To implement the provisions of Article 47 of the 1999 constitution on freedom of expression and information (Article 46 of the 1992 constitution), Law No. 56/V/98 1998 on

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93 Interviews with CNE chairwoman on 8 December 2009.

94 Ibid.

95 Interviews with CNE members and CSO and political party members, Praia, 11 December 2009.

mass media (*Lei da Comunicação Social*) provides for a regulatory body for the broadcasting and communications sector, the Mass Media Council (*Conselho de Comunicação Social*) that is not yet fully functional, but should play a relatively important role in the parties' access to CNE-controlled media. This council never meets. It is in suspension because it has not been possible so far to gather the majority of two-thirds of deputies necessary for the appointment of council members.<sup>96</sup> The directorate-general of mass media under the prime minister is therefore the body responsible for regulating the telecommunications sector. It assigns licenses and monitors media operations, controls the program schedule, organises the right of reply. While the Mass Media Council is not yet functional, the CNE is responsible for the distribution of airtime between the parties with respect to presidential and legislative elections, taking into account the configuration of the National Assembly.<sup>97</sup> The CNE pays airtime fees for radio and TV on behalf of the parties.

### **Electoral registration committees**

Each electoral district has an electoral registration committee (*Comissão de recenseamento eleitoral* – CRE), with members elected by local councils (communal and municipal). There are 22 CREs, one for each district, each comprising three to five members depending on the number of voters by locality (constituency coinciding with the town or municipality). CRE members are elected for a three-year term renewable once. But once elected by local councils, the local committee members only receive instructions from the CNE; their budgets, previously approved by the DGAPE and incorporated into its budget, have been directly sent to the Ministry of Finance since the adoption of the new election law in 2007. In the same way as the CNE, the CREs are technically assisted by the DGAPE.

The CREs' main functions consist of taking all necessary steps for the preparation and updating of the voter registration list. This includes, among others:

- Initiation and implementation of the registration process;
- The development, in accordance with the law and under CNE supervision, of the locality's electoral roll;
- The publication and carrying out of public education materials and activities on the timeline for the conduct of the census process;
- Cleaning up the voter registration list (fake registration, multiple registrations, etc.);
- Receiving and hearing at first instance of challenges to the electoral roll; and
- The distribution of voter cards under CNE supervision.

### **The independence of the CNE and CREs**

The independence of the CNE and CREs is provided for in the electoral law. They may not be subject to any influence or control by any person or authority whatsoever. The CNE and CREs

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96 Interviews with the Director of *Mass Media*.

97 On these issues, see the website of the Directorate for Mass Media (*Direcção Geral da Comunicação Social*), [www.dgcs.gov.cv](http://www.dgcs.gov.cv).

are 'free' to make use of any person or structure that they consider relevant in ensuring that successful electoral management systems are in place and functional. But beyond the legal provisions concerning the independence of the CNE and CRE what really gives them credibility and legitimacy is the behaviour of the members of these bodies, their ability to exert their authority through the rigour and impartiality they show in their decisions.

Both individual interviews and focus group discussions held in Praia for this report show that stakeholders, including civil society organisation leaders and journalists, are unanimous in recognising that the bodies involved in managing elections in Cape Verde – the CNE, the DGAPE and the CREs – enjoy a reasonable level of credibility and reliability. For most of them, the relative success of electoral management bodies can be ascribed to several factors, including:

- The agreement among a large majority of politicians on the important provisions to apply in electoral management;
- Compliance with the decisions of all arbitration bodies (CNE, Constitutional Court, etc.) involved in electoral management;
- The rather exemplary behaviour, at least so far, of most heads of the said bodies; and
- The transparency of most of the electoral process. The best example of this is the participation of political party representatives in CNE proceedings.

## D. Funding of elections in Cape Verde

Each of the three key bodies involved in election management is funded separately. The DGAPE prepares its budget in consultation with the Ministry of Finance. To date, its normal operating budget, outside of election years, is approximately 70 million escudos (US\$ 850 000). In an election year, the DGAPE budget covering normal operations and the conduct of elections is nearly 100 million escudos (US\$ 1.2 m).<sup>98</sup> Prior to the adoption of the 2007 electoral law, this budget included CRE budgets. The DGAPE reports on its financial management to the *Tribunal de Contas* through the Ministry of Finance.

The CNE's budget is included within the budget for the National Assembly, because it depends institutionally on Parliament. It proposes its budget annually (for its regular operating budget) and periodically (for election budgets) to the National Assembly, which approves it systematically and integrates it into its own budget. The regular operating budget (outside election year) of the CNE is in the order of € 250 000 (US\$ 337 000) and more than € 2.5 million (US\$ 3.37 million) for the CNE only in election years. For the 2008 local elections, the budget provided for by the CNE is in the order of € 4 million (US\$ 5.4 m) of which at least € 2 million (US\$ 2.7 m) will be used to support political parties.

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98 Interviews with CNE members on 8 December 2009.

The CNE reports on its financial management to the *Tribunal de Contas* and addresses an annual report on the political dimension of its activities to the National Assembly.

The election budget also includes funding for competing political parties. To ensure equal opportunities for candidates and contribute to the fight against corruption among political leaders, Cape Verde's political system provides for a system of public financing of parties. Thus, the parties represented in parliament get a block grant each year. The grant received by the parties depends on their electoral performance since the amount is earmarked for each vote received. After auditing campaign funds, the CNE gives parties that participated in an election public financial support in proportion to the number of votes obtained by each party at the rate of € 5.00 (US\$ 6.74) for each vote obtained. This government support for party participation in elections is different from the general financial support provided for in the 'Charter of the parties' (a code of conduct negotiated by competing parties and passed into law), which applies to all political parties.

A number of changes have been introduced to strengthen the financial independence of the CNE by the 2007 electoral law (Art. 26). The operating budget is released monthly through an appropriations system, while the capital budget is approved by the National Assembly and made fully available to the CNE by the Ministry of Economy and Finance. The CNE is supported for its additional activities by its bilateral cooperation development partners (in particular Portugal). The CNE has significant financial autonomy because at the beginning of the year it has the totality of its budget allocated by the National Assembly. It therefore doesn't have to ask for disbursements of its funds each time needs arise. However, CNE members consider it necessary to give the Commission the freedom to propose its own budget and defend it in Parliament in order to avoid interference from the Ministry of Internal Administration.<sup>99</sup>

Until the adoption of the 2007 Electoral Law, the CREs managed their budgets independently. They were therefore free to decide on recruitment and services to use to execute tasks related to electoral management. They were however required to submit their proposed budgets for approval by the DGAPE which then incorporated them into its own budget. Disbursements were made on a quarterly basis upon submission of proof for the previous quarter. An important change has occurred since the adoption of the new Electoral Law in June 2007 in that CRE budgets are directly sent to the Ministry of Finance.

As in most countries with limited resources, development partners support the organisation of elections in Cape Verde. But their contributions, deemed essential by the stakeholders,<sup>100</sup> are generally oriented towards the DGAPE, for the provision of election materials, and towards civil society organisations for sensitisation and citizen monitoring of the electoral process. According to a widely shared view, the fact that a good part of election materials is obtained directly through the assistance of partners is a factor that reduces conflicts around procurement issues.<sup>101</sup>

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99 Interview with Mrs Rosa Vicente, CNE Chairwoman, 8 December 2009.

100 Interviews with the CNE Chairwoman and the Director General of DGAPE.

101 Opinions collected during discussions in a focus group held on 11 December 2009 in Praia for this study.

The CNE budget mainly covers electoral operations only. Its chairwoman and members believe that it must have the financial means to do more training for polling station agents, develop public education materials on elections and work with civil society organisations to raise public awareness.<sup>102</sup>

## E. Electoral disputes in Cape Verde

According to Article 219 of the 1999 Constitution, it is the Constitutional Court that has the jurisdiction to hear cases related to elections and the organisation of political parties, under the terms of the law. Under the 1992 Constitution, the Supreme Court had this role.<sup>103</sup>

Thus, the Constitutional Court is the institution that is competent to hear all electoral disputes for presidential, legislative and local government elections, including appeals against decisions of the CNE.

There is not much litigation, due to the consensus on electoral rules and transparent nature of the electoral process, even though it often results a difference of only a few votes between competitors. However, there are cases of legal challenge to local, legislative and presidential elections.<sup>104</sup>

## F. A critical assessment of the performance of EMBs in Cape Verde

Issues relating to the improvement of political governance have traditionally been the subject of open and lively debate in Cape Verde. Although there are some disagreements on the best strategy for developing the country and the proper role of government in economic planning, there is broad consensus on the Cape Verdean model of democratic governance. The widespread use of Creole in discussions on policy makes the debate on democracy more participatory, broad based and inclusive.<sup>105</sup> This is noticeable both in National Assembly sessions and in the public arena in general.

The focus group held in December 2009 in Praia as part of the research for this study included participation from leading players in the electoral system, and made it possible to identify the strong points of electoral governance in Cape Verde. Above all, it made it possible to note the broad consensus among the participants, whether politicians or members of the civil society, on the performance of the CNE. The CNE chair is well respected for her competence and independence. Given its composition, its powers and its financing, the CNE is seen as a strong and respected institution in the political system. It manages to monitor the

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102 Interview with Mrs Rosa Vicente, CNE Chairwoman, 8 December 2009.

103 1992 Constitution, Art. 238.

104 See Mario Ramos Pereira Silva, *Código Eleitoral Anotado*, 2nd edition, Praia, 2007, p. 245. With precedent cited from other countries: Supreme Court Decision No. 11/2001 invalidating the election in Albalade-Huambo constituency in Angola (p.246) and a second Decision No. 6/2006 invalidating the vote of 21 polling stations in São Tomé and Príncipe (p.247).

105 Manuel Veiga, 'Le créole du Cap-Vert', in *Découverte des Iles du Cap-Vert*, op.cit., p.97.

whole electoral process and ensure the equal rights of candidates both in terms of access to the media and electoral competition. However, opposition and civil society have put forward some grievances. Thus, some aspects of the electoral system are still under discussion among the protagonists in the political arena. The largely favourable popular perception of the electoral management bodies in place, and the CNE in particular, must be tempered by a rigorous analysis of the weaknesses still confronting the electoral system of Cape Verde.

### **Popular perception of the electoral system and the electoral management bodies**

Since the advent of the democratic system in 1991, the country has, like many other countries in the west African sub-region, experienced a peaceful change of power at the highest levels of government as well as a peaceful renewal of the country's key institutions. Since 1991, 10 elections have been held: four presidential elections (1991, 1996, 2001 and 2006), four legislative elections (1991, 1996, 2001 and 2006) and two local elections.

One of the notable features of Cape Verde and in particular its electoral management bodies, is the fact that elections with very close results are managed without any outbreaks of violence and with almost no major challenges. Thus the February 2001 presidential election was hotly contested with the winner, Pedro Pires, beating his challenger, Carlos Veiga by only ten votes. Similarly, in February 2006, Mr Pires again defeated his 2001 opponent, Carlos Veiga, by about 3 300 votes.<sup>106</sup>

Today, Cape Verde is regarded as having an effective electoral system. The model adopted by Cape Verde operates on the basis of division of roles between the Electoral Commission and the civil service. In this institutional electoral framework the function of technical support for the organisation of elections is entrusted to the Directorate-General of Electoral Process Support (DGAPE), which is a department of the Ministry of Internal Administration. As regards the Electoral Commission, it supervises and makes the necessary provisions to ensure a proper process. The system works successfully to identify the shortcomings and weaknesses after each election process and correct them. Cape Verde is one of those African countries where public opinion supports the political system in general and the electoral system in particular.<sup>107</sup> There is general acceptance by Cape Verdeans of the idea and practices of democracy. This attachment of Cape Verdeans to democracy is noticeable at several levels: the choice of a system, the democratic culture, the institutions, and the accountability of deputies to their constituencies. All of which supports the perception that the quality of democracy and governance in Cape Verde meets the required internationally accepted standards.

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<sup>106</sup> Ministério da Administração Interna, Direcção Geral da Administração Eleitoral, *Sociological Study on 2001 and 2006 Legislative and Presidential Elections*, DGAPE, January, 2007, pp. 24 and 36.

<sup>107</sup> Hounkpe and Madior Fall, op.cit.

### *Satisfaction with the way democracy works*

The results of opinion polls conducted by Afrobarometer on the level of democracy in the country are quite encouraging, since the proportion of those who argue that Cape Verde is a full democracy has increased considerably (34% in 2008 as against 7% in 2002 and 15% in 2005), while at the same time the proportion of those who consider that the archipelago is a democracy with problems (major or minor) continues to go down (from 64% in 2005 to 55% in 2008). The least critical in this respect are residents of Santiago Island with 45% and 54%, respectively.<sup>108</sup>

The criticism directed against democracy is more pronounced among young people, though the percentage of those who believed the country is a democracy with problems had declined from 74% to 55% from 2005 to 2008. The proportion of individuals close to the two largest political parties who believe that Cape Verde is a problem democracy has significantly decreased, from nearly 70% in 2005 to 56% in 2008, which may be an indication of a greater support for the democratic culture among political party activists.

Nearly half of the population of Cape Verde (47%) said in 2008 that they were satisfied with the way democracy works in the country. This result is almost the same as that recorded in 2005 (46%). However, the proportion of those who were not satisfied had gone up from 41% in 2005 to 47% in 2008. This increase in dissatisfaction rate is recorded mainly within the island of Santiago where it rose by 16%, going from 35% in 2005 to 51% in 2008; while in Praia (the capital city), the opposite was noted, that is to say, an increase in the proportion of those who are satisfied from 35% in 2005 to 50% in 2008. The more 'nonconformist' behaviour among young people is highlighted once again because most (54%) of those in the 15–24 age group claim they are not satisfied with the way the democratic system works in Cape Verde – over 7% more than the national average. Amongst older groups, the proportion of those who say they are not satisfied decreases, especially among individuals over 55.

Satisfaction with the functioning of democracy in Cape Verde is a fact not only among supporters and activists of the largest political parties, but also among activists of the smaller parties, especially the UCID, the PTS and PCD. Compared to 2005, individuals close to the PAICV show greater satisfaction with democracy (51%) against the 46% recorded among MPD supporters.

When asked about the transparency of elections, Cape Verdeans consider that they tend to be more free and fair. While in 2005 56% of the people viewed the 2001 legislative elections as generally free and fair, the rate rose to 69% when Cape Verdeans were asked about the 2006 legislative elections. Only 8.3% had considered them as not having been free and fair, a 50% reduction as compared to previous elections. In Praia and São Vicente urban centres have the largest proportion of those who consider that the last legislative elections were transparent, respectively 74% and 72%. The most negative perceptions were noted on Fogo Island, but even so, the rate was 52%.

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108 Afrobarometer, *A qualidade da democracia e da Governação em Cabo Verde*, 2008.

### *Accountability of deputies to their constituencies*

The majority of Cape Verdeans believe that deputies in the National Assembly should visit their constituencies at least once a month. This is the opinion at the national level, with 54% of respondents in 2008, compared to 49% in 2005. Those who most demand visits at least once a month are the inhabitants of Santo Antão (67% in 2008), and those, far fewer, of Fogo (32%). More than seven out of ten Cape Verdeans believe that deputies never or rarely do their best to listen to what people have to say. This rate has remained relatively constant since 2005. However, there was a significant decrease in the scepticism towards the deputies. The most sceptical, in 2008, were inhabitants of Praia and São Vicente. The level of scepticism towards municipal councillors, nationally in 2008, is similar to that towards the deputies, with the people of Praia and São Vicente still the most critical.

Studies on the quality of democracy such as those conducted by Afrobarometer, as well as the interviews and focus groups held for this study in Praia, thus show that Cape Verdeans have faith in their electoral system. The CNE is well viewed by the population as a whole. The distribution of electoral management tasks between the DGAPE and the CNE gets the support of the population, which sees the system as being well-balanced between the desire of the executive to have the whole electoral process managed by the government and the desire of the opposition to have an independent Electoral Commission responsible for the entire electoral process.

The successful management of the electoral process depends on many factors:

- The quality of the legal and institutional framework;
- The credibility of the people appointed as CNE members;
- The consensus that governs the selection of CNE members;
- The exemplary way in which electoral management bodies have carried out their mission;
- The fact that the Cape Verde population is highly educated;
- The high level of political awareness among the people;
- A shared culture of tolerance and peace;
- The commitment of the players, the overwhelming majority of whom are honest;
- The well-balanced nature of politics characterised by bipartisanship thanks to which no party can have a total hold on the political system;
- People's respect for institutions;
- The existence of public support for the constitution; and
- The efforts of civil society to improve the electoral process through the use of mass communication.

### *General support for democracy to be qualified*

In 2008, approximately 44% believed that elections enabled deputies to reflect the voters' opinions, while in 2005 this proportion was 41%. Those who believe the most in this system are the inhabitants of urban centres of Praia and Mindelo, closely followed by those of Fogo.

In 2008, 31%, a 3% increase from 2005, believed that elections more or less reflect voter opinion. More than half of the respondents (51%), the same proportion as that recorded in 2005, believed that elections can oust leaders who are not doing what the people want. The most convinced of this idea are the inhabitants of São Vicente (70% in 2008 and 58% in 2005) and those of Praia (60% in 2008 and 69% in 2005). Nearly seven Cape Verdeans out of ten say they do not fear being intimidated during election campaigns. However, this proportion varies greatly depending on the island. While on São Vicente and Santo Antão, the rate is, respectively, 86 and 83%, on Fogo the rate went down to 51%. In this island, nearly a third said they feared being intimidated.

The belief that the vote is secret is very high in Cape Verde. Almost 8 out of 10 Cape Verdeans consider it unlikely that those in power can know for whom people voted during elections. The most convinced people are Santo Antão and São Vicente inhabitants (respectively 83% and 88%) while the least satisfied are those of the inner areas of Santiago Island (70%).<sup>109</sup>

### **Making the voters' register reliable**

The fact that Cape Verde is an archipelago and the importance of the diaspora makes it difficult to establish and manage the voters' register. Thus there is a continuing debate on how to make the voters' register reliable and eradicate irregularities. After each election, initiatives are taken to improve it. The registration process has been markedly improved with the use of the new information and communication technologies. In line with Cape Verde's adoption of 'e-government' in 1997, the register is based on biometric voters' data that is gathered at each registration desk and connected to a central database. Thus there is a program that allows for the management of data contained in the electoral register. The country has been using a computerised voting system since the 2000 election. From June 2007, a general registration process with each voter's digitised signature was conducted for the 2008 elections. Every political party and every citizen can access voter registration lists which are available at the CNE and the DGAPE websites. The lists are also published in the press. Each voter can call a hotline to find out where to vote. From 2007–2008, information about the correct polling station to use was sent to voters by SMS.

In addition, there is now collaboration with the register of births and deaths to remove dead people and duplicates from the register. Progress has thus been made in securing the vote. The 2007 electoral law introduced the use of indelible ink starting from the 2008 elections to prevent multiple voting, which sometimes occurred although rarely.<sup>110</sup>

### **The continued weaknesses of the electoral system**

Although there are strengths, the Cape Verde electoral system has many weaknesses.<sup>111</sup>

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109 Ministério da Administração Interna, Direção Geral da Administração Eleitoral, *Sociological Study on 2001 and 2006 Legislative and Presidential Elections*, DGAE, January, 2007, pp.24 and 33.

110 Art. 215 of the 2007 Electoral Law.

111 See in particular Lima, A., and Hempel, M., *Democracia, Sistemas Eleitorais e Economia Social*, Assembleia Nacional, Praia, 2002.

With regard to the Electoral Commission, the influence of the loyalties of members representing political parties is obvious. Discussions within the Electoral Commission often reproduce the political divide in the country, lack objectivity and become heated. Furthermore, representatives of opposition parties and civil society organisations consider that the CNE's financial autonomy must be strengthened and that the government's influence on the mobilisation of resources must be removed altogether.<sup>112</sup>

There is also criticism about the lack of a completely level playing field. Opposition parties believe that there must be a more stringent prohibition of the use of state resources in campaigns. In the same vein, most players, especially those of the opposition, noted the strong presence of the party in power in the media. Indeed, in the period preceding the electoral campaign, the government monopolises the media with endless coverage of official events. The imbalance in access to the media in favour of the ruling party is still more noticeable on national state television.<sup>113</sup>

Regarding election results, there is still the persistence of a culture of litigation with mutual accusations of bribery, which the bulk of the population considers unjustified, but also the lodging of legal challenges to contest elections results in some localities.

### **The problem of low turn-out**

One of the main legitimising factors of the democratic system is the rate at which the electorate turns out to vote in practice. The level of abstention can be considered a good indicator of citizens' dissatisfaction with the democratic system, although some analyses tend to qualify this assertion by referring to the low voter turnout in consolidated democracies like the USA or Switzerland.

Available data provide insight, albeit tentative, on the evolution of electoral abstention in Cape Verde for both legislative and presidential elections.<sup>114</sup> The phenomenon is interpreted here in light of a combination of information provided by CNE and interviews given by PAICV, MPD, PCD and PRD party leaders. The view of the population is also a key to explaining the problem.

#### *The extent of abstention*

Some data indicate a national participation rate of about 60%. The rate increases when you add the diaspora. The abstention rate within national boundaries varies from island to island and from municipality to municipality: the abstention rate is the lowest on Santo Antão island and it is the highest in the Porto Novo municipality. In the 1991 legislative elections, the abstention rate was 24.7%. In 1995, it dropped to 23.5%, a rate similar to those seen in most countries with a consolidated democratic process. However,

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112 Opinions expressed during focus group discussions, 11 December 2009, Praia.

113 Ibid.

114 Ministério da Administração Interna, Direção Geral da Administração Eleitoral, Sociological Study on 2001 and 2006 Legislative and Presidential Elections, DGAE, January, 2007, p.48.

for subsequent elections conducted in 2001, the abstention rate went up 45.5%, in other words, abstention almost doubled. For 2006 it was 45.8%.

In the diaspora, the turnout was significant, particularly in Africa, where two thirds of registered voters exercised their franchise. In America, the abstention rate was 45.5%; in Europe and the rest of the world, unlike other areas, the abstention rate was 75.5%. Overall, as would be expected there is a clear trend showing that the diaspora has an abstention rate above the national average.<sup>115</sup>

### *Causes of voter apathy in Cape Verde*

The main factors explaining electoral abstention in Cape Verde are twofold. First, there are factors attributable to the deliberate choice of voters who decide not to vote because they are dissatisfied with the answers the political system provides for their problems.<sup>116</sup> Then, there are factors external to the will of the voter and related to shortcomings of the electoral system itself:

- The language and messaging used in political communication do not reflect voters' concerns;
- The image of politicians more concerned with their personal careers than with the public interest and the similarity between the candidates' platforms;
- Failure in communicating with the majority of the diaspora;
- The difficulties faced by some voters in registering on some islands;
- The great distance to polling stations for some voters;
- The mobility of people inside the country and within the islands;
- Mobility outside the country and the difficulties in changing the location of electoral registration; and
- Lack of reliable register of births and deaths.

The abstention rate is so high in Cape Verde that there is a general consensus among the political elite that the electoral code must be revised, to introduce measures to increase turnout. Several measures considered as urgent have been suggested<sup>117</sup>:

- Carry out a completely new electoral registration process, on the basis of methods to be agreed by consensus;
- Require reliable voter identification with data from the national registration data bank;
- Allow voter registration and the publication of lists all year long, with a connection between the electoral registration committees and government departments such as emigration, the judicial system, health institutions, etc.;
- Introduce new technologies and electronic voting to the electoral system;

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115 Ibid.

116 Ibid., p.33.

117 Ibid.

- Expand the types of documents which can be used in polling stations for voter identification, in particular for elections in the diaspora; and
- Introduce early voting for certain categories of voters who for various reasons are not able to vote on election day (security forces, diplomats).

Some of these ideas are being implemented. Thus, for the March 2008 local elections, the DGAPE, in collaboration with the CNE, worked to improve the electoral system through the introduction of more efficient software in making the new permanent voters register. This system should be centralised to reduce the risk of false registrations and double registrations.

In addition, from 1 March to 1 September 2010, the country performed a census of its citizens living abroad to ensure their participation in the 2011 legislative and presidential elections. Following the approval of the revision of the electoral law in 2007, the result of an agreement after several years of dispute between the two major parties in the archipelago, the ruling PAICV and the opposition MPD, the government was required by law to conduct a census of Cape Verdeans in the diaspora. This census was controlled by the CNE and not by Cape Verdean embassies and consulates and the date was set with the unanimous approval of deputies.

Furthermore, the reform of the Electoral Law in 2007 also made it possible to determine that as from the next elections, the number of voters in each polling station should not exceed 450, reducing the previous limit of 600. This change is justified by the need to ensure to all Cape Verdeans exercise their right to vote and do so in a timely fashion, thus avoiding the late closing of polling stations.<sup>118</sup>

## G. Recommendations

### **Clarify the mandate of and relationships among the various electoral bodies**

- Clarify legal powers and relationship between electoral management bodies to avoid or reduce misunderstandings and conflicts of jurisdiction and influence between the Directorate-General for Electoral Process Support (DGAPE) and the National Electoral Commission (CNE).

### **Strengthen civil society involvement in the electoral process**

- A weak link in the electoral process in Cape Verde is civil society, which is struggling to assert itself as an important player that can assume the duties the election management bodies cannot handle, such as voter education and election overseeing. It is impor-

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118 PANA Agency, August 2010.

tant to strengthen this role by formalising and giving civil society the funding and technical expertise it needs.

### **Level the playing field**

- Ensure equality of opportunity for competitors in elections, in particular by acting against the practice whereby the ruling party uses state resources for political purposes and is more visible on state television than the opposition.

### **Regulation of the media**

- Establish an effective body to regulate the access of political parties to media by finally creating the Mass Media Council (*Conselho de Comunicação Social*). This would lighten the burden on the CNE which is required to play the media regulation role in addition to many other functions it performs in the electoral process. On this point, Cape Verde could learn from the experience of regulating access to media by political parties underway in some countries of the Economic Community of West African States (ECOWAS).

### **Implement the recommended measures to improve voter registration and turnout**

- The Ministry of Internal Administration 2001 report made important recommendations for improving voter registration that have only been partly implemented; the remainder should also be addressed.

# 4

## Ghana

**Mathias Hounkpe**

### **A. Summary**

Like several other countries in the West Africa sub-region, the Republic of Ghana went through a succession of constitutional changes between independence in 1957 and the return to democratic government in 1992, mostly due to the intrusion of the armed forces into the political scene through military coups d'état. The first three decades of Ghana's existence were marked by long stretches of military rule interspersed with only two short periods during which democratic governments were installed after more or less free elections.

Even though Ghana has a long experience of electoral management by bodies independent of the government, pre-1992 electoral management was characterised by deep distrust of the successive electoral management bodies (EMBs) from both politicians and ordinary citizens. The current Electoral Commission, in operation since the restoration of democracy in the early 1990s, is an heir to the EMB tradition, but at the same time has broken away from the distrust for EMBs which was prevalent before it was established. The Ghanaian Electoral Commission (EC) has a remarkably wide mandate, with powers that extend beyond the conduct of general elections, to policing the activities of political parties. Now that it has conducted an unbroken sequence of elections, including at least four general elections (1996, 2000, 2004 and 2008) the performance of the EC and its contribution to domesticating democracy in Ghana can be evaluated.

The Ghana Electoral Commission is independent, and this is recognised by almost all players in the country's electoral process. The Commission's legal framework – reflected in its composition, the conditions offered to members of the Commission (terms of employment and the determination of their salaries) and the protection of EC against outside interference in its management – is one of the major determinants of the independence

enjoyed by the EC. However, in at least one respect the independence of the EC seems to exist almost despite, rather than because of, the legal framework, which provides for the nomination of its members at the discretion of the president rather than for an independent body to recommend those who should serve. In practice, the members nominated have been individuals recognised for their qualifications for the position.

The performance of the Electoral Commission has also gradually improved over time, thanks in large part to the quality of the staff, and especially its leadership. Also important has been the support and positive attitude of the other key players in the electoral process in Ghana, including political parties, media, civil society organisations and state institutions.

In spite of its good reputation, the EC does suffer from many internal weaknesses, primarily due to poor working conditions of its members, the poor performance of the Commission in managing the electoral register, and the poor quality of some staff employed by the Commission, including election officials. The EC's inability to enforce election laws, including the law on political parties, and inadequate coordination with other institutions involved in the electoral process, sometimes also result in weaknesses in the management of this process.

Even though efforts have been made to address some of these weaknesses, urgent action is still needed to consolidate Ghana's young democracy. The creation of a formal framework for consultation with civil society could improve the work of the Commission. The Commission's independence would be strengthened by giving it sufficient financial resources to protect it from the discretionary powers of the Ministry of Finance. The resolution of electoral disputes is also a weak link in the electoral process, which could be improved by the creation of special election tribunals.

## **B. The political development of Ghana**

Independent since 1957, Ghana, like several other countries in the sub-region, experienced a series of abrupt constitutional changes brought by military coups d'état. The first three decades of its existence were characterised by long periods of military rule interspersed with only two brief periods (1969–1972 and 1979–1981) during which democratic regimes were installed following more or less free elections.

### **Nkrumah and the First Republic**

Ghana gained independence from British colonial rule on 6 March 1957, the first black African country to do so.<sup>119</sup> The territory called Ghana emerged out of four broad component parts separately administered until 1946,<sup>120</sup> when the British colonial government decided to rule them as a single entity.

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119 The following is essentially from *Ghana: Democracy and Political Participation*, Open Society Foundation, AfriMAP and OSIWA, 2007, pp.17–19.

120 These were: Gold Coast Colony (present-day Western, Central, Eastern, and Greater Accra regions), Ashanti (Ashanti and Brong Ahafo regions), the Northern Territories (Northern, Upper East and Upper West) and Trans-Volta Togoland (Volta Region).

In 1951, six years before independence, the British government promulgated a constitution which created a legislative assembly composed mainly of members elected by direct or indirect universal suffrage. Under this constitution, an executive council was also established with a majority of its membership drawn from African members of the legislative assembly, and three white members appointed by the governor of the colony. A new constitution approved on 29 April 1954 established a government made up only of Africans, all from the legislative assembly, whose members were now elected by direct universal suffrage. The elections held under that constitution gave a majority to the Convention People's Party (CPP) headed by Dr Kwame Nkrumah, who became prime minister.

In 1960, three years after independence, the country shifted from the Westminster system of parliamentary government to a presidential system, which later turned into authoritarian presidentialism. The ruling CPP was not particularly comfortable with the independence constitution, which had devolved powers to regional assemblies as a compromise with the opposition's demand in the run-up to independence for a federal system.<sup>121</sup> The 1960 Constitution, drawn up by a de facto one-party parliament, gave wide powers to the first president, Kwame Nkrumah, and in effect seriously restricted the level of popular participation.<sup>122</sup> In 1964, a constitutional referendum changed the political system into a one-party state, which gave still wider powers to President Kwame Nkrumah. For example, the president simply announced the list of new members of parliament (MPs), taking the place of the citizens who were supposed to express themselves in the elections which were due to be held in 1965. This system lasted until the February 1966 coup.

### **Chronic coups d'état**

The officers who staged the 24 February 1966 coup d'état cited the Nkrumah regime's authoritarianism and corruption, as well as its oppressive denial of human rights in justification of their action. They formed a provisional government led by a National Liberation Council (NLC) and promised to return the country to civilian rule as soon as possible. In October 1969 the NLC held parliamentary elections in which the Progress Party led by Koffi Busia won 105 of the 140 seats in parliament. This parliament cohabited for almost a year with a presidential office which exercised executive power under Brigadier A. Afrifa's leadership. On 31 August 1970, special elections were held to choose a civilian government, in which Edward Akufo-Addo, a former chief justice, was elected president with Dr Busia as prime minister.

However, the Second Republic was short-lived. Citing the Busia government's inability to eradicate the rampant inflation that followed a currency devaluation decided in December 1971, the army seized power again in a non-violent coup on 13 January 1972. Led by Colonel Acheampong, the authors of the coup formed the National Redemption Council (NRC),

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121 Bohane, A.A., *Ghana: Evolution and Change in the Nineteenth and Twentieth Centuries*, Longman, London, 1975.

122 For example, he restricted the Parliament's power to examine the national budget, while judges were appointed and dismissed under the Presidents' discretionary powers.

which was transformed in 1975 into the Supreme Military Council (SMC). But, unable to end the economic crisis and bring down the high cost of living, the SMC was faced with rising discontent expressed through strikes and street protests organised by students and professional associations throughout 1977 and 1978. In July 1978 General Acheampong (as he had become) was overthrown by his Chief of Staff, Gen. Frederick Akuffo, who reinstated political party activities, but this did not ease popular discontent or eradicate widespread corruption; neither did it solve the economic crisis.

In June 1979, the Akuffo government was overthrown in a violent coup led by a group of officers gathered in an Armed Forces Revolutionary Council (AFRC), led by Flight Lieutenant Jerry John Rawlings. The AFRC took up the draft constitution prepared by a constitutional assembly set up by the Akuffo government. Rawlings also let the presidential and legislative elections go ahead as planned by General Akuffo. Following the elections, the People's National Party (PNP), which claimed the legacy of Nkrumah's CPP, won 71 of 140 seats in parliament and its leader, Dr Hilla Limann, was elected president of the Third Republic.

### **Jerry Rawlings and the birth of the Fourth Republic**

After only two years of a democratic regime, President Limann was overthrown in December 1981 by Flight Lieutenant Rawlings, who used as an excuse the Limann government's inability to eradicate corruption and stabilise an economy in dire straits. Both executive and legislative powers were concentrated in the hands of a Provisional National Defence Council (PNDC).

Under pressure from the international community and domestic forces, the PNDC regime gradually set in motion a series of measures that culminated in the establishment of the Fourth Republic from January 1993. In 1984 the PNDC created a National Commission on Democracy (NCD) to study the modalities for the return of participatory democracy in Ghana. In July 1987, the NCD submitted a report with an outline of the modalities for the organisation of district-level elections. These elections were held in 1988 and 1989. However, the PNDC military junta reserved the right to appoint one third of district assembly members. A number of constitutional exercises were undertaken in the 1990–1992 period, including NCD regional fora, the production of a draft constitution by a Committee of Experts and the convening of a Consultative Assembly.

From July 1990 the PNDC inaugurated a series of controlled public fora, ostensibly as a means for achieving national consensus on a new democratic order for the country. But the fora became closed debating sessions for government supporters. The unintended impact of the regional fora, nonetheless, was that the NCD Report submitted in March 1991 clearly and frankly indicated the overwhelming preference among Ghanaians for a constitutional order based on a multi-party system. This compelled the PNDC to shift its ground from the tacit support for a no-party system that was to be evolved from the district assembly system. The PNDC formed a nine-member Committee of Experts to prepare an outline of a new constitution for consideration by a consultative assembly. Following the Committee of

Experts report, the PNDC established the Consultative Assembly to draft the 1992 Constitution. Finally, the text of the new constitution was subjected to a nationwide referendum and adopted in April 1992.

In 1992, the PNDC metamorphosed into the National Democratic Congress (NDC) political party, which won the 1992 and 1996 elections with Jerry John Rawlings as president. In the 2000 elections, the New Patriotic Party (NPP) emerged victorious in the first peaceful handover of government in Ghana since independence. President John Agyekum Kufuor assumed the reins of government in January 2001 and was re-elected in 2004. The January 2009 saw the return to power of NDC, with Professor John Atta-Mills, Jerry Rawlings' former deputy, as president.

Table 1: Ruling administrations in Ghana, 1957–2007

Dates	Government in power
1957–1960	Westminster Constitution (Nkrumah government)
1960–1964	First Republic: presidential system introduced
1964–1966	First Republic: one-party rule
Feb. 1966–Oct. 1969	National Liberation Council (NLC)
Oct. 1969–Jan. 1972	Second Republic (Busia government)
Jan. 1972–Oct. 1975	National Redemption Council (NRC)
Oct. 1975–Jul. 1978	Supreme Military Council I (SMC I) (Gen. Acheampong)
Jul. 1978–June 1979	Supreme Military Council II (SMC II) (Gen. Akuffo)
June 1979–Sept. 1979	Armed Forces Revolutionary Council (AFRC)
Sept. 1979–Dec. 1981	Third Republic (Limann government)
Jan. 1982–Dec. 1992	Provisional National Defence Council (PNDC)
Jan. 1993–present	Fourth Republic

Source: AfriMAP-OSIWA, *Ghana: Democracy and political participation*, 2007, p.18.

## C. The Electoral Commission (EC)

Electoral democracy in Ghana until the 1990s was characterised on the one hand by a relatively extensive experience of autonomous electoral management bodies, and on the other hand by political players' and citizens' long-standing distrust of these bodies. The current Electoral Commission, in place since the return to democracy in the early 1990s, is an heir to the EMB tradition; but it has also broken away from the distrust for EMBs which was prevalent previously. The Ghana Electoral Commission has a notably wide mandate, with powers that extend beyond the strict organisation of elections, to monitoring the activities of political parties, including party registration, policing their activities and auditing their accounts.

The Ghana Electoral Commission is independent, and this is recognised by almost all players in the country's electoral process, which can be seen in its composition, the length of its members' mandate and their salaries. The EC also enjoys the freedom to organise internally which allows it to determine its own structures without outside interference.

However, in spite of its good reputation, the EC suffers from many challenges, primarily due to poor working conditions of its members, the poor performance of the Commission in managing the voters' register, and the poor quality of some staff employed by the Commission, including election officials. Inadequate coordination among other institutions involved in the electoral process sometimes also results in weaknesses in the management of this process. Efforts are being made to address some of these weaknesses.<sup>123</sup>

### Historical background

Ghana, like other English-speaking countries in the west African region, has traditionally used one of other form of 'autonomous' electoral management body. This is in contrast to the situation observed in most French-speaking west African countries where electoral management has for a long time been entrusted to a ministerial department, i.e. the Ministry of the Interior.

Although electoral management was entrusted to a ministerial department during the 1950–1968 and 1974–1977 periods, Ghana made regular use of autonomous Electoral Commissions even before the 1993 restoration of democracy. During some periods, there was a single commissioner in charge of elections, i.e. a one-man election commission. This was the case for example in 1968, and again between 1969 and 1974. At other times, there was an Electoral Commission with several members, such as the National Commission for Democracy (NCD) between 1982 and 1992, which conducted District Assembly elections in 1988–1989,<sup>124</sup> or again the Interim National Electoral Commission (the INEC) established in 1992. This is also the model for the current Electoral Commission in operation since 1993.

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123 Most of the information in this chapter comes from: Joseph Ayee (ed.), *The 1996 General Elections and Democratic Consolidation in Ghana*, University of Ghana, Accra, 1999; Gyimah-Boadi, E., *Modelling Success: Governance and Institution-Building in Africa: The Case of Ghana's Electoral Commission*, CDD, Accra, Ghana, 2008.

124 This is the same National Commission for Democracy created by the PNDC in 1984 to reflect upon the modalities for reinstating democracy in Ghana. See Ayee, op.cit.

Several factors have contributed to the early adoption by Ghana of an independent election management body, including the institutional legacy of British colonial rule. Indeed, the period immediately after the end of World War II was characterised by relative liberalisation of the political space and the adoption of multi-party politics. The holding of competitive elections, a natural and inevitable corollary of multi-party politics, necessitated the establishment of credible bodies for their management. Since then, Ghana, like most other former British colonies, has resorted to various forms of independent electoral management body.

Other factors are unique to the political development of Ghana after independence, and these include lessons learned from its democratisation process, following a long period of political instability and a succession of coups that led to deep mistrust of the administration. In this respect, however, the situation in Ghana is similar to the one in Benin, where mistrust was essentially the reason why the legislature also chose to entrust the management of the electoral process to an independent body in 1994 (though differently constituted from that in Ghana).

The use of an independent electoral management body has become routine in Ghana, without the actual institution in office ever being unconditionally endorsed. Both ordinary citizens and political parties continued to show some mistrust towards these bodies and this model of election management. Election management by these various bodies was characterised by doubts about their integrity, their independence – especially vis-à-vis the executive power – and the transparency of electoral processes.

This almost permanent distrust of the electoral institutions for pre-1992 Electoral Commissions can be explained by a major factor: the appointment procedure for members of the Electoral Commission, whether it was a one-man structure or a commission with several members. Before 1992, members of the commission were appointed unilaterally by the executive, in particular the president, without taking into account the opinion of the political opposition. This situation resulted in challenges to elections results and charges that the election commission was essentially an instrument at the service of the government and its leader, the president and head of state.

A major change happened when democracy was restored with the creation of the 4th Republic following the adoption of the current constitution by referendum in 1992. Since 1992, elections in Ghana have been managed by two different bodies.

There was first the Interim National Electoral Commission (the INEC) which managed the 1992 constitutional referendum and the general elections (presidential and legislative) of the same year. The INEC, like almost all of its predecessors, was viewed by politicians, especially from opposition parties, with great suspicion. They feared and denounced the manipulation of elections through control of the INEC by the ruling party. The major political parties who participated in the November 1992 presidential election – including the New Patriotic Party (NPP), the People's National Congress (PNC), the People's Heritage Party (PHP) and the Provisional National Defence Council (PNDC)/National Democratic Congress (NDC) – complained of deficiencies in the management of the presidential elec-

tion and boycotted the legislative elections of December the same year. The then opposition parties demanded, inter alia, the replacement of the INEC by another commission whose membership should include representatives of all political parties participating in the electoral contest.

The Electoral Commission in its current form was established by the 1992 Constitution, in its Articles 43, 44, 45 and 46, and a 1993 law, the Electoral Commission Act 451.<sup>125</sup> The constitution provides for the necessary arrangements for the establishment of the Electoral Commission to replace the Interim National Electoral Commission. The constitution specifies the composition and terms of selection of members of the EC. It also states the qualifications for EC members, members' salaries, the duration of their terms and conditions of incompatibility. The constitution establishes the core functions of the Commission and clearly states its independence of the control of any person and/or institution. To enable and ensure the operationalisation of the Electoral Commission, these constitutional provisions are complemented by the 1993 act. This text provides for the measures necessary for the organisation and functioning of the Electoral Commission. More specifically, the Electoral Commission Act 451 contains provisions on the organisation of the Commission, sub-committees necessary for its operation, the selection of the Commission, the composition of its demarcated entities, financing and auditing of the Commission's financial management, etc. (see below).

Despite the provisions of the 1992 Constitution aiming to ensure its independence, the new EC was still greeted with suspicion by opposition politicians. It took a lot of time and effort on the part of the EC to earn the trust it enjoys today in terms of electoral management in Ghana.<sup>126</sup>

Since the restoration of democracy in 1992, the Electoral Commission has organised an unbroken series of elections, including four general elections: in 1996, 2000, 2004 and 2008. The management of elections by this new Electoral Commission has enabled Ghana to experience two peaceful changes of government, in 1998 and 2008, since the beginning of the democratisation process in 1992.

## **EC structure and staff**

### *Composition*

The Ghana Electoral Commission is composed of seven members including a chair, two deputy chairs and four other members. Like other constitutional institutions – such as the Public Service Commission and the National Council for Higher Education – members of the Electoral Commission are all appointed by the president after consulting the Council of State, an advisory body without any major power established by the 1992 Constitution.

Several factors mean that politicians, especially from opposition parties, and public opinion distrust an election commission constituted in this way. First, the chair and

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125 See the compilation of laws titled *Electoral Laws*, published by the Electoral Commission in 2008 with financial support from UNDP.

126 Ayee, op.cit.

two deputy chairs of the Commission are not elected by their peers and but are directly appointed by the head of state. Second, the selection of commission members is not done in such a way as to ensure consensus among the political class. For example, there is no requirement for the consent or at least consultation a body that reflects the political configuration (Parliament or other). The president is just asked to request the opinion (not binding) of the Council of State, whose members are mostly appointed by the head of state himself.<sup>127</sup> The almost unilateral appointment of EC members by the head of state is a distinctive Ghanaian feature which is on the face of it highly problematic. There is all the more need, therefore, to direct attention to the factors that in practice have helped to establish trust and confidence in the EC today among Ghanaian politicians.

### *EC internal organisation*

The Commission is organised into two divisions: the Operations Division and the Division of Finance and Administration. Each division is under the responsibility of a deputy chair of the EC and led by a coordinating central director. The division is further subdivided into departments headed by directors. Under the current structure, the Operations Division consists of three departments: the Elections Department, the Training Department and the Research, Monitoring and Evaluation Department. The Division of Finance and Administration is composed of the Human Resources and General Services Department, the Finance Department and the Information Technology Department.<sup>128</sup>

According to the Commission's website, the permanent staff is made up of two coordinating directors, for each division; 17 directors (seven at head office and ten in the regions); 138 district officers; 20 senior electoral officers at head office; and about 1010 other categories distributed among the regional and district offices. During its field exercises the commission recruits numerous temporary staff in the categories of registration/returning officers, deputy registration/returning officers and presiding officers and polling assistants. The presiding and polling assistants are recruited five to a polling station. The Commission currently operates twenty-one thousand polling stations. In addition the Commission engages temporary drivers during exercises such elections and registration.<sup>129</sup>

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127 Article 89(2) of the 1992 Constitution gives the following composition for the Council of State: the following persons are appointed by the President in consultation with Parliament – (i) one person who has previously held the office of Chief Justice; (ii) one person who has previously held the office of Chief of Defence Staff of the Armed Forces of Ghana; (iii) one person who has previously held the office of Inspector-General of Police; (b) the President of the National House of Chiefs; (c) one representative from each region of Ghana elected, in accordance with regulations made by the Electoral Commission under Art. 51 of this constitution, by an electoral college comprising two representatives from each of the districts in the region nominated by the District Assemblies in the region; and (d) eleven other members appointed by the President.

128 Ghana EC website, <http://www.ec.gov.gh>, accessed on 28 August 2010.

129 Ghana EC website, <http://www.ec.gov.gh/node/15>, accessed on 13 October 2010.

The Elections Department is responsible for the core electoral functions: voter registration, demarcation of constituencies, and the conduct of elections themselves. The Department of Research, Monitoring and Evaluation is responsible for evaluating the Commission's programs by analysing its strengths and weaknesses. It verifies complaints and grievances of different stakeholders and makes recommendations to the executive committee of the EC (the chair and two deputy chairs). It is responsible for documenting all of the Commission's activities. The department is also responsible for monitoring the activities of all political parties legally registered with the Commission and validates their credentials. It ensures the neutrality of political parties' or candidates' logos, checks their sources of funding and audits their campaign accounts and budget. Political parties in Ghana are required to have offices and conduct business in at least two thirds of the country's districts.<sup>130</sup> The Department also assists students who are doing internships at the EC in their research.

The Department of Information Technology processes information from the districts. It consists of 100 people including non-permanent staff in three sections (systems development, data entry, equipment and maintenance). It makes the recommendation for the IT system to be used for the electoral register. The completed registration forms are scanned before finalising and public posting of the list. The Commission's filing system is also computerised.

The Public Relations Department is in charge of promoting the Commission's image; it establishes and maintains contact with the Commission's customers and suppliers. Every agent is responsible for promoting the image of the EC, and this principle is stipulated in a code of conduct and the Commission's collective-bargaining agreement.

### *Decentralised structures of the EC* <sup>131</sup>

The constitution establishes just the overall framework for the establishment of the Electoral Commission, and the details are set out in the Electoral Commission Act. Under Article 9 of the Act, the EC shall have a representative in each region and each district of the Republic of Ghana. In practice, local offices representing the EC are composed of 10 members per region and three members maximum per district.

The decentralised structures of the Commission include regional offices representing 10 regions of the country headed by directors, and district offices headed by district electoral officers in each of the country's districts. The technical departments and sections 'shall perform such functions as shall be assigned to them by the Commission'.<sup>132</sup>

An important element that needs to be stressed is that the Commission's representatives

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130 In 2006, 28 additional districts were created, raising the number of districts from 110 to 138. This resulted in the appointment of 28 new EC representatives who, while waiting for facilities (offices, etc.) still depended on former EC representatives. In 2008, yet further districts were created, bringing the total number to 169. See [http://www.ghanadistricts.com/home/?\\_=27&sa=5226](http://www.ghanadistricts.com/home/?_=27&sa=5226), accessed 04 February 2011.

131 Most of the information in this section comes from a report on the Ghana Electoral Commission commissioned in 2007 by the National Assembly of Benin (*Cellule d'Analyse des Politiques de Développement de l'Assemblée Nationale – CAPAN*), in possession of the author. (Hereafter 'CAPAN Report'.)

132 Electoral Commission Act, 1993, Section 9.

at the local level are chosen by the EC.<sup>133</sup> In addition, the EC assigns duties, terms and conditions of employment of members of the various regional and other offices. This practice, which is found in most English-speaking countries of the sub-region, is contrary to the practice in francophone countries, where almost all members of the different sub-units of the Electoral Commission are appointed by the same authorities who choose the members of the Electoral Commission at the national level and thus have the same sources of legitimacy.

This hierarchy between the EC at the national level and its decentralised structures has important, and largely positive, implications for the organisation and functioning of the Commission. The clear reporting lines between different levels of the electoral management body reduce the risk of misunderstanding and failure to follow instructions.

### *EC staff management*

The management of matters relating to the staff of the Electoral Commission is left almost entirely to its own discretion. Indeed, the Electoral Commission Act 451 (Section 8), gives the Electoral Commission the authority to recruit people with the technical expertise it needs to perform its duties. Consequently, the Commission recruits and appoints its officers autonomously, in consultation with the Public Service Commission and after identifying human resource needs. Recruitment is done on a competitive basis according to Ghanaian administration rules, i.e. among other things, on the basis of objective criteria clearly specified. Almost all vacancies are published in the media.

The recruitment of election officials – the agents responsible for the management of polling stations and voter registration operations – is also done on a competitive basis by a selection panel chaired by either the EC chair himself or by one of its deputy chairs. The selection panel also includes a representative from the Public Service Commission and a representative of the Ghana Institute of Management and Public Administration (GIMPA), a public training institution for the public and private sectors.<sup>134</sup>

As far as internal organisation is concerned, the discretion of the Electoral Commission is not limited to staff recruitment. The EC is also free to determine the number and nature of the technical committees it deems necessary for the management of the electoral process (Electoral Commission Act 451, Section 7). Committees set up by the EC may contain members who do not belong to the Commission, but must be chaired by a member of the Electoral Commission.

## **The EC's powers and functions**

The Ghanaian Electoral Commission is without doubt one of the best equipped EMBs

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133 Art. 9, Electoral Commission Act. Selection criteria are not specified. The law simply says there must be Commission representatives at regional and district levels and they must fulfil all functions assigned to them by the Commission. The same legal provision asks the Commission to choose the representatives in consultation with the Public Service Commission.

134 CAPAN Report, op.cit.

in the West Africa sub-region as regards powers over the electoral process. It also has an important ability to impose sanctions for election law offences.

#### *Full powers over the entire electoral process*

The powers of the EC Ghana enable it to cover the whole electoral process. The Electoral Commission is competent to establish the voters' register and update it annually. It organises, supervises and verifies all public elections (including the election of national, regional and constituency level officials for each political party, the election of union officials, etc.), not only elections to political positions, as well as referendums. It provides civic and electoral education for the people, including through sensitising citizens about the electoral process and its objectives.<sup>135</sup>

The Electoral Commission determines the location of polling stations, according to demographic data. It is also responsible for everything concerning the printing of ballots. It recruits and trains polling staff, and all the people intervening in the election process. The Commission is also responsible for the collection of election materials and ballots once the polls are closed.<sup>136</sup> The Commission also handles the preparation of individual polling cards.

The Electoral Commission is empowered to declare the results of the presidential election; the Commission's chair discharges this formality.<sup>137</sup> For other elections, results are declared by other individuals appointed by the Commission, both at the constituency level and at the polling centre.

The Ghana Electoral Commission registers political parties, reviews their operations and audits their accounts. It also collects and distributes financial and material resources allocated to parties by the Ghanaian public authorities. The distribution thus made may not be strictly equal, but depend on past performance of the parties in question.<sup>138</sup>

The EC is constitutionally empowered to check, on a regular basis, the validity of constituency boundaries across the country and to make changes when they are needed.

#### *Powers to impose penalties*

The Ghana Electoral Commission has the power to invalidate election results if they have not yet been published or announced. When alerted, it conducts investigations and if the allegations of irregularities are proven, it declares the results in question invalid. However, when allegations of irregularities are made after the publication or announcement of results – which would in such circumstances be only provisional – invalidation can only be pronounced by the Supreme Court of Ghana for presidential elections,<sup>139</sup> or by the High

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135 Voter education is sometimes directly done by the EC, but at other times in collaboration with the NCCE.

136 Section 2, The Electoral Commission Act.

137 Presidential Election Law, PNDCL 285, Art. 4.

138 Political Parties Act 574, 2000. See also *Ghana: Democracy and Political Participation*, op.cit., pp.83–86.

139 Presidential Election Law, 1992, PNDCL 285, Art. 5.

Court for parliamentary elections.<sup>140</sup> In both cases, the cancellation of the election involves holding new elections.

The EC also has the power to correct some errors or irregularities. In this case, any person aggrieved by the error or irregularity can bring the case before the EC.

### *Code of Conduct and Inter-Party Advisory Committee*

The Electoral Commission has developed a code of conduct for political parties in order to improve relations between the parties and the behaviour of political parties' members during elections.

The adoption of a code of conduct was one of the main recommendations of the Inter-Party Advisory Committee (IPAC) first convened by the EC in March 1994 and consisting of representatives of the various political parties and the EC.<sup>141</sup> The IPAC's principal function is to serve as a channel of information between the Commission and the parties and build consensus on contested electoral issues. Representatives of development partners may also be invited. The EC Operations Division is responsible for preparing a monthly consultation meeting between the Commission and IPAC. This participatory and consensus-building mechanism has been sustained and replicated in monthly meetings at the regional and district levels.

The code of conduct was also recommended by observers at the 1996 elections and all duly registered political parties adopted a voluntary code of conduct for the 2000, 2004 and 2008 elections. The adoption was facilitated by the EC, the National Commission for Civic Education (NCCE) and the Institute of Economic Affairs (IEA), an NGO.<sup>142</sup> The code covered the campaigns, activities undertaken outside the campaigns, elections, the mode of application and implementation. The code provided, inter alia, that complaints filed under its provisions were to be investigated by a committee composed of political parties, the EC and IEA, at national, regional and district levels. It also provided that in case of infringement of its provisions, the injured party should report the violation to the party responsible for the offence in the first instance and attempt to amicably resolve the dispute. In case of failure to amicably resolve the dispute, it can be reported to the committee established for this purpose. This committee is instructed to give a fair hearing to all parties concerned and has a power of sanction in the form of reprimands. The solutions advocated by the code do not preclude the right of victims to bring a criminal or civil action before ordinary courts.

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140 Representation of the People Law, 1992, PNDCL 284, Art. 16. (Both laws were adopted before the restoration of elected government.)

141 The IPAC has ensured that political parties and donors make input into electoral reforms and the management of the electoral process and also bring their concerns for general discussion. Among the electoral reforms introduced since 1993 are the photo voter identification cards, transparent ballot boxes, involvement of party agents in voter registration as observers, a single day for presidential and Parliament elections, voter photos on the electoral register, etc. Bofo-Arthur, K. (ed.), *Voting for Democracy in Ghana: The 2004 Elections in Perspective*, 1, Accra, Freedom Publications, 2006, pp.38–41. See also *Ghana: Democracy and Political Participation*, op.cit., pp.74–78.

142 The involvement of IEA, an NGO, was an innovation designed to reinforce collaboration between the EC, political parties and civil society.

Although the code has worked satisfactorily, it could be even more effective if it were enacted as law so that it would be legally binding and also include more powerful enforcement mechanisms.

## Independence of the EC

The Electoral Commission of Ghana enjoys a strong reputation for independence despite complaints from political parties about the way its members are selected. Its composition, which emphasises members' expertise rather than their political representation, contributes much to this independence. The control by the EC of the entire electoral process and its own budget is also an important factor that makes it more independent compared to other state institutions.

### *The EC model: Non-partisan experts*

The institutional model followed by the Ghana Electoral Commission is an independent body whose members are people of recognised experience and expertise. In other countries following this model, these experts are usually designated by 'consensus' among political parties. In Ghana, however, members of the EC are not really appointed by consensus, but rather by the president after consulting the advisory opinion of the Council of State. Nonetheless, a tradition has been established for the appointment of people with solid experience and recognised professional and ethical qualifications. This practice of what might be termed 'customary law' has become one of the real achievements of Ghanaian democracy.

The experience in several new democracies in the sub-region is that the presence of representatives of political parties or candidates in the EMB weakens the independence of the commission. Instead of sending members meeting the criteria of honesty and integrity set by law, political parties prefer to be represented by activists concerned primarily with the success of their candidates or their parties. Consequently, deliberate behaviour to negatively influence the functioning and consequently the performance of the commission is commonplace. Thus there have been attempts to disrupt the electoral process or to manipulate certain aspects of the management of the electoral process to influence the results. In Benin, for example, 94% of members of the *Commission Electorale Nationale Autonome* (the Benin EMB) are nominated by political parties.

In Ghana, by contrast, political parties do not nominate representatives to the Electoral Commission. Moreover, despite the 'almost unilateral' appointment of EC members by the president, the people appointed in 1993 were experienced personalities recognised to have a high level of integrity and morality and mastery of the electoral process.<sup>143</sup> People believe that the skill displayed by the EC comes from its members' long experience in managing elections, including the experience accumulated by EC members who also belonged to

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<sup>143</sup> For example, Gyimah-Boadi, E., *A Study of Ghana's Electoral Commission*, CODESRIA Research Reports, No. 2, 2010, CODESRIA, Dakar, 2010; also see interviews during focus groups held in Accra for this report, January 2010.

previous commissions. For example, the current chair, Dr Kwadwo Afari-Gyan, was deputy chair of the INEC whereas one of two current deputy chairs, Mr David Azey Adeenze-Kangah, was a member of both the NCD and the INEC.

#### *Control of the electoral process by the EC*

The election law gives the EC almost complete responsibility for both the preparation and the practical organisation and control of the electoral process. The law also leaves to the EC the freedom to choose the way it fulfils its duties, such as the appointment of resource persons necessary to manage the electoral process, the adoption of rules and regulations it deems necessary to fulfil its obligations, etc.

All these measures to increase the control of the Electoral Commission over the electoral process also reduce the potential for interference by other players. The situation would be very different if, for example, other actors were in charge of selecting resource persons or if another agency was involved in the preparation of regulations deemed necessary by the EC.

#### *Term of office of the EC and its members*

Under the electoral law, the Ghana Electoral Commission, like most of its counterparts in the sub-region, is a permanent institution, i.e. it is established indefinitely, not just for a single election. Moreover, and this is a Ghanaian peculiarity, at least three of its members, including the chair and two deputy chairs, are appointed for life. Ghana's election commissioners are much more independent of those who have chosen them and/or politicians than their counterparts in the sub-region. Similarly, the Ghanaian election commissioners enjoy greater authority and have more responsibility than those in a single-election Electoral Commission (such as in Benin) or Electoral Commissions whose members have a fixed term.

#### *EC members' term of office*

The Ghana Electoral Commission members' term of office is one of its unique features. Indeed, in all other new democracies in the West Africa sub-region, the EMB members' term of office is fixed and does not exceed a single mandate of a few years – 7 years maximum – or a mandate renewable only once. This is the case in Burkina Faso and Nigeria, where the EMB members' term of office is five years renewable once. In Liberia, members of the EMB have a non-renewable seven-year term. The Senegal case differs slightly from the two examples above in that the term is six years renewable once, but with one third renewed every three years.

In Ghana, by contrast, no fixed term is assigned to the members of the Electoral Commission. The constitution prescribes that the chair of the Commission enjoys the same terms and conditions of work as a judge of the Court of Appeal. This means that as long as he or she fulfils the conditions for maintaining his position, the EC chair is not removable until retirement age, which is 70 years for a judge of the Court of Appeal. The two deputy chairs of the Electoral Commission, while getting the same sort of security of tenure, have

slightly different conditions from those of the chair and enjoy the same terms and conditions of work as High Court judges. In other words, the deputy chairs of the EC are appointed for as long as they meet the legal requirements for their positions, up until the retirement age set at 65 years for a High Court Judge. The chair and two deputy chairs of the Electoral Commission have the right to retire at the age of 60 years, but they can also stay on in office for six months after the legal age of retirement.<sup>144</sup>

The situation of the four remaining members of the Electoral Commission is different and rather ambiguous, because although the provisions of the constitution and the law relating to the EC are clear enough about the conditions and terms for the chair and deputy chairs of the EC, they remain silent on the term of office of the four commissioners. In practice, these members are also expected to remain at their posts until retirement, even if they don't work full time for the Commission and are involved only intermittently in its work.

#### *Conditions for the removal of EC members*

The conditions for the removal of EC members are, like the term of each member, also somewhat unique. Legislation relating to the EC, like those of most new democracies in the sub-region, does not provide for the dissolution of the Electoral Commission as an institution. This can be explained by the desire to keep the EC away from the influence and control of other state bodies, particularly the executive branch.

The dismissal of the chair of the Electoral Commission or one of its deputy chairs can only occur in the case of proven misconduct or incompetence or incapacity, physical or mental. The following procedure is applied:

- If the president receives a petition for the dismissal of the EC chair and/or one of its deputy chairs, he sends it to the chief justice who determines whether the case appears well founded or not.
- If the chief justice finds that there is a prima facie case, he sets up a five-member committee, three of whom are appointed by the Judicial Council and selected from among members of the High Courts and /or chairs of regional tribunals, and the other two are appointed by the chief justice with the advice of the Council of State. They cannot be members of the Council of State, MPs or lawyers.
- The committee conducts investigations and makes recommendations to the chief justice who, in turn, sends them to the president. The president must act in accordance with the recommendations of the committee.<sup>145</sup>

The president, the authority which appoints the EC members, also has the final say when it comes to formal dismissal. However, and very importantly, he must act in accordance with the recommendations of the five-member committee.

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<sup>144</sup> Constitution, 1992, Art. 44 and Art. 145.

<sup>145</sup> Constitution, 1992, Art. 146 paras 3–11 (on the removal of judges).

### *Members' compensation*

Under the constitution and electoral law, the salaries of the chair of the EC and his two deputy chairs are clearly defined. The law also provides for the conditions for salary review (for example, their salaries cannot be reduced) and the setting of their retirement pensions. Although the determination of the salaries of the remaining four EC members is left to the legislature, it is unlikely that there could be a huge salary difference or unfair treatment of members who are neither chair nor one of the deputy chairs.

## **D. Funding of elections in Ghana**

### **The EC budget**

The Commission's budget has four main headings:

- Staff salaries and remuneration (on average US\$ 8 million);
- Administrative expenses (US\$ 4 million);
- Other expenses (US\$ 4 million); and
- Capital budget (US\$ 6 million).<sup>146</sup>

Elections on average cost taxpayers US\$ 2.4 million (for example, in 2004). However, in 2008, the Commission budgeted US\$ 50 million, due to the fact that it had to update the technology for voter registration, renew the car fleet and increase election officials' fees. With a population of 25 million inhabitants, Ghana has roughly 14 million voters. Spreading US\$ 50 million among the total number of voters over four years, the cost per voter is US\$ 1 per capita per year. In local elections, the average cost is US\$ 1.5 per voter per year. This population/cost ratio means that Ghana's elections are among the world's least expensive.<sup>147</sup>

### **Management of the budget by the EC**

The EC autonomously determines its budget and manages its own financial resources. It decides the budget required for an election before submitting it to the executive, which cannot make amendments without consulting the Commission. Furthermore, emphasis is placed more on ex post facto auditing through the requirement of a routine annual audit by the Auditor General. Such measures, even if they do not cover all possible sources of interference with the EC, still help to reduce opportunities for manipulation of financial mechanisms to influence the preparation and/or organisation of elections.

The constitution is silent on how elections are to be funded and the Electoral Commission Act merely provides in its Article 10 that 'the Commission's administrative expenses including salaries and wages of people working for it are charged on the Consolidated

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<sup>146</sup> Estimates given are the most recent available, from 2007. They were given during interviews with EC members in January 2010.

<sup>147</sup> *Getting to the CORE – A Global Survey on the Cost of Registration and Elections*, IFES, UNDP, June 2006.

Fund'; that is, they are the responsibility of central government. The Commission's funds come from two main sources. The government finances expenses related to the management of the core tasks of the electoral process, though it may, as government, feel the need to seek the support of development partners. The Electoral Commission may also directly request donor support for the funding of certain activities which, while not being among its core responsibilities, are still useful for the proper management of the electoral process. These include, for example, voter education.<sup>148</sup>

Development partner contributions to the financing elections are relatively high. According to Joseph R. A. Ayee, the success of the Electoral Commission depends heavily on the financial support it receives from development partners,<sup>149</sup> while, for Emmanuel Gyimah-Boadi, 'the practice where much of the EC's budget is funded by foreign donors is not sustainable'.<sup>150</sup> It is feared that development partner fatigue could lead the EC into a serious crisis and therefore constitute a serious threat to Ghanaian democracy.<sup>151</sup>

Despite the EC's autonomous management of its funds, it cannot be regarded as completely independent in terms of its financing, since its budget come from the state's central finances. The government thus sets the limits regarding administrative expenses, forcing the commission to prioritise its activities. Moreover, sometimes the funds for operating and capital expenditure are not released in a timely manner, or the executive says it does not have available funds to put already approved sums at the disposal of the EC.

The delayed disbursement of resources seems to be one of the main reasons for the difficulty the EC had in compiling the register of voters for the 2008 general elections: having received no government funding in time, the Commission found it necessary to adjust the timetable provided for compiling the register of voters. This resulted in a rushed process and consequently the establishment of a list that was widely regarded as being unreliable, due to the fact that there was no mechanism to prevent the registration of minors, aliens and multiple registrations. Consequently, the EC found itself at the end of the registration operation with a list that contained between 800 000 and 1 million more voters than its best advance estimates.<sup>152</sup>

## **Budget preparation and approval**

The Commission's Elections Department within the Operations Division determines the timing of national elections and prepares the budget for elections (general elections and local elections) involving all the EC's decentralised units in the budgeting exercise. The division develops its action plan, its time-line and its annual budget about one year before implementation and sets the election date. This process means that it is possible to seek the assistance

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148 Interviews with EC members, Accra, January 2010.

149 'Election management and democratic consolidation: The Case of the Electoral Commission of Ghana' in Ayee, *op.cit.*

150 Gyimah-Boadi, E., 'A Study of Ghana's Electoral Commission', CODESRIA Research Reports, No. 2, 2010, CODESRIA, Dakar, 2010.

151 Interviews with EC members, Accra, January 2010.

152 *Ibid.*

of development partners on time. Around the month of June each year, the regions submit their financial requests to be integrated into the Commission's general budget. This preliminary work contributes to the development, by the Finance Department, of the budget and other documents necessary for the proper preparation of electoral operations.

The Finance Department is responsible for:

- Budget preparation (running budget and operational budget);
- The development of the procurement plan; and
- The development of the cash flow plan.

These financial plans are presented by the chair of the Commission to the executive (in particular the Minister of Finance) and to the Parliamentary Committee on Special Budgets. The parliamentary committee recommends parliament's approval of expenditure if it is satisfied by the explanation given by the EC chair. In addition, amendments, including cuts, can only be adopted with the consent of the EC.<sup>153</sup>

In spite of the opportunity it has through budget approval by the parliamentary committee, Parliament rarely proposes changes to EC budgets. In fact, since 1993 (when the EC was created), all budgets have been adopted by the executive and the legislature, without amendment. Indeed, the Government (including the Ministry of Finance) even seeks the Electoral Commission's expertise to prepare the budget of other activities connected with the management of the electoral process.<sup>154</sup>

Operating expenses incurred in a non-election year, such as salary costs and recurrent expenditures, are allocated each month. The capital and services budget is allocated on an annual basis. Invitation to tender is made after the budget is approved and funds committed. At the end of a financial year the balance sheet is drawn up and unspent funds are returned to the treasury.

## **Audit of EC budget and election materials**

The Commission has an internal audit service and a contract verification service.<sup>155</sup> The Commission's administrative expenses (salaries, benefits and pensions) charged on the Consolidated Fund are audited annually by the Auditor-General or his representative.<sup>156</sup>

In terms of procurement contracts, the Commission has established special procedures in addition to the general conditions applicable to any government procurement contract. In particular, the EC set up a committee comprising: MPs (representing the opposition and the ruling party), a contracts specialist, and its directors responsible for elections and finance, a purchasing specialist and other technical staff as needed. The committee deliberates and sends its recommendations to the executive committee of the Commission which ultimately decides.

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153 CAPAN Report, op.cit.

154 Interviews with EC members, Accra, January 2010.

155 CAPAN Report, op.cit.

156 Electoral Commission Act, Art. 11.

In each district there is a warehouse to stock election materials. However, the authorities recognise that the storage system is not very efficient.<sup>157</sup> By law, single used ballots must be kept for one year after the elections. If no appeal is registered after one year, they are systematically destroyed by the Commission.

## E. Electoral disputes in Ghana

Under Part IV of the 1992 Representation of the People Law, adopted by the military government during the transition to democracy but which is still in force (though amended), the validity of the election of a Member of Parliament of Ghana can be challenged before the High Court. The election petition can only be presented by a person:

- Who lawfully voted or had a right to vote at the election to which the petition relates;
- Claiming to have had a right to be elected at the election;
- Claiming to have been a candidate at the election; and
- Claiming to have had a right to be nominated as a candidate at the election.

The grounds for cancelling an election result include ‘that general bribery, general treating, general intimidation or other misconduct ... have so extensively prevailed that they may be reasonably supposed to have affected the result of the election’; as well as non-compliance with the principles laid down by law, corruption and the ineligibility of a candidate to stand.

The petition must be made within 21 days of the date of publication of results of the election in question in the Official Gazette. But when the petition is based on allegations of corruption i.e. payment of money by the person whose election is contested, the 21-day period runs from the date on which such payment was supposedly made.<sup>158</sup>

The High Court conducts investigations to determine whether to cancel the vote for the seat in question or whether to assign it to one of two people contesting the result.

The 1992 Presidential Elections Law states that the challenge to the validity of the election of the President of the Republic can be made before the Supreme Court of Ghana. The petition can be made by any citizen of Ghana within 21 days after the proclamation of the results of the said elections. The procedure for lodging the petition should be established by Parliament’s Rules of Court Committee.<sup>159</sup>

The response to election law offences that fall short of the level at which a result should be cancelled is less organised. As regards most election offences – for example, violations taking place in the context of the registration of voters, illegal voting, misconduct by election officials, etc. – the law is silent on the procedures that could lead to sanction. It simply says, after each type of offence, that such an act constitutes misconduct and can be punishable by a particular penalty (fine and/or imprisonment). Thus when a violation is found,

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157 Interviews with EC members, Accra, January 2010.

158 Representation of the People Law, PNDCL 284, 1992 Sections 17–19.

159 Presidential Elections Law, PNDCL 285, 1992, Section 5.

several categories of players could intervene to ensure the perpetrator is punished, including the EC, the security forces, or the prosecution service.<sup>160</sup>

In Ghana, the management of electoral disputes is, in the opinion of most key players in the electoral process, one of the weakest links in the chain of electoral management. This is the case, first, because the sharing of responsibilities between different players called upon to intervene in the resolution of electoral disputes is not always clear. Secondly, the treatment of electoral disputes suffers from certain characteristics of the court system in general. Indeed, the normal judicial process is often very slow (a case may take several years to process) and easily lends itself to manipulation by skilful lawyers. One consequence of following the usual court procedure for the resolution of electoral disputes is that finalisation of the case can sometimes last until the next elections. The actors interviewed for the study refer to cases where the court decision invalidating an election was rendered only after the expiry of the mandate of the elected person, which made the proceedings useless. Thirdly, the actors who have to intervene in the management of electoral disputes, including security forces, and others who have the power to bring the judicial system into action, are not trusted by those involved in elections, especially those from opposition parties. Sometimes people feel that the judges on electoral disputes are biased in favour of the ruling parties. Thus, the speed with which electoral disputes are handled sometimes seems to depend on the political allegiances of some of the accused. In other words, the courts are tougher and faster in enforcing respect for procedures against opposition politicians than against those associated to whichever party is in power before the election.<sup>161</sup>

## F. Critical evaluation of EC performance

Since its inception in 1993, the Ghana Electoral Commission in its current form has organised at least eight national elections (presidential and legislative in 1996, 2000, 2004 and 2008), several local elections and other non-political elections. The way EC works as regards election management in Ghana has revealed that the Commission has many strong points, though there are still weaknesses that should be corrected.

Electoral management in Ghana is moving in the right direction. The situation is in contrast to what can be observed in some new democracies in the sub-region, such as Benin, where the management of elections has gradually showed serious signs of weaknesses and shortcomings. In Ghana, the quality of elections managed by the EC since 1993 has been improving steadily over time. Election after election, the structure responsible for the management of elections has improved its control of the process and earned the trust

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160 Representation of the People Law, PNDCL 284, 1992, Part V.

161 Interviews with civil society, political parties and EC representatives, and with judges, Accra, January 2010.

of most key players in the electoral process; it has also benefited from the willingness of the latter not to erect obstacles in its path.<sup>162</sup>

## **The strengths of the Ghana EC**

The Electoral Commission of Ghana, as compared to almost all of its counterparts in the sub-region has many strengths, including its favourable legal context, the quality of EC members and the positive feedback from the EC's performance.

The first strength recognised by all actors in the electoral process is the legal framework in which the Commission operates. Although the system for appointment of Commission members is defective, since they are appointed by the head of state with almost complete discretion, the general legal framework contributes to strengthening the EC in at least two ways. First, the fact that the Electoral Commission is established and protected from external interference by the constitution itself is a strength of the EC. In Ghana, all players in the electoral process, starting with members of the EC, recognise that this fact greatly contributes to the commission's authority and legitimacy. Secondly, the Electoral Commission Act also gives it very generous regulatory powers allowing it to enact any rules it deems necessary for the proper conduct of the electoral process. This prevents the EC from being subject to regulations that are difficult to implement, unnecessary and/or unenforceable as is sometimes seen in some of the other young democracies in West Africa. The power conferred upon the EC to draft all the documents it needs to accomplish its mission allows it to take suitable legal provisions in real time whenever the need arises.

The second category of the Ghana EC's strong points relates to the quality of the people that lead the commission. In this particular case, what is meant by the quality of EC leaders is not their training and education, but rather their commitment to credible elections, and perhaps especially to get the trust of other key players in the electoral process. This quality was all the more useful and necessary when the EC was established in 1993 under circumstances that created an environment of suspicion and mistrust, especially from opposition politicians but also among the general public.

The willingness of EC members to reassure important stakeholders in the electoral process has manifested itself through several initiatives by the EC. In 1995, for example, the EC decided to revise the voters' register, whose reliability had been challenged by political players during the 1992 elections. This was done with the participation and cooperation of political parties, whose representatives were permitted by the EC to monitor all the steps and intervene if thought necessary.

Other initiatives likely to give credibility to and improve the quality of elections include the adoption in 1995 of the voter's card with a photo; even though in that year, for reasons of lack of resources, only a third of voters living in the towns of the country's ten

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<sup>162</sup> Information in this section essentially comes from interviews conducted in January 2010 with key players of the Ghana electoral process for this study. See also reports by AfriMAP, Gyimah-Boadi and Ayee already cited.

regions and ten selected rural districts were provided with the card<sup>163</sup> (this became fully effective in 2000). In 1996, the EC adopted transparent ballot boxes and booths of better quality compared to the past, the public counting of votes and announcement of results at the polling station, as well as the proclamation of preliminary results by electoral constituency.<sup>164</sup>

One of the most important initiatives taken by members of the EC to increase the confidence of other players, including political players in the electoral process, is the creation in March 1994, of the Inter Party Advisory Committee (IPAC). IPAC created a framework for discussing issues relating to the integrity of the electoral process such as preparation of elections, the timing of elections (presidential and legislative), the use of transparent ballot boxes, etc.

Beyond EC efforts to increase the confidence of other key players in the electoral process, its performance over time has also helped to strengthen it. The positive results obtained by the Electoral Commission in the various elections that it has organised have incrementally strengthened its credibility and led to expectations that it will be able to manage future elections with similar success. The Commission has always held elections, especially general elections and local elections, on time according to the constitutional schedule, without anyone violently challenging results. The EC has developed a reputation for fair treatment of political players (candidates and political parties) during election periods. There has never been any major complaint of bias since the EC started managing elections in Ghana.

Finally, we must mention the contributions of other key players in the electoral process. Indeed, each of the various actors – political parties, candidates, civil society organisations, media leaders, and public security forces – involved in the electoral process has avoided behaviour likely to weaken the Commission. They have given it all possible support and help to organise credible elections.

## The weaknesses of the EC

The working conditions of the Ghana Electoral Commission need improvement. The members do not feel well treated in view of the risks and pressures of all kinds which they are exposed to in the exercise of their functions.<sup>165</sup> The fact that their salaries are aligned with those of heads of other institutions, such as those of some judges, does not seem fair to the EC chair and deputy chairs. Indeed, EC members encountered during the study believe they are running an activity with very much more at stake and are therefore subject to pressures and temptations which are much higher than the heads of other institutions or most civil servants.

Personnel recruited by the EC during election time, such as election officials – particu-

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163 The other voters made do with voting cards with their fingerprints.

164 So that citizens (in particular electors) can quickly know who is elected in their constituency, of course pending possible litigation.

165 Interviews with EC members at the national level and in the demarcated entities, Accra, January 2010. In spite of our efforts, we were not able to get the figures for the salaries of EC members.

larly registration and polling station officials – are not happy with their salaries<sup>166</sup>: election officials often complain that salaries are too low and threaten to disrupt operations. For the December 2008 elections, the EC suggested raising the polling station officials' remuneration by 100% to deal with threats from agents to disrupt the electoral process.

The quality of working conditions for members of the EC appears to be inversely proportional to the distance from the seat of the country's capital city, Accra. Indeed, at the EC national headquarters, conditions are acceptable, even if they deserve improvement to enable EC organisers to give their best. At the regional and district levels, the further one moves away from the Accra the less favourable the conditions are. Infrastructure deficiencies, insufficient staff, and lack of resources of all kinds are the daily lot of the members of EC branch offices.

The voters' register – whose dubious quality led to the boycott of the 1992 legislative elections by the major political parties – remains one of the weaknesses of the management of elections by the EC. The conditions in which the registers are drawn up are rarely the best: either the deadline for list establishment is too short, or the means to ensure the peaceful implementation of the operation are missing. For example, during the registration of voters for the December 2008 general elections, it took the first outbreaks of violence on the ground for the EC to perceive the need to involve the security forces at this stage of the electoral process. The EC itself acknowledged that the results obtained at the end of the registration operation exceeded the best estimates of the number of voters. The problem was only solved thanks to the positive attitude of the key political players in the Ghanaian electoral process, who all agreed to go ahead with the elections despite the fact that the register had major shortcomings. This last point is worth emphasising inasmuch as the difference between the two candidates in the second round of presidential elections in 2008 was a mere 50 000 votes.

The neutrality and competence of election officials – registration officers and polling station officials, and even some heads of EC branch offices – are also aspects of the electoral process where the EC shows some weaknesses. One cause of these problems is the fact that, for lack of sufficient resources, the Electoral Commission is obliged to recruit a temporary workforce whenever there is an election. This situation naturally raises the problem of ensuring the neutrality of the persons so recruited and the quality of their preparedness before they are involved in the electoral process.

### **The current debate on the EC**

These shortcomings and weaknesses largely explain the requests from civil society and political parties for amendments to the Electoral Commission's operating conditions. Beyond the term of office of the Electoral Commission, there are also currently discussions in relation to conditions of collaboration and sharing of roles between the players in the process to increase the quality of elections held in Ghana.

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<sup>166</sup> We were unable to obtain information allowing us to compare election officials' salaries with those of other civil servants.

Among the suggestions put forward, we must mention proposals to change the mandate of the EC and pay particular attention to the following issue:<sup>167</sup>

- The term of office for the EC and commissioners;
- The quality of the voters' registers and how to update them;
- The quality of the resource persons necessary for the management of the electoral process by the EC;
- Clarification of the roles of the different institutions involved in the electoral process;
- Collaboration between the EC and other key players in the electoral process;
- Lack of coordination on voter education by the EC, the NCCE (which organise its own campaigns through its communication department), the security forces and civil society organisations; and
- The possible expansion of the IPAC consultative framework between the EC and the political parties to other key players in the electoral process such as the media and civil society members.

Although for the moment the voices that want amendments to the mandate are not loud, they nevertheless enjoy powerful support. Former President John Kufuor clearly expressed this in his farewell speech of 5 January 2009, saying it is risky to have an electoral management body with a permanent mandate. Among other things, he called for:

- EC members' term of office to be 6 years, renewable once, so it straddles legislatures; and
- EC members to be selected by an electoral college.<sup>168</sup>

## **Relationship between the EC and other election stakeholders**

The relationship between the Ghana Electoral Commission and other major actors in the electoral process is better than in other new democracies in West Africa. A unique feature of the Ghana EC appreciated by all key players in the country's electoral process is the early recognition by the Commission's leaders of the need for an environment conducive to collaboration between the EC and other actors. This recognition has been accompanied by a willingness of EC members to take initiatives to promote such collaboration.

### *Political parties*

The EC led the process of creating platforms bringing the EC and specific actors in the electoral process together in order to create the best conditions for the election process. The IPAC, the platform comprising political representatives and the EC established at the initiative of the Electoral Commission, is a typical example. This platform helps to ensure

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167 Interview with the Dean of the Faculty of Political Science of Legon University and with a former NCCE member, Accra, January 2010.

168 Excerpts from a speech a copy of which was read on the website: <http://www.thefreelibrary.com/President+Kufuor's+adieu%3A+President+John+Kufuor's+farewell+speech...-a0194269682>, accessed on 30 August 2010.

that the EC takes into account the concerns of political parties and candidates in preparing and organising the electoral process. This same framework is also used by the EC to keep the political parties and candidates informed of the arrangements made and the difficulties encountered in managing the electoral process.

Nonetheless, some political parties do not seem completely happy with the way the IPAC works and think that the EC does not always take into account their concerns. Some believe that the organ should be formalised in an act of parliament, although there are concerns that this step could cause problems with the independence of the EC as provided for by the constitution.<sup>169</sup>

### *Security forces*

The National Election Security Task Force (NESTF) is another ad hoc platform initiated by the EC, which brings together the EC and actors relevant to the security of elections, including representatives of various sections of the security forces. This framework helps the Operations Division and security agencies (General Inspectorate of Police, Director General of Immigration, etc.) to develop the budget for security during election periods and plan the training of security guards hired to participate in security for the elections.

### *Civil society*

Beyond the almost formal frameworks mentioned here above, the EC maintains other flexible relationships and is accessible to other players in the process. This was acknowledged by representatives from all sectors encountered in this study. Thus, regular meetings are also held with civil society actors (national election observers, religious groups, trade unions, parent teachers associations, etc.), to exchange information and/or suggest solutions to specific problems posed by the management of elections.<sup>170</sup>

For the implementation of their activities relating to the management of elections, NGOs mobilise funding directly from development partners. But in carrying out activities, they know they can rely on the almost permanent availability of the EC to play its rightful role. Ghanaian civil society organisations provide an enormous amount of support for the EC. They initiate actions to help strengthen EC capacities, including activities to improve the environment in which it operates. Civil society contributes, for example, to voter education during election time and helps in the training of security forces, media, EC members, and others involved in the election process.

In addition, Ghanaian civil society carry out activities that could help strengthen the legitimacy of the EC. Thus, in tense situations, civil society organisations intervene to help the Commission deal with any politicians inclined to flout the authority of the EC or influence its decisions. For example, according to the 2008 general elections observation report made by the Christian Council of Ghana (CCG), ‘the most important contribution (made discreetly) during this period [of elections] is the emergence of a network including leaders of the West

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169 Interviews with representatives of political parties, Accra, January 2010.

170 Interviews with players in the Ghana electoral process, Accra, January 2010.

Africa Network for Peace (WANEP), the Institute for Policy Alternatives (IPA), the Institute for Democratic Governance (IDEG), the Christian Council of Ghana, the National Catholic Bishops Conference and the National Peace Council (NPC)'. According to the same CCG observation report, 'this group has initiated [during the election period] multiple contacts with the EC, the candidates of the two main political parties, the Minister of the Interior, the Chief of Defence Staff, and the outgoing President John Agyekum Kufuor'.<sup>171</sup>

The group of leaders from civil society was very useful when, between the two rounds of the 2008 presidential race, the tension made everyone fear the worst for the country. According to Rev. Kwabi Albert, acting chair of the Christian Council of Ghana, the group helped ease the tension by pointing out very clearly to some of the players mentioned above, including the outgoing president and the two candidates of the 2nd round of the 2008 presidential race, that 'the EC decision, whatever it is, should be imposed on everyone and be accepted by all' and asking each of them to fulfil their historical responsibilities.<sup>172</sup> These remarks were confirmed by both IEA and IDEG leaders interviewed for this study.

### *Popular confidence in the EC*

The first conclusion that emerges from Ghanaian citizens' views on the Electoral Commission is that in spite of initial reservations, especially from opposition politicians of the time (1993), the Commission has earned widespread confidence through its determined approach and its actions in practice. Only three years after being established, after organising the 1996 general elections, over 70% of citizens polled in December 1996 (as shown in Table 2) already indicated that the Electoral Commission had properly fulfilled its mission.

Table 2: EC performance (based on the free and fair nature of the 1996 elections)

Question: Do you think the 1996 elections were on the whole free and fair?		
Answer	Numbers	Percentage
Yes	1 979	73.3
No	419	15.5
Don't know	300	11.2
Total	2 700	100.0

Source : Joseph R.A. Ayee (ed.), *The 1996 General Elections and Democratic Consolidation in Ghana*, 1998.

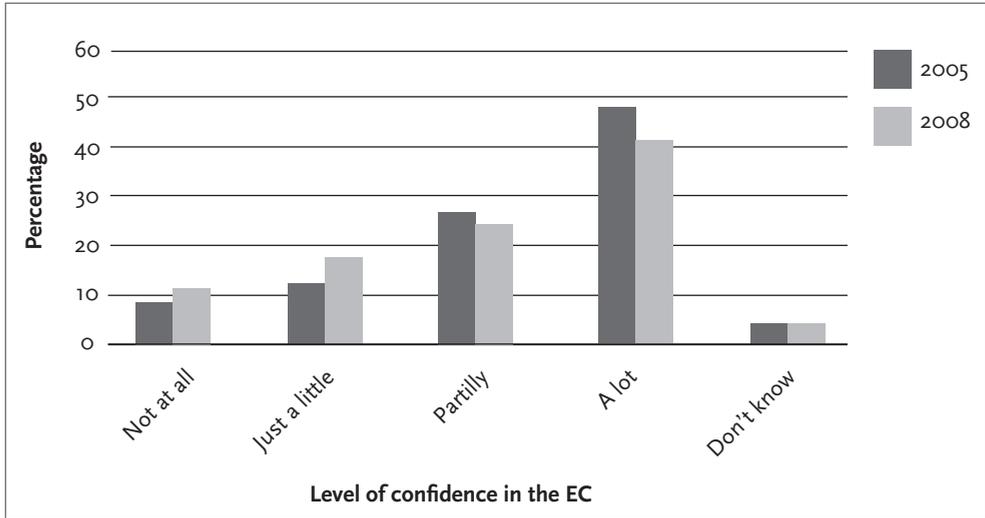
Unlike a country like Benin where confidence in the CENA (National Autonomous Electoral Commission) has eroded over time, the confidence of Ghanaians vis-à-vis their EC has been maintained and even strengthened over time. Another public opinion poll conducted by IFES (International Foundation for Electoral Systems) in 1997 gave almost the same results, that over 78% of citizens of voting age believe that the EC fulfils its mission well

171 Christian Council of Ghana, *Election Observation Report for the 2008 Presidential and Parliamentary Elections*.

172 Interview with Rev. Kwabi, Accra, November 2009.

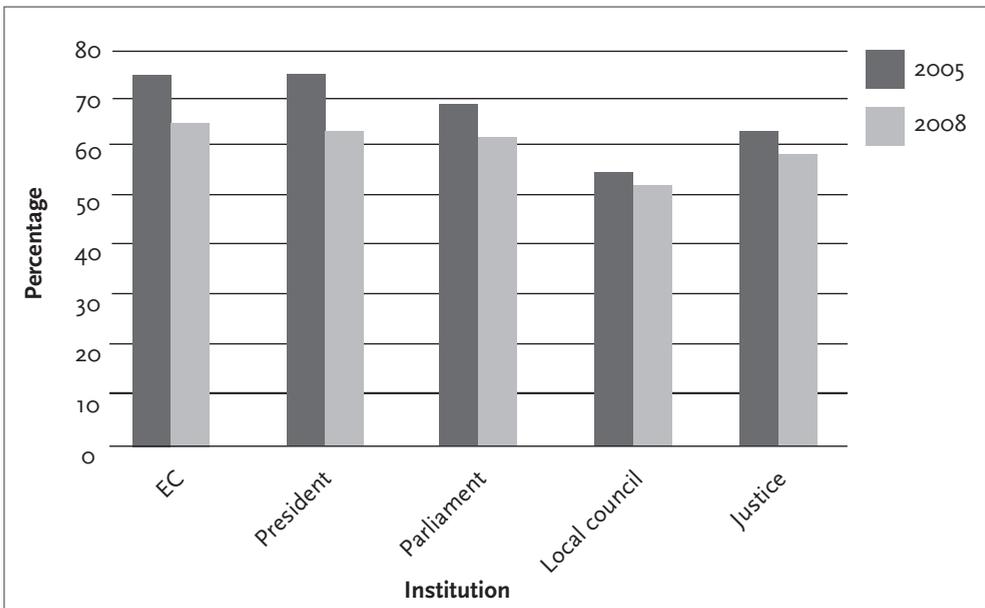
enough. Those findings are supported by Afrobarometer polls in 2005 and 2008, which found that over 70% of Ghanaians remain fairly confident in their EC. Ghanaians also put the EC among the country's most credible institutions. As shown in Figure 2, the Electoral Commission enjoys more confidence from citizens than the president, parliament, district assemblies or the justice system.

Figure 1: Level of confidence in the EC



Source: Afrobarometer rounds 3 (2005) and 4 (2008).

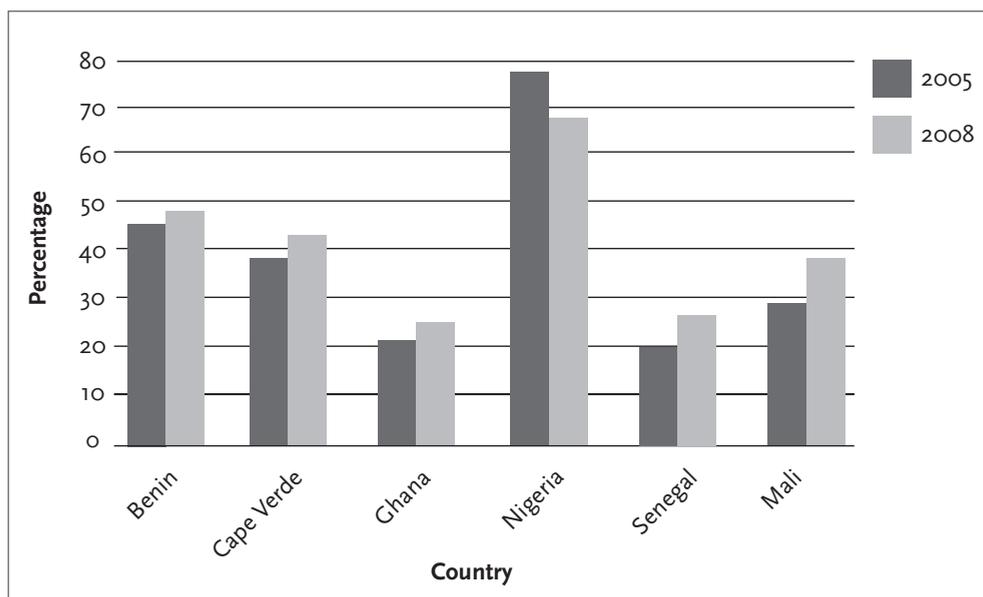
Figure 2: Citizens' confidence in each of the following institutions



Source: Afrobarometer rounds 3 (2005) and 4 (2008).

Finally, according to Afrobarometer, Ghanaian citizens are among those in the west African sub-region who have the most confidence in their Electoral Commission, as shown in Figure 3.

Figure 3: No confidence or limited confidence in the EC



Source : Afrobarometer rounds 3 (2005) and 4 (2008).

### Challenges to address

The method by which the executive makes financial resources available to the Commission is very problematic. Almost all of the players interviewed think that the government may influence the independence of the Commission through the way in which resources are made available.<sup>173</sup> Either the resources are being made available to the EC late, or once the budget is adopted by the EC, the government delays the implementation of the Commission's payment schedule under the pretext that the necessary resources are not available. Most of the players interviewed believe that this partly explains the changes that are sometimes made in the electoral timetable and the overly short time finally allotted to some operations. The difficulties encountered in preparing the register of voters for the 2008 general elections could partly be explained by this phenomenon.

The prominence of its chair is potentially disruptive of the proper functioning of the Electoral Commission of Ghana. The general feeling is that the presence of Electoral Commission chair surpasses that of the institution itself.<sup>174</sup> This situation raises concerns that the dominance of a particular individual prevents the institutionalisation and consolidation

173 Interviews with the EC, political parties and civil society representatives, Accra, January 2010.

174 Focus group held in Accra and separate interviews with players representing the EC and civil society, Accra, January 2010.

of the Commission's role, while the chair's retirement could affect citizens' perception of the Commission itself.

It is also clear from interviews with civil society members that the current state of relations between the EC and civil society organisations needs improving. Indeed, although there is a good atmosphere of cooperation between civil society and the EC (this is acknowledged by the actors of both institutions), civil society leaders believe that a framework along the lines of the IPAC or NESTF, to bring together the EC and civil society, could improve the quality of all contributions to the electoral process. The current situation leaves room for interpersonal relationships as a major determinant of collaborative activities between civil society actors and members of the EC. The creation of a framework like the one linking the EC and the political parties could help solve this problem.

The slowness of the EC to change its procedures when proven to be necessary is another weakness. Civil society players, political party leaders and even EC members met during the study acknowledged that the Commission was slow in implementing the recommendations of the evaluation workshops held following each election. The same people (including EC members) think that the Electoral Commission has been slow to adapt to new opportunities for better management of elections, for example the use of information and communication technologies (ICT) in the electoral process.

The quality of human resources which the EC has used during election time is another weakness identified by the election stakeholders interviewed (including EC members). With the elections approaching, the Commission, for lack of sufficient resources of its own, is obliged to carry out temporary recruitment to fulfil its missions. It is difficult for the Commission to ensure the technical competence of the people it recruits and especially their neutrality.

The Electoral Commission is also criticised for its inability to enforce election law and prevent fraud. The Electoral Commission does not have the means to monitor the universal implementation of provisions relating to the management of the electoral process. Moreover, the EC views electoral fraud as a criminal offence for which the responsibility to respond lies elsewhere (with the police, attorney-general, judges of election petitions, etc.). While it is true that the electoral law is silent on the division of roles between the different players involved in the management of electoral disputes, this state of affairs affects the authority of the EC and damages electoral management. As a consequence, many feel that there is impunity for election violations.

On election day, the lack of staff forces the Commission to rely on members of the security forces who are not fully prepared to cope with the insecurity that goes with elections. Similarly, the Commission still fails to prevent multiple voting in some places, because of the poor quality of the ink that is easily erasable, and the quality of the voters' register, which has always been a weak point. The inadequate preparation of some polling agents is also an issue that needs more attention, as well as the insufficient number of polling stations that create queues that are very long and sometimes difficult to manage in practice.

## G. Recommendations

### Legal/Constitutional provisions

#### *The Commissioners' appointment and mandate*

- Change the procedure for appointing EC members so that it is no longer an almost unilateral appointment by the president and more actively involves representatives of the parliament in the form of pre-approval by a qualified majority;
- Amend the Electoral Commission Act to make the process for nominating its members more representative and more inclusive of the views of different political parties and sectors of civil society; and
- Amend the Electoral Commission Act to provide for the length of mandate and terms of office of the other four commissioners apart from the chair and two deputy chairs whose terms of service are not currently specified.

#### *The procedure for making resources available to the EC*

Amend the laws on finance and the budget process to provide a special framework to insulate the public financing of elections from the risk of the government abusing its powers as national treasurer as well as to prevent unaccountable management of public resources by the EC. More concretely, adopt:

- Procedures of prior and concurrent review of EC resources on top of the ex post facto audit currently applied; and
- Procedures ensuring automatic disbursement of resources defined in the EC budget as soon as it is adopted, and thus keep disbursement away from the discretionary powers of the Ministry of Finance.

### Improved management of electoral disputes

- Adopt a special mechanism to hear election petitions instead of resorting to the regular court system whose slowness and cumbersome procedures do not seem very suited to the settlement of electoral disputes. The creation of an electoral court could meet this need.

### Creating an institutional framework for collaboration with other stakeholders

- The Electoral Commission should put in place an institutional framework for consultation with civil society organisations, similar to the IPAC for political parties; and
- The EC should work with all stakeholders to make an assessment of existing cooperation bodies, i.e. IPAC and NESTF to determine the needs and ways to improve these bodies and, in particular, to determine ways to formalise these bodies that take into account the need to preserve the independence of the EC.

## **Resolving the problem of EC staff and infrastructure**

- The EC should improve recruitment and training procedures for election officials, to ensure adequate numbers, independence and qualifications of EC temporary staff. To this effect, it should therefore establish a pool from which it could extract election officials to be trained for each election; and
- Consequently, the Commission's budgetary resources and staff should be substantially increased. In particular, the regional branches of the Commission should have sufficient human resources.

## **Improving EC members' and election officials' salaries**

- The salaries of members must be increased to reduce the risks that they succumb to the temptation of corruption.

## **Improving the electoral register**

- The EC should ensure it has sufficient time to compile or update the register of voters; and
- It should put in place practical mechanisms that can help lend credibility to the register of voters by reducing the risk of multiple registrations and multiple voting. In particular, the EC could organise a forum on ICTs and the reliability of voter registration and the election process to make the most of the potential benefits of ICTs to the reliability of the electoral list.

# 5

## Nigeria

**Adele Jinadu**

### **A. Summary**

Nigeria has struggled to find ways to engender confidence in the conduct of free and fair elections. The problem is a two-sided one: how to design and ensure an efficient, effective, and politically non-partisan election management body; and how to reorient the country's political culture so that the political elite and the general public will show a commitment to the rules and regulations of electoral governance, in order to ensure credible and competitive elections.

The on-going Nigerian electoral reform process is a response to the cumulating documented reports by international and national observer groups of electoral malpractices during the 1999, 2003 and 2007 general elections. The reports demonstrated how the management of the electoral governance process and elections in the country has contravened the country's electoral law and international conventions and standards on elections.

Some of the deficits in the country's electoral history are:

- The abuse of the power of incumbency;
- Severe financial and logistical constraints on the work of electoral management bodies, necessitating dependence on state and local governments by field offices of the electoral bodies;
- Unreliability of voters' registers, and failure to deliver them on time, and receive claims and objections against them, in line with regulations;
- Manipulated nomination processes, at party level and by electoral bodies or their officials, including failure to receive nomination papers of opposition candidates or the requirement for prohibitive nomination fees and deposits by candidates;
- Stuffing of ballot boxes, either within the polling units or elsewhere;

- Multiple voting and voting by under-aged or unregistered/surrogate people;
- Falsification of results;
- Electoral violence, during electioneering campaigns and on voting day;
- The partisan role of the Police and security services to harass candidates and in encouraging or not taking action to prevent electoral malpractices before and during election; and
- Tardy and expensive adjudication processes, which encourage electoral impunity.

How to guarantee the independence of Nigeria's electoral management body has generally been a major contentious issue in the politics of electoral governance and electoral reform in the country. What complicates the design problem in Nigeria's case, when situated in a comparative African context, is that the logic of Nigeria's federal structure from time to time necessitates the creation of federal and unit-level electoral governance institutions and processes, and with them separate electoral management bodies at both levels. Among the challenges remain the system for appointing commissioners, the lack of a cast iron constitutional guarantee of independence from outside interference, and a history of military involvement in politics that still overshadows electoral management. The systems for funding the Electoral Commission and election activities continue to allow for executive interference in the election management process. Abuse of incumbency by monopolisation of state resources to ensure re-election is routine. Election dispute resolution is highly problematic and effectively encourages impunity, through excessive focus on procedural technicalities rather than substantive issues.

The 2008 Report of the Electoral Reform Committee, the latest in a long line of investigations of Nigeria's electoral problems, made comprehensive and important recommendations to address these multiple problems. While some important amendments were made to the 1999 Constitution and Electoral Act in 2010, in advance of the 2011 general elections, the great majority of these recommendations remained outstanding. The most important of these are:

- The reorganisation and repositioning of the Independent National Electoral Commission (the INEC), to ensure its autonomy and professionalism, through a process to be initiated by the National Judicial Council;
- The integration of the State Independent Electoral Commissions (SIECS) into the INEC to ensure their autonomy from state institutions and politics;
- Introduction and use of electronic voting machines for future elections;
- Modification of the electoral law to allow independent candidates to contest elections;
- modification of the first-past-the-post electoral system with proportional representation, based on closed party lists;
- Modification of the Electoral Act to ensure that 30% of the party lists under proportional representation are reserved for women, and 2.5% for physically challenged, without prejudice to their rights to compete for representation under the first-past-the-post system;

- The Electoral Act should shift the burden of proof from election petitioners to the INEC, and the rules of evidence formulated to achieve substantive justice rather than mere observance of technicalities;
- Resolution of all election petitions between returned candidates for elective executive and legislative positions in the general elections at all levels – federal, state and local government – are sworn in and assume office;
- Political parties that score at least 2.5% of National Assembly seats should be considered for cabinet level appointments, in order to dilute the zero-sum approach to politics and power, encouraged by the first-past-the-post electoral system; and
- The Electoral Act should guarantee the participation of civil society at all stages of the electoral process.

## B. Constitutional development, party politics and electoral history

### A short history of elections – and coups – in Nigeria<sup>175</sup>

From 1923, based on the 1922 Clifford Constitution, Nigerian representation in colonial legislative governance structures began when the ‘electoral principle was introduced with the concession that three unofficial representatives from Lagos and one from Calabar should be elected by residents of those towns who had minimum incomes of [one hundred pounds sterling]’.<sup>176</sup>

Further landmark constitutional advances and electoral reform under colonial rule took place between 1945 and 1960, and included the 1947 Richards Constitution, which established a Legislative Council consisting of representatives from the North and South of the country, and separate and devolved regional governance institutions in the East, North and West; and the 1951 Constitution, which introduced indirect elections to the three Regional Houses of Assembly (Eastern, Northern and Western) through a system of electoral col-

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175 See Balandier, Georges, *The Sociology of Black Africa: Social Dynamics in Central Africa*, Praeger, New York, 1970; Ballard, J.A., ‘The Administrative Origins of Nigerian Federalism’, *Journal of Modern African Studies*, 70, 1971; Ngou, C.M., ‘Elections and the Formation of the Independence Government’, in Peter P. Ekeh, Patrick Dele Cole and Gabriel O. Olusanya (eds), *Nigeria Since Independence: The First Twenty Five Years: Volume 5, Politics and Constitutions*, Heinemann, Ibadan, 1989; Olagunju, Tunji, Jinadu, Adele and Oyo-vbaire, Sam, *Transition to Democracy in Nigeria (1985–1993)*, Safari Books, St. Helier, Jersey, 1993; Watts, R.L., *New Federations: Experiment in the Commonwealth*, Oxford University Press, Oxford, 1966; Osaghae, Eghosa, *Crippled Giant: Nigeria Since Independence*, Hurst and Company, London, 1998; Dudley, Billy J., *Instability and Political Order: Politics and Crisis in Nigeria*, Ibadan University Press, Ibadan, 1973; Dudley, Billy J., *An Introduction to Nigerian Government and Politics*, Macmillan, London, 1982; Joseph, Richard, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic*, Cambridge University Press, Cambridge, 1987; Nnoli, Okwudiba, *Ethnic Politics in Nigeria*, Fourth Dimension Publishers, Enugu, 1978; Jinadu, L. Adele, ‘Federalism, the Consociational State and Ethnic Conflict in Nigeria’, *PUBLIUS: The Journal of Federalism*, Vol. 15, 1985; Jinadu, L. Adele, ‘Theoretical Issues in Nigerian Constitutions’, in Ekeh, Cole and Olusanya, op.cit.; Oyediran, Oyeleye, ‘The 1983 Elections’, in Ekeh, Cole and Olusanya, op.cit.

176 Sklar, Richard L., *Nigerian Political Parties: Power in an Emergent African Country*, NOK Publishers International, New York and Enugu, 1983, p.28.

leges. Further reforms led to the progressive introduction of universal adult suffrage in elections, starting with the 1950 Lagos Town Council elections, and expanding through the other regions by the time of the first federal elections in 1959.

The federal elections of 1959, held on the basis of a parliamentary system, were marred by violence and allegations of electoral malpractices. The Governor-General, Sir James Robertson, invited the Northern Peoples' Congress (NPC) led by Sir Abubakar Tafawa Balewa to form the federal government that would lead Nigeria to independence in 1960. Some saw the invitation as overhasty, given that the two other main parties – the Action Group (AG), under Obafemi Awolowo, and the National Council of Nigeria and the Cameroon's (NCNC, later to become the National Council of Nigerian Citizens), under Nnamdi Azikiwe – had also been negotiating the possible formation of a coalition government. The NPC was seen as being more amenable to the interests of the departing British. Nevertheless, in 1963 Nigeria adopted a new republican constitution, by which the President replaced the governor-general as executive head of state, and the regional governors heads of their respective regions.

The 1960 independence constitution and the 1963 republican constitution both provided for parliamentary government; each region also had its own constitution providing for a parliamentary system. Competitive electoral politics at both federal and regional levels during this period was thus linked to the ability of contending political parties to win and sustain parliamentary majorities, under the first-past-the-post electoral system.

The 1964 federal elections were preceded by outbreaks of large-scale violence and a major party political realignment, which grew out of a crisis within the ruling party in the Western Region, where two main factions of the AG confronted each other, and from major policy disagreements within the NPC/NCNC federal coalition government principally over allegations that the 1962/1963 census results had been manipulated to favour the Northern Region. The elections were boycotted in the Eastern Region, in some constituencies in the Western Region, and in four of the five constituencies in Lagos, where no voting took place. The country had a temporary reprieve from the crisis as a result of an agreement brokered by the Chief Justice of the Federation and the Chief Justice of Eastern Nigeria. Elections were subsequently held in March 1965 in constituencies in the Eastern Region, Western Region and Lagos where the 1964 federal elections were boycotted. Thereafter a broad-based federal government was formed of all the major parties except the Action Group.<sup>177</sup>

At the regional level, competitive electoral politics was no less controversial.<sup>178</sup> In the Northern Region, the 1961 regional elections were characterised in Tiv Division by violence that continued into 1964. In the Western Region a full-blown crisis developed between the two factions of the ruling Action Group. Chief Obafemi Awolowo, national leader of the AG,

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177 Dare, Leo, 'The 1964 Elections and the Collapse of the First Republic', in Ekeh, Cole and Olusanya, op.cit., p.117.

178 Anifowose, Remi, *Violence and Politics in Nigeria: The Tiv and Yoruba Experience*, MOK Publishers International, New York, 1982; Dudley, Billy J., *Instability and Political Order: Politics and Crisis in Nigeria*, University of Ibadan, Ibadan, Press, 1973; Post, K.W.J. and Vickers, M., *Structure and Conflict in Nigeria, 1960–1965*, Heinemann, Ibadan, 1973.

who had stepped down as regional premier in 1959 to contest the elections to the federal House of Representatives, was charged, convicted and imprisoned on charges of attempting to overthrow the federal government by force. The schism led to the declaration of a state of emergency in the region by the federal parliament in 1962. Fresh regional elections were held in 1965 amidst charges and counter-charges of electoral malpractices.<sup>179</sup>

The continued uncertainty that followed these political crises was one of the precipitating causes of the 15 January 1966 attempted military coup. Though officers loyal to the federal government aborted the coup before it could install a new government, the prime minister and the federal minister of finance were killed. The rump of the federal government asked the President of the Senate, who was acting head of state in the absence of the country's president who was abroad on leave, to hand over power to a military ruler. Maj-Gen. Johnson Aguiyi-Ironsi, the most senior Nigerian military officer, who apparently had no prior knowledge of and was assumed not to have been part of the coup plotters, was invited to assume power as military head of state and head of government.

In July 1966 another coup overthrew Aguiyi-Ironsi. His chief of staff, Gen. Yakubu Gowon, assumed power as head of state and government. The ensuing political instability, and the ethnic tensions it generated and exacerbated, led to the civil war which broke out in July 1967 and ended in January 1970, with the defeat of the proposed break-away state of Biafra. In July 1975 Gowon was overthrown in another coup, after he reneged on his commitment to hold new elections. General Murtala Mohammed replaced him. In February 1976, Mohammed, whose administration had put in place a democratic transition programme, including constitutional and electoral reform, was assassinated in a botched coup attempt. His second-in-command, General Olusegun Obasanjo, assumed power, as head of state and government.

The Obasanjo administration saw the transition programme, begun under General Murtala Mohammed, to a successful conclusion. Thus, the first set of military coups between 1966 and 1975, ended with a return to civilian rule on 1 October 1979. Obasanjo's administration enacted the 1979 Constitution, which replaced parliamentary with presidential government, under a consecutive two-term limit of four years each for the President and governors. As a prelude to the formal handing over to a democratically elected government, the Federal Electoral Commission (FEDECO), established in 1976, conducted general elections into the offices of president and governor at the federal and state levels respectively, and into federal and state legislatures.

The declaration of Alhaji Shehu Shagari of the National Party of Nigeria (NPN) as the winner of the first presidential elections in October 1979 was challenged in court on the grounds that, though he had a simple plurality of the votes cast in the elections, he fell short of a new 'spread factor' requirement to secure at least one-quarter of the votes cast

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179 See, in particular, Anifowose, Remi, *Violence and Politics in Nigeria: The Tiv and Yoruba Experience*, MOK Publishers International, New York, 1982; Dudley, Billy J., *Instability and Political Order: Politics and Crisis in Nigeria*, op.cit.; Ngou, C.M., 'Elections and the Formation of the Independence Government', in Ekeh, Cole and Olusanya, op.cit.; Post and Vickers, op.cit.

in at least two-thirds of the 19 states of the federation. The Supreme Court's decision interpreting the two-thirds requirement in favour of Alhaji Shehu Shagari was a controversial one, seen by some as being politically motivated to favour the military regime's preferred presidential candidate.

The FEDECO commissioners were sharply divided over the administration and conduct of the elections at the state and federal level. This paralysis and the crisis of confidence in the impartial and efficient conduct of the October 1983 general elections revived memories of the bitter and controversial federal elections of 1964, and the western regional elections of 1965.

The military struck again on the night of 31 December 1983 to 1 January 1984, and General Mohammadu Buhari took over power as military ruler. He was ousted in another military coup in August 1985, which saw General Ibrahim Babangida become military president. The Babangida administration set in motion an elaborate democratic transition process, which many saw as tortuous and deliberately designed to ensure his perpetuation in power.<sup>180</sup>

The democratic transition programme of the Babangida administration restructured the country's Electoral Commission, legislated and established a mandatory two-party system; adopted a new and only partially implemented constitution in 1989; and, between 1987 and 1993, conducted local government elections on a trial non-party basis in 1987 and later on a party basis, followed by competitive party-based elections for state governors and state legislators, and for the presidency and federal National Assembly.<sup>181</sup>

The democratic transition programmes between 1975 and 1979 and between 1985 and 1999 saw the establishment of constitutional review committees in 1975, 1987, and 1995, the convening of constituent assemblies in 1977, 1988, and 1996 and the empanelling of special committees on constitutional reform. The 'Political Bureau' appointed by General Babangida in 1986 made comprehensive recommendations on electoral reform in its 1987 report; and the 1991 *Report of the Judicial Commission into the Affairs of the Federal Electoral Commission (FEDECO) 1979–1983* (the Babalakin Report) also made extensive recommendations for electoral reform on the basis of its findings.

Despite these attempts to learn lessons from the political and electoral history of the country and accordingly to improve on the country's electoral governance, President Babangida's administration annulled the presidential elections of 12 June 1993, won by Chief Moshood Abiola of the Social Democratic Party (SDP), although they were adjudged the most credible elections ever conducted in the country.<sup>182</sup> The annulment precipitated yet another constitutional and political crisis, which General Babangida attempted to resolve by 'stepping aside' in favour of an Interim National Government (ING).

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180 Diamond, Kirk-Greene and Oyediran, *op.cit.*

181 Olagunju, Jinadu and Oyovbaire, *op.cit.*

182 See Oyovbaire, Sam and Olagunju, Tunji, *Crisis of Democratisation in Nigeria: Selected Speeches of IBB*, Volume III, Chapter 13, 'Expediency and the Path of Honour, Address to the Nation on the occasion of the annulment of the Presidential Election of 12 June, 1993 on 26 June, 1993', Malthouse Press Limited, Lagos, 1996; Osaghae, *op.cit.*, pp.251–256; Akinterinwa, Bola, 'The 1993 Presidential Elections Imbroglia', in Diamond, Kirk-Greene and Oyediran, *op.cit.*

In response to a challenge by Chief Abiola, the Lagos High Court ruled that the ING was 'illegal' since it was created after General Babangida, who signed the decree creating it into law, had already stepped aside and had no authority to sign. The court also ruled that the annulled presidential election be restored and effect given to the 1989 Constitution. The ING appealed the ruling. But before the appeal could be heard and determined, the ING was overthrown in yet another coup in November 1993 – which, however, has remained the last coup to date – that installed General Abacha, who was virtually the effective head of state under the ING, as military ruler.<sup>183</sup>

Though there were hopes that the Abacha administration would return Chief Abiola's electoral mandate to him, these hopes never materialised. Following his death in 1998, General Abdulsalam Abubakar succeeded him as military ruler. The Abdulsalam administration's transition programme adopted the 1999 Constitution, which still in force (though amended in 2010), and ended with competitive party elections, among newly registered political parties, at the local government level, gubernatorial and legislative elections at the state level, and presidential and legislative elections at the federal level, in May 1999. Elections have since been held every four years – in 2003 and 2007, with the next set of elections due in 2011. However, local government elections under the purview of State Independent Electoral Commissions were not held regularly as required after the ones conducted in 1999 under the military administration; in fact in a number of states, governors appointed local government caretaker committees after 2003, in contravention of the constitutional provision under Section 7(1) of the 1999 Constitution that 'the system of local government by democratically elected local government councils is under this constitution guaranteed.

Controversy trailed the conduct of the 2003 state and federal elections, with national and international observer and monitoring teams drawing attention to their substantially flawed nature.<sup>184</sup> Moreover, a concerted move was made in 2006–2007 to change the constitutional provision for a limit of two terms for the president and governors to allow incumbents, about to complete their constitutionally entrenched two consecutive terms of four years each in office, to run for an extra, 'elongated' term.<sup>185</sup>

The 2007 state and federal elections declined even more precipitously in their credibility and general acceptability than the previous elections since independence. Election Tribunals nullified not only some state and federal legislative seats, but also the election

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183 Osaghae, *op.cit.*, p.265.

184 European Commission, Nigeria, *European Union Mission Election Observation Mission Final Report*, Abuja: European Commission Mission in Nigeria, 2003; Human Rights Watch, *Nigeria's 2003 Elections: The Unacknowledged Violence*, New York, 2004; and Transition Monitoring Group, *Do Votes Count, Final Report of the 2003 General Elections*, Abuja, 2003; all cited in Jibrin Ibrahim, 'Elections and their implications for democratic consolidation in Nigeria', pp.32–52, in Jega, A., Wakili, H., and Zango, I. (eds), *Consolidation of Democracy in Nigeria: Challenges and Prospects*, Aminiu Kano Centre for Democratic Research and Training, Kanu, 2009

185 Ibrahim, Jibrin, 'Legislation and the Political Process: The Third Term Agenda and the Future of Nigerian Democracy', Seminar Paper, Centre for Democracy and Development, London, 21 April 2006; National Civil Society Coalition Against Third Term Agenda, 'Don't destroy our unity with third term agenda', Abuja, 2006.

of six governors (in Adamawa, Bayelsa, Cross River, Ekiti, Kogi, and Sokoto States). The presidential election was also (unsuccessfully) challenged in the Presidential Election Tribunal.

### **Ethnicity and federalism: Linking electoral reform to reform of the party system**

Ethnicity, as a major element of the country's social structure, has had a profound impact on the origins and developmental trajectory of competitive electoral and party politics, and on the theory and practice of federalism in the country.<sup>186</sup> The most obvious manifestation of this impact has been the close relationship between ethno-cultural associations and political parties. Each of the three major parties in the early years of independence – the AG, the NCNC and the NPC – substantially had their roots in an ethnic and regional power base, while ethnic minorities also formed their own political parties, with strong electoral support in the minority ethnic homelands in each of the three regions.<sup>187</sup> The national leaders of all the three major parties preferred to stay in their ethnic heartlands and became regional premiers, a choice that both derived from and reinforced the structure and dynamics of the country's federal system between 1954 and 1960 and its emphasis on regional autonomy, with the consequential weakening of the central government.<sup>188</sup>

Yet by 1960 the competitive logic of federal elections had impelled these major ethno-regional-based parties to extend their focus beyond their regional heartlands, to become competitive at the federal level. The result of this federalisation of the party system was a de facto two-party system cutting across ethno-communal lines at the federal level, and a single-dominant party system at the regional level, during the First Republic (1960–1966).

This federalisation of the party system contributed significantly to the political and constitutional crises of October–December 1965 that precipitated the fall of the First Republic. The military-brokered transitions in the country in 1975–1979 and 1985–1999 thus tried to discourage the formation of ethnic-based parties.

A significant objective of the electoral reforms embodied in the 1979 and 1989 constitutions and the consequential electoral laws was the reform of the party system, to:

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186 Jinadu, L. Adele, 'Federalism, the Consociational State, and Ethnic Conflict in Nigeria', in Nnoli, op. cit., p.15.

187 Chief Obafemi Awolowo's Action Group (AG) drew its major electoral support from the Yoruba stronghold of the Western Region; Nnamdi Azikiwe's National Council of Nigeria and the Cameroons (NCNC) had its major support base among the majority Igbo ethnic group in the Eastern Region, but also considerable electoral support among the Yoruba in the Western Region; and the Sardauna of Sokoto, Sir Ahmadu Bello's Northern People's Congress (NPC) strong electoral support came from the Hausa/Fulani in the Northern Region.

188 Watts, R.L., *New Federations: Experiment in the Commonwealth*, Oxford University Press, Oxford, 1966, p.340.

- Beginning with the 1989 Constitution, provide for internal democracy and accountability within the political parties, through requirements like party nomination primaries, and the establishment of a party bureaucracy, involving a distinction between career politicians and party technocrats;
- Ensure their national, i.e. country-wide presence and spread in membership and leadership composition at all levels;
- Grant the Electoral Commission the power and function of registering political associations as political parties, and to regulate and supervise their activities;
- Fund party activities through disbursements of state-appropriated conditional grants and the audit of party finances; and
- Rescind decrees that banned some discredited politicians from contesting.<sup>189</sup>

The role of the Electoral Commission under the 1985–1993 Babangida administration’s democratic transition programme in bringing about a reformed and more responsible party system and improved electoral governance was complemented by that assigned to two newly-created institutions: the Agency for Mass Mobilisation for Economic Recovery, Self-Reliance and Social Justice (MAMSER), and the Centre for Democratic Studies (CDS), both of which had, as their mandate, value reorientation congruent with democratic political culture.<sup>190</sup> The establishment of both institutions, like that of the Electoral Commission, arose out of the recommendations of the Political Bureau Report and the Babalakin Report, both of which pointed to the need to anchor and reinforce the structural and institutional reform of electoral governance and democracy generally in the country on the creation of a democratic political culture, in which citizens took their civic responsibility seriously and were mobilised to defend their electoral mandate and democracy.

These reforms have neither resolved the ethnic factor in Nigerian politics nor brought about internal democracy within the parties. Nor have they removed the prevalent political culture of impunity, which continues to sully the country’s electoral governance. However, the post-1987 as well as the post-1999 political parties have brought some break from the political parties of the First Republic: though ethnicity has been domesticated within them, there are now no ethnic-based political parties; while, however imperfectly or fraudulently conducted in practice, the mere requirement of party primaries has at least provided a law-based point of departure for the struggle within the parties for institutionalising and practising internal democracy.

The politics of ethnicity, combined with the demands and legal shortcuts of military rule, also contributed substantially to the increasing multiplication of Nigeria’s federal units. At independence, the country had three regions: Northern, Western and Eastern. As early as 1963, a Mid-West region was added, creating four regions, each with the same powers

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189 Olagunju, Jinadu, and Oyovbaire, op. cit., pp.196–225; Jinadu, L. Adele, ‘Electoral Administration in Africa: A Nigerian Case Study Under the Transition to Civil Rule Process’, in Adejumo, S., and Momoh, A. (eds), *The Political Economy of Nigeria Under Military Rule, 1984–1993*, SAPES Books, Harare, 1995.

190 Olagunju, Jinadu and Oyovbaire, op.cit.

as under the 1960 constitution. In May 1966, the Aguiyi-Ironsi military administration adopted the Unification Decree (No. 34 of 1966), which abolished the country's federal system and created a centralised government, a substantial grievance and factor in a coup against him in May 1966, which led to the emergence of the then Col. Yakubu Gowon as head of a new military regime. In May 1967, the Gowon administration divided the country into twelve states from the four regions in existence before the January 1966 coup, as a pre-emptive (but unsuccessful) measure to prevent or forestall the apparent preparation for the declaration of the secession of the Eastern Region from the Federation, by the military administration in the region. The military-brokered democratic transitions of the military administrations that followed the removal of General Gowon in July 1975 faced irresistible pressures to create more states to accommodate the growing demand of various self-identified ethnic groups for their own states; so that they too could benefit from the national revenues distributed to the various governments of the federation. In 1976, the number of states was increased to 19 by Gen. Murtala Mohamed; in 1987 to 21 and in 1991 to 30 by the Babangida administration; and in 1996 by Gen. Abacha to the current 36. The number of local government councils in the country rose from 305 in 1983 to 774 by 1999. Although the constitution of the federal republic entrenches the powers of the states in the concurrent list, the general understanding and convention over the years has been that what is neither in the federal exclusive nor in the concurrent list, i.e. the residual, falls within the legislative competence of the states. The individual states, unlike the original regions, no longer have their own separate constitutions to govern the exercise of those powers at state level.

Another way in which ethno-regionalism has manifested itself is the issue of rotating the tenure of federal political officeholders, up to and including the presidency, among the different zones of the country, through informal or formal arrangements within each political party. Though the zones have been differently configured at different times, the current division is usually among six ethno-political regions: North West, North Central, North East, South West, South East and South South. Zoning is intended to mitigate or attenuate the winner-takes-all effect of the first-past-the-post electoral system.<sup>191</sup>

### C. Nigeria's electoral management body: History, structure and independence

Since the 1960 Constitution, Nigeria's federal electoral management body has been established under the constitution, but with its name changed from Electoral Commission of the Federation under the 1960 Constitution, to Federal Electoral Commission under the 1979 Constitution, to National Electoral Commission under the partially implemented 1989 Constitution, to National Electoral Commission of Nigeria under the Abacha administration, and to the Independent National Electoral Commission under the current 1999 Constitution. Each change in name was apparently intended to distance each Electoral Com-

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191 Jinadu, L. Adele, 'Theoretical Issues in Nigerian Constitutions', in Ekeh, Cole and Olusanya, op.cit.

mission from the ill repute and controversy surrounding its predecessor and to create the impression that the successor Electoral Commission would be independent, and insulated from partisan control, especially by the government.

Table 1 outlines the names of the various federal electoral bodies, their chairmen and their chairmen's tenure since 1958.

*Table 1: Names of Nigerian electoral management bodies and their chairmen, 1958–2010*

<b>Name of electoral body</b>	<b>Chair</b>	<b>Chair's tenure</b>
Electoral Commission of Nigeria (ECN)	R.E. Wraith	1958–1959
Electoral Commission of the Federation	Eyo Esua	1964–1966
Federal Electoral Commission (FEDECO)	Chief Michael Ani	1976–1979
Federal Electoral Commission (FEDECO)	Hon. Justice V. Ovie–Whiskey	1980–1983
National Electoral Commission (NEC)	Prof. Eme Awa	1987–1989
National Electoral Commission (NEC)	Prof. Humphrey Nwosu	1989–1993
National Electoral Commission (NEC)	Prof. Okon Uya	1993
National Electoral Commission of Nigeria (NECON)	Chief Sumner Dagogo-Jack	1994–1998
Independent National Electoral Commission of Nigeria (INEC)	Hon. Justice Ephraim Akpata	1998–2000
Independent National Electoral Commission of Nigeria (INEC)	Dr Abel Guobadia	2000–2005
Independent National Electoral Commission of Nigeria (INEC)	Prof. Maurice Iwu	2005–2010
Independent National Electoral Commission of Nigeria (INEC)	Prof. Attahiru Jega	2010–present

Source: *Report of Nigeria's Electoral Reform Committee*, Abuja, Nigeria, 2008, p.98 with slight modification.

## Membership, chair and secretary

Since the 1960 Constitution, the membership of the Electoral Commission (EC) has changed several times. This is partly due to the increasing number of states in the federation, but also to changes in the provisions for appointing the members, as laid out in the country's constitutions and electoral laws.

The 1960 Constitution (Section 45[2]) provided for membership of the EC of the Federation to consist of a Chairman and a member drawn from each of the three regions of the Federation, all appointed by the Governor-General 'in accordance with the advice of the prime minister' who 'in relation to the appointment of a member representing a region, shall consult the Premier of that region' (though not, at that time, parliament).

The 1979 Constitution followed the principle of regional/state representation on the Electoral Commission, by stipulating that, in addition to the chair of the Federal Electoral Commission (FEDECO), one member shall come from each of the states of the federation (19 at the time the constitution came into force).<sup>192</sup> However, the same section also provided, unlike the 1960 Constitution, for:

- 'Not more than 5 additional members, who shall be appointed by the president on their merit';
- The president to consult with the newly created Council of State in constituting the membership of the commission; and
- The confirmation of the appointment of the members by the country's Senate.

This made for a total membership of 25, setting the stage for an unwieldy Electoral Commission, which as it turned out, was split along fractious partisan and parochial state lines almost to the point of immobilising it, by the time of the 1983 general elections. This was partly because some members of the commission defined their mandate and stewardship as primarily to defend their state interests or the interest of the political parties in power in their states, which might not, as was the case in a number of states, be the political parties in power at the federal level.<sup>193</sup>

One other institutional-structural problem was determining where executive authority within FEDECO resided – in the chairman or in the commission's secretary. The problem was created by the fact that the Electoral Act 1982 designated the commission's secretary as 'Executive Secretary and Chief Federal Electoral Officer', creating the impression that the secretary was the chief executive of FEDECO. The commissioners, therefore, saw him as the person responsible for the conduct of the elections. According to the *Report of the Judicial Commission into the Activities of FEDECO* (the Babalakin Report), the description of the secretary as the chief electoral officer of the federation 'create[d] the impression that some other authority [than FEDECO] had primary responsibility for the conduct of the elections, and that the role of FEDECO was limited to the supervision of this other authority. Indeed, virtually all the Electoral Commissioners who appeared before us took the view that they were not

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192 Third Schedule, Part I, C, Section 5(a–c).

193 Jinadu, Olagunju & Oyovbaire, op.cit., p.152.

responsible for the conduct of the 1983 elections. Their role, they argued, was to 'oversee' and to 'supervise'.<sup>194</sup> However, the Report concluded, 'clearly, the constitution puts the responsibility for organising and conducting elections squarely on the Electoral Commission'.<sup>195</sup>

The law establishing the National Electoral Commission in 1987 (Decree No. 23 of 1987, amended by Decree No. 8 of 1989), the partially implemented 1989 Constitution and the 1999 Constitution tried to resolve these inherited institutional-structural problems of the Electoral Commission as follows. First, Decree No 23 of 1987, the 1989 and the 1999 constitutions reduced the number of members of the commission, making it more compact, as follows: including the chairman in both cases, 9 members under Decree 23 of 1987 and the 1989 Constitution,<sup>196</sup> and 13 members under the 1999 Constitution.<sup>197</sup> In effect, this meant jettisoning the principle of state representation and replacing it with what turned out, more by convention than by statutory requirement, to be an ethno-regional zonal representation as the basis for the composition of the commission. In other words, since the establishment of the National Electoral Commission in 1987, the composition of the membership of the country's Electoral Commission has reflected the country's bi-polar North/South split, which is further sometimes disaggregated into a six-polar geopolitical zonal diversity: North Central, North East, North West, South East, South South, and South West.

Secondly, the law establishing the National Electoral Commission in 1987 (Decree No. 23 of 1987, amended by Decree No 8 of 1989) made it clear that the chairman of the commission was both the chief executive and the chief accounting officer of the commission. This position has since been modified by the Independent Electoral Commission (Establishment) Act 1999, which in Section 10(1) provides that the commission's secretary shall be 'the accounting officer of the Commission', while Section 2(1) stipulates that the chairman of the commission shall be the 'Chief Executive of the Commission'.<sup>198</sup> Nonetheless, the commission's secretary remains a powerful figure in the Commission. The rule has been for the federal government to appoint the commission's secretary, usually a senior civil servant of at least the level of director on secondment from the federal bureaucracy. Skilful navigation of the power relationship between the chairman and secretary of the Commission has become

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194 *Report of the Judicial Commission into the Activities of FEDECO*, 1991, pp.98–99.

195 *Ibid.*, p.109.

196 1989 Constitution, Third Schedule, Part I, H, Section 17.

197 1999 Constitution, Third Schedule, Part I, F, Section 14(1) (a–b).

198 The 1999 Constitution, in listing the composition of the INEC under Section F 14-(1) of the Third Schedule (Federal Executive Bodies established by Section 153 of the constitution), makes no reference to the office of Secretary to the Commission. The Electoral Act 2006 (Part II), in providing for the Staff of the Commission, stipulates that 'there shall be a Secretary to the Commission who shall be appointed by the Commission' (Section 9-[1] [a]); and that 'subject to the general direction of the Commission, the Secretary shall be:

(a) responsible for keeping the proper records of the proceedings of the Commission;

(b) the head of the Commission's secretariat and be responsible to the for the administration thereof; and

(c) responsible for the direction and control all other employees of the Commission with the approval of the Commission'. (Section 9[2] [a–c]).

However, the 1999 Constitution and the Electoral Act 2006, unlike the Independent National Electoral Commission (Establishment) Act 1999, are silent on who is the Commission's Accounting Officer. In the extant Civil Service Reform of the Federation, the Minister is the political head of a ministry, while the Permanent Secretary is the ministry's chief accounting officer.

a central factor in the management and organisation of the country's Electoral Commission. Tension between the two officers was a major reason for the near paralysis of the activities of the National Electoral Commission and its eventual dissolution in 1989.

Table 2 (pages 122–123) provides a comparative synopsis of constitutional provisions on the mode of appointment, tenure and removal of members of Nigeria's electoral management bodies since 1958.

### **Federal and state-level electoral management**

The federal system of government in Nigeria provides the basis for the creation of federal and unit-level electoral, i.e. regional governance institutions and processes in the country. This explains the general practice of the establishment of two types of electoral body, a federal electoral body and a separate electoral body in each region/state. But this duplication has not always been the practice, in that it has depended since 1960 on whether elections are on the federal exclusive or on the concurrent or the residual legislative list. For example, regional electoral bodies predated the statutory establishment of a federal electoral body in 1958. Thereafter the country has, in effect, alternated between having:

- A federal electoral management body to conduct federal level general elections and regional electoral management bodies to conduct regional and local government elections (1960–1966, under the 1960 and 1963 constitutions);
- A federal electoral management body to conduct both federal and state general elections, and a state electoral management body to conduct only local government council elections (1979–1983, and since 1999, under the 1979 and 1999 constitutions respectively); and
- One electoral management body to conduct federal and state general elections, and local government council elections, as was the case during the ill-fated and aborted democratic transition of 1985–1993, under the partially implemented 1989 constitution.

The 1999 Constitution that is now in force reverted to the status quo under the 1979 Constitution by providing for federal and state Electoral Commissions. Thus, in line with the 1979 Constitution, the 1999 Constitution includes in the exclusive (federal) legislative list the management of elections to executive and legislative branch offices at federal and state levels only, reserving elections to local government councils for the residual (state) legislative list. The 1999 Constitution also reintroduced federal and unit level electoral management bodies in the country, establishing:

- A federal electoral body, the Independent National Electoral Commission (the INEC), to conduct federal and state general elections;<sup>199</sup> and
- State-independent Electoral Commissions (SIECs) 'to organise, undertake and supervise' all local government elections in the state and to advise the INEC on 'the

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<sup>199</sup> Third Schedule, Part 1 F, Section 15(a).

Table 2: Comparative constitutional provisions on the mode of appointment of members of Nigeria's electoral management bodies since 1958

Constitutional provision	Name	No. of members
<b>1960 Constitution</b> Section 45 (repeated in relevant provisions 1963 Constitution)	Electoral Commission of the Federation	'Chief Electoral Commissioner, who shall be Chairman, and a member representing each territory.' Section 45(2) (a-b)
<b>1979 Constitution</b> Sections 140-145	Federal Electoral Commission (FEDECO)	'(a) a Chairman, who shall be appointed from among the following members specified' below: 'one member from each of the States of the Federation' and 'not more than 5 additional members who shall be appointed on their merit'. 1979 Constitution, Third Schedule, Part I, C, Section 5(a-c)
<b>1989 Constitution</b> (partially implemented), Sections 151-156 (preceded by Decree No. 23 of 1987, amended by Decree No. 9 of 1989, establishing the National Electoral Commission)  <b>Note:</b> Name of the country's EMB changed from National Electoral Commission (NEC) to National Electoral Commission of Nigeria (NECON) in 1994 to mark a break from the controversy surrounding the NEC over the annulled presidential elections of June 12 1993. But the law establishing the NEC, Decree No. 23 1987 as amended by Decree No. 9 of 1989, was apparently not abrogated.	National Electoral Commission (NEC)	A Chief National Electoral Commissioner and 8 other members (1989 Constitution, Third Schedule, Part I, H, Section 17); in addition, 'on the recommendation of, and in order to assist the Commission', a State Electoral Commissioner for each State of the Federation. 1989 Constitution, Third Schedule, Part I, H, Section 19
<b>1999 Constitution</b> Sections 153-161	Independent National Electoral Commission (INEC)	'(a) a Chairman, who shall be the Chief Electoral Commissioner; and (b) twelve other members, who shall be persons of unquestionable integrity and not be less than 50 years and forty years of age, respectively'. 1999 Constitution, Third Schedule, Part 1, F, Section 14(1) (a) (b). In addition, 'there shall be for each State of the Federation and the Federal Capital territory, Abuja, a resident Electoral Commissioner'.

Who appoints?	Tenure	Removal	Independence
Governor-General, 'acting in accordance with the advice of the Prime Minister', who 'in relation to the appointment of the member...representing a Region... shall consult the Premier of that Region'. Section 45(4)	5 years from date of his appointment (Section 45(6)(a); 'or if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment as such'. Section 45(6)(b)). Section 152(1) provides that a member 'may, if qualified, again be reappointed. In accordance with the provisions of this Constitution'.	'A member...shall not be removed from office except in accordance with the provisions of this section.' Section 45(8)	'In the exercise of its functions under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority.' Section 45(9)
President, subject to (a) the provisions of the Constitution, (b) confirmation by the Senate. Section 141(1); and (c) 141(3).	Same as under the 1960 Constitution. (See, 1979 Constitution, Sections 142(1)(c) and 142(2).)	President, 'acting on an address supported by two-thirds majority of the Senate, praying that [the member] be so removed for inability to discharge the functions of the office (whether arising from infirmity of mind or body or any other cause) or for misconduct'. Section 144(1-2)	Same as under the 1960 Constitution. (See, 1979 Constitution, Section 145 (1).)
President (1989 Constitution, Third Schedule, Part I, H, Section 18; in the case of State Electoral Commissioners, President appoints but on the recommendation of the National Electoral Commission. (1989 Constitution, Third Schedule, Part I, H, Section 19)	5 years from date of appointment (1989 Constitution, Section 153(1)(c)). No tenure stipulated for State Electoral Commissioners by the 1989 Constitution.	Same provision applies as under 1979 Constitution (1989 Constitution, Section 155(1-2) for members of the National Electoral Commission; no specified for State Electoral Commissioners.	'In exercising its power to make any appointment or to exercise disciplinary control over persons, [the National Electoral Commission] shall not be subject to the direction or control of any other authority or person.' 1989 Constitution, Section 156 (1)
President, subject to (a) the provisions of the 1999 Constitution; (b) confirmation of the Senate (Section 154(1)); and (c) consultation with the Council of State (Section 154(3)). Appointment of Resident Electoral Commissioners for each state of the Federation and the Federal Capital Territory, Abuja, is by the President and is neither subject to confirmation by the Senate nor consultation with the Council of State.	Same under the 1979 Constitution. (See, Section 155 (1)(c) and Section 155(2).) However, 'no person shall be qualified for appointment...if he has been re-appointed for a further term as a member' of the Commission. (See, Section 156(3).)	Same under the 1999 Constitution. See Section 157(1). The 1999 Constitution defines 'misconduct' to mean 'a breach of the Oath of Allegiance or oath of office of a member or a breach of the provisions of this Constitution or bribery or corruption or false declaration of assets and liabilities or conviction for treason or treasonable felony'. Section 161(d)	'In exercising its power to make appointments or to exercise disciplinary control over persons, the Independent National Electoral Commission shall not be subject to the direction or control of any other authority or person.' Section 158(1)

compilation of and the register of voters' as 'applicable to local government elections in the State'.<sup>200</sup>

## **Powers and functions of the Electoral Commission**

Under the 1999 constitution, the INEC is in charge of organising elections for the offices of president and vice-president, governor and deputy governor of a state, and members of the federal Senate and House of Representatives and the houses of assembly of each state. It registers political parties, adopts rules to govern their campaigns and monitors their organisation and operation, including by auditing and publishing reports on their finances; it compiles the voters' register, and carries out any other functions conferred upon it by an act of the National Assembly.<sup>201</sup>

This broad range of responsibilities is given greater detail by the Electoral Act that has governed each set of elections. For the most part, the powers set out in the Electoral Acts since 1999 have remained similar, setting out the detailed procedures for voter registration, production of voters' cards, procedures on the election day, the powers of the INEC to register political parties, the nature of electoral offences, procedures for electoral disputes, etc. In 2010 an Act was adopted for the 2011 elections, after some controversy, to replace the 2006 Electoral Act that had governed the 2007 elections, after some controversy and debate over necessary reforms. Important changes brought in by the act are discussed below, in the section on the post-1999 debate on electoral governance in Nigeria; but for the most part its provisions were similar to those in previous legislation.<sup>202</sup>

## **Independence of the Electoral Commission**

The issue of the independence of the country's Electoral Commission has always been a critical electoral governance problem in the country. Typically, two broad approaches have been reflected in Nigerian constitutions and electoral laws since 1960:

- Insulating the operational activities of the Electoral Commission, including its financing and budget, from undue interference from public authorities, political parties and individuals; and
- Protecting the process for appointing and removing the members of the Electoral Commission.

*Insulating operational activities of the Electoral Commission from external direction*

Nigerian constitutions since 1960 have contained provisions relating to the autonomy of the Electoral Commission, under the heading 'Independence of certain bodies'. There have been two variations of these provisions. The first variation is that provided by the 1960 Con-

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200 Third Schedule, Part II, B Section 4(a–b).

201 Section 153(f) and Part I of the Third Schedule to the 1999 Constitution.

202 Please note that it has not been possible to update every section of this report to reflect the provisions of the 2010 Electoral Act.

stitution, Section 40(9) and the 1979 Constitution, Section 145 (1). The relevant provision under the 1960 Constitution Section 40(9), stipulated that:

In the exercise of its functions under this constitution, the Commission shall not be subject to the direction or control of any other person or authority.

The second variation is provided by the 1989 Constitution Section 156(10), and the 1999 Constitution Section 158(1). The 1999 Constitution provides that:

In exercising its power to make appointments, or to exercise disciplinary control over persons, the...Independent National Electoral Commission shall not be subject to the direction or control of any other authority or person.

The difference between the two variations is significant: the first covers the ‘functions’ of the Commission, as enumerated in the constitution, whereas the second variation insulates only the appointment of its staff and its disciplinary powers over them. The clear imputation of the second variation is that in the exercise of its functions other than those relating to appointment and discipline of its staff, the Commission may be subject to ‘the direction or control of any other authority or person’.

Underscoring the implications of this different formulation for the autonomy of the electoral body, Dr Abel Guobadia, who chaired the INEC between 2000 and 2005, has observed that ‘The [1999] Constitution granted the Commission power and independence over its employees but fell short of giving similar independence in the discharge of its functions’, in contrast to the INEC, Act No. 17 of 1998, which ‘provided that the Commission shall not, in discharge of its functions, be subject to the control of any other authority or persons’.<sup>203</sup> In 2010, the 1999 Constitution was amended to provide that INEC’s power to regulate its own procedures ‘shall not be subject to the approval or control of the President’, which, though not as broad as the previous wording, addressed some of these concerns.<sup>204</sup>

The need for the National Electoral Commission (NEC), established in August 1987 to have its own self-recruited bureaucracy, whose loyalty it could command, deploy operationally as it liked and over whom it would exercise disciplinary powers, led to a successful request from the commission in 1989 to be recognised as a ‘scheduled organisation’ under the country’s Pensions Act. This was a significant development in that it involved making a distinction between the commission as a corporate entity with its own legal status, and the Electoral Commissioners who are political appointees with fixed term tenure. This status continues under the present INEC.

Guobadia, however, raises serious questions about the propriety of the federal government directing the Electoral Commission to apply existing standard administrative and financial operating procedures in the civil service to the commission’s own operations, as this tended to make for ‘indirect control of the Commission’s activities by the

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203 Guobadia, A.I., *Reflections of a Nigerian Electoral Umpire*, 2009, p.18.

204 Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, amending Section 160 of the 1999 Constitution.

government'.<sup>205</sup> In relation to procurement, for example, the fact that the Electoral Commission is responsible to a supervising ministry or oversight agency creates the impression that the Electoral Commission is an extra-ministerial agency or a department of the supervising authority, with its autonomy diminished to that extent. Guobadia states that 'the Commission found the involvement of non-staff of the Commission in the award of its contracts to be unacceptable'. This, according to him, was because 'the government in power becomes privy to the award of contracts and payment for the procurement of balloting instruments and other sensitive equipment and materials to be used at elections. Elections in which personnel of the said government had tangible interests obviously tainted the perception of neutrality'.<sup>206</sup> Since the procurement process was thus effectively under 'the direction or control of any other authority or person,' the Commission's autonomy was compromised. To this must be added Guobadia's discussion of the deliberate and mischievous use of bureaucratic red tape to frustrate the operations of the Electoral Commission, what he refers to as 'this pattern of parsimony and delay in the release of budgeted funds'.<sup>207</sup>

The legal and institutional framework governing Electoral Commissions since the 1979 Constitution was laid by military-brokered transition programmes under the military administrations of Muhammed/Obasanjo (1975–1979), Babangida (1985–1993) and Abubakar (1998–1999). In discussing the autonomy of the commission, one must therefore bear in mind the character of military rule, specifically the absence of a legislature and the location of its functional equivalent in the Armed Forces Ruling Council (AFRC). The enactment of the law establishing the Electoral Commission and the electoral law, under the transition, therefore, devolved on the AFRC, although constitution review committees and constituent assemblies set up or elected under these military administrations did much of the groundwork. To this must be added the problem of who or what constitutes 'government,' when various groups and individuals within government might be pursuing their own agenda and trying to manipulate the commission to serve or achieve their agenda.

For example, under the Babangida administration, the 1987 decree establishing the NEC empowered the commission to recognise political associations seeking registration as political parties. Yet early in 1989 (even before the premature removal of all the commissioners), this power was taken away from the commission, and given by decree to the AFRC. Then, when the transition programme was revised, a Transition Committee headed by a military officer was created to coordinate aspects of the transition programme, with the attendant confusion over the transmission line between the federal government and the commission.

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205 Guobadia, *op.cit.*, p.18.

206 *Ibid.*, p.19.

207 *Ibid.*, p.25.

As Eme Awa, chairman of the NEC, would later put it, ‘the Transition Committee ... seemed to function like a holding company, with NEC tucked away into one corner’.<sup>208</sup>

The 1999 Constitution was also compacted under military rule, and remains something of an anathema under democratic civilian rule, in view of Section 158(1) of the constitution which, except in relation to ‘exercising its power to make appointments or to exercise disciplinary control over persons,’ effectively allows for the Commission to be subject to the direction of another authority or person.

Nigeria’s federal electoral management bodies have also had to rely at different times on state governments and state Electoral Commissions for logistical and administrative assistance. In this respect, drawing on his experience as a member of Nigeria’s National Electoral Commission, this author has observed that, ‘...the fact of underdevelopment, with its accompanying structural manifestations as well as the heavy burden of the geographical and topographical problems of access posed by the country’s immense size means that [the National Electoral Commission] cannot be as autonomous as it would wish to be’.<sup>209</sup> This dependence on logistical and administrative support from state governments under civilian administrations since 1999 allows state governors and the governing parties at state level to gain unfair electoral advantage by abusing the power of incumbency through financial inducements to state resident Electoral Commissioners, their local government electoral officers and their ward electoral officers.

#### *Appointment of Electoral Commissioners*

Generally, the power to appoint members of the country’s Electoral Commission lies with the head of state, although the power of appointment is subject to a number of other constitutional provisions.

The 1960 Constitution (Section 45[3]) vested the appointment of members of the Electoral Commission of the Federation in the Governor-General, ‘acting in accordance with the advice of the Prime Minister,’ who is required to consult the premier of each Region in respect of the appointment of a member of the commission from the region. The 1979 and 1999 Constitutions improved on this provision by strengthening the consultation and appointment process, giving the Council of State<sup>210</sup> a consultative role and the Senate the power to approve the appointment of members of the Electoral Commission.<sup>211</sup>

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208 Awa, Ewe, ‘Electoral Administration in the Early Administration’, in Diamond, Kirk-Green and Oyediran, op.cit., p. 130.

209 Jinadu, L. Adele, ‘Political Science, Elections and Democratic Transitions in Nigeria’, in Jega, A., and Ibeanu, O. (eds), *Elections and The Future of Democracy in Nigeria*, Nigerian Political Science Association, Abuja, 2007, p.37.

210 Council of State comprises the President, the Vice-President, all former Presidents of the Federation and all former Heads of the Government of the Federation, all former Chief Justices of Nigeria, who are citizens of Nigeria, the President of the Senate, the Speaker of the House of Representatives, all the Governors of the States of the Federation, the Attorney-General of the Federation, and one person from each state appointed by the Council of Chiefs of the State from among themselves.

211 1979 Constitution, Section 141; 1999 Constitution Section 154.

The partially implemented 1989 Constitution differed from the 1979 Constitution and the 1999 Constitution, in that it did not subject the appointing power of the President either to consultation with the Council of State or to confirmation by the Senate. However, the National Electoral Commission Decree of 1987, Decree No. 23 of 1987 provided for the appointment of the Chairman and members of the Commission by the National Council of States, on the nomination of the President.

A controversy in recent years surrounding the appointment of the Chairman and members of the electoral body has been the requisite qualifications for membership of the Commission. The 1999 Constitution (Section 156[1] [a]) provided, among other provisions, that 'No person shall be qualified for appointment [to the Independent Electoral Commission] if he is not qualified or if he is disqualified for election as a member of the House of Representatives'. Although this particular provision was contained in the 1979 Constitution and the 1989 Constitution (Section 154[1] [a]), the 1999 Constitution (Section 65[2] [b]), unlike these other constitutions, specifically listed as qualification for election to the Senate and the House of Representatives, that the candidate for election must not only be 'a member of a political party but also be sponsored by that party'.

This provision, some opposition parties have alleged at various times, has been used by the current ruling party at the federal level, the People's Democratic Party (PDP), to undermine the independence of the Independent National Electoral Commission through the appointment of PDP members as national Electoral Commissioners. In making the allegation, no particular member of the commission was named or identified as a card-carrying member of the PDP. However, under the administration of President Goodluck Jonathan, installed following the death in office of President Umaru Yar-Adua in early 2010, two nominated national Electoral Commissioners of the INEC were dropped in June 2010, before their confirmation by the Senate, after public protest that they were PDP members. Amendments to the constitution in 2010 then removed the requirement that members of the INEC be members of a political party.<sup>212</sup>

The president's appointment of the chairman and members of the country's electoral body has generally gone unchallenged in the courts. However, the appointment of Justice V. Ovie-Whiskey as Chairman of FEDECO in June 1980 by President Shehu Shagari was challenged before the High Court on grounds that he was in the employment of the former Bendel State (as chief judge). The court held that he would have been disqualified, except that he had retired from service before the case was heard, and thus did not give the injunction requested.<sup>213</sup>

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212 Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, amending Section 156 of the 1999 Constitution.

213 *Adesanya v President of Nigeria and Hon. Ovie-Whiskey*, in Fawehinmi, Gani (ed), *Nigerian Constitutional Law Reports*, Vol. 1, 1981, p.249; see also Susu, B.A., 'Constitutional Litigation in Nigeria', CJC Press (Nigeria) Limited, Lagos, p.104: 'In *Senator Abraham Adesanya v President of the Federal Republic of Nigeria*, the Senator was challenging the appointment of Justice Ovie-Whiskey as Chairman of the Federal Election Commission by the President. Although this issue was abandoned with the raising of the question of locus standi at the Court of Appeal, the question of unconstitutionality was decided upon by the High Court. Unfortunately, at the Court of Appeal, the challenger was found without the locus standi to initiate the challenge and the question of the unconstitutionality of the appointment was not taken up by the Supreme Court'.

### *Removal of Electoral Commissioners*

The 1979, 1989 and 1999 Constitutions spell out conditions under which members of the electoral bodies shall be removed from office. The relevant provisions typically empower the president, 'acting on an address supported by two-thirds majority of the Senate, praying that [a member of the Electoral Commission] be so removed for inability to discharge the functions of the office (whether arising from infirmity of the mind or body or any other cause) or for misconduct'.<sup>214</sup> The 1999 Constitution defines 'misconduct' to mean 'a breach of the Oath of Allegiance of a member or a breach of the provisions of [the] Constitution or bribery or corruption or false declaration of assets and liabilities or conviction for treason or treasonable felony'.<sup>215</sup> These provisions, replicate provisions for the removal of certain categories of judicial officers from office.<sup>216</sup>

In practice, the provisions have never been applied against members of the country's Electoral Commission. However, there was a case of a member of the Electoral Commission, under the Abel Guobadia-led INEC (2000–2005), who was forced/had to resign over allegations of 'bribery or corruption,' involving legal services which she had contracted on behalf of the commission with a consortium of lawyers. Much earlier, the Babangida administration had twice removed the entire membership of the National Electoral Commission under the chairmanship of Professor Eme Awa in 1989, and under the chairmanship of Humphrey Nwosu in 1993 before their tenures had lapsed, in both cases without due process or reasons given for it.

Much more recently, Acting President Goodluck Jonathan wrote a letter on 28 April 2010 to the INEC Chairman Maurice Iwu, asking him to proceed on a 'disengagement leave,' preparatory to the end of his first five-year tenure as Chairman on 12 June 2010. He was instructed to hand-over to the 'most senior' Electoral Commissioner, pending the appointment of a new chairman for the Electoral Commission.<sup>217</sup> This was in spite of the fact that the country's constitution sets clear rules for removing the chair of the INEC, raising questions about whether the practice in the civil service, where civil servants could be directed to proceed on terminal leave before their retirement, was applicable to the case of members of the Electoral Commission. But, if placed in the context of Section 158(1) of the 1999 Constitution, which provides that the commission shall be subject to direction by 'any person or authority,' except in respect of the appointment and discipline of its staff, it would seem that the president had the power or authority to give such a direction to the Commission's Chairman. Whether such a 'direction' is in line with the spirit of the constitution regarding the independence of the commission is another matter.

However, the simpler means of removing Electoral Commissioners is the president's ability under the constitution not to renew the appointment of members of the commission

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214 1979 Constitution, Section 144(1–2); 1989 Constitution, Section 155(1); and 1999 Constitution, Section 157(1).

215 1999 Constitution, Section 161(D).

216 See 1999 Constitution, Section 292(1)(a).

217 See Abubakar, Mohammed, 'Iwu: Troubled tenure, shabby exit', *The Guardian*, Lagos, 4 May 2010, p.8.

who are qualified for a non-renewable second term. This means that a president may refuse to renew the appointment of an Electoral Commissioner who is not 'playing ball,' and is conscientious in playing a non-partisan role. A former chairman of the Independent National Electoral Commission, Dr Abel Guobadia, has pointed to a negative impact of the presidential use of the power of non-renewal on the Electoral Commission, as was the case with the replacement of all but two members of the commission whose tenure had expired in mid-August 2003. The result, according to Guobadia, was that 'the Commission in September 2003, with ten new members, was a different Commission from the earlier Commission,' which had been working on and had intimate knowledge of on-going reform efforts within the Commission.<sup>218</sup> Thus, 'there was a loss of momentum as a result of the large turn-over of the membership. Valuable time was lost in allowing the new members who now constituted the majority to settle down and learn on the job'. For this reason, he counsels 'a permanent body with as large a membership as the Commission, ought not to ... have such a large membership turn-over at any point in time. The Commission should always have a sizeable number of members who are abreast with current activities and development within the Commission'.<sup>219</sup> A solution to this problem might be, as is the case in Ghana, to extend the tenure of Electoral Commissioners to retirement age.

## D. Funding of elections in Nigeria

The 2008 Electoral Reform Committee (ERC) sums up the funding history of the country's electoral bodies as follows:

Generally, the nation's electoral bodies have been poorly funded, the funding problem has been determined first and foremost by the state of the economy, the interest of the state, and those of its ruling class, and on the realities of what is at stake (power), and its associated benefits.<sup>220</sup>

The funding of elections must take into account not only the cost of funding the Electoral Commission itself, but also monies expended by other agencies for electoral purposes.

### Budget numbers

Table 3 summarises the budgetary and extra-budgetary allocations to the National Electoral Commission (from 1987–1991) and Table 4 summarises the approved budget of the INEC for 2009 and 2010 fiscal years.

If we take the 1991 figure of N 282 164 160 budgeted for elections (gubernatorial, mainly) as illustration, at the then current exchange rate of about US\$ 1=N 8.04, this comes to about US\$ 35 million, which translates to roughly US\$ 0.50 as the unit cost per voter, based on

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218 Guobadia, Abel I., *Reflections of a Nigerian Electoral Umpire*, 2009, p.128.

219 Ibid.

220 Electoral Reform Committee (ERC), *Report of the Electoral Reform Committee*, Volume 1, Main Report, Abuja. December, Abuja 2008, p.99.

Table 3: Summary of budgetary & extraordinary allocation to NEC 1987–1991

Year	Recurrent Subvention (Naira*)	Capital Subvention (Naira)	Voters Registration (Naira)	Elections Subvention (Naira)	States & Local Government (Naira)	NEC Local Government Buildings (Naira)	Grants to Political Parties (Naira)	Total Naira
1987	14 500 000.00			200 000 000.00	26 477 086.00			240 977 086.00
1988	42 500 000.00	15 400 000.00			7 13 079.00			65 013 079.00
1989	40 000 000.00	95 448 628.00	43 700 000.00	277 919 204.00	29 14 344.00			486 182 176.00
1990	69 000 000.00	59 499 265.00		86 165 950.00	3 091 155.00	100 000 000.00	539 980 656.20	857 737 026.00
1991	102 000 000.00	80 783 984.00	171 005 000.00	282 164 160.00	5 055 520.00	79 000 000.00	200 000 000.00	920 008 664.00
Total	268 000 000.00	251 131 877.00	214 705 000.00	846 249 314.00	70 851 184.00	179 000 000.00	739 980 656.20	2 569 918 031.20

Source: Tunji Olagunju, Adele Jinadu & Sam Oyovbaire, *Transition to Democracy in Nigeria*, Addendum A.

\*US\$1=N4.7 (1987); US\$1=N4.54 (1988); US\$1=N7.40 (1989); US\$1=N7.40; US\$1=N8.04 (1991).

Table 4: Approved budget of INEC, 2009 and 2010

Fiscal Year	Personnel (Naira)*	Main Overhead (Naira)	Electoral Recurrent (Naira)	Capital (Naira)	Total (Naira)
2009	5 841 761 025.44	2 998 837 056	2 500 000 000	5 081 380 000	16 421 978 081
2010	10 939 834 261.06	2 396 355 068	25 966 119 866	10 910 395 500	50 212 704 695
Total	16 781 595 286.44	5 395 192 124	28 466 119 866	15 991 775 500	66 634 682 776.44

Source: Privileged. \*US\$ 1 = N 148 (Official Naira-US\$ rate, August 2010).

72 million registered voters. The election expenses for 2003 amounted to N 25.143 billion, and for 2007 N 34.012 billion.<sup>221</sup> If we take the 2007 figure and a conservative exchange rate of US\$ 1 = N 155 this comes to US\$ 219.4 million, which on the basis of 60 million registered voters in 2007 gives US\$ 3.7 for the unit cost per voter.

## Legal framework

The constitution and the Electoral Act adopted for each set of elections provide for the core funding of the commission's operations, including elections, by the government and for 'aids [and] grants...to carry out its functions,' from other sources than the federal government. Pursuant to Section 81(1) of the 1999 Constitution, the Electoral Act 2006 required at Section 6(1) that 'the Commission shall submit to the Federal Ministry of Finance not later than 31 August in each financial year an estimate of its expenditure and income (including payments to the Independent Electoral Commission) during the next succeeding financial year'. In the case of the members of the INEC and the SIECs, Sections 84(1) and 124(1) of the 1999 Constitution require that they 'shall be paid such remuneration, salaries and allowances as may be prescribed by the National Assembly [by a House of Assembly in the case of SIECs], but not exceeding the amount as shall have been determined by the Revenue Mobilisation Allocation and Fiscal Commission'; while Section 84(2) [Section 124(2) for SIECs] requires that such 'remuneration, salaries and allowances,' payable to them 'shall be a charge upon the Consolidated Revenue Fund of the Federation'. In terms of administration, the Electoral Act 2006 provided for the establishment of 'a fund to be known as Independent National Electoral Commission Fund' into which shall be paid any funds for carrying out its functions, whether from the federal government, other grants, or interest from investments, and sets the rules under which disbursements may be made from the fund (Sections 3-5).

Given the constitutional and legal framework for the core funding of the operations of the electoral body, outlined above, it is understandable why Abel Guobadia, Chairman of the INEC (2000-2005), would complain about 'indirect control of the Commission's activities by the government,' and of a 'pattern of parsimony and delay in the release of budgeted funds'. This is possible because the budget of the Commission is typically defended before, and vetted/reviewed by the Federal Ministry of Finance, as required under the Electoral Act 2006 (Section 6), and thereafter incorporated as part of the estimates of the revenues and expenditure of the Federation for the following financial year, which the President, under the 1999 Constitution (Section 84[1]) 'shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year'.

The annual budget exercise and debate on the Appropriation Bill in both houses of the National Assembly also provide the opportunity for interference in the work of the Commission by the federal legislature and the federal bureaucracy, especially in areas of contract award and procurement for elections and related operations of the commission.

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221 Nwankwo, C., Fabiyi, O. and Ameh, J., 'INEC spent 96.7 billion in five years', *The Punch*, Lagos, Monday, 16 February 2009, p.2.

Timely release of budgeted funds for the commission body can be and is typically frustrated by competing demands by ministries, departments and agencies of the federal government, even after the release had been authorised.<sup>222</sup>

The INEC's Official Report on the 2007 General Elections points out that, although 'there was a remarkable improvement in the funding of the 2007 General Elections when compared with previous elections, the benefit of increased appropriation of funds for the elections were offset by the late release of funds ... due to difficulties ... created in most cases by the Federal Ministry of Finance ... and the Central Bank'. The Report attributes the delays to the role of the Bureau of Monitoring, Prices and Intelligence Unit 'in ensuring due process in the processing of procurement of election materials'.<sup>223</sup>

Delays in the procurement and distribution of election materials on the field are partly due to the centralisation of funds and of decisions about procurement at the headquarters of the Commission. As a result, Resident Electoral Commissioners are susceptible to attempts to bribe them. Indeed, the centralisation of procurement decisions at the Commission's national headquarters is one significant reason why Resident Electoral Commissioners find themselves going to state governments cap in hand to solicit assistance. In 2010, the 1999 constitution was finally amended to provide for recurrent expenditure and salaries to be a direct charge on Consolidated Revenue Fund of the Federation, reducing its dependency on the executive.<sup>224</sup>

## Donor assistance

The Electoral Act 2006, Section 3 (c) recognised that the Commission may receive 'aids [and] grants' presumably from other than government sources. Among such aids and grants are those from international development partners and foreign governments in support of critical areas identified in the INEC's Strategic Plan, 2004–2007. The grants from the development partners are drawn from the Joint Donor Basket Fund (JDBF) established in 2006 by a consortium of four international development partners, the European Union (EU), the British Department for International Development (DFID), the Canadian Development Agency (CIDA), and the United Nations Development Agency (UNDP), with the Fund 'jointly managed and coordinated' by the UNDP. The international development partners created the JDBF partly to insulate the Commission from undue interference: UNDP acts as a buffer or mediating agency between them and the Commission.

According to a JDBF source, the amount in the JDBF for the 2006–2007 period was US\$ 30 million, of which 70% was to support the INEC activities, and 30% to support election-related activities by the country's civil society organisations. For the 2009–2014 period, US\$ 80 million has been placed in the basket, with expectations that it would rise

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222 Jinadu, *op.cit.*, p.35.

223 Independent National Electoral Commission, 2007, p.51.

224 Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, adding Subsection (3) to Section 81 and Subsection (8) to Section 84 of the 1999 Constitution.

up to US\$ 120 million. Of the US\$ 80 million, US\$ 22 million has been earmarked for the INEC activities or technical assistance, US\$ 18 million for civil society election-related activities, and the others for other related election activities, like the promotion of gender equality and the participation of women in the electoral process. Other sources of grants to the Commission have come from the US Government, among other countries.

### **Accounting for expenditures**

The issue of the financial autonomy of the electoral body cannot be treated in isolation from the necessity for accountability and transparency in the management of public funds. As Eme Awa, puts it, the 'NEC was a goldmine to all those with a solid or precarious interest in 'mining' expected royalties to be paid to them'.<sup>225</sup>

The 1999 Constitution and the Electoral Act, supplemented by financial regulations and due process requirements in the public services of the federation and the INEC's own internal financial control and audit processes, provide the legal framework for the exercise of oversight of the commission's management of its finances. Critical elements in the oversight framework include:

- The review of the budget estimates of the Commission for each financial year by the relevant federal ministries/agencies, before its inclusion in the Appropriation Bill, in line with Section 81(1) of the 1999 Constitution and relevant sections of the Electoral Act.
- The consideration and defence of the Commission's annual budget estimates at the National Assembly, in the exercise and discharge of its powers and control over public funds, under Chapter 5 E of the 1999 Constitution.
- Annual audit of the accounts of the Commission by external auditors from a list provided by the Auditor-General for the Federation, and comments thereon by the Auditor-General for the Federation, in line with Section 85(3a-b) of the 1999 Constitution, and Section 5(2) of the Electoral Act 2010.
- Periodic check by the Auditor-General for the Federation.
- Submission of a report by the Auditor-General for the Federation to the National Assembly for consideration and debate on the management of the finances of the Commission, as provided under Section 85(4) of the 1999 Constitution.
- Requirement for due process assurance through the Bureau of Monitoring, Prices, and Intelligence Unit (BMPIU) in processing procurement of election materials.

In practice, however, there have often been problems in ensuring that these systems are effective, because of rent-seeking activities, poor or inadequate record keeping, delays in submitting reports, and weak implementation or follow-up of recommendations for sanctions or corrective/preventive measures in the report of the Auditor-General for the Federation.

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225 Awa, Eme, *op.cit.*, p.130.

## E. Electoral disputes in Nigeria

According to the 2008 report of the Electoral Reform Committee, 'from the first election petitions of the 1950s to date, the judiciary has always provided the last port of call when out-of-court settlement could not resolve post-election challenges'.<sup>226</sup> The deficits range from problems related to voter registration, abuse of the power of incumbency for unfair electoral advantage, electioneering campaign, election financing, polling procedures, nomination processes, declaration of results, electoral violence, ballot design, nature of franchise, candidate substitution to ballot box snatching, ballot box stuffing, inadequacy of polling stations, establishment of illegal polling stations, disappearance of election officials, and the combination of administrative inefficiency, procedural flaws and corruption in the preparation for and in the conduct of elections, among several others.

### Legal framework

The 1979 Constitution provided for election tribunals comprising high court judges. Article 269 specifically established three types of election tribunal:

- The Presidential Election Tribunal, whose Chairman and members shall be appointed by the Chief Justice of the Federation;
- The Gubernatorial and Legislative Houses Election Tribunal, with the Chairman and members appointed by the President of the Court of Appeal; and
- The Local Government Election Tribunals, with the Chairman and members appointed by the Chief Judge of the relevant state.

Appeals from each of these tribunals could be made to the Supreme Court, in the case of the Presidential Election Tribunal; to the Court of Appeal, in the case of the Gubernatorial and Legislative Houses Tribunal; and to the State High Court, in the case of the Local Government Elections Tribunals.

Section 285(1) of the 1999 Constitution established National Assembly Election Tribunals 'which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether:

- Any person has been validly elected as a member of the National Assembly;
- The term of any person under this constitution has ceased;
- The seat of a member of the Senate or a member of the House of Representatives has become vacant; and
- A question or petition brought before the tribunal has been properly or improperly brought.

Section 285(2) established in each state of the federation a Gubernatorial and Legislative Houses Election Tribunal 'which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected

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<sup>226</sup> Electoral Reform Committee, p.108.

to the office of Governor or Deputy Governor or as a member of any legislative house'. The Sixth Schedule to the 1999 Constitution sets out the composition of the National Assembly Tribunal, and of the Gubernatorial and Legislative Houses Election Tribunal.

The Electoral Act 2006 provided at Section 142 for the establishment and composition of the Area Council Election Tribunal for the Federal Capital Territory with original jurisdiction, to the exclusion of any other court or tribunal, to hear and determine any question as to whether any person has been validly elected to the office of chairman or vice-chairman or councillor. At Section 143, it provided for the establishment and composition of the Area Council Election Appeal Tribunal for the Federal Capital Territory 'which shall, to the exclusion of any other court or tribunal hear and determine appeals arising from the decision of the Area Council Election Petition Tribunal,' and provides also that 'the decision of the Area Council Election Appeal Tribunal in respect of Area Council elections shall be final'. Part VIII, Sections 124–139 of the Electoral Act set out electoral offences and the first schedule to the Act sets out the rules of procedure for election petitions.

The adjudication takes place at two levels: pre-election adjudication and post-election adjudication. While the pre-election adjudication takes place in the normal law courts with the process extending to the post-election period in a number of cases, the post-election adjudication is typically undertaken in election tribunals established for the purpose by the constitution and the Electoral Act, as outlined above, and on appeals from the election tribunals to the Court of Appeal and the Supreme Court as appropriate. However in a number of cases, both kinds of adjudication have involved out-of-court resolution as well: for example, Chief Olu Falaiye, the runner up in the 1999 presidential elections withdrew his case in the court against the declaration of Chief Olusegun Obasanjo of the People's Democratic Party (PDP), as the winner of the elections.

In late 2010, the 1999 Constitution was amended to shorten deadlines and reduce quorums for election tribunals, consolidate cases for different constituencies in the same election tribunal, and streamline procedures.<sup>227</sup>

## **Election litigation in practice**

Disputes arising from party nomination processes, especially party primaries, since their introduction during the transition programme of the Babangida administration (1985–1993), have mostly been settled through internal party adjudication mechanisms and processes. However, failure to resolve internal party disputes over alleged irregularities and the outcome of gubernatorial primaries led to the 'annulment' of nine SDP and four National Republican Party (NRC) state gubernatorial primaries by the AFRC in 1991, and the presidential primaries of both parties the following year.

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227 Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, amending Section 285 of the 1999 Constitution; Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010, substituting new Sections 233, 239, 246 and 285, and the Sixth Schedule to the 1999 Constitution. Due to the late publication of these amendments, it was not possible to fully update this chapter on the details of the provisions.

There have been increased cases of unresolved intra-party disputes over the outcome of party nomination processes at the party level since 1999. In a number of the cases, aggrieved party members have gone to the courts for redress in cases where they felt they had been unfairly treated, believing that their parties had breached their constitutions and nomination rules for elective public political offices. The courts have shifted from a position of non-interference in what they saw as purely internal affairs of the political parties to one of taking on and adjudicating election-related party disputes brought before them by aggrieved party members, who allege that their parties have breached the rules and regulations governing the parties' nomination processes.

Some examples of this shift in the country's election jurisprudence are the following:<sup>228</sup>

- In the 1983 case of *Onuoha v. Okafor*, and the 2003 case of *Dalhatu v. Turaki* case, the Supreme Court ruled that the courts had no jurisdiction over what it ruled was the 'domestic affair' of a party.
- In the 2007 case of *Ugwu v. Ararume*, and the 2007 case of *Amaechi v. INEC*, the Supreme Court ruled that the substitution of Ararume and Amaechi by other candidates in their party's (PDP) 2007 gubernatorial primaries in Imo State and Rivers State, respectively, was unlawful.

The proliferation of unresolved intra-party disputes adjudicated by courts, especially since 2003, has grave consequences for competitive electoral politics in the country; for if the political parties cannot successfully manage their own nomination and primary processes, then they are likely to contaminate and detract from the credibility of competitive elections and electoral governance generally.<sup>229</sup>

Pre- and post-election adjudication in the courts has over the years become not only a major part of electoral governance in the country but also a multimillion naira big business for the legal profession. There is now hardly any election dispute that does not ultimately become one for adjudication by the courts. With respect to pre-election petitions, for example, the INEC has observed that:

During the run up to the 2007 General Elections, particularly after the primaries, a significant number of litigations from aggrieved party members seeking redress of perceived wrongs and injustices littered the political scene. Although this could be seen as a healthy expression of democratic options, many of the court cases were not resolved until very close to the elections. There were also issues of eligibility, whereby some disqualified candidates went to court to challenge

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228 See Okoye, Festus, 'Restorative Justice and the Defence of People's Mandate: The Judiciary in the Aftermath of the 2007 Elections in Nigeria', in Ibrahim, J., and Ibeanu, O. (eds), *Direct Capture: The 2007 Nigerian Elections and Subversion of Popular Sovereignty*, Centre for Democracy and Development, Abuja, 2009.

229 For an informed account of the destabilising consequences of poor management of party nomination and primary processes by the political parties during the Second Republic, see Ollawa, P., 'The 1979 Elections', p.161 in Ekeh, Dele Cole and Olusanya, op.cit.

their disqualification, those of the PDP gubernatorial candidacy for Imo State, AC [Action Congress] and ANPP [All Nigeria Peoples' Party] candidacies for Anambra State and most dramatic of all, the case of the AC Presidential candidate, the then Vice-President, Atiku Abubakar.<sup>230</sup>

An issue which was the subject of pre-election adjudication in 2007 was whether the INEC had the power to reject or disqualify nominated candidates, during the process of verifying their claims to determine their compliance with the constitutional provisions on eligibility. The litigation arose from concerns of some candidates that the INEC might succumb to pressure from powerful figures in or outside of government at both federal and state levels to disqualify them on trumped up charges or unproven allegations not subject to due process. As Okoye puts it, 'the government used the office of the Solicitor General, the EFCC [Economic and Financial Crimes Commission] and the INEC to assume powers not donated to them and to disqualify candidates not in their good books'.<sup>231</sup>

The famous illustration of this 'usurpation' of judicial powers was the INEC's purported disqualification of Vice-President Atiku as the AC Presidential candidate for the 2007 elections on the basis of the outcome of an administrative inquiry set up by the Federal Executive Council, which had found against him. Many saw the hands of the ruling party in the disqualification. Atiku sought redress in the courts. The Supreme Court ruled, a few days to the presidential elections, that the INEC had no such power to disqualify nominated candidates, since under the provisions of Section 32(4)(5) and (6) of the Electoral Act 2006, 'only a State High Court or Federal High Court has the statutory power to disqualify a candidate from contesting'.<sup>232</sup>

As for post-election adjudication, this has generally arisen out of disputes over the declaration of results in elections to the office of President, Governor and member of federal and state legislatures. The results of presidential elections since 1999 have been subject to litigation, although the challenge to the 1999 elections was withdrawn. The Supreme Court upheld the results of the presidential elections of 2003 and 2007, which were challenged by defeated presidential candidates, on the ground that, though flawed, the conduct of the elections substantially complied with the principles of the Electoral Act, while the flaws or 'non-compliance' did not substantially affect the result of the elections.

Indeed, the decision in the appeal brought before the apex court by General Buhari, the runner up in the 2007 presidential elections, was a split four-to-three decision, leading lawyer and activist Chidi Odinkalu to observe that 'the Supreme Court does not decide whether or not elections are free and fair. It only decides whether the allegations(s) of fraudulent election have been proved as a matter of evidence. The Supreme Court by its decision in

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230 INEC 2007, p.51.

231 Okoye, *op.cit.*, p.145-148.

232 *Action Congress v INEC* (2007) 12 NWLR (Pt 1048) 222; *Action Congress v INEC* (2007) 12 NWLR (Pt 1048) 222 @257, 265; *Action Congress v INEC* (2007) 12 NWLR (Pt 1048) 222 @262, 272-273; *Ugwu v Ararume* (2007) 12 NWLR (Pt 1048) 367; and *Amaechi v INEC* (2008) NWLR (Pt 1080) 227; all cited in Okoye, *op.cit.*, fn 36, 37, 38.

*Buhari v. Obasanjo* in the last (2007) election ensured that it is now impossible to prove electoral fraud or manipulation certainly in a Presidential election'.<sup>233</sup> A major bone of contention in the case was whether the incontrovertibly proven fact that the ballot papers for the 2007 presidential election were not serialised, in contravention of the Electoral Act 2006, was ground enough to nullify the election. The majority judgement held that though the ballot papers were unserialised, no evidence was adduced before the court to show that the candidate declared the winner benefited from it; while a dissenting minority judgement held that, that fact in itself was ground for nullification of the elections. According to Bamidele Aturu, 'as Justice Oguntade pointed out [in his dissenting judgement] it is difficult to see how a decent election can be conducted without serial numbers [on the ballot papers]'.<sup>234</sup>

As Table 5 shows, election petitions are practically the norm rather than the exception for elections in Nigeria at all levels.

Table 5: Election cases brought before various election tribunals after the 2007 general elections

State	Governorship elections	Senate elections	Federal House of Representatives elections	State House of Assembly Elections/ FCT Municipal Chairman & Councillor elections	Total
Abia	5	6	11	30	52
Adamawa	1	3	4	12	18
Akwa Ibom	2	2	4	3	11
Anambra	9	13	40	72	134
Bauchi	1	1	7	16	25
Bayelsa	2	2	1	22	27
Benue	4	4	9	13	30
Borno	1	4	3	2	10
Cross River	2	2	4	11	19
Delta	4	3	13	35	55
Ebonyi	2	1	3	8	14
Edo	1	3	10	19	33
Ekiti	2	4	10	25	39
Enugu	8	6	2	38	54
Gombe	1	1	3	7	12
Imo	6	6	19	16	47
Jigawa	-	2	3	1	6

233 Chidi Anselm Odinkalu, 'Re: Supreme Court on 2007 Elections: Another Missed Opportunity', private email communication, 12 December 2008.

234 *Buhari v Yar'Adua* (2008), Special Edition MJSC; Bamidele Aturu, 'Supreme Court on 2007 Elections: Another missed opportunity', private email communication, December 12 2008.

Table 5 continued...

State	Governorship elections	Senate elections	Federal House of Representatives elections	State House of Assembly Elections/ FCT Municipal Chairman & Councillor elections	Total
Kaduna	3	1	5	10	19
Kano	2	4	17	20	23
Katsina	2	4	15	23	44
Kebbi	2	7	7	11	27
Kogi	3	4	5	33	47
Kwara	3	5	49	21	150
Lagos	2	1	7	2	12
Nasarawa	1	5	6	12	24
Niger	2	5	5	36	48
Ogun	3	4	9	35	51
Ondo	4	9	17	34	64
Osun	1	3	10	25	39
Oyo	7	1	7	24	39
Plateau	1	4	2	21	28
Rivers	9	5	13	44	71
Sokoto	2	3	1	13	19
Taraba	4	3	3	12	22
Yobe	2	1	1	2	6
Zamfara	2	5	9	7	23
Federal Capital Territory	-	1	3	4 Chairmanship/ 9 councillorship to FCT Municipal Council	17
Total					1250

Source: Adapted from INEC, 2007, pp.57–58.

In the cases involving the gubernatorial elections in Edo State and Ondo State, the results of the elections declared by the INEC were overturned and the losing candidates, who belonged to the opposition party in each of the two states in the state, were declared winners and sworn in as governors of their states. In both cases, the tribunals relied on the following provision of Section 147(2) of the Electoral Act 2006:

If the Tribunal or Court determines that a candidate who was returned elected was not validly elected on the ground that he did not score the majority of the votes cast at the election, the Tribunal or the Court, as the case may be, shall declare as elected

the candidate who scored the highest number of valid votes cast at the election and satisfies the requirements of the Constitution and this Act.

This approach of using ‘mathematical calculation and recalculation in the determination of election disputes rather than seeing them as a process’<sup>235</sup> was criticised by a dissenting judgement by the Hon. Mr Justice Aniagolu and the Hon. Mr Justice Irikefe of the Supreme Court in the 1984 case of *Ojukwu v Onwudiwe*. In his dissenting judgement, the Hon. Mr Justice Aniagolu held that:

The arithmetical computation of votes cast only comes in when the electorate have been allowed to freely cast their votes. Once the atmosphere has been substantially befouled by violence and thuggery the election in the area where they occur must be cancelled and a fresh one, if possible, conducted.<sup>236</sup>

In the cases involving the gubernatorial elections in Adamawa State, Bayelsa State, Cross River State, Kogi State, and Ekiti State, the tribunals nullified the elections on the ground of massive irregularities, and ordered re-run elections; and in each case the candidate earlier declared as winner, was returned as the winner again. In Ekiti State and Osun State, the unsuccessful candidate in 2007 (in both cases from the Action Congress of Nigeria, CAN) was finally installed as governor, but only in the last months of the four-year term. However, their own terms would run as from the date of their substitution as governor.

The case of the gubernatorial election in Anambra State is interesting. The 2003 gubernatorial election was nullified by the tribunal and the loser, Peter Obi of the All Progressives Grand Alliance (APGA), declared the winner, in a judgement delivered in 2006. The incumbent governor at the time of the 2007 election, Peter Obi, had thus served only two years of his four-year tenure at the time of the election, having been sworn-in in 2006 after his declaration as the winner of the 2003 gubernatorial elections in the State. Notwithstanding this, the INEC, apparently under pressure from the PDP, went ahead to conduct the elections. Andy Uba, the PDP candidate, was declared the winner of the gubernatorial election and sworn in as governor of the state. Peter Obi, who refused to take part in the elections because his tenure had not run out, went to court for a determination that since he was still governor and had not finished his tenure, there could be no election to an office that was not vacant. The Supreme Court upheld Peter Obi’s position, declared that the INEC should not have conducted the 2007 gubernatorial elections in Anambra State, and ‘ordered that the Fifth Respondent (Dr Andy Uba) should vacate the office of

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235 Falana, Femi, cited in Okoye, *op.cit.*, p.135, fn.17.

236 Quoted in Okoye, *op.cit.*, p.136.

the governor of Anambra State with immediate effect to enable the Plaintiff/Applicant (Mr Peter Obi) to exhaust his term of office'.<sup>237</sup>

### Effect of litigation on the election process

A problem of pre-election adjudication is that there is hardly enough time to conclude the cases under litigation well before the upcoming elections. Many of the cases, as in the case of the litigation over the disqualification of Vice-President Abubakar Atiku, were concluded 'very close to the elections'. As a result 'these litigations took a heavy toll on the focus and pace of the Commission in the days leading to the elections'.<sup>238</sup> In some other pre-election adjudication cases, like the case brought by Rotimi Amaechi against his disqualification by the PDP as the party's gubernatorial candidate in Rivers State, the litigation was concluded in his favour only in October 2007 by the Supreme Court, overruling the Court of Appeal five months after the elections, which were conducted in May 2007. The Supreme Court further ruled that Rotimi Amaechi should be immediately sworn in as governor, even though his name had not been on the ballot. The Supreme Court's judgement in the case has been criticised as amounting to the court's effectively substituting itself for the voters and choosing as governor for the people of Rivers State a candidate whose name was not on the ballot.<sup>239</sup>

As for post-election adjudication of contested election results, the trend has been since 2003 for them to drag on long after the declared winners had been sworn in as president, governor or legislator. In cases involving the presidential and gubernatorial elections, post-election litigation cases typically go on appeal for final determination in each case from the Court of Appeal to the Supreme Court for presidential elections; and from the gubernatorial election tribunal to the Court of Appeal.

The adjudicatory process on average takes up to two years and in some of the cases it can take up to three years, as in the case of *Buhari v. Obasanjo* over the 2003 presidential elections, which lasted 35 months; or even more, as is the case with the gubernatorial election tribunals in Ekiti State and Osun State, which were yet to be concluded and the cases resolved finally, less than six months to the 2011 general elections. That post-election adjudication takes so long to resolve is apparently because 'no definite time has been set to determine a case, as for instance the National Party of Nigeria [NPN] suit challenging the election of Chief Solomon Lar [of the Nigeria Peoples' Party as Governor of Plateau State in 1979], instead of John Kadiya [the NPN candidate]. The judgement was delivered in 2004!<sup>240</sup> – over 25 years after the elections were held. This state of affairs is described as 'an affront to the rule of law seen from an activist and progressive viewpoint

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237 *Obi v INEC* (2007), Vol. 9 MJSC 1, where, in his lead judgement, Aderemi (JSC) held that, 'as at 14 April 2007 when the 1st Respondent (INEC) was conducting gubernatorial elections in Anambra State, the seat of the Governor of that State was not vacant. That election was a wasteful and unnecessary exercise.'

238 INEC 2007, p.51.

239 Okoye, *op.cit.*, p.150.

240 ERC, *op.cit.*, p.104.

or mind'.<sup>241</sup> How has pre- and post-election adjudication, particularly since 1999, affected electoral governance and governance generally in Nigeria? It has done so in at least three respects.

First, pre-election adjudication has tended to heighten not douse pre-election tension, and to frustrate the time-bound preparation for elections by the electoral body. As the INEC puts it, '...the late resolution of the pre-election litigations arising from the eligibility of the AC Presidential Candidate [Atiku] resulted in a major problem of logistics that almost marred the Presidential Election'.<sup>242</sup> This was because, with the litigation concluded with the judgement of the Supreme Court in favour of Alhaji Abubakar Atiku three days before the presidential elections, 'the Commission had to print 65 million fresh presidential election ballot papers within three days....[to] be distributed across the 120 000 polling stations in the states of the federation'.<sup>243</sup>

Secondly, failure to conclude post-election adjudication of gubernatorial elections before the swearing-in of returned candidates has resulted in the tenure of the candidate who won the rerun election commencing from the date he/she was sworn-in after the rerun elections. The effect of this situation is twofold:

- (a) It has given rise to the staggering of gubernatorial elections, a departure from the practice since 1979 of holding all gubernatorial elections simultaneously across all the states of the federation on the same day; and
- (b) It means that governors whose elections were annulled but who won the rerun would spend more than the constitutionally mandated limit of eight years (two consecutive terms of four years each in office, something that can technically run up to 12 years, if the earlier elections were annulled in his/her first four-year term) (see Table 6).

Thirdly, questions have also been raised about whether a governor whose election was annulled and who was defeated in the rerun elections should also be required to refund to the state all the salaries and allowances s/he received as governor before the annulment of the election. Another issue arising from the situation is whether it is fair for a governor, whose election is the subject of post-election adjudication before an election tribunal, to use state resources and funds to defend himself/herself in court; while the plaintiff, the defeated candidate challenging the declaration of the governor as the winner, 'suffers a coincidence of adverse financial, legal, and evidentiary burdens,' as the Nigerian Bar Association (NBA) memorandum to the ERC observed.

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241 Hon. Mr Justice Pats Acholonu quoted in Okoye, *op.cit.*, p.139.

242 INEC, *op.cit.*, p.51.

243 *Ibid.*, p.50.

Table 6: States where gubernatorial elections will not be held in January 2011 because of election tribunal overturning of election results declared by the INEC in the 2007 elections<sup>244</sup>

States	Next Gubernatorial Elections
Adamawa	2012
Bayelsa	2012
Edo	2012
Ekiti	2014
Kogi	2011 (November)
Ondo	2012
Osun	2014
Rivers	2011 (May)
Sokoto	2012

The Nigerian Bar Association, in its 2008 submission to the Justice Mohammed Uwais-led Electoral Reform Committee, was emphatic in attributing a major source of the problem of electoral administration, management and governance in the country to a legal framework that encourages impunity.<sup>245</sup> The memorandum elaborates on this position as follows:

The destruction of the electoral system has been achieved through a system by which the law has over time elevated the Certificate of Return irrespective of how it is acquired into a prize with overwhelming significance in Nigeria's electoral system. The issuance of the Certificate of Return is the document issued to the declared winner as evidence of their eligibility to the office contested in the election. The process of issuing this certificate is administrative and has increasingly become divorced from the processes and legitimate outcomes of elections. In 2003, for instance, persons who were never candidates in the electoral contest, nevertheless, procured Certificates of Return, enabling them to occupy high offices of state without having canvassed for office. Many of them survived the challenge

244 However, in an advertisement in a number of national newspapers on 1 September 2010, INEC excluded the following states on the list in Table 6 of states where gubernatorial elections will not hold in January 2011, because of the provisions of the amended Electoral Act 2011 and the amended Section 180 of the 1999 Constitution: (a) Adamawa; (b) Bayelsa; (c) Cross River; (d) Ekiti; (e) Kogi; and (f) Sokoto. According to the new electoral law, in the determination of the four-year term, where a re-run election has taken place and the person earlier sworn-in wins the re-run, the time spent in office before the date the election was annulled shall be taken into account. Although the Electoral Act 2010 has been signed into law, the amended 1999 Constitution is the subject of litigation in court over whether it would require the assent of the President to come into force. The National Assembly's position is that it does not require the assent of the President, while the Presidency holds a different view. However, the relevant provisions of the Electoral Act 2010 can not come into force unless the amended 1999 Constitution also comes into force. In any case some of the affected Governors have indicated their intention to challenge INEC's position in court on the ground that the relevant of the amended provisions cannot be applied retroactively. See *This Day*, Lagos, 4 September 2010, p.1.

245 Nigerian Bar Association, Memorandum to the Electoral Reform Committee, January 2008, pp.4-7.

to their elections to serve the offices to full term. In the absence of any requirement for the electoral umpire to prove substantial compliance with the electoral laws before issuing the Certificate of Return, the process of procuring this Certificate, has increasingly been commercialised.

The legal advantages of being in possession of the Certificate of Return are indeed high. Once issued, the certificate can only be set aside by a court or tribunal at the end of an election petition. The holder enjoys a presumption of regularity, which, with time, has become quite difficult to rebut. S/he can be sure to be sworn into office and to reap the benefits of office, including recouping the costs of electioneering through access to power. Electoral jurisprudence in the period since 1983 has progressively created an almost insurmountable burden of proof for persons seeking to over-turn a duly issued certificate of return. Being sworn into office is itself a substantial incentive in favour of delaying and frustrating the processes of electoral dispute resolution. This delays election petitions. For their part, the candidate who does not have this Certificate suffers a coincidence of adverse financial, legal and evidentiary burdens.

Accordingly, among other things, the NBA recommended that the legal framework for elections should take away the 'unduly elevated significance' of the Certificate of Return and make its award a judicial rather than an administrative process as well as urging that the independence of electoral adjudicators be guaranteed in law and practice.

## **F. Assessment of electoral governance and process in Nigeria**

Successive Electoral Commissions and the country generally have not been able to shake off a history of poor performance in the management of electoral processes, in spite of strong guarantees of independence enshrined in a solid legal framework to ensure credible electoral governance in the country. Indeed, the ERC situates the challenge of electoral reform in the country on its assessment that 'our electoral bodies have not been independent of the executive arm of government since 1976 when they were centralised by the military'.<sup>246</sup>

### **A historically poor performance of the Electoral Commission**

The history of electoral governance in the country highlights an amoral political culture, underscored by a general indifference to the desecration of the electoral process, in the form of grave electoral malpractices. The combination of country's civic and political culture and its legal framework has consistently failed to ensure the procedural certainty that should characterise electoral competition and engender general confidence in the outcome. This much is clear from the Babalakin Commission Report (1986), the Political Bureau Report (1986), the Uwais Electoral Reform Committee Report (2008),

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246 ERC, *op.cit.*, p.99.

and in numerous reports of international and domestic observer and monitoring teams before and since May 1999. Summarising its findings on the administration and management of elections in the country, the Electoral Reform Committee Report pointed out that, 'The 85-year-old history of Nigeria's elections shows a progressive degeneration of outcomes. Thus the 2007 elections are believed to be the worst since the first elections in 1922'.<sup>247</sup> In their effect, the issues that are at the heart of the crisis of electoral governance in the country can be classified into the following broad categories:

- The partisan role of the state at federal and state levels, through abuse of the power of incumbency by governing parties, to obtain unfair electoral advantage for their parties' candidates;
- Logistic, financial and human resource capacity problems not only of the Electoral Commission but of the country generally, both of which are due to the country's underdevelopment;
- The country's topography, creating nightmarish access and distribution problems for deployment of electoral materials and electoral officials, and for transmitting of results to and from mountainous and riverine areas; and
- The combination of a legal framework and a civic and political culture which encourages electoral impunity.

The major deficits include:<sup>248</sup>

- The abuse/misuse of the power of incumbency by public political officeholders.
- Lack of confidence in electoral bodies to conduct free and fair elections.
- Severe financial and logistical constraints on the work of successive electoral bodies. This state of affairs has generally resulted in the dependence of the field offices (i.e. state and local government) of the electoral bodies on state governments, who seize on the opportunity offered by such dependence to abuse and deploy the power of incumbency to compromise state and local government council electoral officers.
- Inadequacy/unreliability of voters' register, and failure to display them early enough, to enable claims and objections to be filed, in line with regulations.
- Manipulated nomination processes, at party level and by electoral bodies or their officials, including failure to receive nomination papers of opposition candidates, or the requirement for prohibitive nomination fees and deposits by candidates.
- Inadequacy of staff of electoral bodies to conduct elections, failure to maintain a regular/permanent list of volunteers for electoral duties, and the consequential and reliance on ad hoc staff, who are poorly trained for electoral duties, and who are recruited mainly from state civil service or local government council officials, whose allegiance generally tends to be to the party controlling the state governments and local government councils.

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<sup>247</sup> Ibid., p.19.

<sup>248</sup> For more elaboration, see Ibrahim, Jibrin, *Nigeria's 2007 Elections: The Fitful Path to Democratic Citizenship*, Special Report 182, United States Institute for Peace, Washington, DC, 2007.

- Lack of allegiance of party polling agents/observers to their candidates and parties, and their ready complicity with the declaration of false results at polling and collation centres, especially at polling stations, and at ward and local government collation centres.
- Stuffing of ballot boxes, either within the polling units or elsewhere.
- Controversy over the nature of the ballot paper, over its distribution before the election, and over use of fake ballot papers.
- Multiple voting and voting by under-aged or unregistered/surrogate people.
- Falsification of results.
- Paucity of polling booths and non-information/inadequate information about their location/including diversion of polling booths from one location to another.
- Inadequacy of polling stations to ensure secrecy of the ballot.
- Electoral violence, during electioneering campaigns and on voting day.
- The partisan use of the Police and security services to harass candidates and in encouraging or not taking action to prevent electoral malpractices before and during election.
- Lack of confidence in the electoral process, including its management by the electoral bodies by the general public, and a general scepticism/lackadaisical attitude among them that nothing can be done to ensure the sanctity of the electoral process, making them ready to participate in and commit electoral malpractices.
- Tardy and expensive adjudication processes, which encourage electoral impunity.
- Manipulation of constituency delimitation.
- Manipulation of the media for partisan electoral gains.
- Lack of effective participation by women in the electoral process, leading to their effective disenfranchisement, e.g. failure to register them for cultural and political reasons, and their marginal positions in the political parties.
- Manipulation of party primaries, and lack of internal democracy within the political parties.
- Weakening of the local government as a third tier of government, by state governments, as a preliminary step to distorting and compromising the electoral process by governing parties at the state level.

What follows briefly illustrates the nature and electoral governance implications of the more grievous of the major deficits itemised above.

### **Voters' register and voter registration**

Typically, the voter registration exercise is shoddily conducted, leaving room not only for irregularities like the registration of 'under-aged' voters (i.e. those who do not meet the age requirement), multiple registration, and proxy registration, but also for violence, as political parties try to outsmart each other in carrying out the irregularities. Shortage of registration materials and distribution problems create delays in the exercise, as also does deliberate

starving of some registration centres and even states of voter registration materials, and their hoarding in several other places for purposes of mass registration in private homes.

How to conduct credible voter registration and to depoliticise it through a process of continuous registration, using facilities at the various local government council offices in the country for the registration of vital statistics, remains an important issue in the country's electoral governance. There are three significant dimensions to this particular set of problems.

First, there is the problem of dividing the register into different constituencies, and further subdivision into polling units in each constituency, a task that is more often than not complicated by delay in compiling, verifying and then releasing and distributing the register in a timely fashion before election day.

The second problem is the cost of voter registration. The concern in this respect is over the prohibitively huge financial and human resource cost of conducting fresh registration exercise every four years during each four-year cycle of general elections. It is an exercise which typically involves huge paper work, necessitating 'staggering' budget cost for the purchase of stationery; printing of registration materials; payment of honoraria to temporary (ad hoc) voter registration officials to be deployed to about 380 000 voter registration centres in 1987, reduced to 120 000 by 2007; and with the decision since 2007 to do digital electronic registration, the importation of digital equipment for that purpose. For the 2010 voter registration ahead of the 2011 general elections, the estimated cost of the exercise was N 75–N 85 billion (US\$ 1 = N 148), while for the 2006/2007 exercise, the cost of the purchased digital equipment was about N 20 billion. By one estimate, the budget of about N 85 billion for the 2010 voter registration in the country, 'translates to a cost of N 1 292.30 (US\$ 8.6) per registered voter, the highest per capita cost for registering a voter anywhere in the world'.<sup>249</sup>

The third problem is that of over-registration and multiple registration in targeted areas, since the number of registered voters has important implications for electoral outcomes; while the size of population is also linked to the provision of facilities and infrastructure for communities by the state.

Table 7: Voter registration figures in Nigeria, selected years

Year	Registered voters
1959	9 043 782 <sup>(a)</sup>
1977	48 633 782 <sup>(b)</sup>
1983	65 304 818 <sup>(c)</sup>
1987	72 000 000 <sup>(d)</sup>
2002	60 823 022 <sup>(e)</sup>
2007	60 000 000 <sup>(f)</sup>

Sources: (a) Ngou, in Ekeh, Cole and Olusanya, op.cit. p.98; (b) Ollawa, op.cit., p.131; (c) Diamond, op.cit., p.70; (d) Awa, op.cit., p.134; (e) Clifford Nduhijo, 'Disparity here and there, North maintains lead in population', *Guardian* (Lagos), 15 May 2003, see <http://www.guardiannewsngr.com/policy/politics/article02>; (f) INEC.

249 'Nigeria's voter registration is world's most expensive', *Business Day*, Lagos, 2 August 2010.

## Ballot box and ballot papers

Malpractices surrounding the ballot box and ballot papers to secure unfair partisan advantage for favoured political parties and candidates by their perpetrators range from:

- Snatching of ballot boxes en route to polling stations or from polling stations to stuff them unlawfully with illegally procured ballot papers;
- Distribution of ballot papers ahead of election day for illegal use;
- deliberate late arrival of ballot boxes and ballot papers to polling stations on election day;
- Deliberate starving of polling stations in some communities with ballot papers and ballot boxes on election day; and
- Burning or pouring of acid into ballot boxes after voting and before counting of votes cast.

The design of the ballot paper itself can be problematic, in view of the sometimes-large number of candidates contesting elections. In 1990, the idea of open voting was adopted, after a series of intense debate within and outside the commission, as the open balloting or queuing system, by which voters were required after accreditation to queue behind the pictures or agents of the candidates of their choice and be counted serially. The justification for its adoption was that it would eliminate electoral malpractices like snatching, stuffing and destruction of ballot boxes, and inflation of votes associated with the secret ballot system, in addition to being cost effective in eliminating the need to print ballot papers and manufacture ballot boxes.

As it turned out, the open ballot system was not the panacea it was expected to offer for electoral malpractices. Voters waiting for accreditation or on the queue or waiting to queue to vote were given monetary inducements, sometimes with currency notes stuck in loaves of bread given out to them! Electoral officers could skip numbers, as indeed they did in several disputed cases, as they counted in a rapid fashion in several polling units; and where results were declared, the figures recorded on the results sheets were sometimes altered in the process of transferring them from the polling units to collation centres. Under such circumstances, there would be no validly cast paper ballots to use if the results recorded and declared on the results sheets were challenged at the collation centres or in courts. The open ballot system was also blamed for the low 15% nationwide voter turnout in the first party-based elections conducted by the NEC in December 1990.

In September 1992, the open ballot system was replaced with what was described as a modified open ballot system, in effect a reversal to secret balloting. The process required accreditation before voting starts; when voting starts, each of the accredited voters takes his/her turn in going into a hidden cubicle, marks his/her choice on the ballot paper there, then comes out to drop the ballot paper into the ballot box in the view of polling officials and others present. This was also the procedure adopted under the 2010 Electoral Act governing the 2011 general elections. The unusual separated accreditation and voting procedures, with the announcement of the numbers of voters accredited before voting starts,

were designated to reduce the chance of mysterious increases in the number of voters in the final count.

Regarding administrative ineptitude, there can be no sadder illustration of this than the INEC's oversight in not ensuring the serialisation of the ballot papers used for the 2007 presidential elections. Notwithstanding the difficult circumstances created by the Supreme Court ruling for the inclusion of Vice-President Atiku's name on the ballot as the AC candidate, the INEC had a responsibility to vet the draft ballot paper before printing.

## **Voting and vote counting process**

The voting and vote counting process on election day is abused in a variety of ways to distort and steal the mandate of the electorate. This is due to lapses in the administration and conduct of the elections, or to wilful connivance and criminal behaviour of electoral officers, police and security personnel deployed for elections duties at the polling stations, the voters and their accomplices or instigators. Lapses include (i) late opening of polling stations; (ii) inadequate supply or lack of basic voting materials – ballot papers, indelible ink, ink pads; (iii) insufficient number of or missing election officials; and (iii) wrong or incomplete voters' register – all of which usually create tension and result in disorderly behaviour by voters.

The most common malpractice is multiple voting by the same voter, either in a polling station or in a number of polling stations. It is not uncommon to witness voters bragging openly that they have voted several times, without being discovered or apprehended. Other malpractices in this category revolve around:

- Voting by under-age and unqualified voters, including hordes of non-nationals from neighbouring states;
- Altering and/or inflation of voting figures to favour preferred candidates;
- Announcement of false results;
- Deliberate refusal of returning officers to declare results on the spot;
- Exclusion of polling agents of some candidates from the polling stations and from collation centres;
- Last minute changes in the location of polling and collation centres to the disadvantage of some candidates; and
- Bribery or criminal inducement of election officials, including police and security officers posted to man polling stations.

## **Abuse of power of incumbency**

Governments and governing parties in Nigeria have since colonial times abused the power of incumbency to secure unfair advantage for favoured candidates and candidates of governing parties. This has taken various forms in the country's electoral governance history.

One variant of the manipulation of the electoral law and regulations to create an unfair electoral playing ground is the stipulation of the advance payment of usually non-refundable and prohibitive fees for prospective candidates as requirement for their candidature. At the party nomination/primaries level, it has become a common practice to stipulate exces-

sively high fees for obtaining even nomination forms, which party members who want to enter the party's primaries would have to pay.

Another form that the abuse of the power of incumbency has historically assumed in the country, is the use of state power and resources and of traditional authority, including the civil service, police and state security agencies, and to a lesser extent the courts, to harass political opponents in the period leading to and after election day. Such abuse of the power of incumbency reached its nadir in the 2003 and 2007 general elections, not only reviving sad memories of the disintegrative consequences for the country of the crass and unabashed partisan deployment of such authority between 1962 and 1966, but also assuming the more novel form of the unholy coalescence of state power and the financial clout of corporate Nigeria to create an unfair electoral advantage for governing parties and their candidates particularly for presidential and gubernatorial elections.

### **Staffing problems**

Much the greater part of the deficits that are due to administrative ineptitude of the electoral bodies can be traced to their human resource incapacity and their consequential reliance on ad hoc staff, who may have divided loyalty and over whom they can hardly exercise disciplinary powers. For example, the staff strength of the INEC in 2009 was about 12 000, of which not more than 9 000 to 10 000 could be deployed for election or voter registration, both of which typically require between 36 000 and 48 000 officiating ad hoc staff.

Where to recruit the ad hoc staff is a major and recurrent problem for the country's electoral bodies. No less problematic is organising training for and paying of ad hoc staff adequately, if they are not to be 'up for sale' to the highest bidder, who may induce them to compromise the electoral process, by altering or falsifying election results, selling voters' cards or ballot papers, or increasing the voter register.

### **Explaining the crisis of electoral governance in Nigeria**

How is one to explain the persistence of the itemised problems in the administration and management of elections in the country?

The first feature is the character of the Nigerian state as the site for zero-sum electoral competition for the acquisition of political power the vast patrimonial economic power it confers. This partly explains why Nigerian electoral politics has over the years increasingly assumed violent, war-like forms, accentuated by the winner-takes-all tendency inherent in the first-past-the-post electoral system practised in the country since independence. It is also why no effort has historically been spared by partisans across party lines to subvert the electoral process, knowing full well that they can get away with electoral impunity. It has turned politics into a huge business enterprise, where rules designed to ensure the indeterminacy of elections are openly and crassly violated, and where regulators become active or inactive collaborators in the grand larceny of the people's electoral mandate.

The second feature is the progressive violation by the country's political class of one critical institutional hallmark of liberal democratic politics, namely the normative separation

or rather insulation of administration from politics. It has in effect also largely contributed to undermining and eroding professionalism in the country's public institutions. In the case of electoral governance, the abuse and misuse of the power of incumbency for unfair partisan political advantage clearly attests to this conflation of politics and administration, which has gravely contributed to the desecration of the electoral process, with regulators including electoral management bodies, the national broadcasting commission, anti-corruption commissions and the police turning a blind eye to the desecration, or selectively taking action for redress in a party political partisan manner.

The third feature, growing out of the character of the Nigerian state as the site for primitive accumulation and the violation of the separation of administration from politics, is a political culture and judicial process whose operation tends to condone and even reward impunity.

What, then, needs to be done to address the crisis of electoral governance in the country? Despite sanctimonious declarations of commitment to electoral reform by the country's political class, particularly its ruling fraction, the critical electoral reform problem is how to contend with the conflict of interest that the country's public political officeholders have in confronting the need for electoral reform. The subterfuges and prevarications over the nexus connecting electoral reform and constitutional reform are manifestation of this conflict of interest. Yet what needs to be done must be confronted as a policy and a strategic imperative.

## G. Post-1999 debate on electoral governance in Nigeria

The general outrage against the conduct of the 1999 federal and state general elections in the country renewed with immediate urgency the question of electoral reform as a dimension of constitutional and political reform in the country. The debate crisscrossed with the even more contentious and controversial elections of 2003 and 2007. In his inaugural address on 29 May 2007, President Umaru Yar'Adua promised to 'set up a panel to examine the entire electoral process with a view to ensuring that we raise the quality and standard of our general elections and thereby deepen our democracy'.

### **Establishment of the Electoral Reform Committee (ERC)**

In August 2007, the federal government established an Electoral Reform Committee, under the Chairmanship of a former Chief Justice of the Federation, the Hon. Justice Muhammadu Lawal Uwais, to look at various aspects of electoral governance in the country, and make recommendations for their improvement. The terms of reference were to review Nigeria's election history, examine the current legal and institutional framework, including the electoral system, and make any recommendations to ensure the independence of the Electoral Commission, the integrity of the process and the avoidance of electoral violence, or any other matters it thought relevant<sup>250</sup>

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250 ERC, *op.cit.*, paragraphs 1.41(a-g).

The work of the ERC generated a lively and robust nation-wide debate on electoral reform, reflected in the large turnout at its zonal public hearings and the 1 466 memoranda submitted to it. Little wonder that its report and recommendations were widely acclaimed as reflecting the general view of Nigerians about the root causes of and solutions to Nigeria's electoral governance crisis.

## Conclusions of the ERC

In its report published in 2008, the ERC reached the following conclusions on the basis of the analysis of the data it gathered in the course of its assignment.<sup>251</sup>

- Degeneration of electoral outcomes: 'The 85-year history of elections in Nigeria shows a progressive degeneration of outcomes', with the 2007 elections 'the worst since the first elections were held in 1922'.
- Role of politicians and their perception of power: Elections conducted under military rule have generally been more credible than those conducted under civilian rule. This is because of 'the effort of politicians to perpetuate their hold on power at all costs', becoming 'more desperate and daring in taking and retaining power, more reckless and greedy in their use and abuse of power, and more intolerant of opposition'.
- Expectations of Nigerians: The high expectations of Nigerians from their engagement 'with politics and democracy ... have more often than not been dashed as politicians and political officeholders have less faith in properly conducted elections as a foundation for democratic governance than the electorate'.
- Role of Election Management Bodies (EMBs) and Other Agencies: The institutional arrangements and legal provisions for the conduct of elections and the strong relationship between election management bodies and the security agencies 'have over the years become focal points at which elections are compromised' in the country. In addition, 'the EMBs have been overburdened with too many responsibilities which have affected their performance'.
- Conflicts over Electoral Outcomes: 'From the first elections petition of the 1950s to date, the judiciary has always provided the last port of call when out-of-court settlements could not resolve post-election challenges. While the courts have discharged this important responsibility creditably, care should be taken not to drag the judiciary into the political arena too often, as this can affect its credibility'.
- Civic, Moral and Political Education: There is 'compelling need for massive investment in the institutionalisation of broad-based civic, moral and political education of Nigerians, politicians as well as the electorate'.
- Poverty and Corruption: Because they combine to 'undermine and threaten the foundations of democratic institutions ... the efforts to fight poverty and corruption should be intensified'.

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251 Summarised/extracted from ERC, *op.cit.*, pp.18–23.

- Welfare of Nigerians: There is need to improve the Nigerian economy and to empower Nigerians, in order that ‘they will be better able to defend democracy especially when threatened by blundering politicians’.
- Inclusiveness: There is need for an electoral system which ensures that ... all major stakeholders, especially the parties that perform creditably, women and other interest groups, are not sidelined in the emerging governments’.
- Tenure and Incumbency: These are ‘major factors in the corruption of the electoral processes and the violence that always features in elections’.
- Military Interventions: ‘The military ... always intervened when the institutions of democratic governance had broken down or the nation was facing possible disintegration’. Efforts should therefore be made to make military intervention ‘unnecessary’ and ‘unattractive’ by curbing ‘the mounting and increasing impunity with which politicians have breached existing laws’.
- Civil Society: Because they have played ‘an important role in the agitation for of the political space ... Civil Society Organisations should be empowered legally to enable them effectively discharge their functions as sentinels and watchdogs of democracy’.
- Multi-Party System: ‘The views expressed by Nigerians during the public hearings were overwhelmingly in favour of reducing the number of political parties to between 2 and 7,’ from the ‘existing fifty (50) parties’.

## ERC recommendations

On the basis of its findings and conclusions, the ERC made a number of major recommendations, including the following:<sup>252</sup>

- Membership and structure of the INEC: ‘The appointment of the Chairman, Deputy Chairman and members of the Board of the INEC shall be channelled through the National Judicial Council which should be empowered to (i) advertise the positions, spelling out requisite qualifications; (ii) receive applications/nominations from the general public/specified civil society groups; (iii) shortlist three persons for each position; (iv) send the nominations to the National Council of State to select one from each category and forward to the Senate for confirmation’.
- Tenure of Office of Members of the INEC: This should be five years subject to renewal for another five years.
- Security of Tenure/removal of the INEC Chairman and Members: ‘The chairman and members of the INEC may only be removed by the Senate on the recommendation of the National Judicial Council by two-thirds majority of the Senate, which shall include at least 10 members of the minority parties in the Senate.
- Funding of the INEC: The funding of the INEC, including its election expenditure and recurrent expenditure for its activities, as well as the salaries and allowances

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252 Summarised/excerpted from ERC, *op. cit.*, pp.24–75.

of its Chairman and commissioners should be first charge on the Consolidated Revenue Fund of the Federation’.

- Unbundling of the INEC: The 1999 Constitution should be amended so that some of the functions currently performed by the INEC should be assigned to the following institutions, which should be established for that purpose: (i) A Political Parties Registration and Regulatory Commission; (ii) An Electoral Offences Commission; (iii) A Constituency Delimitation Commission; and (iv) A Centre for Democratic Studies, ‘to undertake broad civic and political education for legislators, political officeholders, security agencies, political parties and the general public’.
- Composition and Functions of State Independent Electoral Commissions (SIECs): ‘Existing SIECs should be reorganised and integrated into the structure of INEC for greater efficiency and autonomy’.
- Voter Registration and the Voter Register: There should be continuous voter registration, fully computerised and based on biometric data to detect and eliminate multiple registrations.
- Ballot Boxes and Ballot Papers: The INEC must ensure ballot papers have water-tight security features, with transparent tracking system; while security of ballot boxes should be improved with provision of seals and locks, and ‘ballot materials ...under the protection and oversight of security agencies and electoral officials ... to protect local political leaders from obstructing their distribution’.
- Polling Booths/Stations: The INEC should give political parties and observers an accurate list of polling stations, including locations and number of registered voters before elections; while the INEC should also identify satellite polling stations, so that voters will be properly directed to where they are to vote, and ensure that each polling station has no more than 50 registered voters to avoid congestion and delays in casting and counting of votes.
- Voting Process: The use of electronic voting machines is recommended for future elections, but this should be done gradually and after a period of testing and experimentation.
- Collation and Declaration of Results: The INEC should make contingency plans for alternative power supply in collation centres where this may be necessary; ‘swiftly and publicly display detailed results, with all results announced at the polling stations by the Presiding Officer, duly signed and copies given to agents of the political parties with candidates in that election, the Police and the State Security Service.
- Independent Candidature: Independent candidates should be allowed to contest elections, under certain conditions.
- Internal Democracy in the Political Parties: The party system should be reformed ‘with more insistence on intra-party democracy,’ such that ‘the political parties will develop internal procedures for party nomination that are open, transparent, inclusive and democratic’. Moreover, ‘political parties should pay more attention

- to the nomination of women and youths as candidates ... and ensure that women have equal access to leadership opportunities within party organisations’.
- Jurisdiction of Courts in Party Matters: ‘Disqualification of candidates fielded for any election should be done on the basis of the provisions of the 1999 Constitution and electoral law by the Courts’.
  - Electoral System: ‘Nigeria should retain the First-Past-the-Post System but should also inject a dose of Proportional Representation based on the close party lists,’ with the Electoral Act 2006 amended to ensure that 30% of the party lists under the proposed Proportional Representation system are reserved for women and 2% for physically challenged persons, without prejudice to their right also to compete for representation under the First-Past-the-Post system’.
  - Adjudication/Management of Election Disputes: Rules and procedures to enhance speedy disposal of election petitions must be introduced, with the law shifting the burden of proof from the petitioners to the INEC ‘to show that disputed elections were indeed free and fair ... and rules of evidence ... formulated to achieve substantive justice rather than mere observance of technicalities’. Furthermore, ‘no executive should be sworn in before the conclusion of cases against him/her. In the case of legislators, no one should be sworn in before the determination of the case against him/her. The INEC should have no right of appeal’. To this end, ‘a time limit should be set for disposing election petitions and appeals from the decision of the Tribunals by amending the 1999 Constitution’ – ‘the determination of cases by tribunals should take four months and appeals should take a further two months, a total of six months’.
  - Diluting the Zero-Sum Approach to Electoral Politics: ‘Political parties that secure at least 2.5% of national assembly seats during general elections should be considered for cabinet level appointments.
  - Participation of Civil Society in the Electoral Process: Electoral legislation to guarantee the participation of civil society at relevant stages of the electoral process, including helping to educate and inform voters on the mechanisms and importance of registering to vote and in the significance of elections to the consolidation of Nigeria’s young democracy.
  - Role and Stake of Stakeholders in electoral governance: Need for all stakeholders to see elections as only part of a process and not a terminal point in the development of politics.
  - Role of Security Agencies: ‘The police force should organise training, lectures and workshops for its personnel prior to elections;’ ‘include in its training curriculum a course on the role of police during elections;’ and ‘the law enforcement agencies should be properly oriented to appreciate the need for neutrality during elections’.

The Government White Paper on the ERC Report rejected the ERC’s recommendations on: (i) reorganising and repositioning the INEC to ensure its independence and profes-

sionalism; (ii) the reorganisation and integration of SIECs into the structure of the INEC; (iii) proportional representation; and (iv) ensuring the resolution of all of election cases in the courts within six months and before swearing-in of newly elected public officials.<sup>253</sup>

But the White Paper accepted the recommendation on the unbundling of the INEC and the establishment of the Political Parties and Regulatory Commission, the Election Offences Commission, and the Constituency Delimitation Commission to assume, as appropriate, the functions taken away, ‘unbundled’, from the INEC. The Electoral Act 2010 provides the legal framework for the 2011 general elections, and necessary constitutional amendments were brought into effect to implement it in January 2011.

## The Electoral Act 2010

The 2010 Electoral Act that would govern 2011 federal and state elections, with constitutional amendments that accompanied the act, implemented some of these recommendations but ignored others.

On funding of the INEC, the 1999 constitution was amended to provide for recurrent expenditure and salaries to be a direct charge on Consolidated Revenue Fund of the Federation, reducing its dependency on the executive.<sup>254</sup> On management of election disputes, deadlines were shortened and quorums reduced for electoral tribunals, in an attempt to speed up the adjudication of cases.<sup>255</sup>

The amendments to the constitution also strengthened the independence of the electoral commission from both the executive and political parties by providing that INEC members shall not be members of a political party,<sup>256</sup> and that INEC’s power to regulate its own procedures ‘shall not be subject to the approval or control of the President’.<sup>257</sup>

In relation to internal democracy in political parties, the constitution was amended to make clear the right of the National Assembly to give the INEC stronger powers, while the initial version of the 2010 Electoral Act gave detail to these powers, stating that ‘Where a political party fails to comply with the provisions of this Act in the conduct of its primaries, its candidate for election shall not be included in the election for the particular position in issue’.<sup>258</sup> However, this promising reform was reversed in December 2010, when the

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253 Egbe, Nkanu, ‘INEC Chairman from where?’, op-ed column, *The Guardian*, Lagos, 16 March 2009.

254 Sub-section (8) added to Section 84 of the 1999 Constitution by Constitution of the Federal Republic of Nigeria (First Alteration) Act, of 2010.

255 New subsection (1) of Section 285 of the 1999 Constitution; new Sections 233, 239, 246 and 285, and the Sixth Schedule to the 1999 Constitution substituted by the Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010.

256 Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, amending Section 156 of the 1999 Constitution: ‘a member of any of these bodies [various federal executive bodies] shall not be required to belong to a political party, and in the case of the Independent National Electoral Commission, he shall not be a member of a political party’. Previously, the Constitution had provided that a person could not be a member of any of these bodies, including INEC, unless he or she was qualified to be a member of the House of Representatives, which implied membership of a political party, since independent members of the House are not permitted.

257 *Ibid.*, amending Section 160 of the 1999 Constitution.

258 Section 87(9) of the Electoral Act No. 6 of 2010, before amendment.

Electoral Act was amended to delete this provision, while specifying that, when political parties submit their lists of candidates, ‘the Commission shall not reject or disqualify candidates for any reason whatsoever’.<sup>259</sup> Challenges to party primaries would thus have to come before the courts. Other provisions on the INEC’s powers to monitor political parties remained in place, while the Electoral Act also provided rules on the merger of political parties.<sup>260</sup>

However, the recommendations on appointment of the INEC chair were not implemented, nor the recommendation on permitting independent candidates, nor the proposal to ‘unbundle’ the INEC and establish complementary electoral management bodies – despite the acceptance of the idea by the government White Paper on the ERC proposals.<sup>261</sup>

## H. Recommendations

The following is an outline of policy options for electoral reform, which draws on desk research and findings from focus group discussions on electoral governance in Nigeria conducted in Abuja and Lagos in the course of this study, and the ERC recommendations.

### Electoral system

- There is need to adopt some modified form of proportional representation in the country, in place of the current first-past-the-post simple majority system. The modification will defuse the zero-sum/winner-takes-all approach to politics, help to attenuate post-election tension in the country, and make its electoral governance process more competitive by being more reflective of the relationship between the proportion of electoral votes won by a political party and its legislative representation.
- There is, in this respect, also great value in the recommendation of the ERC that 30% of the party lists be reserved for women and 2.5% for the physically challenged ‘without prejudice to their right to compete for representation under the first-past-the-post system’.

### Electoral administration: Appointment, tenure, removal

- A major overhaul and strengthening of election administration in the country should be undertaken is imperative, and along the lines recommended by the ERC, to make it administratively, operationally, and financially independent of federal and state governments, given Nigeria’s electoral history of gravely flawed elections, which are significantly due to the impunity of, and abuse of the power of incumbency by the executive at local government council, state and federal levels.

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259 Section 31 (1) of Electoral Act 2010, as amended by the Electoral (Amendment) Act 2010.

260 Section 84, Electoral Act 2010.

261 See, on the reforms generally, International Crisis Group, *Nigeria’s Elections: Reversing the Degeneration?*, Africa Briefing No. 79, 24 February 2011.

- This will require, as the ERC recommended, that ‘existing State Independent Electoral Commissions should be reorganised and integrated into the structure of the INEC for greater efficiency and autonomy’. This was the provision under the partially implemented 1989 Constitution.
- The model of the electoral management body which the ERC Report recommended is a variation of the independent commission, in which different bodies, each independent of the executive, are responsible for the direction and management functions of elections. This is done by separating and insulating electoral governance from the executive and legislative branches, and empowering them with a permanent core of professional staff appointed by and responsible to them rather than staff deployed from the executive or other branch of government. These bodies would usually be paired, with one responsible for election administration, and the other serving as a regulatory and supervisory body. In effect, the ERC recommended unbundling the INEC, by sharing its functions among three institutions: (a) an Independent National Electoral Commission; (b) a Political Parties Registration and Regulatory Commission; and (c) a Constituency Delimitation Commission.
- The mode of appointment of members of the INEC and of the three commissions ‘unbundled’ from it, their tenure and the financing of the activities and operations of their commissions should be insulated from partisan politics, and made seriously independent of political officeholders. This would require imaginative institutional innovation, whereby their appointment is made, and their conduct and the operations of the commissions supervised, by a small group, largely made up of distinguished, non-partisan personalities drawn from various spheres of public life, to whom the commissions will be accountable. On this score, the ERC recommendations fall short of safeguarding the independence of the INEC and the proposed other three commissions, through the role assigned to the Council of State, made up largely of sitting executive officeholders at federal and state levels and the National Assembly, who are also political officeholders, over whose party political activities the commissions have oversight and supervisory powers.
- To safeguard the independence of the INEC, the provisions of Section 158(1) of the 1999 Constitution stipulating that ‘In exercising its power to make appointments, or to exercise disciplinary control over persons, the...Independent National Electoral Commission shall not be subject to the direction or control of any other authority or person,’ should be replaced by the Section of the 1960 Constitution, which provides that, ‘in the exercise of its functions under this constitution, the Commission shall not be subject to the direction or control of any other person or authority.
- Removal of the Chairman and members before their tenure expires should be by the Senate on the recommendation of the National Judicial Council by two-thirds

majority of the Senate, which shall include at least 10 members of the minority parties in the Senate, as recommended by the ERC. However, to prevent the mass of members whose tenure expires at almost the same year and to ensure continuity, the presumption of a renewal for a second term should be in favour of members who would want a second term. This would prevent the kind of situation, which faced the commission under Dr Abel Guobadia in 2003, when the President's use of the power of non-renewal resulted in all but two of the commissioners leaving simultaneously at the expiration of their tenure in mid-August 2003.

- As the ERC recommended 'the funding of INEC should be first charge on the Consolidated Revenue Fund of the Federation;' Beyond the ERC's recommendation on this score, INEC financial provisions and tendering procedures, while it must be subject to its own due process and external audit, should not be encumbered by civil service tendering procedures and approvals.
- Electoral administration should be decentralised and localised, as a routine dimension of state and local politics, with the reformed national electoral body laying broad guidelines to be implemented by its state and local government subsidiaries or outposts. For example, non-partisan state and local electoral task forces, made up of distinguished state and local personalities, and drawing on and analogous to the idea of a Neighbourhood Watch to drive out marauders, can be established to monitor the electoral process in their communities.

### **Electoral administration: Voter registration, voting and voting process**

- Voter Registration should be routinised as a continuous process, and as part of a computerised national registration of vital statistics to avoid the rush to do new voter and fresh voter registration every four-year electoral cycle.
- The voters' register should be regularly updated and made available to political parties and the general public. There should be ample time and within the requisite timeframe before Election Day for the display of the voters' register, for filing of claims and objections, and for their consideration and determination. The INEC should also undertake its own stratified random sampling of names on the voters' registrar across the country.
- Voting should start promptly at the scheduled time for it to start and end within one hour of the scheduled closing time. This means the logistics of moving material and persons to and from the polling centres should be well-planned and rehearsed, and that election/voting materials should be in place at the polling centres well ahead of the commencement of accreditation.
- Each polling station should not cater for more than 500 registered voters, and at the end of voting the votes cast should be counted and results declared at the polling centres.
- Polling centres should be well advertised before Election Day, with effort made to make them permanent at fixed locations, for ease of identification.

## **Electoral administration and inter-agency collaboration**

- An inter-agency approach should be adopted towards the electoral process, among various regulatory agencies in view of the seamless nature of the electoral process. This will require regular meetings, exchange of views, sharing of resources and information and policy coordination to ensure and enforce compliance with the electoral law and rules and regulations.
- Such collaboration can be useful in voter education, voter registration, in the movement of election materials, and monitoring of party political activities.

## **Electoral adjudication**

- As recommended by the ERC, post-election cases should be resolved expeditiously within six months and before officeholders are sworn in.
- The legal framework for electoral governance should be reformed with emphasis on the substantive issues under adjudication and a re-examination of the substantial compliance law, shifting the burden of proof on returned candidates and the INEC, requiring certification of results by courts before the announcement of results by making their issuance a judicial and not merely an administrative process, and enlarging the scope of locus standi in electoral matters – all as argued in the NBA submission to the ERC.

## **Professionalism and capacity building**

- The INEC and the commissions to be ‘unbundled’ from it should emphasise professionalism and ethics in its permanent staff. They should offer attractive and competitive salaries, allowances and conditions of service to retain and attract the best, and offer them opportunities for training and retraining. The application of ICT to their operations should be their first order priority.
- The INEC Electoral Institute should be reorganised and restructured as the focal point for training of INEC’s permanent staff and ad hoc staff for election-related assignments and as a research centre for data gathering, dissemination, advocacy purposes, strategic planning and generation of futures scenarios.

## **Elections and the development process**

- Public policy should aim at the public welfare and the reduction of poverty, as the anchor of credible, free and fair elections, and for the defence of the people’s mandate. This should be linked to the developmental imperative of capacity building in the country.

# 6

## Senegal

**Ismaila Madior Fall**

### A. Summary

Despite its reputation as one of Africa's pioneer democracies, with its unbroken series of elections since independence and the establishment of a multi-party system in the 1970s, Senegal did not have an electoral system that met the necessary conditions for transparent elections until 1992. At that time important reforms were made to the constitution and to the electoral code, by agreement among the main political parties, which laid the foundations for the country's first change of ruling party in the year 2000.

Although it was major turning point in the management of elections in Senegal, the electoral code of 1992 still granted the political parties too much power in the administration of electoral operations. At times, the lack of an election management body independent from political stakeholders led to blockages in the electoral process and violent contestation of election results. The creation of the National Election Observatory (*Observatoire Nationale des Elections* – ONEL) in 1998 and its successor, the Autonomous National Electoral Commission (*Commission Nationale Electorale Autonome* – CENA) in 2005, constituted further major steps forward in election management in Senegal. These institutions, mandated not to organise elections but rather to supervise and oversee their organisation, made it possible to introduce a previously lacking element of neutrality and trust into the electoral process. The risk of electoral fraud was substantially reduced and there has been a progressive decrease in violent tensions during election periods.

Nevertheless, the organisation of elections in Senegal has yet to eliminate electoral fraud. Although the advocates of the system argue that any electoral fraud that may exist is now marginal, since proof is rarely found, there is no denying the persistence of problems that foster suspicion and generate recurring crises. The reliability of the electoral register has become the focus of electoral disputes, illustrated by the contestation of the results of the 2007 presidential elections and the boycott of the legislative elections held that same year.

A critical analysis of the election management system in Senegal leads to the conclusion that there is an urgent need to stabilise the rules of the electoral process, which often change according to the political interests of the moment. The Senegalese model for election management, which entrusts the organisation of elections to the Ministry of the Interior and their oversight to the CENA, also needs strengthening by increasing the independence and powers of the Electoral Commission. The quality of electoral practice could also be improved by rationalising the political parties and instituting a more regular system of dialogue among them.

## B. Constitutional change, party politics and electoral history

### The colonial period

Senegal was the first French colony in West Africa. As of 1816, a modern form of political organisation was gradually introduced. As part of this process, the French executive branch, which enjoyed broad powers in the management of the colonies, began applying a policy of 'assimilation' which in theory aimed at granting colonised populations the same political status as French citizens. This culminated in the establishment of a highly centralised and hierarchical administrative mechanism, founded on the representation of the Senegalese people in continental France, at the local level and, beginning in 1895, across French West Africa (*Afrique Occidentale Française* – AOF).<sup>262</sup> In the late 1950s, France replaced the policy of assimilation with one of 'association', a version of the British Empire's 'indirect rule' consisting in the respect of the culture of colonised populations and administering colonial territories through their own representatives. Assimilation meant that Senegalese citizens took on a greater role in the management of their territory and progressively in the political struggle for independence that came in 1960.

The earliest electoral competitions in Senegal date back to October 1848 with the institution of a deputy representing the colony in the French chamber of deputies. The right to French citizenship, granted in 1833 to the inhabitants of Saint-Louis and Gorée, allowed those who were able to prove at least five years of residence to participate in the elections. Persons of French or biracial extraction were automatically entitled to vote.

At the local level, the first elected representation followed the creation of the first *communes d'arrondissement*. In each of the communes of Saint-Louis and Dakar-Gorée, created by decree on 10 August 1872, a municipal council was established, led by a mayor and two deputy mayors. Rufisque obtained similar status in 1880 and, by 1887, Senegal totalled four communes with the separation of Dakar and the island of Gorée into two entities.<sup>263</sup> The condition for enrolment on the electoral registers was then reduced to a year of residence. Furthermore, the *Conseil Général*, which previously existed as an advisory body to the governor,

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262 On this issue, see Mbaye, S., *Histoire des institutions coloniales françaises en Afrique de l'ouest (1816–1960)*, Imprimerie Saint-Paul, Dakar, 1991.

263 They were combined again under the decree of 9 April 1929, reducing the number of communes to three.

was re-established, this time as a body elected by French citizens; that is, those originating from the four communes. Under the law of 19 October 1915, these were the only participants in elections in the territory, a situation that continued until 1946. Other elections were also held during that period, such as the election of the Colonial Council (*Conseil colonial*) in 1920, following the unification of Senegal, and the election of the Council of the Republic (*Conseil de la République*) – the upper chamber of the French parliament – in 1945.<sup>264</sup> The active participation of native Senegalese people began in the four communes under the leadership of a small black elite, a majority of whose members held positions in the lower echelons of the colonial administration or in trade.

In order to circumvent restrictions on political freedoms, it was informal associations rather than political parties that began the process of creating political awareness and the struggle to obtain more rights and responsibilities. The association *Aurore de Saint-Louis* (Dawn of Saint Louis) was created in 1910, followed in 1912 by the Movement of Senegalese Youth (*Mouvement des Jeunes Sénégalais*), both of which contributed substantially to the election in 1914 of Blaise Diagne, the first African deputy in the French parliament.<sup>265</sup> The parliamentary lobbying undertaken by Blaise Diagne led to the extension of French citizenship to all natives of the four communes and to their descendants. The first genuine party, the Senegalese Socialist Party (*Parti Socialiste Sénégalais*) was founded around 1929.<sup>266</sup> In 1938, this party, led by Lamine Gueye, would become the Senegalese section of the French Socialist Party, then known as the French Section of the Workers' International (*Section Française de l'Internationale Ouvrière* – SFIO). However, these movements had only limited influence on colonial policies. Electoral violence, distribution of gifts by the administration and bias in favour of certain candidates had begun to undermine the concept of the vote.<sup>267</sup> On the other hand, the political struggle was more elevated amongst Senegalese intellectuals living in France.

In the aftermath of the Second World War, natives of Senegal became more closely involved in the management of their territory, following a number of reforms impelled by the Brazzaville Conference in 1944 between the Free French led by General Charles de Gaulle and leaders of African colonies. At the political level, freedom of association and assembly was extended to the colonies,<sup>268</sup> and citizenship rights were granted to all men and women living in France's colonial territories.<sup>269</sup> At the economic level, an investment fund was created for the economic and social development of the overseas territories. Senegal was represented in the 1946 constituent assembly that drafted the constitution of the French Fourth Republic by the SFIO list led by Lamine Gueye and Léopold Sédar Senghor,

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264 See Atlan, C., *Elections et pratiques électorales au Sénégal (1940–1958). Histoire sociale et culturelle de la décolonisation*, Doctoral thesis in History, EHESS, Paris, 2001.

265 On the history of the Senegalese political elites see Ndao, E.H.I., *Sénégal, histoire des conquêtes démocratiques*, NEAS, Dakar, 2003.

266 Hessling, G., *Histoire politique du Sénégal*, Karthala, Paris, 1985.

267 See Quantin, P., 'Les élections en Afrique : entre rejet et institutionnalisation', in *Polis revue camerounaise de science politique*, Vol. 9, spécial 2001/2002, p.5.

268 Decree of 13 March and 11 April 1946.

269 Law of 7 May 1946.

elected under the double-college system in the legislative elections of October–November 1945 and 2 June 1946. The French Constitution of 27 October 1946 established the French Union, under which the colony of Senegal became an overseas territory with decentralised local government status.<sup>270</sup> The constitution also created the General Council (*Conseil général*), subsequently replaced by the Territorial Assembly of Senegal (*Assemblée territoriale du Sénégal*) in 1952. In order to fill the 50 seats on the Council, elections were held on 15 December 1946 with the participation of five political parties. At that time, there were four polling districts in Senegal. The *Bloc Union Républicaine Socialiste* list, led by Lamine Gueye and Senghor, won all of the seats. The assembly was also mandated to elect three Union councillors representing Senegal in the Assembly of the Union. The elections were held on 3 November 1947.

Elections in Senegal have always been marked by alliances and splits. Alliances with the Bordeaux-based French trading houses that were the foundation of the economy, alliances with the colonial administration whose favours could be bought with subservience, and alliances among members of the native political elite in defence of their common interests, in terms of rights and liberties. However, once members of that elite gained important elected offices such as deputy or mayor, disagreements grew up, notably around the status of the Senegalese territory and the condition of its population. Divisions arose within the political class, leading to violence during elections. Such was the case in 1947 with Senghor's departure from the SFIO section and his founding of the Senegalese Democratic Bloc (*Bloc Démocratique Sénégalais* – BDS), which was soon to win a senatorial seat, on 14 November.

The legislative elections of 17 June 1951, the local government (cantonal) elections of 30 March 1952 and the senatorial elections of 18 May 1958 saw the victory of the BDS, but not without bitter violence between BDS supporters and those of the SFIO. From that time on, the BDS and its leaders established their hegemony over Senegal's political arena thanks to support from trades unions and the leaders of the principal Muslim brotherhoods.<sup>271</sup> In addition, in September 1956, Senghor brought together under his leadership the *Union Démocratique Sénégalaise* (UDS), the United Socialists (*Socialistes Unitaires*), the Movement for the Autonomy of Casamance (*Mouvement Autonomiste Casamançais* – MAC) and the Senegalese People's Movement (*Mouvement Populaire Sénégalais* – MPS). The SFIO withdrew at the last moment and remained the principal opponent of this coalition of political parties known as the Senegalese People's Bloc (*Bloc Populaire Sénégalais* – BPS), dubbed the 'unified party of the masses'.<sup>272</sup> Senghor's legislative efforts helped improve the electoral process through two important laws (of 23 May 1951 and 6 February 1952), which extended the electoral college, increased the number of polling stations to a proportion of one polling station per 1500 voters, and imposed mandatory printing of ballots in the colours of the parties. As a measure against electoral fraud, the laws also required the representation

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270 Borrel, F., *L'évolution politique et juridique de l'Union française depuis 1946*, LGDJ, Paris, 1958, p.500.

271 See Monjib, M., 'Comportement électoral, politique et socialisation confrérique au Sénégal', *Politique africaine*, No. 69, mars 1998, p.53.

272 See Ly, A., *Les regroupements politiques au Sénégal (1956–1970)*, CODESRIA, Dakar, 1992.

of all of parties in the committees to review and finalise the electoral register and in polling stations, as well as the distribution of voters' cards by the administration.

Framework Law No. 56-619 of 23 June 1956 and its implementing decrees launched an evolution towards greater autonomy by establishing new institutions. Senegal now had its own executive branch, known as the Council of Government (*Conseil de gouvernement*), comprising members chosen from within the Territorial Assembly, whose powers were enhanced. In addition, universal suffrage was introduced, as well as a single college for elections to parliament and local assemblies. The 14 polling districts that existed at that time elected the 60 members of the Assembly on 31 March 1957. The BPS won 47 seats, against 13 for the SFIO led by Lamine Gueye, which had become the Senegalese Party for Socialist Action (*Parti Sénégalais d'Action Socialiste* – PSAS). Mamadou Dia, as co-leader with Senghor, became the first president of the council of government (that is, the equivalent of a prime minister).<sup>273</sup>

The Constitution of the French Fifth Republic was intended to resolve the various political problems faced by France at that time. Among these problems was the issue of how to organise the relationships between the Republic and the peoples with which it dealt. Through a referendum of 28 September 1958, Senegal approved the new constitution of the Fifth Republic that established the Franco-African community. Its adoption was the subject of bitter opposition from the African Party for Independence (*Parti Africain pour l'Indépendance* – PAI), founded in 1957 by BPS dissidents, and the African Assembly Party (*Parti du Rassemblement Africain* – PRA) founded by Abdoulaye Ly, Amadou Makhtar Mbow and Assane Seck, who were deserters from the Senegalese Progressive Union (*Union Progressiste Sénégalaise* – UPS), itself only created in 1958 by the union of the BDS, the PSAS and the *Mouvement Socialiste d'Union Sénégalaise*, a splinter group from the SFIO. On 25 November, the Territorial Assembly opted for the status of member state of the Community, and set itself up as a constituent assembly with a mandate to draft the first constitution of Senegal. Properly speaking, this was the beginning of the constitutional history of Senegal, which adopted its first constitution on 24 January 1959.<sup>274</sup> Senegal was no longer an overseas territory but a state, although it only enjoyed internal sovereignty.<sup>275</sup> However, a door remained open in Article 78, paragraph 3, which provided for the possibility of transferring powers from the community to one of its member states through specific agreements. The Senegalese proponents of independence in unity used this provision to accede to independence in the framework of a federation with what was then called Sudan (present-day Mali) on 20 June 1960, without leaving the community. The *Union Progressiste Sénégalaise* would be the principal architect of this final step towards independence.<sup>276</sup>

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273 Prior to the ordinance of 26 July 1958, Mamadou Dia was only vice-president of the Council, as the presidency fell to the governor, *ex officio*.

274 See Gonidec, P.-F., *La constitution de la République du Sénégal du 24 janvier 1959*, Penant, 1959, p.137.

275 See Fall, I.M., *Evolution constitutionnelle du Sénégal de la veille de l'indépendance aux élections de 2007*, CRE-DILA CREPOS, Dakar, 2007; and Ndao, *op.cit.*, p.231.

276 See Zuccarelli, F., *Un parti politique africain : L'union progressiste sénégalaise*, LGDJ, Paris, 1970.

Senegal definitively acceded to independence on 20 August 1960, following the dissolution of the Federation of Mali.

### Political developments following independence

Once independence had been achieved, the National Assembly elected in March 1959 and made up solely of members of the UPS adopted the first constitution of an independent, unitary Senegal on 26 August 1960. The independence constitution maintained the parliamentary regime and bicephalous executive instituted by the constitution of 24 January 1959. Power was shared between the three political leaders of the UPS at the time: Lamine Gueye was president of the National Assembly, Mamadou Dia was president of the council of government and Léopold Sédar Senghor was president of the republic.

After two years in operation, this system of government experienced an institutional crisis, as a result of the unclear legal distribution of powers between the president of the republic (the head of state) and the president of the council (the head of government) combined with a leadership crisis against a backdrop of political rivalry within the dominant party, the UPS. The crisis culminated in the resignation of Mamadou Dia in 1962 and a radical change in the political system with the adoption of a new constitution on 7 March 1963, establishing a presidential regime to replace the parliamentary regime, which was blamed for the crisis of 1962. The system of government established by the constitution of 1963 was designed in reaction to that of 1960. In order to avoid the pitfalls of bicephalism, a single-headed executive was instituted with the president wielding executive powers exclusively. In order to prevent a crisis between the executive and legislative branches, a strict separation of powers was organised, and its corollary was the functional specialisation of powers (all executive powers went to the President, all legislative powers went to parliament, all judicial powers went to the judiciary) and the mutual irrevocability of powers, which is to say that the government was not accountable to parliament and the executive did not have the right to dissolve parliament.

The goal of the constitutional law of 1963 was to promote political stability in a Senegal still reeling from the trauma of the crisis of December 1962. In this regard, compared to the pre-existing constitutional order, the constitution of 7 March 1963 attempted to break away from the previous parliamentary government with the advent of a presidentialist government. Due to its very long lifespan (1963–2001), the 1963 constitution had time to permit progressive initiatives to further democracy and the rule of law.

The Senegalese state inherited a highly centralised administration, in a territory set up as a single administrative unit yet with a highly ethnically diverse and largely illiterate population.<sup>277</sup> The government monopoly over the management of elections was maintained through a Ministry of the Interior that was largely at the service of the governing party.<sup>278</sup> Dependency on foreign powers continued to prevail on the economic level, due to underdevelopment. The Senegalese state therefore took up the struggle for development by

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277 See on this point Diouf, M., *Sénégal: Les ethnies et la nation*, NEAS, Dakar, 1998.

278 Mbodj, E.H., 'Faut-il avoir peur de l'indépendance des institutions électorales en Afrique?'

designing an economic and social development plan, accompanied by a reform of government institutions in a framework of decentralisation. The political elite, which was trained in the French school and well versed in parliamentary practices and thereby politically, socially and culturally assimilated, ensured continuity in the management of the state with, however, a few innovations.

Despite constitutional recognition of the multi-party system in Article 3 of the 1963 text, no specific law was adopted until 1975 to regulate the conditions for the formation of parties and the conduct of their activities. The constitution therefore provided no barrier to the determination of the leadership of the UPS to impose its unitary vision of the management of the state, to the point where a de facto single-party system came into being. The political context at the time was marked by mergers and banning of parties. After the dissolution in 1960 of the *Parti Africain de l'Indépendance* and in 1964 the Senegalese National Front (*Front national sénégalais* – FNS), created by Chiekh Anta Diop a year earlier, the *Parti du Rassemblement Africain* was the only legal opposition party facing the monolithic bloc of the ruling party.

In the early days of government under the 1963 constitution, although the multi-party system was maintained, President Senghor created in 1966 what he called the 'unified party', in which his party, the *Union Progressiste Sénégalaise* was joined by the sole legal opposition party of the time, the *Parti du Rassemblement Africain*, led by Abdoulaye Ly; as well as part of the membership of the Bloc of the Senegalese Masses (*Bloc des Masses Sénégalaises* – BMS), led by Cheikh Anta Diop, and some members of the *Parti Africain de l'Indépendance*, led by Majmouh Diop, these latter two parties having no legal recognition. On pretext that the development of Senegal required concerted action on the part of all citizens and particularly the elite, Senghor tolerated very little opposition. Faced with an opposition that was virtually non-existent, the UPS had no difficulty winning the elections of December 1963, February 1968, and January 1973, which were marked by violent incidents. The persistent economic crisis, international pressures and endless strikes led the government to soften its policy. Political parties began to resurface, with the recognition in 1974 of the Senegalese Democratic Party (*Parti Démocratique Sénégalais* – PDS) and the establishment of a framework for a multi-party system.

## Opening up to competitive elections

Constitutional reforms in 1976 and 1978 incontestably democratised the Senegalese political system by allowing the emergence and expression of multiple political views and the organisation of competitive elections in which opposition candidates could take part.<sup>279</sup>

After these reforms, the political system became much more open and democratic. It was the end of the single-party era and the beginning of the dismantling of most of the subterfuges that had been used to block the political system and ensure the hegemony of the dominant party. To take one example, in presidential elections, the dominant party

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279 See Sy, S.M., 'La démocratie multi partisane au Sénégal à la lumière de la révision constitutionnelle de 1976', *Annales Africaines*, 1976, p.9.

had long used a technique to exclude candidates competing against the incumbent: Article 24 of the 1963 Constitution provided that candidates for the office of President were only eligible if they were backed by a legally registered political party or by the signatures of fifty voters including at least ten deputies. In the context of Senegalese politics at that time, ‘unless there was a division within the [ruling] party..., only one candidate could meet the conditions established by the constitution’, to wit, the candidate of the ‘unified party’.<sup>280</sup> President Senghor was thus the only candidate in the different presidential elections organised prior to these reforms, with Stalinesque results.<sup>281</sup>

Similarly, with regard to the legislative elections prior to the reforms, the law had been used to the advantage of the party in power to keep other political parties or groups out of Parliament. The ordinance of 6 June 1963 establishing the number of members in the National Assembly, their allowances and conditions of eligibility and the system of ineligibilities and incompatibilities, stipulated that deputies in the National Assembly were elected on a majority basis using a list system with rounds on a national list, with no possibility of voting for candidates from different lists or preferential voting. The party in power, which was assured of beating its competitors, claimed all of the seats and easily excluded any members of the opposition taking part in the elections, as the *Parti du Rassemblement Africain* did in 1963.<sup>282</sup> Despite competitive legislative elections, parliament remained monochromatic, with representatives of the dominant party only. The system was certainly not democratic.

Following the democratic opening of 1976–1978, Senegal began a historic sequence of competitive elections. Henceforth, the Senegalese people were no longer reduced to a choice between a single candidate and a blank ballot;<sup>283</sup> they had gained freedom of suffrage, the liberty of comparing before choosing, a liberty that ‘symbolised the very idea of democracy’.<sup>284</sup> The first competitive presidential election in 1978 saw the participation of several candidates. For the legislative elections, the voting method was changed to enable the opposition to enter Parliament. Thus, pure proportional representation was applied, enabling the PDS to enter Parliament in 1978 with 18 deputies out of 100. These deputies were able to politically contest the decisions of the majority through criticism in

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280 Gautron, J.-C., and Rougevin-Baville, M., *Droit public du Sénégal*, Pedone, Paris, 1977, p.60.

281 Thus, in the presidential election of 1 December 1963, President Senghor was elected by 85.08% of registered voters. And things continued in the same vein. The results were similar after the elections of 25 February 1968 with the advent of the single party following on the dissolution of the PAI and the merger with the PRA-Sénégal; the incumbent and sole candidate was elected by 94.11% of the vote. The scenario of the single candidate triumphing with 99.97% of the votes in a non-competitive presidential was repeated in the vote of 28 January 1973. The system of sponsorship by deputies from the single party also promoted the solo candidacy of Senghor in the presidential elections of 1973, in which he was re-elected with 99.97% of the vote. See Ndao, op.cit., p.516. On the African elections of the day, see CEAN-CERI, *Aux urnes l’Afrique ! Elections et pouvoir en Afrique noire*, Pedone, Paris, 1978.

282 Indeed, in the legislative elections of 1st December 1963, two lists were in competition: the list of the UPS led by its chairman, Lamine Gueye, and the list of the PRA Sénégal, symbolically footed by Abdoulaye Ly at the bottom of the list. See Sy, S.-M., *Les régimes politiques sénégalais de l’Indépendance à l’alternance*, op.cit., p.57.

283 Senghor called on opposition and clandestine supporters to choose blank ballots. See Ndao, op.cit., p.516.

284 See Lekene Donfack, E.C., ‘La candidature indépendante et la liberté de suffrage en droit camerounais’, *Revue africaine des Sciences juridiques*, Vol. 1, No. 1, 2000, p.21.

parliamentary debates and to contest the laws passed by the majority before the Supreme Court, using the constitutional control mechanism. In this, the reforms marked real progress for democracy in Senegal.

Further progress was made in 1981, after President Senghor finally stood down before the end of his fifth term, leaving his prime minister Abdou Diouf to contest the presidential elections held at the end of 1980 on the ticket of the Socialist Party (*Parti socialiste* – PS), as the UPS had been renamed in 1976. The arrival in power of President Diouf contributed to the adoption of a true multi-party system, with the abolition of the limitation on the number of parties and the indications on ideological tendencies.<sup>285</sup> The number of parties immediately jumped from four to fourteen,<sup>286</sup> thereby opening up the competition for power.

### *First electoral crises*

The presidential and legislative elections that were organised simultaneously in 1983 culminated in a serious electoral dispute.<sup>287</sup> Abdou Diouf and his party had triumphed in the ballot, but the opposition heatedly contested what it referred to as ‘the electoral masquerade of 27 February 1983’ and the opposition parties that had won seats in the National Assembly (the PDS and the *Rassemblement national démocratique* – RND) refused to take their seats for some time. The challenge by the opposition was largely based on the lack of minimum conditions for a transparent election, such as the fact that the use of polling booths was optional.<sup>288</sup>

Electoral disputes continued to grow from one electoral cycle to the next, reaching critical mass on the occasion of the presidential and legislative elections of 1988, when violent protests at the results claiming victory for Abdou Diouf and his party culminated in the arrest and trial of the leaders of the opposition.<sup>289</sup> The constitutional reforms of President Diouf do not seem to have met the challenge of democratic consolidation that they set out to fulfil. The country was in a state of uncertainty<sup>290</sup> and a crisis of legitimacy that more closely resembled deconsolidation than a consolidation of democracy.<sup>291</sup>

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285 Law No. 81-16 of 6 May 1981, *portant révision constitutionnelle*. See Nzouankeu, J.M., ‘La consolidation et le renforcement de la démocratie au Sénégal. Constitutional revision of 6 May 1981’, *RIPAS* No. 2, December 1981, p.323.

286 Sylla, S., ‘Les leçons des élections sénégalaises du 27 février 1983’, *Annales africaines*, 1987, p.231.

287 *Politique africaine* No. 11, 1983, ‘Les élections sénégalaises du 27 février 1983’; Sylla, S., ‘Les leçons des élections sénégalaises du 27 février 1983’, *Annales africaines* 1983–1984–1985, p.78.

288 O’Brien, C.C., Diop, M.C., and Diouf, M., ‘Les élections sénégalaises du 27 février 1983’, *La construction de l’Etat au Sénégal*, Karthala, Paris, 2003, p.95.

289 Young, C., and Kanté, B., ‘Gouvernance et démocratie : les élections de 1988 au Sénégal’, in Hyden, G., and Bratton, M. (eds), *Gouverner l’Afrique. Vers un partage des rôles*, Nouveaux Horizons, Paris, 1992, p.43.

290 Fall, M., *Sénégal, L’Etat d’Abdou Diouf ou le temps des incertitudes*, L’Harmattan, Paris, 1986.

291 Diop, A.-B., ‘Espace politique et violence électorale au Sénégal’, *Afrique Développement*, Vol. XXVI, No. 1 and 2, 2001, p.155.

### *The consensual electoral code of 1992*

On the heels of the general elections of 1988, the government organised a roundtable with all political parties to discuss all issues arising from the disputed polls. The excessively broad focus of the roundtable meant that it failed to yield results and only served to further heighten tensions between the government and the opposition. In 1991, President Diouf appointed a commission to facilitate talks between the Senegalese political parties with a view to establishing consensual electoral rules,<sup>292</sup> the *Commission nationale de Réforme du Code électoral*, which also decided to review certain provisions of the Constitution of 1963. President Diouf urged the National Assembly to ratify the Commission's report 'without changing a single comma'. This became the electoral code of 7 February 1992.

Among the highlights of the reform are the following points aimed at modernising and democratising the electoral system:<sup>293</sup>

- Lowering the age of electoral majority from 21 to 18;
- Establishing the right to vote for members of the Senegalese diaspora, a provision that would be copied in numerous African countries;
- Guaranteeing the secrecy of the ballot by making use of ballot boxes mandatory for all voters;
- Identification of voters through mandatory presentation of a voter's card;
- Using indelible ink to avoid repeat voting;
- Revision of the general electoral roll with a view to establishing new voters' lists under the supervision of the parties;
- Establishment of the rule of two presidential terms maximum;
- Representation of all of the parties taking part in the vote in each polling station;
- Distribution of voters' cards in the presence of party representatives;
- Establishment of a national ballot-counting commission and departmental commissions, presided over by a magistrate and including representatives of all of the parties running in the elections;
- The principle that presidential and legislative elections should not be organised on the same dates;
- Increasing the number of polling stations to bring polling sites closer to the voters;
- Making the Court of Appeal competent to hear electoral campaign disputes;
- Authorising coalitions of parties in legislative elections (a vital opportunity to limit the impact of voting procedures favouring the Socialist Party, whose long-standing establishment guaranteed success under the majority list system);
- Banning of pre-campaigns or disguised electoral campaigns;
- Establishment, on consultation with the parties, of a reasonable sum for candidates to deposit;

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292 Presided over by Judge Kéba Mbaye and including four other experts: Abd-El Kader Boye, Tafsir Malick Ndiaye, Youssoupha Ndiaye and Alioune Badara Sene.

293 For an analysis of the reform of the electoral system, see Diop, A.-B., *Le Sénégal, une démocratie du phénix*, Karthala, Paris, 2009, p.191.

- Authorisation of independent candidates in presidential and legislative elections;
- Election of the President of the Republic on the first round conditional on an absolute majority of ballots cast totalling one quarter at least of all voters enrolled;
- A combination of a majority vote at the departmental level and a proportional vote at the national level in legislative elections to promote small parties entering Parliament; and
- A guarantee of equal access to the media for all candidates.

It was believed that with this new code, heralded by all, ‘nothing would ever be the same again’ and that the country had definitively turned its back on its cycle of ‘electoral play-acting’<sup>294</sup> and disputed election results, and had embarked on a cycle of peaceful elections. However, such was not the case: the presidential and legislative elections of 1993 were tainted by confirmed malpractice. Electoral engineering had been unable to eradicate the culture of electoral fraud. The presidential and legislative elections had revealed ‘a political class unable to put its own consensus into practice’.<sup>295</sup> The presidential election, which was contested from the time of the electoral campaign, culminated in total confusion with the blocking of the proceedings of the national ballot-counting commission (*Commission nationale de recensement des votes*) and the surprising resignation of the chairman of the Constitutional Council (*Conseil constitutionnel*), Kéba Mbaye. The legislative elections were equally contested and with greater violence.<sup>296</sup>

*The ONEL: A prelude to democratic change of government*

The implementation of the reformed electoral code during the elections of 1993 showed its limitations, which were aggravated during the local elections of 1996: a concern for legitimacy thus overtook the concern for efficiency. Corrective measures were required. Following a request by the opposition, in 1992 President Diouf instituted a commission (the *Commission cellulaire*, different from that of 1991) mandated to organise the Senegalese political parties in a collaborative evaluation of the local elections of 1996 and propose consensual measures to the President of the Republic aimed at improving the Senegalese electoral system.<sup>297</sup> Due to the irreconcilable positions of the ‘*Collectif des 19*’, a collective of 19 opposition parties that called for an independent Electoral Commission, and the Socialist Party, which favoured the status quo, the discussions were stalled. Following a request for arbitration addressed to him by the *Collectif des 19*, the head of state tabled a bill establish-

294 The elections of 1983 were thus described by the French satirical newspaper *Le Canard enchaîné*.

295 Diop, A.-B., *Le Sénégal, une démocratie du phénix*, op.cit., p.192.

296 With the assassination of the deputy chairman of the constitutional council, Mr Babacar Sèye. See, on this subject Diop, M.-C., and Diouf, M., ‘Léopold Sédar Senghor, Abdou Diouf, Abdoulaye Wade, et après ?’, in O’Brien, Diop and Diouf, op.cit., p.110. On the assassination, see Coulibaly, A.-L., *Wade, un opposant au pouvoir. L’alternance piégée ?*, Les Editions Sentinelles, Dakar, 2003, p.67; Niang, M., *Pour que triomphe la vérité. L’assassinat de Maître Babacar Sèye*, La Platine, Paris, 2002; Thiam, I.-D., *Un procès d’intention à l’épreuve de la vérité*, Editions de l’Hémicycle, Paris, 2004.

297 The commission was chaired by Ibou Diaité and composed of professors of law Moustapha Sourang, Babacar Kanté and El Hadj Mbodj and a retired civil administrator, Magib Seck.

ing the National Elections Observatory (*Observatoire National des Elections* – ONEL) which made post-electoral peace possible after the legislative elections of 1998. Senegal experienced uncontested election results for the first time, following the second set of all-party discussions on the electoral code and the creation of the ONEL, with the legislative elections of 1998 and the presidential elections of 2000.<sup>298</sup> The Socialist Party lost its first elections since independence, and President Diouf handed over the position of head of state to Abdoulaye Wade, leader of the *Parti Démocratique Sénégalais*. The peaceful change of government – *alternance*, in French – was widely hailed as a victory for democracy in Africa.

### The post-alternance era

In 2004, at a time when Senegal was moving away from the peaceful 2000–2002 electoral cycle that included the presidential election of 2000, the legislative elections of 2001 and the local elections of 2002, and a second cycle of elections was upcoming with the legislative elections set to take place in 2006, the opposition posited the need for stronger independent oversight of the elections, since it considered that the conditions for transparent elections were not met or at least that they could be improved upon (notably doubts about the electoral roll and limitations regarding the status and powers of the ONEL).<sup>299</sup> Opinion was divided on the issue of the establishment of an independent Electoral Commission that would be placed in charge of the whole electoral process. The members of the party in power (the PDS) were in favour of strengthening the ONEL as a supervisory and monitoring body. The opposition parties favoured the creation of an independent and permanent Electoral Commission with a mandate to manage the entire electoral process. In order to make it possible to organise consensus on this issue, with a view to creating a body for the management of independent elections, the President of the Republic, in conformity with his constitutional powers, issued two decrees: first, decree No. 2004-673 of 2 June 2004 established a commission mandated to make proposals on the setting up of an ‘autonomous Electoral Commission’. Under the terms of Article 2 paragraph 2 of the decree, this commission, comprising a representative of each of the legally constituted political parties, was to ‘submit its proposals to the President of the Republic within a deadline of two months following its institution’. Next, presidential decree No. 2004-1379 of 29 October 2004 appointed Professor Babacar Gueye as chair of the commission. Professor Gueye surrounded himself with a team of experts to facilitate the work and organise the proposals made by the parties in a report submitted to the President of the Republic.

As a result of these discussions, agreement was reached on the creation of the Autonomous National Electoral Commission (*Commission Electorale Nationale Autonome* – CENA),

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298 An illustration of this is the decision of the Constitutional Council to proclaim the final results of the second round of the presidential election, which reported that the Constitutional Council had not been informed of any disputes within the deadline stipulated in Article 29, paragraph 2, of the constitution (Décision No. 73/2000 du 25 mars 2000, in Fall, I.M. (ed.), *Les décisions et avis du Conseil constitutionnel du Sénégal*, CREDILA, Dakar, p. 307).

299 The limitations complained of were, in particular, the impermanent nature of the ONEL and its inability to sanction the administrative authorities for failing to fulfil their electoral tasks.

which was formally established in 2005 following the unanimous adoption by all the deputies in parliament of law 2005-07 of 11 May.

However, against all expectations, the electoral cycle following the democratic change of government faced problems that unfortunately caused the electoral system to regress in relation to the previous consensus on the rules of the process and acceptance of the results. The point of departure for this crisis in the electoral system was the adoption by the National Assembly of a law extending the mandate of the deputies on 20 January 2006. In response to torrential rains that had left thousands homeless, the government had, as stated in the preamble of the law,<sup>300</sup> mobilised considerable resources to deal with the situation and provide temporary shelter for the disaster-stricken population and to definitively eradicate the shanty towns. It was in that framework that the head of state decided to launch the '*Jaxxaay*' ('eagle') plan with a view to rapidly rehousing the disaster victims. All of which the government claimed required the reallocation to the disaster victims of resources originally intended to finance the elections of 2006. For these reasons, the President of the Republic made a proposal to the national representatives to combine the presidential and legislative elections to be held between 13 February and 1 March 2007. This was the thrust of the law of 20 January 2006, which stipulated that 'in derogation of paragraph 1 of Article 60 of the constitution, the mandate of the deputies elected at the outcome of the elections of 29 April 2001 is extended, to be renewed on the same day as the presidential election'. This was a controversial political decision in light of the radically polarised positions of the party in power and the opposition, but it was ratified by a parliamentary majority and validated by the Constitutional Council.<sup>301</sup>

As the date of the combined elections neared, the president was still, for a variety of reasons,<sup>302</sup> visibly anxious to postpone the legislative elections and to delink them from the presidential election. This time, a pretext was provided by the opposition. Indeed, upon referral by the PS and its left-wing ally, the *Ligue Démocratique/Mouvement pour le Parti du Travail* (LD-MPT, Democratic League-Labour Party Movement), the Council of State (*Conseil d'Etat*) in its decision of 12 January 2007, set aside the decree on the distribution of the number of seats to be filled by departmental majority vote on grounds of non-conformity with demographic criteria.<sup>303</sup> Thus, the President had a ready-made pretext for postponing once again the date of the legislative elections and uncoupling the elections. 'Unless the provisions of Article 31 of the constitution have been misunderstood', mischievously proclaimed the explanatory memorandum for the draft law, 'the presidential election scheduled for 25 February 2007 must imperatively be held on that date. On the other hand,

300 *Loi constitutionnelle No. 2006-11 du 20 janvier 2006 prorogeant le mandat des députés élus à l'issue des élections du 29 avril 2001 and Loi constitutionnelle No. 2007-21 du 19 février 2007 modifiant la loi No. 2006-11 du 20 janvier 2006 prorogeant le mandat des députés élus à l'issue des élections du 29 avril 2001.*

301 *Décision 92/2005 Affaire No. 3/C/2005 Prorogation du mandat des députés du 18 janvier 2006*, in Fall (ed.), op.cit., p.387.

302 Notably the formation of a coalition of parties running in the legislative elections that was made up of a significant portion of the opposition (PS and LD) and partisans of Wade's former Prime Minister Idrissa Seck.

303 For details, see [www.socialisme-republique.sn.org](http://www.socialisme-republique.sn.org).

following the decision of the Council of State of 12 January 2007, setting aside the decree on the distribution of the seats of the deputies, it is no longer possible to organise the legislative elections within the deadlines stipulated under Article L. 168 of the electoral code, whereby it is mandatory for declarations of candidacies to be submitted sixty days before the date of the vote. The present constitutional bill, which amends the constitutional law of 20 January 2006, authorises the organisation of legislative elections on 3 June 2007'.<sup>304</sup>

These efforts by the ruling party to disrupt the electoral schedule undoubtedly undermined the electoral process and democracy itself. They were manoeuvres on the part of the ruling party aimed at influencing the electoral process in its own favour by generating a crisis of confidence among the protagonists, which discredited the whole system. The changes caused negative side-effects such as a challenge to the 2007 presidential election results by the unsuccessful candidates, and the subsequent boycott of the legislative elections that same year. And yet, such incidents were believed to be things of the past after the democratic feat of peaceful regime change in 2000.<sup>305</sup>

### C. Status, powers and functioning of EMBs

According to the French republican tradition inherited by Senegal, elections are a matter of national sovereignty and are thus organised by the minister of the interior with the support of the administration. Traditionally, the management of the whole electoral process in Senegal was delegated to the minister of the interior, leading to the virtual exclusion of all non-state stakeholders in the rules for transmission of power. However, the liberalisation of the political landscape and the organisation of competitive elections in 1977 with the first participation by a legal opposition party, the PDS, made it possible to open up a national debate on the issue of fair and transparent elections. The electoral fraud and violence that had studded all of the votes organised up to 1998 made it an absolute necessity for independent bodies or bodies that were independent from the administration to be set up to organise or supervise elections. The setbacks observed during the municipal elections of 1996 finally convinced the Socialist Party to accept the long-standing call from the opposition for the creation of an independent organisation for the management of elections. Through a series of political negotiations, the model of elections exclusively managed by the administration was progressively challenged, first of all by the establishment in 1997 of the *Observatoire National des Elections*<sup>306</sup> and then by the creation in 1998 of the High Council for Broadcast Media (*Haut Conseil de l'Audiovisuel* – HCA).<sup>307</sup> These institutions were respectively replaced by the

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304 See the preamble to the abovementioned law of 19 February 2007.

305 This process of discrediting the electoral system should be put into perspective given the proper organisation of the local elections in 2009, which established the victory of the opposition in the major cities, including the capital.

306 Law No. 97-15 of 8 September 1997.

307 Law No. 98-09 of 2 March 1998. The HCA replaced the High Council of Radio and Television (*Haut conseil de la radio télévision*, HCRT) created in 1991.

Autonomous National Electoral Commission (*Commission Nationale Electorale Autonome* – CENA) and the National Council for the Regulation of Broadcasting (*Conseil National de Régulation de l'Audiovisuel* – CNRA), which, for the most part, copied and reinforced their mandates.

Since that time, the chosen format has been collaboration in the organisation of elections between the administration and an independent body, first ONEL and later the CENA. This system has, however, caused some political turbulence. The administration remains responsible for the material organisation of elections, while ONEL (1997–2004) and subsequently the CENA (since 2005) monitor and supervise the actions of the administration in electoral matters. In addition to the Ministry of the Interior, which is in charge of the organisation of elections, and the CENA, which is the elections supervisory and monitoring body, other institutions also play a role in the electoral process. These are the CNRA, the commission in charge of ballot counting (*Commission de recensement des votes*), local authorities and the Ministry of Foreign Affairs.

## The Ministry of the Interior

The Ministry of the Interior is the chief administrator of elections in Senegal. Its purview, through its central and decentralised departments, includes the material organisation of all elections and referendums in Senegal.<sup>308</sup>

### *Central services*

The national offices in the ministry responsible for elections essentially comprise the general Directorate of Elections (*Direction générale des Elections* – DGE) and the directorate for computerisation of the electoral register (*Direction de l'Automatisation des Fichiers* – DAF). The DGE was created in 1997, with the mission of organising all elections and referendums in Senegal.<sup>309</sup> Its creation followed a number of dysfunctions observed in the organisation of elections, particularly the local elections of November 1996. The DAF is in charge of the centralisation and processing of all data relating to the electoral rolls as well as the dissemination of the results required for management and decision-making.

The DGE is the central body or keystone of election organisation in Senegal and is responsible for:<sup>310</sup>

- The drawing up and revision of voters' lists, in collaboration with the directorate of computerisation of the electoral register (DAF) of the Ministry of the Interior;
- The maintenance of the electoral register;
- The design, development, installation and conservation of electoral documents and archives;
- The organisation and monitoring of the distribution of voters' cards;

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308 Decree No. 2003-292 of 8 May 2003, *portant organisation du ministère de l'Intérieur*.

309 Art. 14 of Decree No. 2003-292 of 8 May 2003, *portant organisation du ministère de l'Intérieur*.

310 Arts 14 to 18 of Decree No. 2003-292 of 8 May 2003, organising the Ministry of the Interior.

- The monitoring of the conditions of ballot printing;
- The enforcement and monitoring, in collaboration with the territorial authorities, of the principles applying to campaign materials;
- Support for the security services in relation to the security arrangements applicable during voting operations;
- Training of administrative officers, judicial authorities and elected representatives pertaining to the electoral process;
- Awareness and civic information campaigns;
- Production and management of the location of polling stations across the country;
- Adaptation of computer tools to electoral needs;
- Analysis of elections;
- Dissemination of technical information relating to elections, particularly regarding the implementation of the electoral process and various statistics;
- Support for the judicial authorities in the fulfilment of their missions under the terms of the electoral code;
- The preparation and execution of the budget for the revision of the voters' lists and the elections in collaboration with the relevant department; and
- The management of budget allocations for the fulfilment of the responsibilities of the general directorate of elections.

In order to successfully fulfil its mission and organise elections under optimum material conditions, the DGE is supported by associated departments within the ministry, notably the directorate of electoral operations (*Direction des opérations électorales*) and the directorate of training and communication (*Direction de la formation et de la communication*). In addition, there are other support services, such as the administrative and financial bureau and the IT bureau.

#### *Decentralised services*

The Ministry of the Interior is supported in organising elections at lower levels of government by the governors of each region, the prefects who head each *département*, and the sub-prefects who manage the rural communities (*communautés rurales*). These authorities play a role in the creation of committees to create and revise the voters' lists, the collection of electoral returns and the security of electoral operations.

### **The Autonomous National Electoral Commission**

The responsibilities of the CENA include the monitoring and supervision of all electoral operations. It enforces the legislation on elections and the transparency and fairness of the vote, by guaranteeing that the electors and candidates are free to exercise their rights. By contrast to other institutions of the republic that are established by the constitution, the election management bodies do not appear in the constitution, but are created by a law. The CENA was established by Law No. 2005-07 of 11 May 2005. Previously, the ONEL was created by Law No. 97-15 of 8 September 1997. Furthermore, the

laws creating these bodies do not expressly establish them as independent authorities. In the case of the CENA, for instance, the law merely indicates that it ‘is a permanent and financially independent body with its own legal status’, although in light of its role and its position in the system of administrative institutions, it is perceived as an independent authority.

### *Status and structural composition*

The modes of appointment and composition of the CENA are intended to guarantee its autonomy and integrity. According to Article L4 of the electoral code, ‘The CENA is composed of twelve (12) members appointed by decree. They are selected from independent figures, solely of Senegalese nationality, known for their moral integrity, their intellectual honesty, their neutrality and their impartiality, after consulting institutions, associations and organisations such as those of lawyers, academics, human rights advocates, communications professionals or any other body. The members of the CENA are appointed for a six-year mandate, with one third renewable every three years’.<sup>311</sup>

By contrast to ONEL, the CENA is a permanent structure. Once they are appointed, the members may not be dismissed or removed from office. Similarly, the body may not be dissolved by the executive. Between elections, its mission is to keep the country’s electoral archives and to conduct educational and awareness activities. In addition, it proposes amendments to improve the electoral legislation. In actual fact, it is not a part of the traditional trilogy of powers. The body in charge of monitoring and supervising elections does not belong to the executive, the legislative or even less the judicial branch. It is an independent authority mandated to supervise the traditional bodies in charge of organising elections.

As it was created by a law, the stability of the CENA remains an issue, since its continuing existence remains at the discretion of the legislature although the law describes it as ‘permanent’. It would be wise to enshrine its position under the constitution so as to permanently safeguard it from interference by parliamentary majorities that may be tempted to shape it according to their partisan needs and concerns.

The CENA is represented at regional and departmental levels. Each autonomous regional Electoral Commission (*Commission électorale régionale autonome* – CERA) is composed of seven members appointed by the chairperson of the CENA from among the independent figure of each region, who are of Senegalese nationality and who are known for their moral integrity, their intellectual honesty, their neutrality and their impartiality, on the approval of a general meeting of the CENA. The autonomous departmental Electoral Commission (*Commission électorale départementale autonome* – CEDA) is composed of five members appointed under the same conditions as the members of the CERA.

At each Senegalese embassy or consulate located in a country with the required number of Senegalese nationals to participate in elections, that is 500 registered voters, the CENA is represented by a delegation comprising:

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311 Art. L.4 of the electoral code (*Code électorale*). (Our translation.)

- A chairperson appointed by the chair of the CENA, from among the members of the Senegalese community in that place;
- Two other members of the community appointed by the chair after consulting the nationals; and
- An employee of the embassy or consulate who acts as secretary.

The members of foreign delegations of the CENA (*Délégations extérieures de la CENA – DECENAs*) are appointed by the chairperson of the CENA, on approval by a general meeting of the CENA and following an investigation on their morality, their intellectual honesty, their neutrality and their impartiality. All members of CENA branches are sworn in before the competent courts of their jurisdictions<sup>312</sup> with the exception of the members of the DECENAs, who are sworn in by the head of the diplomatic or consular mission of their jurisdiction.

#### *CENA personnel*

The powers of the members of the CENA are equal, although the chairperson and deputy chairperson exercise functions of protocol. Only the general meeting is invested with a deliberative function. The CENA deliberates on all issues and rules by consensus or by qualified majority vote. In addition to the members appointed by the President of the Republic, the CENA includes a secretary-general appointed by decree upon nomination by the chairperson of the CENA and a deputy secretary-general appointed by the general meeting of the CENA.

The CENA has adopted rules of procedure resolving that its decisions will be taken in secret. The rules of procedure generally aim to rationalise its responsibilities in order to avoid unnecessary duplications. They clearly define the missions assigned to the chair and the secretary general as well as the structure of the activities of the CENA by distributing tasks according to specific technical areas and through an administrative and territorial division.

The administration of the CENA comprises a secretary-general, a deputy secretary-general, a head of IT services, two IT specialists, a head of communications, a funds accountant, a materials accounting manager, an adviser, an archivist, six secretaries, an archivist-documentalist, two monitors representing the CENA at the directorate of computerisation of the electoral register (DAF) in the Ministry of the Interior, an accounting assistant, a switchboard operator, 18 drivers, a caretaker, a fleet manager, five cleaning ladies, and three security agents. Each CEDA is composed of nine people (five members, a secretary-assistant, a driver, a watchman and a surface technician). Each new CEDA has the right to a new vehicle (pick-up truck), furniture (desks, tables, chairs) and working equipment (computer and miscellaneous consumables), not to mention that they had to be

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<sup>312</sup> The swearing-in of the members of the CENA is organised by Art. L.17 of Law No. 2005-07 of 11 May 2005, which stipulates that 'The members of the CENA are sworn in before the Constitutional Council'. The members of the CERAs and CEDAs are sworn in before their respective competent courts.

provided with headquarters. The new personnel hired, and particularly the five members of each CEDA, had to receive extensive training on the different aspects of the electoral process, as did the controllers and supervisors they subsequently chose to represent the CENA on the administrative commissions and in polling sites and stations.<sup>313</sup>

Insufficient training of CENA members and polling station personnel is a constant. Most often, the members making up the polling stations and the voters are not versed in the electoral documents, notably the provisions of the electoral code relating to the organisation of elections. In the event of difficulties, magistrates and other sworn officials may read and explain the content of the rules governing electoral matters. Their limited number and the possibility of their absence may negatively affect the conduct of the vote in certain polling centres.<sup>314</sup>

The credibility of CENA representatives on the regional level has often been called into question. In the view of some of the participants in the focus group held for this study in Saint-Louis, the CENA does not fulfil its role, either nationally or locally. For instance, in Saint-Louis, anyone can be a CENA supervisor. Persons of dubious morality are often hired on the sole basis of friendship to do jobs requiring both reliability and expertise.<sup>315</sup> In Saint-Louis, several people who were co-opted into the CEDA had political leanings and were chosen based on circumstantial financial reasons. They were people who attended political party rallies and meetings.<sup>316</sup>

Generally speaking, there are relatively few women in elections management bodies and in the CENA in particular. No legal provisions mention gender balance and, among the twelve members of the CENA, there is only one woman.<sup>317</sup> It would be important, in this regard, for the law to stipulate a representative quota of women in the appointment of members to the CENA. In this respect, the composition of the EMBs with a view to increased involvement of women has been overlooked by the May 2010 law on gender parity, which only applies to elected assemblies such as Parliament and local government.

### *Powers and functions of the CENA*

The powers and functions of the CENA are exhaustively listed by the law. Under the terms of Article L.8 of the law on the creation of the CENA, the electoral management body is granted supervisory and monitoring powers. Like a referee in a sporting competition, the CENA plays an active role to the extent that it monitors and reports any infringements of electoral regulations and has the legal power to redress them.

Supervision and monitoring imply the verification of all of the actions carried out by the bodies and authorities in charge of each election. Reporting violations implies observation, questioning of the authorities responsible for the material organisation of the election and

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313 CENA report, 2010.

314 Presentation by B. Seck, RADHO representative in Saint-Louis, to the Focus Group of 17 February 2010 organised in Saint-Louis.

315 El Hadji Ndao, CODESEN representative in Saint-Louis, Focus Group, 17 February 2010.

316 Ousseynou Diongue, Consultant-Trainer, Focus Group, 17 February 2010.

317 Interview with the abovementioned CENA members.

conducting investigations or asking to see documents or any vouchers that may enable the CENA to fulfil its mission.

The jurisdiction of the CENA is very extensive. It covers virtually the whole of the electoral process. Article L.8 enumerates the following powers:

- Supervise and monitor every aspect of the process of producing and managing the electoral roll, with a right to access documentation relating to analyses, to the physical configuration of computer hardware and equipment, to programs and to procedures for data entry, updating, data processing and data retrieval;
- Supervise and monitor the production and revision of voters' lists by appointing a monitor of each commission or other organisation responsible for establishing or revising voter registration lists; monitors shall keep a slip attesting to the registration or the modification of the registration of each voter, and endorse the registration receipt given to the voter as well as the stub that is used for computer data entry;
- Monitor and supervise all updates to the location of polling stations;
- Supervise and monitor the printing and distribution of voters' cards; the CENA is informed of the whole process of procurement and ordering of voters' cards; a monitor appointed by the CENA shall sit ex officio on any commission or body mandated to distribute voters' cards;
- Supervise and monitor the submission of candidates' applications to stand for regional, municipal, rural and legislative elections with a view to endorsing the receipts to certify that the applications were submitted properly and within the legal deadlines;
- Ensure that the candidates in the presidential election, the lists of candidates and the CENA receive the voters' list by polling station at least two weeks before the date of the vote;
- Supervise and monitor ordering and printing of electoral ballots;
- Ensure that the publication of the list of polling stations takes place no later than 40 days before the start of the election campaign, as well as the notification of candidates and lists of candidates;
- Validate the appointment by the administration of the members of the registration commissions, review commissions, distribution commissions and of the polling stations supervisors;
- Supervise and monitor, with the political parties, the provision of electoral documents and equipment;
- Monitor and supervise the publication of voters' lists, and ensure that any necessary rectifications are carried out;
- Monitor the counting of unclaimed voters' cards;
- Appoint monitors in all polling stations;
- Participate in the selection of national and international observers;
- Co-sign the cards of the candidates' proxies or lists;

- Supervise the collection and transfer of returns from the polling stations to the sites designated for counting and centralisation of results;
- Participate in the proceedings of regional, departmental and national ballot counting commissions;
- Keep copies of all electoral documents;
- Contribute to the civic education of the people on voting; and
- Make any proposals to improve the electoral code.

Contrary to what one may think, the creation of the CENA does not entail the exclusion of the civil service administration from the organisation and material management of the electoral process. In the Senegalese electoral system, the civil service remains key to the electoral process. The CENA plays a policing role with powers to monitor and sanction. Its status as a referee in the political competition has been enhanced compared to that of ONEL, as it has the power to sanction, the power to give directions, powers of removal, etc. It ensures that electoral legislation is upheld and enforced by the administrative authorities, the political parties, the candidates and the voters.<sup>318</sup>

In the event that legislative or regulatory provisions relating to elections or referendums are not respected by an administrative official, the CENA orders him or her to take appropriate corrective measures. If administrative official does not comply, the CENA has the power to overrule and substitute the action of the official who is responsible for the electoral procedure, not to mention its power to refer a situation to the competent court. Furthermore, it can propose administrative sanctions against the responsible officer and ensures that they are executed. The public prosecutor or deputy public prosecutor has the right to initiate proceedings when seized by the CENA with a complaint on electoral operations. However, in the implementation of such action, the CENA is a joint party to the case at every stage of proceedings. The CENA may also seize the court by direct summons of the defendant or defendants. Despite its numerous powers, the CENA is obliged to collaborate with the administration, which is still responsible for the material organisation and management of the elections, although its management is monitored and supervised by the CENA.

## **Other bodies involved in the management of elections**

### *The Ministry of Foreign Affairs*

The Ministry of Foreign Affairs is in charge of the organisation of elections outside Senegal through the heads of its diplomatic and consular missions, in close collaboration with the Ministry of the Interior. As election management bodies, the heads of diplomatic and consular missions have the same powers in relation to presidential and legislative elections in

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<sup>318</sup> Art. L.10 of the law on its creation.

their respective jurisdictions as the administrative authorities within Senegal.<sup>319</sup> Senegalese nationals abroad do not vote in local elections.

### *The National Council for the Regulation of Broadcasting*

The National Council for the Regulation of Broadcasting (*Conseil national de régulation de l'audiovisuel* – CNRA) was created by law 2006-04 of 4 January 2006. It is in charge of regulating the whole of the public and private broadcasting landscape in Senegal. In relation to elections, it is responsible for regulating the media coverage of electoral campaigns.<sup>320</sup> It ensures the equality of candidates in terms of time allocated and sets rules regarding the production, programming and broadcasting conditions of regulated broadcasts.<sup>321</sup> Like the CENA, the structure of the CNRA has certain guarantees of independence. The CNRA comprises nine members appointed by presidential decree taken from a variety of social spheres (the arts, academics, human rights, etc.). Their mandate lasts six years and is neither renewable nor revocable. The members of the CNRA cannot be sued, served with summons, arrested or tried for acts committed or opinions stated in performance of their duties.<sup>322</sup>

The responsibilities of the CNRA go beyond the management of elections. In relation to the political parties and the organisation of elections, it has a mission (i) to monitor the compliance with the regulations on broadcast media and (ii) to 'ensure that the provisions of the aforementioned Law No. 2006-04 of January 2006 are upheld as well as those of the specifications and agreements governing the sector' of broadcast media. It ensures compliance with fair access to the broadcast media for all political parties, trades unions and recognised civil society organisations under the terms established by the laws and regulations in force. It establishes rules on the conditions of production, programming and broadcasting of regulated broadcasts during election campaigns.

Since its creation, the CNRA has intervened actively in the preparation and conduct of the campaigns for the different elections held since its establishment. It regulated media coverage of the presidential elections of 25 February 2007, the legislative elections of 3 June 2007 and the senatorial elections that same year, as well as the local and regional elections of 22 March 2009.

The CNRA has carried out its work, reported on its progress and continues to do so despite the difficulties it faces due to mistrust from political and media stakeholders, and misunderstanding of its role by a population that is not always aware of the responsibilities and powers of regulatory bodies. It is making progress and attempting to establish itself as a pivotal actor in the democratic process, as can be seen from its annual reports.

In the run-up to the local elections of 3 June 2007, the CENA tried to exercise its warning

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319 Under Title VIII of the legislative section and Title IV of the regulatory section of the electoral code on the participation of Senegalese nationals abroad in elections of the President of the Republic and deputies.

320 See in particular CNRA, *Rapport annuel au Président de la République*, 2007.

321 Art. 7 of Law No. 2006-04 of 1 January 2006.

322 *Ibid.*, Art. 3.

and watchdog mission fully. It visited different public and private bodies and held meetings with the political parties to remind them of their responsibilities and obligations in relation to the elections.<sup>323</sup> During these meetings, the CNRA determined the order in which the candidates would appear by drawing lots and reminded them of their allotted airtime. During the electoral campaign, the CNRA pointed out a certain number of irregularities. These involved statements of a xenophobic nature, use of images of children, a time overrun and a violation of the privacy of people who were filmed.

The CNRA's mandate to regulate broadcasting, especially during the sensitive election campaign period, was carried out with some difficulty. In the view of the CNRA, its mission to ensure equal treatment of the candidates in the legislative elections was impeded by insufficient technical equipment, the problem of translating certain languages used by the candidates (particularly Portuguese, Bambara and Manjack), and the lack of clarity and consistency in the paper record of broadcasts. Two requests were made to the CNRA to investigate broadcasts and dispel any misunderstandings. The CNRA rejected the complaint from the *Union nationale patriotique* (UNP)/Tekki coalition that it had been marginalised by the media. However, the CNRA ordered the re-editing and rebroadcasting of the package complained about in the case of the *Mouvement de la réforme pour le développement social* (MRDS).

Observing that media coverage had gone well overall, the CNRA recognised that this success was due in part to the collaboration of the public and private media, which had upheld the principles of pluralism, fairness and balance. In addition, the political parties and coalitions of parties complied with the provisions of the constitution and the electoral code in relation to their allotted air time.<sup>324</sup>

### *Ballot counting committees*

Since the advent of the consensual electoral code of 1992, ballots are counted first of all by returns committees, or *Commissions de recensement des votes*, which are responsible for counting the ballots. There are departmental, regional and national ballot counting committees.<sup>325</sup>

Departmental committees are composed of three magistrates, one of whom acts as chair, and all of whom are appointed by order of the President of the Court of Appeal from among the magistrates of all courts and tribunals. They also include a representative of each candidate or list of candidates and his or her alternate. Their headquarters are located at the premises of the departmental court. The regional committees are intended for local elections. There are eleven such committees across the country. Each regional committee is chaired by the president of the regional court, or, where he or she is unavailable, by another magistrate of the same jurisdiction, appointed by the former. Regional committees also include two magistrates appointed by the President of the Court of Appeal, as well as a representative of each

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323 Cf. *Rapport de supervision pour les élections législatives* of 3 June 2007.

324 See Conseil national de régulation de l'audiovisuel, *Rapport de supervision des élections législatives* of 3 June 2007.

325 Since 2008, Senegal has 14 regions and 45 departments.

candidate or list of candidates. Their headquarters are located on the premises of the regional court. The national ballot-counting committee has its headquarters in the Court of Appeal. It is chaired by the President of the Court, or, where he or she is unavailable, by another magistrate appointed by the former. It also includes two judges appointed by the President as well as representatives of each candidate or list of candidates and their substitutes.

The departmental, regional and national committees count the ballots based on the returns from each polling station. The regional and national, though not the departmental, committees may, where applicable, set aside or revise the returns submitted by the polling stations. The national ballot counting committee proclaims the preliminary results of presidential and legislative elections. Regional counting committees proclaim the results of local elections at regional level.<sup>326</sup>

### **Independence of the electoral management bodies**

The independence of the Ministry of the Interior in its power to conduct and manage elections is naturally questioned due to the fact that it belongs to the executive branch and due to its ties with the political party in power which is a competitor in all elections. Despite official guarantees of independence, the other bodies involved in the electoral process are also not spared criticism, and their independence is regularly questioned due to weaknesses in the procedures for appointing their members and the political influence exercised over them by the executive.

#### *The Ministry of the Interior*

The role of the Ministry of the Interior in the conduct of elections has traditionally been suspected of being a channel for government control over electoral operations. At the head of the executive branch are the supreme political authorities of the state, notably the head of state, the prime minister and an appointed minister of the interior who is accountable to the head of state and the prime minister. These political ties were eloquently pointed out by El Hadj Mbodj in the following terms: 'Indeed, as a leading member of the government which is the institutional emanation of the party in power, the minister of the interior is, in actual fact, politically responsible for the electoral victory of his political family. The political obligation of accountability that is incumbent upon him also extends to his representatives in the administrative districts in charge of steering the electoral process at the community level. This systematic infiltration of the whole chain of the electoral process by the government and its territorial branches was quickly perceived as a negative factor limiting the unfolding of the democratic process in the new African democracies under formation. It is not able to provide the traditional minimum guarantees of neutrality, impartiality, transparency and honesty of the vote (...)'<sup>327</sup>

The tendency to recruit election staff on a selective or even partisan basis and collusion between the party in power and the administrative authorities has created confusions

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<sup>326</sup> Arts LO.134, LO.182, LO.183, and L.217 to L.219 of the electoral code.

<sup>327</sup> Mbodj, *op.cit.*, p.2.

obscuring the relationship between the administration on the one hand, and ordinary citizens and the opposition parties on the other hand.<sup>328</sup> In this context, becoming a card-carrying member of the ruling party opens doors to positions of responsibility, when it does not purely and simply give rise to favouritism.<sup>329</sup> Some civil servants thus feel obliged to follow orders to please or satisfy the political authorities and thereby maintain their special privileges. This perversion of administrative rules had consequences for the organisation and conduct of elections. In the view of a sizeable segment of the population and the opposition political parties, the administration could not organise the vote on a neutral basis, despite the introduction of oversight bodies.

The civil servants at the Ministry of the Interior in charge of organising elections recognise that they are hierarchically dependent on the Ministry of the Interior, but they claim that this in no way affects their independence. They affirm that within the electoral operations directorate (*Direction des opérations électorales*) officers are chosen who have no political affinities with the party in power.<sup>330</sup> The director of electoral operations, who is also a state inspector-general, declares with pride: 'I have been in the department for 41 years, and I do not expect anything from the administration. The Minister cannot give us orders that are against the law. I have organised more than ten elections plus one referendum.' He adds that despite the change of government, he has been kept in his position.<sup>331</sup>

### *The CENA*

The members of the CENA are appointed by the President of the Republic.<sup>332</sup> On first sight, this prerogative seems to reflect executive control over the composition of the CENA. However, the powers of appointment of the members of the CENA are theoretically offset by a series of legal precautions, including, as noted above, requirements of moral character and, more importantly that the president should first consult 'institutions, associations and organisations such as those of lawyers, academics, human rights advocates, communications professionals and others'.<sup>333</sup> The impact of the consultations is very limited in practice, however, as the institutions do not appoint the members of the CENA, but simply provide an opinion that is not binding on the appointing authority.

Members of electoral monitoring bodies are often challenged on their appointment. The naming of General Amadou Abdoulaye Dieng in 1997 as chair of the ONEL was

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328 This situation is not unique to Senegal, it has been seen in more accentuated form in other countries, particularly Cameroon. See the incisive study by Momo, Claude, 'L'administration électorale en Afrique subsaharienne francophone', in *Politeia* No. 12/2007, pp.401–434 and the study by Endong, Aboya, 'Parti administratif, Transitions démocratiques et patrimonialisme en Afrique Noire', in *Politeia* No. 10, 2006, p.336.

329 Tine, Antoine, Polis Revue électronique, *Revue Camerounaise de science politique*, p.12.

330 Interview with the Director of electoral operations of the Ministry of the Interior and his colleagues, 8 February 2009.

331 The Director General of elections, who is still in office, was effectively appointed by former President of the Republic Abdou Diouf.

332 Art. L.4 of the electoral code (*Code électoral*).

333 *Ibid.*

virulently contested by the opposition on grounds that he had initiated a movement to support the re-election of President Abdou Diouf, who was running to succeed himself.<sup>334</sup> The CENA also saw its members contested upon their nomination. Chairperson Moustapha Touré was objected to by the opposition, which pointed out his wife's position in the leadership of the PDS, the party in power, in the region of Thiès. At that time, the opposition also indicated its reservations on the impartiality and moral probity of certain members of the CENA.<sup>335</sup>

Theoretically, the members of the CENA benefit from statutory guarantees that protect them in the performance of their duties. They may not be dismissed from their duties before the end of their term, except upon their own request or for reasons of physical or mental disability, duly diagnosed by a doctor appointed by the board of the medical profession, with the assent of the CENA.<sup>336</sup> Another statutory guarantee resides in the relatively long duration of their mandate. Members of the CENA are appointed for tenures of six years, with one third of the members renewable every three years. Members of the CENA may not seek or receive instructions or orders from any public or private authority.<sup>337</sup> The conditions of termination of their appointment are also strictly regulated. Similarly, the rules on conflicts of interest are clearly defined and the following persons may not be members of the CENA: members of government, members of a minister's office, elected representatives in office and heads of administrative districts, and relatives of candidates running for president up to the second degree.<sup>338</sup>

The CENA benefits from a legal framework guaranteeing its independence. Its operational independence is based on the permanent nature of the institution, its status as a legal entity, its financial independence and the granting to it of considerable powers.<sup>339</sup> It has asserted its independence in budgetary terms by refusing to allow its budget to be included in the budget of the Ministry of the Interior. As an independent body of the administration, whose electoral mission it is mandated to monitor and supervise, it could not accept this insidious form of limitation of its financial independence. The CENA has always obtained the adoption of its budget without modifications of its appropriation either from the Ministry of the Budget or from parliament. In this regard, the CENA is heard directly by the Finance Committee of the National Assembly before which it tables its budget.<sup>340</sup> The CENA's operational independence is ensured by the fact that it prepares and adopts its own rules of procedure, enabling it to have its own staff (IT officer, watchman, security agent, etc.).

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334 For further explanations and clarification, see Oul Ahmed Salem, Zékaria, 'L'observatoire national des élections au Sénégal : une neutralité sous surveillance', in Quantin, P. (ed.), *Voter en Afrique : comparaisons et différenciations*, Karthala, Paris, 2004, pp.178–181.

335 On these different episodes, see 'Action de récusation du Président et du vice-président de la CENA', *Sud Quotidien*, 29 July 2005; 'Présidence de la CENA : L'opposition exige la révocation de Moustapha Touré', *L'Observateur*, 11 June 2005; *Sud Quotidien*, 8–9 August 2005.

336 Art. 6 of the electoral code (*Code électoral*), edition 2009, p.4.

337 Art. L.4 of the electoral code.

338 Ibid.

339 Art. L.1 paragraph 1 of Law No. 03-2005, *portant création de la CENA*.

340 Interview with M. Sall, Secretary General of the CENA, 26 January 2010.

However, despite these statutory guarantees of independence, the CENA and its members are constantly subjected to pressures from the executive branch. The November 2009 resignation of Moustapha Touré from his position as chair of the CENA, upon request by the President of the Republic, is an illustration of the extent of the control that the executive wields over the CENA despite legal guarantees of independence. According to Mr Touré, '[...] The President of the Republic asked me to come in for an audience, which took place on 5 November 2009 at the presidential palace. When I arrived at his office, he clearly explained to me that he no longer had confidence in me. He repeated several times: 'you are against me; you are fighting against my party. Since you no longer have my confidence, he added, I am asking you for restitution of the mandate I entrusted in you in the days before you lost my confidence'.<sup>341</sup>

The independence of the CENA has been the focus of public debate. In the view of some, the CENA has yet to come into its own, it lacks authority and remains silent on fundamental aspects of the electoral process (such as the reliability of the electoral roll). As proof, they argue that the people turn directly to the press to contest electoral fraud, revealing a clear lack of trust in the CENA.<sup>342</sup> In the view of others, the CENA is free theoretically, but in practice doubts may be cast on its independence. According to the deputy secretary general in charge of elections for the LD-MPT party, Abdoulaye Badiane, the members of the CENA were appointed without respecting the consultation procedures stipulated in Article 4 of the electoral code, and appointment by decree necessarily implies partisan and political choices as illustrated by the resignation of the chair of the CENA upon request of the president.

The impartiality and neutrality of the CENA were particularly questioned during the presidential election of 2007. The opposition even considered that the role of the CENA was one of the keys to the re-election of President Wade. Some said that it was 'an accomplice in fraud and an electoral masquerade'.<sup>343</sup> In the view of others, 'thanks to its powers in practice and the fact that its members and its delegates in the field are largely appointed by the administration, the CENA is far from guaranteeing the transparency of electoral operations. In actual fact, it plays more of the role of an adviser to the state authorities, notifying them of a few corrections which, for the most part, in no way inconvenience the party in power. Furthermore, there is nothing to prove that the civil service maintains, systematically and throughout the country, the neutrality and impartiality expected of it. It is even tempting to think that, to avoid hindering the progress of their careers, few representatives of the state would dare to defy the party in power and rise above partisan contingencies. This was the case before the change of government in 2000'.<sup>344</sup>

In the end, it can only be observed that the CENA has for the most part fulfilled

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341 Interview with Moustapha Touré, chair of the CENA, 'L'énigme de l'élection de 2007 se trouve dans le fichier', *La Gazette du Pays et du Monde* No. 37, 10–17 December, p.11.

342 Focus Group organised in Saint-Louis on 17 February 2010 with civil society organisations and journalists.

343 Abdoulaye Bathily, candidate for the *Jubbanti* Sénégal coalition, in [www.rewmi.com](http://www.rewmi.com).

344 Lo, M., 'Réflexion sur le processus électoral', *Wal Fadjiri*, 12 March 2007.

its mission of monitoring and oversight of elections relatively well. It was not merely expressing self-satisfaction when it stated that ‘The presidential election of 25 February 2007 was held in a manner that was generally satisfactory, allowing the Senegalese people to express themselves and to make their own choice. This choice was implemented in a context of democracy, discipline, clarity and transparency, and also through a level of popular participation that has rarely been equalled’.<sup>345</sup> The continuous provision of information to stakeholders in the electoral process, meetings with the political parties, a strong presence in the field and the constant vigilance of the members of the CENA lent credibility to its overall mission of monitoring and supervising the presidential election.

#### *The National Council for the Regulation of Broadcasting*

Like the other EMBs, the members of the CNRA also assert their independence from the public powers. All the same, the chairperson of the CNRA has pointed out that during electoral campaigns, the party in power predominates in terms of air time, with the assistance of the state media.<sup>346</sup>

#### *Criticisms of lack of independence in electoral management*

Overall, at the level of legal framework, there is a call for greater independence for the EMBs in terms of their status (for example by diluting the presidential monopoly on the appointment of the CENA and CNRA members) and powers (a call for an electoral management structure with full powers to organise elections as is the case in many African countries). A multi-stakeholder workshop on the electoral process and the electoral roll organised on 20 May 2010 in Dakar by independent experts mandated by the European Union and the US Agency for International Development (USAID) to audit the voters’ register provided an opportunity for discussion on the role of the CNRA during electoral campaigns. The opposition coalition deplored the inequality with which the state media cover the news, with a focus on the established authorities. It also deplored the low level of corrective actions on the part of the CNRA, even though the latter is supposed to ensure compliance with the respective air time allotted to the parties. It further criticised the format and design of the ‘pluralistic’ public service programmes.<sup>347</sup> The ruling coalition, on the contrary, felt that the media landscape was not particularly favourable to it, if all public and private media were taken into account, given the fact that the number of private media was greater and they demonstrated a certain automatic opposition to the Government, lacking objectivity and criticising it systematically.

On the more specific issue of ‘disguised electoral campaigns’, divergences were also noted. The opposition criticised what it viewed as undue intrusions by the President of the Republic into campaigns that did not involve his mandate, asking for such actions to be sanctioned by the media regulatory authority, whereas the coalition of parties in power

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<sup>345</sup> CENA, *Rapport général de la CENA sur les élections présidentielles 2007*, Dakar, January 2008.

<sup>346</sup> Interviews of 19 January 2010 (our translation).

<sup>347</sup> Statement by the BCG.

sought to prove that the president had not overstepped his natural role or his duties as head of state in any travel he may have undertaken during the electoral campaign.<sup>348</sup>

## D. Funding of elections in Senegal

EMBs suffer from financial limitations, due to their dependence on the administration, which involves a certain form of subordination to its authority. To enhance their independence, they should be granted financial independence rendering them directly accountable to the supreme audit institution (the *Cour des comptes*).

### The Ministry of the Interior

Theoretically, a ministry has no legal existence of its own separately from the state. Ministries operate under the direct management of the state and depend on the state financially. According to the director general of elections, the budgets for elections are relatively satisfactory since they allow the various costs inherent in the organisation of elections to be covered.<sup>349</sup> The cost of the organisation of the presidential election of 2007 was estimated by the Ministry of the Interior at FCFA 12 billion (US\$ 25 026 000). The electoral register was completely redone for this election and digital voters' cards and national identity cards were introduced for the first time. Some people challenged the high cost of these investments only to get election results that were later contested. According to some, the establishment of the system for production of cards cost FCFA 23 billion (US\$ 47 960 000), and its continued use beyond the electoral period did not seem to interest the government, which risked letting it lapse or require reform after only a short period of use. The government, for its part, asserted that it could maximise returns on the investment through the production of passports, drivers' licences and other digital documents in Senegal and in the sub-region.<sup>350</sup>

### The Autonomous National Electoral Commission

Under the terms of Article 19 of the electoral code, the CENA prepares its budget in collaboration with the competent state technical services and executes it in conformity with the rules of public accounting. The allocations required for the running of the CENA and its branch offices and the fulfilment of its responsibilities are included as independent items in the general budget. They are authorised in the framework of the appropriation act (*loi de finances*). The corresponding allocations are placed at the disposal of the CENA at the start of the financial year.

In theory, the CENA may receive material and financial support from public and private

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348 Summary of the proceedings of the multi-stakeholder workshop on the electoral process and the electoral roll held on Thursday 20 May 2010, at Novotel, in Dakar.

349 Abovementioned interview.

350 General report of the CENA on the presidential election of 2007, p.7.

institutions.<sup>351</sup> In reality, the state authorities have always argued that the funding for elections should be derived chiefly, or even solely, from the state budget, feeling that it would be inappropriate for donors to directly finance this type of activity. This attitude goes against the practice of virtually every other member state of the African Union, where national bodies in charge of elections request and obtain funding for the conduct of their activities outside of the state budget.<sup>352</sup>

The CENA's budget is executed in conformity with the provisions of organic Law No. 2001-09 of 15 October 2001 on public finances and Decree No. 2003-101 of 13 March 2003 on the general rules governing public accounting. Decree No. 2006-07 on the financial regime for the CENA complements the law on the CENA. In relation to its financial management, the CENA has an authorising officer (its chairperson), an appropriations administrator in the person of its secretary-general, and a state accountant appointed by the Minister of Finance.

- The secretary-general draws up an annual draft budget based on the operating costs of the organisation and the objectives and expected activities for the coming year, under the authority of the chairperson. He or she then presents the budget for approval by plenary a meeting of the CENA. The secretary-general makes all proposals to commit funds allocated to the CENA, discharges obligations and prepares orders to pay. The chairperson of the CENA transmits the budgetary document to the minister of finance for inclusion in the general budget of the state, under allocations to institutions. The chair of the CENA approves all measures entailing expenditures and ensures enforcement of and compliance with the applicable public finance laws and regulations.
- The state accountant settles expenditures, manages funds, and prepares the financial statements to which are annexed all necessary vouchers. He or she is the correspondent of the treasury, to which he or she submits for endorsement the financial reports intended for the Cour des Comptes within the deadlines established by law 99-70 of 17 February 1999. The financial reports are subject to the prior approval of a meeting of the CENA. The accountant is appointed by order of the minister in charge of finance, and is subject to the regulations governing state accountants.
- A plenary meeting of the CENA ensures that mandatory expenditures are always included in the budget. The financial year for the CENA begins on 1 January and ends on 31 December of the same year. All income and expenditures must cover the calendar year. The funds required for the execution of the expenditures of the CENA are included in the overall order to pay by the Minister in charge of Finance, as soon as the allocation is available, up to the total amount of the budget allocation included in the *loi de finances*.

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351 Art. 17 of the rules of procedure (*Règlement intérieur*) of the CENA.

352 CENA report, 2008, p.18.

Each year, the chairperson of the CENA submits the administrative accounts to a plenary meeting of the CENA for discussion. The contracts entered into by the CENA must comply with the regulations established by Senegalese law on public procurement (*Code des marchés publics*).<sup>353</sup> The meeting of the CENA decides on the management of the assets of the CENA in conformity with Article 3 of decree 2003-101 of 13 March on general rules of public accounting. The financial management of the CENA is subject to monitoring by the *Cour des comptes*.

For 2007, which was an election year, the electoral expenditures of the CENA were divided into three parts:

- For the national headquarters in Dakar, the amount of the expenditures was FCFA 82 330 000 (US\$ 172 000), which notably included travel expenses for regional supervisors and purchases of A4 paper to print the travel orders of controllers and supervisors.
- The allocations for the 34 CEDAs in Senegal were approximately FCFA 676 674 800 (US\$ 1 411 000) spent on per diems for controllers and supervisors, their transportation, rental of premises, catering for CEDAs and communications.
- The DECENAs, numbering 28 in all, received allowances totalling FCFA 319 100 000 (US\$ 665 000) over the period running from April 2006 to March 2007.

## The National Council for the Regulation of Broadcasting

The CNRA lacks substantial financial freedom. Its chief resource is a budgetary allocation. It merely has the right to propose the adoption of the allocations necessary for its operations during the drafting of the *loi de finances*.<sup>354</sup> However, in its operations, the fines it applies to violators of broadcasting rules could have helped compensate for its underfunding. These financial penalties can reach up to two million CFA francs, not to mention daily penalties for late payment of FCFA 100 000 to FCFA 500 000. However, the sums are paid into the state budget, as they are recovered by agents of the public treasury.<sup>355</sup>

## E. Electoral disputes in Senegal

Although the courts theoretically play an important role in the electoral process, election litigation in Senegal is relatively rare. This paradox can be explained by the fact that the role of the courts goes beyond the resolution of electoral conflicts and that stakeholders who lack faith in the independence of the judges generally do not submit their electoral complaints to them. Finally, the texts governing electoral disputes are not sufficiently well known by the various electoral stakeholders.

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353 The law on public contracts is contained in Decree No. 2002-550 of 30 May 2002.

354 Art. 30 of law 2006-04 of 4 January 2006.

355 Art. 26, *Ibid.*

## Role of the courts

Departmental courts hear disputes regarding the electoral register. Their decisions are final on the facts, but may be taken before the Supreme Court for appeal on points of law.<sup>356</sup> The president of the regional court chairs the regional ballot counting commission. In the event he or she is unavailable, he or she appoints a substitute magistrate from the same jurisdiction.

The powers of the Court of Appeal vary according to the type of election. The president of the Court of Appeal appoints, by order, the magistrates who will sit on the ballot counting commissions. He or she also appoints, under the same conditions, the delegates of the Court of Appeal who will be responsible for ensuring the proper conduct of electoral operations on the day of the vote. Furthermore, during electoral campaigns, the Court of Appeal of Dakar ensures the equality of the candidates.<sup>357</sup> In the case of local elections, the Court of Appeal has jurisdiction to hear electoral disputes.<sup>358</sup>

The Constitutional Council receives applications from potential candidates wishing to run for President of the Republic, establishes the list of candidates, rules on challenges relating to elections of the President of the Republic or the deputies in the National Assembly, and proclaims the results.

## Low levels of electoral litigation

Electoral jurisprudence in Senegal is not well developed. The low number of cases can be explained by unfamiliarity with the relevant laws. Most of the stakeholders directly involved in the management of the elections are not very aware of the contents and subtleties of the legal rules governing the process. For example, anomalies noted during elections are not always systematically transcribed in polling stations' returns as required by law.

Furthermore, the public is often disconcerted by the traditional attitude of electoral judges when cases are brought, who fail to sanction actions that are clearly unlawful under the electoral legislation on grounds that they would not have a decisive impact on the outcome of the elections. Indeed, most of the decisions of electoral judges, even when serious dysfunctions and violations of the electoral code have been observed, refrain from imposing sanctions, because the judges deem that they are not of a nature to alter the fairness of the vote or are not of a nature to decisively influence its results. Such decisions lead to the validation of results that are tainted by fraud.<sup>359</sup>

In the light of the foregoing, citizens hesitate to complain to representatives of the administration or the various Electoral Commissions when they see problems with the conduct of an election. Because of their mistrust towards the administration and the CENA (and its branch offices), they tend rather to resort to the press or civil society

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356 Arts L.43, L.44, R.28 and R.35 of the electoral code.

357 Art. LO.121.

358 Arts L.220 and L.225 of the electoral code.

359 For instance, see the decision of the Constitutional Council (No. 96/2007 of 10 March 2007) proclaiming the results of the presidential election of 2007.

representatives. Reporters dispense information live and in real time on the radio. There have been cases where the authorities, informed through the press, have implemented the necessary corrective actions by spontaneously giving the appropriate instructions. As a vehicle for information, the press speaks for the poor and relays vital elements to obtain a rapid reaction from the authorities.<sup>360</sup>

## F. A critical assessment of electoral governance in Senegal

### **From initiation to consolidation: The standardisation of the electoral system**

The history of the evolution of the Senegalese electoral system could be subdivided into two stages: the first period, running from 1960 to 1992, was marked by the absence of real conditions for democratic elections due to the lack of electoral standards guaranteeing transparency; the second period, which began with the adoption of the consensual electoral code of 1992, saw the progressive establishment of the conditions for organisation of transparent elections. The electoral code of 1992 marked a positive change in the history of electoral management in Senegal, although it was progressively undermined by the excessive power of political parties in the electoral process. The code granted the political parties an important role from the time of creating the electoral register to the proclamation of election results. But this role was not counterbalanced by the existence of third-party observers in the event of disagreement between the parties, which are also stakeholders in the competition. This anomaly was corrected with the creation of the ONEL and then the CENA, which are third-party participants that can act as witnesses, counter-balances and neutral, external observers able to weigh in on cases of disagreement between the stakeholders and avoid paralysis in the system as during the presidential election of 1993.

The doubts that could be held on the quality and impartiality of the system should have been largely dispelled by the creation of electoral regulatory bodies such as the ONEL and the CENA, which were able to ensure credible legislative elections in 1998, presidential elections in 2000 and local elections in 2002. However, the country entered a contested phase, with challenges to the results of the 2007 presidential election and the boycott of the legislative election of the same year. There seemed to be a return to calm with the acceptance by all of the parties of the results of the latest local elections in 2009, when the victory went to the opposition in the major urban centres, including Dakar. Controversy on the rules of the process has been revived in the run

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360 Presentation by Naby Sylla, a reporter at radio RMF, to the Focus Group in Saint-Louis on 17 February 2010. However, the role of the press is not always up to par. Indeed, by reporting on the electoral violence observed here and there on the day of the vote, the press may, by relaying cases of dysfunction or violence, exacerbate the violence by contagion and undermine the credibility of the electoral process in several locations.

up to the 2012 presidential election, in which President Wade has already announced that he will run.

In fact, it can be said that the Senegalese electoral system works relatively well, and that it is growing stronger and showing a tendency towards routinisation. Electoral fraud is largely exaggerated by the losers, who have trouble providing irrefutable proof that could lead to the legal overturning of election results. Since the advent of ONEL and then the CENA, electoral fraud has become marginal thanks to two factors: an improvement in the legal framework; and the mobilisation of politicians and the people. According to the director-general of elections, the electoral code of 1992 prevented any possibility of fraud, and with the high-powered computer system at the directorate, the potential for fraud is minimal.<sup>361</sup> Stating that ‘in terms of fraud, I do not think it exists; I did not really see a single confirmed case of fraud in 2007’, the representative of RADDHO (the human rights NGO, *Rencontre Africaine pour la Defense des Droits de l’Homme*) in Saint-Louis was in full agreement.<sup>362</sup>

Indeed, by progressively learning lessons from each successive vote, the stakeholders, through the electoral mediation technique consisting of establishing consensual rules for the electoral process, have been able to create an electoral system that make it possible to exercise the power of suffrage in conditions of fairness. Senegal is among the countries where citizens are informed of electoral results in the minutes following the closure of the ballot. Such media dissemination of election results has virtually never been challenged by the bodies responsible for proclaiming the results since 1998.

Ultimately, the analysis of the institutional mechanism governing elections and electoral practices shows that, even if they wanted to, the authorities do not have access to decisive levers to divert the votes of the Senegalese people in their own favour. The ruling party undoubtedly benefits from the political advantages of the incumbent, receives financial support in various forms, and has access to the public purse, whose use is not strictly regulated. These advantages are a sort of bonus for the incumbent; but they do not give it the means to organise wholesale fraud and win an election against the will of the electorate.

### **Persistent doubts about the credibility of elections**

And yet, there are still reservations from a variety of stakeholders regarding the reliability of the electoral system in relation to recurring subjects of controversy. On the security of the electoral system, there is a difference in the views of the administration responsible for elections and those of certain stakeholders in the electoral process. According to the administration, great strides have been made. This opinion is based on the use of biometrics that allows voters’ fingerprints to be checked automatically before their voters’ card is even produced. In addition, the electronic data is matched to the national identity card. In

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361 Abovementioned interview.

362 Presentation during the discussions of the focus group held in Saint-Louis with a view to preparing this report, 17 February 2010.

addition to measures to verify the identity of voters, the system for the allocation of polling stations has also been improved. It is the responsibility of the DGE to define location of polling stations, and the directorate manages all aspects relating to electoral materials. It also takes care of the legal framework regulating elections, through drafting the texts governing elections, voter education and awareness, etc.

The considerable progress achieved in the organisation and management of the electoral process has been recognised on all sides. However, the conclusion that the organisation of elections is virtually secure, rendering fraud totally impossible, is not shared by all of the actors. According to certain stakeholders, there is still a potential for fraud based on the impossibility of neutrality on the part of the administrative authorities. In this area, the legacy of past experience has considerable influence on the relationships between the administration and the political parties and ordinary citizens. Accustomed to carrying out actions of a fraudulent nature that considerably and durably undermined the credibility and fairness of the vote, the administration is now hard put to convince others of its good faith, even when its actions are above suspicion.

With the capital of trust historically undermined, the lack of a strong ‘republican’ culture (*culture républicaine*) and the heavy hand of the minister of the interior over the administration, both reinforce doubts on the credibility of the electoral process. According to the administrative authorities, electoral fraud, if it indeed exists, remains marginal, and evidence is rarely brought to light. However, it is undeniable that the real or imagined problems with the electoral roll that motivated the challenges to the 2007 presidential elections and the boycott of the legislative elections, have yet to be resolved, and they runs the risk of reinforcing the doubts of the stakeholders regarding the neutrality of the administration and the credibility of the electoral process.<sup>363</sup>

### **Issues arising from overlapping powers**

The involvement of several different actors in the conduct of elections makes it difficult for the actors to exercise their respective powers. The CENA, in particular, has difficulties implementing its powers to supervise and monitor electoral operations when tasks necessary for the fulfilment of these powers are entrusted to other independent bodies. For instance, in relation to oversight of the electoral register, the CENA does not have the necessary data because of problems with the civil register of births and deaths. Issuing birth and death certificates is an administrative operation that is fully outside of the control of the CENA. On the other hand, the CENA has often been criticised for going beyond the strict framework of its monitoring and supervisory role, and attempting to interfere in the task of physical organisation of elections at the risk of compromising its independence. For example, in 2006 the CENA expressed its agreement and support for the Minister of the Interior in the matter of extending the date of registration on the voting lists and approved

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363 Recently, in the first quarter of 2010, the European Union committed itself to conducting an audit of the electoral roll, with the consent of all political stakeholders, to ensure that it is credible and definitively accepted by all of the stakeholders in the political process.

the decision of the administration to set up mobile units to expedite and facilitate voter registration before the start of the rainy season.<sup>364</sup>

Furthermore, the CENA lacks the means to directly enforce its decisions. The fact that its observations and recommendations must be implemented by other institutions weakens the authority of the CENA and considerably reduces the impact of its decisions. In most cases, indeed, the CENA cannot go beyond simple public denunciations aimed simply at attracting the attention of the Ministry of the Interior to the irregularities it has observed and recommending corrective measures. This was the case when it warned against the selective distribution of voters' cards to newly registered citizens while others who had registered much earlier were still awaiting the distribution or receipt of their cards.<sup>365</sup> In another case, the CENA observed that numerous applications for digital voters' cards and national ID cards had been rejected without explanation by the registration committees. However, it could do no more than urge the Minister of the Interior to deal with this concern of the people by setting up, as quickly as possible, an organisation to expedite the processing of files.<sup>366</sup>

Prior to the presidential election of February 2007, a controversy regarding the electoral register pitted the CENA against the minister of the interior. Delays in the registration of voters had apparently been due to a delay by the CENA in the setting up of its regional branches. A similar delay had also been observed in the setting up of the commissions for the distribution of voters' cards and the actual issuing of such documents. The political authorities attributed these problems to the CENA.<sup>367</sup> This allegation was refuted by the electoral regulatory body which responded in a press release that it wished to 'inform public opinion that it could in no way be held responsible for the delays observed in the registration of the citizens for the establishment of a new electoral register for Senegal'. It denounced 'the preamble to Decree 2006-153 extending the deadline for registration on the new electoral registers [which] cited the delayed establishment of the CENA's branch offices as the chief cause of the delays in registration in all regions other than Dakar'. Finally, the CENA also pointed out 'that despite the complete absence of logistic or financial resources, it had, since 5 September 2005, set up all of its branches for the supervision of the aforementioned operations both in the Dakar region and in the communes of all of the other regions in the country'.<sup>368</sup> This is to say that, in the view of the members of the CENA, the reasons for the delays observed in voter registration were to be sought elsewhere than in the actions of the CENA.<sup>369</sup>

Furthermore, the operating funds required for the CENA were not granted on time,

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364 CENA, press release of 13 May 2006, in *Rapport général sur l'élection présidentielle*, of 25 February 2007, p.100.

365 CENA, press release of 2 August 2006, *ibid.*, p.103.

366 CENA, press release of 4 August 2006, *ibid.*, p.105.

367 Cf. the preamble of Decree No. 2006-153 of 28 February 2006, '*portant prorogation du délai des inscriptions sur les nouvelles listes électorales*'.

368 Cf. CENA press release of 1 March 2006 (our translation).

369 'Retard des inscriptions sur les listes électorales : la CENA dément le chef de l'Etat', *Wal Fadjiri*, 2 March 2006.

despite the financial independence guaranteed by the laws and regulations. In addition, the electoral register was contested and its reliability challenged by an IT specialist from the CENA who had fallen into disfavour. It is in this context that the concerns expressed by the opposition regarding the ability of the CENA to fulfil its responsibilities should be understood. Indeed, the opposition did not hesitate to call for its dissolution with a view to recreating another body on a more consensual basis.<sup>370</sup>

When all is said and done, it remains the case that the role of the civil service in the physical organisation of elections is not always unanimously accepted. There is a need to strengthen the powers of the CENA, and every action of the administration in electoral matters should be closely linked to certification, or at least assent, from the CENA. It has become apparent that the minister of the interior can take actions in the management of the electoral process without the CENA being informed. Issues relating to the creation and management of the electoral roll should not be dealt with unilaterally by the administration, which is still responsible for this area. The limits of the CENA's mandate should not leave the administration with too much flexibility in the taking and implementation of critical decisions for the organisation of elections.

Overlapping powers between the different EMBs were the focus of discussions during the 20 May 2010 multi-stakeholder workshop on the electoral process and the electoral register, discussed above, organised by the EU and the USAID. In the view of some, the powers of the CENA are not always deployed as fully as they should be, and the powers vested in the body by law do not seem to be 'accepted' or 'internalised' by all of the stakeholders in the electoral process. A proposal was made for the technical upgrading of the CENA, taking account of the gap that exists between its powers and mandate on the one hand, and the technical resources provided for it on the other hand. Some participants would have liked to have seen further discussion on a substantial reinforcement of the powers and mandate of the CENA. Such a transformation would even, in the view of some, be a necessary precondition for proper oversight and supervision of the election process in Senegal.<sup>371</sup> More specifically, the opposition coalition was concerned about the conditions under which the first chairperson left the CENA, which were thought to reflect the weakening of the institution by the political authorities.<sup>372</sup>

The conditions under which electoral materials were ordered and purchased also occupied part of the discussions. The focus was essentially on discerning the extent of the CENA involvement in this aspect of the electoral process. The directorates of the Ministry of the Interior pointed out that the low level of involvement of the CENA was due to the fact that it simply lacked the legal power to carry out monitoring activities at that level, since the acts in question were not 'electoral operations', strictly speaking. Thus the CENA was only concerned with electoral materials from the stage of their dispatch and forwarding to the

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370 Memorandum on the electoral process by the CPA (*Coalition populaire pour l'Alternative*).

371 Statement by the *Coalition des Non Alignés* at the workshop.

372 The circumstances of the resignation of the first chairman of the CENA are described in the following chapter on the independence of the CENA.

polling sites.<sup>373</sup> On the other hand, other participants pointed out that the CENA had made statements complaining of its lack of involvement.<sup>374</sup> Clarifications provided by a representative of the CENA allayed the concerns that could have been entertained on the subject, stating that on that specific issue the Ministry of the Interior and the electoral supervisory body have for some time been in agreement on the distribution of powers and that this point is no longer in contest.<sup>375</sup>

### **Disagreements on the legal framework for the organisation of elections**

During the multi-stakeholder workshop, opposition representatives deplored the frequency of constitutional revisions in Senegal, as it was their view that such revisions were opportunistic and dangerous for the stability of the consensus that seemed to have been achieved since the adoption of the electoral code of 1992. They complained that amendments to the constitution had been made unilaterally, without even minimal consultation with the other political stakeholders. Specific examples were cited: the abolition of the rule that a candidate must receive at least 25% of the ballots of all registered voters in order to be elected president in the first round (the rule was reinstated in 2001 and again abolished in 2007), and the creation of electoral districts less than four months prior to local elections. In the view of the opposition coalition, this constitutional revisionism is also in contradiction with Senegal's international commitments and particularly the ECOWAS Protocol on Democracy and Good Governance, a provision of which forbids non-consensual amendments of electoral legislation less than six months prior to any elections.<sup>376</sup>

The ruling coalition had a different perception. It refuted the 'political' or opportunistic nature of the revisions, stating that, for the most part, they arose from international commitments undertaken by Senegal which required domestic law reforms. In addition, they claimed that many of the amendments were politically 'neutral' (such as the reform of the length of the president's term in office and the establishment of gender parity). In short, they argued that, beyond their sheer number, if the contents of the revisions were reviewed observers would see that they were not driven by political or partisan motivations.<sup>377</sup>

However, the discussions did enable the parties to come to an agreement on the following two points: (i) the need for Senegal to comply with the provisions of the ECOWAS Protocol forbidding unilateral modifications of electoral legislation less than six months prior to a vote; and (ii) the urgency of launching a new electoral code reform process, based on proposals made by electoral stakeholders.

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373 Statement by the director general of elections at the workshop.

374 Statement by *Coalition Bennoo Siggil Sénégal* at the workshop.

375 Statement by the CENA at the workshop.

376 Statement by *Coalition Bennoo Siggil Sénégal* at the workshop.

377 Statement by the coalition *Alliance Sopi pour toujours* at the workshop.

## The party system

The historical fact of having been a pioneer among Africa's democracies, with the establishment of a multi-party system in the early 1970s and the achievement of peaceful political transition in March 2000, have earned Senegal flattering descriptions as an 'exception' or a 'democratic showcase' in Africa. This brilliant image seems to be grounded more in myth than in reality.<sup>378</sup> The better part of the history of Senegal since independence has been marked by the domination of the party in power and excessive weakness of the opposition parties. The dominant-party system has been typified by the weakness of all political parties, the opacity of their finances and their limited capacity for popular mobilisation.

### *Legal framework*

Political parties are defined by the constitution as 'contributing to the expression of the right to vote'. They are subject to the code of civil and commercial obligations, the electoral code<sup>379</sup> the law on political parties of 6 May 1981,<sup>380</sup> decree 75-1088 of 23 October 1975 on accounting procedures for parties, and the law of 2007 establishing the CNRA.

An analysis of the legislation on political parties reveals considerable freedom in terms of the conditions for creating political parties. Contrary to Nigeria or Ghana, for example, where strict registration procedures require political parties to be established throughout the national territory, Senegalese legislation, like that in most francophone countries, is characterised by its flexibility, notably the lack of requirements that they demonstrate a certain level of representativeness before they can come into existence. The obvious consequence is an over-inflated number of political parties which, according to the Ministry of the Interior, stands at 150. Knowing that the political system effectively consists of less than a dozen political parties, there is cause to wonder whether many of the organisations calling themselves parties truly merit the name. The reality is that many parties are limited to a handful of persons or just their own leader.

### *Internal organisation and finances*

The rules stipulated by the legislation for the operation of political parties are not particularly restrictive, but even so are generally not obeyed by the parties. These rules apply to the internal organisation and operations of the parties, the system of financing their activities, their right to participate in elections, their right of access to the media and their dissolution in the event they contravene the law.

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378 Fall, I-M., *Evolution constitutionnelle du Sénégal de la veille de l'Indépendance aux élections de 2007*, CREDILA, Dakar, 2007.

379 Law No. 92-15 of 15 February 1992, *portant code électoral*.

380 Law No. 81-17 of 6 May 1981, *relative aux partis politiques modifiée par la loi No.89-36 du 12 octobre 1989*.

Regarding the resources of political parties, those authorised by law are: membership dues and donations and bequests by members. On this point, there is a paradox that should be highlighted: on the one hand, the parties record virtually no membership dues (outside occasional sales of cards from time to time). On the other hand, most of the major parties have resources whose origin is not clearly known to the public authorities and which are not subjected to the audits stipulated by law. Indeed, all political parties are under the obligation to submit their operating accounts before 31 January of each year. In this regard, decree 75-1088 of 23 October 1975 established the accounting reports that all legally registered parties must submit each year in application of Article 3 of the law on political parties providing for the audit of their accounts.

In general, party officials provide the least precise information about their finances, because accounts are not properly kept. No political party is able to provide accurate and verifiable figures on its financial assets or spending. In addition, information in this area seems to be held back. Overall, most of the parties' income officially comes from membership dues and individual donations. But everyone knows that the reality is quite different.

The issue of financing is undeniably one of the problems confronting Senegalese democracy. It is often referred to by the political elite as a concern to be dealt with by the public authorities, and then promptly forgotten. The question of financing in Senegal is paradoxical: there are very solidly established political parties, but these are expected to raise their own finances; whereas countries that have only just embraced the multi-party system have provided public financing to their political parties. President Diouf, who was in power from 1981 to 2000, did commission a study on the status of the opposition and the financing of political parties and a report was submitted in 1999, although the findings were not applied during the presidential election of 2000. President Wade, now in office, repeatedly highlighted the issue in his political speeches whilst in the opposition, but no longer seems to view it as a priority. However, any doubts he may have had as to the acceptability of such financing for public opinion were removed by research conducted by the NGO African Network for Integrated Development (*Réseau Africain pour le développement intégré* – RADI) in December 2004, in which the Senegalese population came out in favour of a public financing system for political parties.<sup>381</sup>

### *Political divisions*

Political parties in Senegal are structured around three major ideological tendencies: liberalism (PDS), Marxist-Leninism (the PAI and its offshoot parties) and social democracy (the PS and its offshoot parties). However, the majority of the parties belong ideologically to what political terminology refers to as 'the left' and the differences among most Senegalese political parties are not really visible in practice. It follows that ideology is not really the basis for the actions of the political parties. This can be observed notably in the parties' strategic alliances. The ambition of the parties is to gain power, alone or in partnership

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381 'Financement des partis politiques. Pourquoi? Comment?', RADI-CERAP NDI, Senegal, March 2005, p.52.

with others. In their strategy to do so, the parties feel free to make alliances and form coalitions across the political field, offering support for another party or another candidate. Alliances and misalliances are formed between parties, while parties and individuals join and leave the government for motives that are not linked to ideologies or programmes but are governed above all by the logic of ‘collusive transactions’<sup>382</sup> or ‘mercenary support’.<sup>383</sup> Such tactics are more beneficial to the party in power and transform the system of political parties into an ultra-dominant party system, where the party in power appears – as we have successively seen with the Socialist Party (1960–2000) then the PDS (since 2007) – to be a ‘giant’ faced with the ‘dwarfs’ which are the opposition parties.

Whether it has been the Socialist Party or the PDS, the ruling party holds all the cards, thanks to the overwhelming majority it enjoys in Parliament (which is also facilitated by the voting method), allowing it to unilaterally change the rules of the political game and turn them to its own advantage. In this context, in political discourse and attitudes past and present, the idea of democratic transition is always conditioned by the difficult equation of uniting all of the tiny political opposition forces against the huge governing force.

Reflection on reform or radical rebuilding of the Senegalese political system constitutes an opportunity to rethink the political parties in a democratic dynamic: their number, their financing, their organisation and their functions. In any case, the debates reveal a need to modernise, strengthen and rationalise the party system by giving the parties greater responsibility for organisation based on shared values, civic education and public spiritedness. This will undoubtedly require them to be provided with the necessary resources to fulfil their public service mission.

### **Progressive decline of electoral violence**

The evolution of elections in Senegal displays a clear trend towards progressively more peaceful polls. In the past, the aftermath of elections was often accompanied by violence, due to the fact that the opposition generally accused the public authorities that organised the elections of altering the results of the vote in favour of the government. This can be illustrated by the post-electoral violence in 1983 and 1988, when opposition leaders were arrested, and in 1993, which led to the assassination of then deputy chair of the Constitutional Council, Babacar Séye, on the eve of the proclamation of the legislative election results.

The trend to decreasing violence can be observed beginning with the legislative elections of 1998. The trend was further confirmed with the presidential election of 2000, the legislative elections of 2001, the local elections of 2002, the presidential and legislative elections of 2007 and the local elections of 2009. Even though election results are still contested,

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382 Dobry, M., *Sociologie des crises politiques. La dynamique des mobilisations multisectorielles*, Presses de la FNSP, Paris, 1992.

383 The expression was coined by Richard Sandbrook, in ‘Personnalisation du pouvoir et stagnation capitaliste. L’Etat africain en crise’, in *Politique Africaine*, No. 26, juin 1987, pp.13–37.

as in the case of the presidential election of 2007, protests have not gone past the stage of making statements and appealing to the Constitutional Council. In reality, the reduction or even the disappearance of electoral violence is a corollary to the progressive elimination of the possibility of electoral fraud which, when it is confirmed, sparks revolt in the electorate.

### **The reform of the consensual electoral code of 1992**

A reform of the electoral code has been in progress since 3 December 2009, under the aegis of the Minister of the Interior, in the form of negotiations involving the Minister of the Interior and his experts, the political parties of the opposition united under the banner of the '*Coalition Benno Siggil Senegaal*', the representatives of the '*Convergence autour du Président pour le 21eme siècle*' (CAP 21, a pro-Wade coalition) and other political parties known as independents, as they claim ties neither to the party in power nor the opposition.

The minister of the interior made 62 proposals for amendments, several of which were rejected by the opposition. The opposition also made certain proposals that failed to convince the majority. In the end, 22 points of disagreement remained. These disputed points included: the sealing of the envelopes and the transferral of the returns (Article L.82), the communication of the results by the media before 10 p.m. (Article R.49), the distribution of seats between the simple majority vote and the proportional vote in the legislative elections (Article L.142), the rules on independent candidates running in local elections, the appointment of proxies to submit the lists (Article L.211), the abolition of distribution of voters' cards on the day of the vote (L.52 and R. 39), the duration of the electoral campaign (Article LO.120), the number of voters per polling station (Article L.64), indelible ink (Article L.75), and other matters. Certain proposals made by the minister of the interior were withdrawn. They relate to ongoing distribution of voters' cards (Article L.52), the prohibition of relatives sitting on the same municipal or rural council (Article L.234 and Article L. 251) and financial deposits for local elections (Article L.201 bis). The proposal by the Ministry of the Interior to do away with the requirement for candidates to produce their criminal records was simply rejected.

Among the points of disagreement, the most disputed and the ones that seem to be the cause of a breakdown in the political dialogue marked by the boycott of the negotiations by the opposition parties were: the electoral roll, the length of electoral campaigns, and the status and powers of the electoral regulatory body.

### **The electoral register**

The reliability of the electoral register was seriously challenged prior to the presidential elections of 2007. According to the opposition and certain observers, there were real doubts about the credibility of this indispensable electoral foundation. After the defeat of the opposition, the issue of the electoral register resurfaced and some even viewed it as the fundamental reasons for the defeat. The idea that the electoral register was inflated by more

than a million additional votes benefitting the PDS majority was confirmed by the former chairperson of the CENA, Moustapha Touré, who, after his forced eviction by the head of state Abdoulaye Wade, made revelations in the media. The presiding magistrate viewed this as the principal source of his differences with the president.<sup>384</sup>

Since then, the opposition has made the revision of the electoral roll a prior condition for the organisation of credible elections. This issue was among the grievances put forward by the opposition, then united under the banner of the '*Front Benno Siggil Sénégal*', when they boycotted the legislative elections of 3 June 2007 and the senatorial elections of 19 August 2007. The PDS rejected these demands out of hand, thereby holding up for several months political dialogue aimed at improving the electoral process.

The issue of the electoral roll is a particularly sensitive one. The opposition suspects the ruling party of taking advantage of the revision of the voters' lists to introduce minors, foreigners and double registrations. Are these criticisms founded and can they have an impact on the electoral process? Firstly, it should be pointed out that the opposition political parties, alongside those of the majority in power, are invited to sit on the commissions responsible for registration, revision of electoral lists and distribution of voters' cards. Secondly, when assessors or political party representatives on such committees observe irregularities, legal channels are in place to sanction any infringements of electoral legislation. Finally, in the electoral roll computerisation directorate, a permanent process was set up for the updating of the electoral roll. Similarly, the production and editing of voters' cards has been personalised. Every voter has a digital identity card – and no one has two different sets of fingerprints! Thus, biometrics rule out duplicates and the detection mechanism is effective enough to discover and rule out eliminate any double registrations.

If by some extraordinary circumstance, ill-intentioned people managed to obtain two birth certificates and register twice, they would be detected during the process of entering the card data into a single, centralised file. In such cases, provisions have been made for criminal action and sanctions. Some people have already been prosecuted and sanctioned. It should also be pointed out that all political parties have the right to request and receive a copy of the electoral roll to check doubtful cases for themselves.

#### *Audit of the electoral register*

In his address to the nation on independence day, 4 April 2009, President Wade recognised the increasing mistrust and doubts about the reliability of the electoral register, and confirmed the need to carry out an independent audit. This address was followed by a request from the minister of the interior to the head of the EU mission to Senegal for technical assistance for such an audit. The EU mission and the US embassy in Senegal then jointly financed a preparatory assessment which proposed terms of reference for the audit.

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384 'L'énigme de l'élection de 2007 se trouve dans le fichier électoral' (interview de Moustapha Touré), *La Gazette* (Dakar), 21 December 2009.

The electoral register audit team (*Mission d'audit du fichier électoral*, MAFE) carried out its work between October 2010 and January 2011, financed by the EU and the US and German embassies.<sup>385</sup> The audit covered 'the entire process of registration, starting from its planning, through registration by the administrative committees, to the handling of the information by the *Direction de l'Automatisation des Fichiers* (DAF), up to the publication of the final electoral lists at the polling stations'; that is to say, 'the division of electoral registration units [the *carte électoral*], the production and distribution of voters' cards and the maintenance of the electoral register by the DAF'.<sup>386</sup>

The principal objectives of the audit of the electoral register were:

- To identify the strengths and weakness of the current system of electoral registration and to determine the corrective measures needed in advance of the 2012 elections;
- To strengthen the provisions relating to registration of voters in order to ensure fair, transparent and democratic elections whose results would be accepted by all stakeholders;
- To build the foundations for the permanent improvement of the electoral register; and
- To respond definitively to the issues relating the 2007 and 2009 register, while bearing in mind the amendments already made in the annual revision of 2010.<sup>387</sup>

At the end of their mission, the audit team concluded that the electoral register was generally reliable, and that the Senegalese legal framework for elections conformed to international standards and could remain in use for subsequent elections. The MAFE nonetheless noted a list of strengths and weaknesses and points to improve during the electoral registration process. The following points were among the most important:

- The Senegalese electoral code respects the requirements of universal suffrage and conforms to the principles of efficiency, transparency and impartiality of the process of electoral registration and the principle of the equal weight of all votes;
- The procedures in place in the different phases of electoral registration guarantee a fair system for all citizens. Irregularities noted in the procedures or in the application of the laws, or anomalies or gaps in the system cannot be attributed to partisan or discriminatory ends aiming at excluding a category of the population.
- The examination of the electoral register showed credible results in relation to the intrinsic quality of the information and the coherence of the database itself. The investigation also revealed that:
  - 2.3% of the names on the register (or 115,000 people) are in fact deceased,
  - 97.8% of the adult population of those registered can be formally identified as living or having lived in the relevant neighbourhood or village,

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385 The team was composed of six members: its head, a facilitator, and four experts: a lawyer, an expert on electoral operations, an expert on information systems and an expert on biometrics.

386 *Mission d'audit du fichier électoral Sénégal 2010 (MAFE), Rapport final*, January 2011, p.17.

387 *Ibid.*, p.18.

- 75% of the adult population is registered on the electoral roll, but only 12% of those aged 18 to 22, meaning that almost 1.15 million individuals of this age bracket were not registered as of December 2010,
- The ratio of men to women registered to vote is 50:50, whereas the proportion in the electorate is 48:52,
- 1% of the population living in Senegal is made up of foreigners, according to the 2002 census, but no case of a foreigner registering to vote has been identified, while those members of nomadic populations registered have been properly identified as Senegalese;
- While in theory a search for multiple registrations showed an outstanding performance of the automatic fingerprint identification system, in practice the system remains to be proved.<sup>388</sup>

### *Oversight committee*

Based on its conclusions, MAFE formulated recommendations aimed at improving the electoral system in Senegal, to be addressed in the short (one to three months), medium (four to 12 months) or long (following the 2012 elections) term. The preparatory mission for the audit had proposed the creation, after the audit had been completed, of a monitoring committee to ensure follow up to the recommendations made by the audit team. The opposition political parties ensured the creation of such a committee before the audit team completed its work, in order to build trust in the process.<sup>389</sup>

This oversight committee (*Comité de veille et de suivi*, CVS), with the mandate to monitor the implementation of MAFE's recommendations, was composed of representatives of:

- The ministries of the interior, of foreign affairs, and of Senegalese in the diaspora;
- The CENA;
- The political parties (five from the coalition of parties supporting the President, five from the coalition *Bennoo Siggil Senegaal*, and four from non-aligned and independent parties);
- Civil society; and
- Development partners (the EU and the US and German embassies), with observer status.

One of the urgent tasks for the CVS was, based on MAFE's recommendation, to carry out a field investigation to verify the population eligible to vote and its conformity with the electoral register. More concretely, the CVS should:

- In the medium term, monitor procedures for registration and altering the register, based on the geographical mandate of each administrative committee;

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<sup>388</sup> MAFE, *Rapport Final*, pp.14–15.

<sup>389</sup> Décret no. 2010-1776 of 30 December 2010, creating an oversight committee for the audit's recommendations (*Comité de veille et de suivi des recommandations de la mission d'audit du fichier électoral*).

- Oversee the process of voter education, in particular of youth, so that all are aware of the steps to obtain an identity card and then a voters card;
- Oversee, in the long term, the improvement of the system for taking into account entries in the civil registry (births and deaths) and the management of the civil registry, with the aim of creating a link between the civil registry and the *Direction de l'automatisation du fichier* to authenticate changes on either register.<sup>390</sup>

## G. Recommendations

### Stabilising the rules of the electoral process

- It is important to put a stop to frequent and opportunistic changes in the rules of the electoral process in Senegal, to the extent that such changes are likely to promote electoral crises that could degenerate into political crises. In order to achieve this, Senegal must undertake to comply with the ECOWAS Protocol on Democracy and Good Governance signed in Dakar in 2001, which forbids any substantial reforms of electoral laws (in their constitutional, legislative or regulatory provisions) within six months prior to an election without the consent of a broad majority of political stakeholders, i.e. without consensus.

### Reinforcing the independence of the EMBs

- The reform of the electoral code currently being debated should strengthen the independence of the electoral management bodies (EMBs) by instituting simple and practical measures on the status and powers of EMBs. For example, the presidential monopoly on the appointment of EMB members should be replaced by joint appointment by various public and professional institutions. The reform should also consider the creation of an election management body with full powers, as is the case in many African countries.

### Institutionalising political dialogue

- Since dialogue and consensus-building have the advantage of consolidating the electoral system and democracy, the political system should consider the possibility of institutionalising political dialogue between the party in power and the opposition in order to avoid periods without dialogue before elections, which undermine their credibility. To this end, it would be useful to plan the creation of an interparty consultation committee to facilitate dialogue between the parties and the election management bodies.
- The oversight committee (*Comité de veille et de suivi* – CVS) set up to oversee the

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<sup>390</sup> MAFE, *Rapport final*. At the date of completion of this report, the members of the CVS had only just elected a chair from among their number, following two months of discussion among representatives of the ruling party and the opposition. The CVS had therefore not yet entered on the majority of its activities.

implementation of MAFE's recommendations could be a positive step in this direction. The mandate of the CVS is, however, limited to recommendations for the 2012 presidential and legislative elections following from the audit of the voter's register. There is a need for a more permanent mechanism to facilitate political dialogue around elections.

# 7

## Sierra Leone

**Adele Jinadu**

### **A. Summary**

The electoral history of Sierra Leone is intimately linked with and has been influenced by a history of political instability and a decade-long civil war. The 1996 elections were held at the height of the civil war. The 2002 elections were run by the United Nations to start a new post-conflict era. The 2007 elections were therefore the first to be held in a peaceful atmosphere. The 2007 elections marked a major improvement in the management of elections. For the first time, elections were organised and fully managed by two constitutional bodies, a national electoral institution, the National Electoral Commission (NEC), in charge of organising and implementing all phases of the electoral process, and the Political Party Registration Commission (PPRC), in charge of supervising political parties' activities.

The establishment of the NEC and the PPRC were thus part of the country's post-conflict institutional arrangements. Since their establishment the two institutions have been crucial to the on-going process of democratisation in the country. While both commissions have made, and continue to make notable progress, there is need to address ambiguities in the 1991 Constitution and related enabling legislation establishing them, particularly relating to:

- The powers of the President to appoint and remove members of both commissions; and
- The powers of the NEC to make statutory regulations on the management and conduct of elections.

The funding of both commissions, particularly the PPRC, is far from adequate and is excessively dependent (about 75%) on external funding. This is a matter the government and

Parliament of Sierra Leone ought to give serious attention to, with a view to empowering both commissions as an investment in the sustainability of democracy in the country.

Despite progress made since the 2007 elections, important issues remain to be resolved. They revolve primarily and essentially around the cultural, economic and political environment of electoral governance. The environment should be improved, through strengthening constitutional government, especially separation of powers, independence of the judiciary, and measures to sanction the abuse of the power of incumbency for unfair electoral advantage. This has several dimensions but the more salient ones arising from the analysis in the study are electoral violence; poverty and youth employment as fadders for fanning discontent and political violence; engendering and compacting trust and constructive cooperation and healthy competition among the two major parties, the APC and SLPP; and containing ethno-regional fissures through balance in public political appointments.

## **B. Historical context**

### **Political history**

British colonial rule in what is today the Freetown peninsula commenced in 1808, but it was not until 1896 that Sierra Leone formally came under unified British rule with the amalgamation of the Colony and Protectorate of Sierra Leone. The colony consisted of the peninsula around Freetown and its coastal environs, established in 1787 as a settlement for freed slaves, later called Creoles, from Europe and North America. It is now known as the Western Area. The protectorate, made up of territories inland ruled by local chiefs, was inhabited by the Mande or Manding ethno-linguistic peoples, including the Mende, Temne, Bulom or Sherbro, Loko and Limba.

The constitutional and political history of colonial Sierra Leone since the amalgamation shaped and was in turn a response to the dynamics of the economic and political competition between the Creoles and the peoples of the protectorate, in response to colonial rule. The decolonisation process that gained momentum and accelerated in the post-World War II period then inserted into Sierra Leonean society new challenges and opportunities for greater African participation in the government, administration and economy of the country and the gradual introduction of the elective principle as the modality for achieving increased political participation by Sierra Leoneans in their own government.

The form that resistance to colonial rule and the demand for political rights by Africans assumed included armed resistance to the annexation of the protectorate to the colony; the formation of political associations and trade union movements, particularly in the mining and railway sectors, and the establishment of print media houses. Political organisation became stronger in the period following a constitutional and political reform of 1924 that extended the jurisdiction of the Executive Council and of the Legislative Council, formerly

restricted to the colony, to include the protectorate, in order to facilitate their integration as a political entity. The reform also provided for the election of three 'unofficial' members from the colony (increased from the single 'unofficial' Creole member elected since the formation of the Legislative Council in 1863) and for three 'unofficial' members from the protectorate, chosen from among the paramount chiefs in the protectorate.

Various political organisations and political parties sprouted up, including in due course the two political parties that have dominated the post-independence period, the Sierra Leone Peoples' Party (SLPP, 1951) and the All Peoples Congress (APC, 1960).

In 1945 the British established a Protectorate Assembly, and in 1951 a new constitution provided for an expansion of African representation and the gradual extension of the franchise from a narrowly-based property/income basis to full-blown universal adult suffrage. Sir Milton Margai, leader of the SLPP, became chief minister in 1953 and prime minister in 1957. Throughout the debates over these reforms the historic divisions between the colony and protectorate, between Creoles and others, remained deep.

In 1961, Sir Milton Margai became prime minister of the newly independent country. On his death in 1964, his brother Albert Margai emerged as prime minister, though not without a power struggle in the SLPP. He immediately set about consolidating his power and sought to restrict organised opposition. Closely fought 1967 elections led to a constitutional crisis and a military coup to overturn the swearing in of Siaka Stevens, leader of the APC, as prime minister. A further military coup in 1968 reinstated Siaka Stevens as prime minister. Sierra Leone became a republic in April 1971, with Siaka Stevens its first president. Elections in 1973 and 1976 were won by the APC, owing to widespread intimidation, and from 1978 Sierra Leone officially became a one-party state. Joseph Momoh succeeded Siaka Stevens unopposed as president in November 1985. Faced with mounting domestic and international opposition, the APC central committee agreed in August 1990 to the reinstatement of democracy. A constitutional reform commission led to the adoption of the 1991 Constitution, which restored competitive multi-party politics.

However, presidential and parliamentary elections scheduled for May 1992 took place against the background of pre-election violence, including insurgent attacks launched after the declaration in 1991 of a 'people's war' by the Revolutionary United Front (RUF), under the leadership of Foday Sankoh. Before elections could be held, President Momoh was overthrown in April 1992 in a bloodless military coup by army officers under the leadership of Captain Valentine Strasser, who constituted themselves into a National Provisional Ruling Council (NPRC), suspended the constitution and proscribed party political activities.

The NPRC announced a new democratic transition programme in December 1993, and appointed a National Advisory Council (NAC) to work out transition modalities, including a draft constitution. Arising from the work of the NAC was the establishment of two key institutions: an interim national Electoral Commission (INEC), headed by a top Sierra Leonean in the United Nations (UN), James Jonah, to conduct credible elections; and a National Commission for Democracy (NCD), 'entrusted with the task of creating and

sustaining a conscious political society'.<sup>391</sup> In 1995, INEC convened a National Consultative Conference on the electoral process, and presidential and parliamentary elections were scheduled for February 1996.

Before the elections could be held, Captain Strasser's administration was overthrown in a military coup led by Brigadier Maada Bio in January 1996. Nevertheless, the elections took place in February and March 1996, under the proportional representation electoral system. No party had a majority in the 80-member House of Representatives<sup>392</sup> and no presidential candidate secured the required 50% of votes cast in the first-round of the presidential elections, though the SLPP secured the largest number of votes. The SLPP candidate, Ahmad Tejan Kabbah, won the run-off presidential elections and was sworn in as president.

Yet another military coup terminated the Tejan Kabbah presidency on 25 May 1997, and installed Major Paul Koroma as Chairman of an Armed Forces Revolutionary Council (AFRC), with Foday Sankoh as vice-chairman. Military intervention by the Economic Community of West African States (ECOWAS) resulted in the reinstatement of President Kabbah as President in March 1998, but the civil war continued with the RUF. In 1999, the UN and the Organisation of African Unity (OAU) stepped in to broker a power-sharing agreement which provided for Foday Sankoh to be vice-president of the Republic, with cabinet responsibility for mineral resources. Additionally, three cabinet positions were conceded to the RUF, which was also allowed to form a political party. Yet the unrest in the country did not abate, leading the United Nations Security Council to authorise the UN Peacekeeping Mission to Sierra Leone (UNAMSIL), towards the end of 1999. After initial setbacks, including a collapse back into war in 2000 and an intervention by British forces on the invitation of the government, UNAMSIL progressively succeeded in demobilising the RUF troops.

Presidential and parliamentary elections were held on 14 May 2002, under a framework provided by the country's 1991 Constitution, the Electoral Laws Act (2002), the Political Parties Act (2002), and a district block electoral system (a form of proportional representation). In the presidential elections, President Tejan Kabbah of the SLPP was returned to power with about 70% of the votes cast, followed by Ernest Koroma as head of the APC, with 22%; the SLPP also won the majority of seats in parliament.

The country's second post-conflict elections were held in August 2007, under a plurality, first-past-the-post electoral system with single-member districts. Seven candidates contested for the presidential elections: including Ernest Koroma (APC), Solomon Berewa (SLPP), and Charles Margai (People's Movement for Democratic Change, PMDC). The results of the elections were inconclusive, as no candidate crossed the threshold of 50% of votes cast to be declared winner. Ernest Bai Koroma of the APC won the presidential run-off election against the SLPP, and was sworn in as president on 17 September 2007,

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391 Gbla, Osman, 'The Crisis of Globalisation and Its Impact on Democracy and Good Governance in Post-Colonial Africa: Case Study of the March to Multi-party Democracy in Sierra Leone (1990-1998)', *Journal of Development Alternatives and Area Studies*, Vol. 20, No. 1 and 2, 2001, pp.93-94.

392 Of the 80 seats, 68 were contested and 12 were reserved for paramount chiefs.

with Samuel Sam-Susama as vice-president. In the parliamentary elections, the APC won a majority of seats, with 59 out of the 112 contested seats.

Table 1 provides an overview of general (parliamentary and presidential) elections, and referenda to approve constitutions, held in Sierra Leone since 1951.

*Table 1: Sierra Leone elections since 1951*

Type of elections	Year
Parliamentary	1951; 1957; 1962; 1967; 1973; 1977; 1982; 1986; 1996; 2002; 2007
Presidential	1985; 1996; 2002; 2007
Referenda	1978; 1991
Local government elections*	1959; 1966; 2004; 2008

\* Local government councils and local government elections were abolished in 1972. The 1991 Constitution provided for the revival of local government councils and of democratically elected local government councils. Local government elections scheduled for 1994 could not hold. The first local government elections since 1972 were conducted May 2004.

Sierra Leone conducted its general elections under the simple plurality (first-past-the post) system in general elections between 1951 and 1996; the proportional system for the 1996 and 2002 general elections; the district block system for the 2002 and 2007 general elections; and the simple plurality system for the 2007 general elections.

## History of electoral administration

The administration and management of local and national elections began from small beginnings around 1951 with the appointment of an elections officer within the country's central administration in Freetown, assisted by a number of staff, including two administrative class or 'senior' officers. With respect to national elections, the elections officer was responsible to the chief minister, while for local government elections, he was subject to the minister of local government affairs. At the up-country or provincial level, district commissioners acted as (electoral) registration officers, while in Freetown the town clerk served in the same capacity, with power to appoint elections assistants, in both cases.

The incorporation of election management into the country's central administration or civil service was part of the colonial inheritance at independence, with oversight of the activities of the officials and institution entrusted with electoral management exercised by the Prime Minister or another member of the cabinet. The assumption behind this arrangement was the myth of the neutrality or impartiality of the civil service and did not survive long, because it never worked in reality. The colonial civil service was not always an impartial arbiter in the electoral process and in elections. In September 1951, for example, the SLPP Secretary General H.E.B. John, among others, alleged that in Freetown and in the Protectorate, 'political officers are trying to influence the Protectorate electorate so as

to prevent the return of many highly educated Protectorate citizens, who are non-chiefs'.<sup>393</sup> The politicisation of the electoral process in this way continued after the country's independence and was one dimension of the attempted and partially successful politicisation of the civil service, including provincial administration, and the judiciary by the ruling parties in postcolonial Sierra Leone between 1961 and 1967 and indeed beyond.<sup>394</sup>

Competitive electoral politics became more rancorous and violent in postcolonial Sierra Leone, inflamed and characterised by allegations that the ruling party, the SLPP, and its successor in power, the APC, abused the power of incumbency for unfair partisan electoral advantage. Similarly, there were mounting allegations of party political partisanship against this civil service-based institutional arrangement for electoral governance in the country. In due course, there was agitation for changes in the system in order to generate and build confidence in its competence and impartiality by insulating it from party and ethnic politics generally and by excising it from its institutional base in the civil service and in provincial administration.

The opportunity to address the issue of electoral reform came with the constitutional and political reform process set in motion in August 1990 by President Momoh before he was overthrown in a military coup. Once set in motion, the reform process was unstoppable and resulted in the reform package that provided the basis for the 1991 constitution. Arising out of the reform package was the establishment of the Interim National Electoral Commission (INEC), which thereafter conducted the 1996 presidential and parliamentary elections. INEC did not start from scratch, however. Throughout the various periods of military rule, when Electoral Commissioners were removed from office, the commission's technical and support staff remained in place, providing an institutional memory and 'a reservoir of considerable experience in electoral administration' for the INEC.<sup>395</sup> The National Electoral Commission (NEC) replaced INEC in March 2000. The NEC Act 2000, which created the NEC, also gave the Commission statutory powers to recruit its own staff. Hitherto, the Public Service Commission, a body within the executive branch, had the responsibility for recruiting staff for the Commission. With its new statutory powers, NEC's Reform Programme of 2005–2008, and NEC Resolution No. 1 of 2005, 'the comprehensive transformation of the Commission began in earnest'.<sup>396</sup>

The 1991 Constitution (Section 34[1]) and the Political Parties Act 2002 took the functions and powers of registering and regulating political parties from the Electoral Commission, and vested them in a Political Parties Registration Commission (PPRC). The 1991 Constitution, therefore, created a bifurcated electoral management system, in the form of two separate bodies: one, the Electoral Commission, is responsible for election administration; and the other, the Political Parties Registration Commission, is a regulatory and supervisory body, with oversight powers over party political activities.

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393 Cartwright, John R., *Politics in Sierra Leone, 1947–67*, University of Toronto Press, Toronto and Buffalo, 1970, p.57.

394 *Ibid.*, pp.195–196 and 250–251.

395 National Electoral Commission, *NEC Strategic Plan: 2001–2005*, available at: <http://hopesierraleone.org/nec.html>.

396 Momoh, H.B., 'NEC's Preparations for Sierra Leone's 2007 Elections', *Peace, Security and Development Update*, No. 1, July 2007.

However, Section 34(4) of the constitution provides that ‘...the first registration of political parties after the coming into force of [the] Constitution shall be undertaken by the Electoral Commission’. In view of this provision, the Political Parties Decree, 1995, Section 3 empowered the INEC to register and issue certificates of registration to political parties, while Section 11 of the decree suspended Section 34 of the 1991 Constitution, which vested such powers in the Political Parties Registration Commission. Even though the Political Parties Decree was replaced by the Political Parties Act in 2002, the Political Parties Registration Commission did not come into existence until 2006.

## C. Institutional structures

The legal provisions governing elections in Sierra Leone are contained in the 1991 Constitution; the Electoral Laws Act 2002; the Electoral Laws (Amendment) Act 2007; the National Electoral Commission Act 2002; the Political Parties Act 2002; and the Local Government Act 2004.<sup>397</sup> The NEC and the PPRC are responsible for the direction and management of different aspects of the electoral governance process. Their powers and responsibilities are established by the 1991 Constitution, and by laws enacted as part of the reform process led by the restored Tejan Kabbah government during the lead up to the 2002 elections.

### National Electoral Commission

#### *Membership and structural organisation*

The Board of Electoral Commissioners serves as the oversight and policy-making organ of the Commission: it ‘is responsible for the overall supervision and control of the electoral process. This includes making overall assessment of the electoral process, interacting with government, the ... donors and the general public’.<sup>398</sup>

The members of the Electoral Commission – the chief Electoral Commissioner and four other commissioners – are appointed by the President after consultation with the leaders of all registered political parties and subject to the approval of Parliament.<sup>399</sup> By convention, their appointment must reflect the country’s ethno-regional diversity as well as gender balance. Currently, the chief Electoral Commissioner, who is the chair, and two of the four other Electoral Commissioners are women.

The Electoral Commission has 14 district electoral offices, with each headed by a district electoral officer, who is assisted by an assistant district electoral officer, among others. The regional headquarters towns – Freetown (Western Region), Bo (Southern Region), Makeni (Northern Region), and Kenema (Eastern Region) – are each headed by a senior district electoral officer, with oversight responsibility for the region.

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397 Other key documents include the Elections Petition rules of 2007, NEC regulations, and the Code of Conduct for political parties.

398 National Electoral Commission of Sierra Leone, *Annual Report*, 2008, p.1.

399 Constitution of 1991, section 32(3).

In 2007, the Commission had 6 171 polling stations throughout the country, with each polling station catering to not more than 500 voters.

### *Staffing*

The Electoral Commission has an administrative secretariat, which is headed by an executive secretary. The National Electoral Commission Act 2002 vested the Electoral Commission with powers to recruit its own staff, with a view to professionalising its bureaucracy and activities and enhancing its autonomy.

The Secretariat is divided into the following departments:

- Internal Audit, which ‘examines the effectiveness of all levels of management in their use of the Commission’s resources for compliance with established policies and procedures’.
- Administration and Finance, consisting of the Administrative and Personnel Unit, and the Finance Unit, and which ‘is responsible for ensuring that effective and efficient administrative support is provided to the NEC for its day-to-day operations’.
- Operations, which ‘is responsible for developing the general electoral operational plan, as well as ensuring its implementation,’ and which is made up of five units – procedures, training and capacity building, information technology, public outreach and external relations, logistics and procurement, and field coordination and reporting.<sup>400</sup>

The Electoral Commission recruits ad hoc staff, through advertisement, to help with the conduct of elections and to serve as training officers, voter education officers, logistics officers, ward coordinators and registration and polling officers. For example, for the 2008 local government elections, the Electoral Commission recruited 35 175 polling staff.<sup>401</sup> Some of these ad hoc positions, like those of returning officers, are gazetted. As part of its training and enlightenment activities, the Electoral Commission has started an election-related pilot diploma programme, to be upgraded in due course into a degree programme at the Institute of Electoral Administration and Civil Education. The Electoral Commission has black-listed between 400 and 500 of those who have served on it as ad hoc staff from serving on it again, for allegedly committing electoral malpractices. A list containing the names of some of them was forwarded to the police, for investigation and prosecution, where necessary.

A number of human resource issues facing the Commission remains to be addressed, notably:

- Identifying what category the Commission falls under (Civil Service or Public Service);
- General conditions of service for Commissioners and staff;
- Terms of service for staff under the new organisational structure;
- Anomalies in new salary scale;

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<sup>400</sup> National Electoral Commission of Sierra Leone, *Annual Report, 2008*, p.2.

<sup>401</sup> *Ibid.*, p.14.

- Lack of insurance for staff;
- No overtime for lower cadre;
- Inadequate allowances (outside the monthly salaries, e.g. relocation); and
- Promotion not based on data from skills inventories, employee experience and staff appraisals'.<sup>402</sup>

### *Functions*

The functions of the commission are to register the electorate and review registration at least every three years, and to conduct elections and referenda by secret ballot. Under section 38 of the 1999 Constitution the Commission must determine the number of constituencies and their boundaries at intervals of between five to seven years. The Electoral Laws Act of 2002 consolidated a number of acts that previously dealt with elections. Importantly, it allows NEC to make regulations to achieve its objects.<sup>403</sup> Thus, the Electoral Laws Act only regulates major provisions and leaves the details to the NEC to regulate in a more flexible way.

More concretely, the NEC has full responsibility for the direction and management of elections. Its tasks include (i) the conduct and supervision of the registration of voters for public elections and referenda; and (ii) making regulations by statutory instrument for the registration of voters, the conduct of presidential, parliamentary or local government elections and referenda, and other matters, including regulations for voting by proxy.<sup>404</sup>

The power to make regulations, in particular without parliamentary approval, was controversial in the 2007 elections. The Commission adopted a 'Regulation/Procedure' that provided that in 'Polling stations with over 100% voter turn out-these stations will warrant immediate invalidation, even if there is no letter of complaint from one of the parties/candidates contesting the elections, or an incident report from the District Electoral Officer'.<sup>405</sup> The Commission applied this regulation for the first time to invalidate election results in the presidential run-off vote from a total of 477 polling stations across the country reporting over 100% turnout. At the same time, the Commission insisted that 'the invalidation ... does not require a repeat of the polling exercise,' because 'the invalidations have NOT affected the outcome of the [presidential] election'.<sup>406</sup> It was a common refrain of focus group participants that the public is generally unaware of regulations issued by the Commission pursuant to this provision.

The leadership of the governing SLPP saw the application of the regulations as potentially damaging to the vote in their geographical strongholds. Many others were apparently not aware of the regulation in view of its novel application; others misunderstood it as requiring

402 National Electoral Commission of Sierra Leone [2010], *Strategic Plan, 2010–2014*, 28 July, p.4.

403 Section 33 of the 1991 Constitution and Section 127 of the Electoral Laws Act 2002.

404 Chapter IV, Section 34 of the 1991 Constitution.

405 National Electoral Commission Secretariat, Declaration, 1 July 2008, p.1.

406 National Electoral Commission (2007), Statement from NEC Chairperson: NEC Statement to the Media, 17 September, Freetown, p.1 (emphasis in original). According to the statement, 'in all, 477 stations across the country have thus been invalidated, as follows: Kailahun: 90, Kenema: 65, Kono: 9, Bombali: 17, Kambia: 8; Koinadugu: 12, Port Loko: 2, Tonkolili: 6, Bo: 123, Bonthe: 2, Moyamba: 24, Pujehun: 113, Western Rural: 1, and Western Urban: 4'.

parliamentary approval if it is to have or to take effect; while others alleged that the chairman and a rump of the Commission took the decision, without the full Commission sitting, and criticised it for not following internally agreed-upon procedures for invalidating such results, or for ‘not doing so within the ambit of the law’; yet others averred that voter turn-out in excess of 100% may be due to change of residence by registered voters and not due to fraudulent action by voters or party supporters or functionaries and should not therefore be automatically invalidated in affected polling stations, without closer investigation of the reason for the over 100% voter turnout.<sup>407</sup> It was alleged that some of the provisions have been politically controversial when they provided grounds for the nullification of election results. For this reason, in particular, some focus group participants argued for the need for the Commission to widely disseminate the reasons for such guidelines as a confidence-building strategy.

Yet, as the chairperson of the Commission pointed out that:

- All the members of the Electoral Commission, including the two protesting members, signed the declaration issuing the regulations, and on whose authority the invalidation was done;
- All 14 electoral districts in the country were affected by the invalidation – the invalidation was not confined to the stronghold of any particular party;
- It was not necessary to refer regulations to Parliament for approval, because the explicit and categorical wording of the enabling provisions of the constitution and the Electoral Laws Act do not require it; and in any case it would not be feasible to revert to Parliament in this particular case, as Parliament might be in recess;
- The electoral law already takes into account change of residence and provides for this to be reflected in the final voter register of the area, where the registered voter has relocated and for his/her name to be expunged from the voter register in the area of his previous residence; and
- The invalidation did not affect the eventual outcome of the presidential rerun elections, and therefore ‘did not require a repeat of the polling exercise,’ in line with international best practices.

Pointing out that the decision to invalidate was properly taken, in that it required by convention a quorum of only three of the five members of the Commission to take binding decisions by the Commission, the chairperson opined that, to ‘avoid confusion’ in the future, the Electoral Laws Act should fill a lacuna in the law, by fixing a quorum for meetings of the Commission.<sup>408</sup> The Commission also sees the need to address ‘the lack of clarity in the provision on the annulment of votes...’ as one of the challenges in the legal framework for electoral governance.<sup>409</sup>

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407 Interview with a former management staff of NEC, Freetown, 13 September 2010; Interview with Chairman, SLPP, Freetown, 13 September 2010.

408 Interview with Chairperson, NEC, Freetown, 14 September 2010; National Electoral Commission, Statement from NEC Chairperson: NEC Statement to the Media, 17 September 2007, p.1.

409 National Electoral Commission (2010), Strategic Plan, 2010–2014, p.5.

An important additional function of the Electoral Commission, which it shares under Section 38 with Parliament, is the division of the country into parliamentary constituencies. Section 38(1) of the constitution provides that, the Electoral Commission shall ‘act with the approval of Parliament’. When it becomes necessary for it to delimit electoral constituencies, the Commission, in consultation with relevant stakeholders, like Statistics Sierra Leone and the Ministry of Internal Affairs, Local Government and Rural Development, will prepare a bill for enactment by Parliament. Thus, when it became necessary to fill a lacuna in the law regulating delimitation of local government wards, preparatory to the 2008 local government elections, the Commission prepared the draft of the Wards (Boundary Delimitation) Regulations, 2008, and sent it to Parliament for consideration. Parliament enacted the regulations into law as Constitutional Instrument No. 2 of 2008.

The Electoral Commission is mandated to conduct voter education, although the bulk of voter education activities are conducted by another institution established in the mid-1990s, the National Commission for Democracy (NCD). A number of civil society groups have also been involved in voter education.

### **Political Parties Registration Commission**

The Political Parties Registration Commission (PPRC) is a regulatory and supervisory body with oversight powers over party political – including electoral – activities.<sup>410</sup> In so providing, the 1991 Constitution theoretically removed regulatory and supervisory functions over political parties from the Electoral Commission, which had hitherto performed them. As noted above, powers to register political parties were left with the NEC for some years, apparently owing to lack of the political will to create the PPRC. Its eventual establishment in 2006, was allegedly due to the insistence of the chair of NEC that the constitutional and legislative provisions should be respected and implemented.

#### *Membership*

Membership of the Political Parties Registration Commission consists of the following persons, appointed by the president subject to the approval of Parliament:

- The chairman of the Commission, who shall be a person who has held judicial office or is qualified to be appointed a judge of the Superior Court of Judicature nominated by the Judicial and Legal Service Commission;
- The chief Electoral Commissioner;
- A legal practitioner nominated by the Sierra Leone Bar Association; and
- A member nominated by the Sierra Leone Labour Congress.

Section 34(3) provides that ‘The Administrator and Registrar-General shall be the Secretary to the Commission’.

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<sup>410</sup> Chapter IV, Section 34 of the 1991 Constitution.

### *Powers and functions*

The PPRC is responsible for the registration of all political parties ‘and for that purpose may make such regulations as may be necessary for the discharge of its responsibilities under [the] constitution’.<sup>411</sup> The Commission has defined this provision to include:

- Monitoring and supervising the affairs and conduct of the political parties, including their internal democracy, to ensure their compliance with the constitution, the Political Parties Act 2002, the conditions of their registration, and the regulations issued by the Commission;
- Promoting political pluralism, including gender consciousness and equity, and the spirit and ethos of constitutionalism among the parties;
- Mediating, when approached by any of the parties to the dispute, conflicts and disputes between or among the leadership of a party or between political parties; and
- Taking action to contribute to the ideals enshrined in the country’s constitution.

Deriving from its statutory powers, the Commission also has the responsibility to enhance and ensure ethics, accountability and transparency within the political parties and in party political activities, and among candidates seeking elective public office. To this end the Commission’s regulations require political parties fielding candidates for elective public office to declare their assets and liabilities before elections, and to declare their election expenditures, including those of their party candidates, three months after the elections. The reports filed in both cases must be published in the Sierra Leone Gazette. The powers of the Commission to regulate party political activities must be read alongside Section 35(6) of the 1991 Constitution, which provides that ‘Subject to the provisions of [the] Constitution, [...] Parliament may make laws regulating the registration, functions and operations of political parties’.

The PPRC is still in the process of institution-building. This involves structuring itself to play its envisioned fundamental role in securing peace in the country, through nudging and persuading the political parties and other stakeholders to engage in healthy competitive and electoral politics, as an antidote to electoral violence. To this end, the Commission has worked closely with civil society organisations, political parties, and other stakeholders in state and society. A result of its efforts in this regard was the agreement it negotiated and brokered between the political parties, in the form of a code of conduct containing regulations for political parties to observe in their party political activities (see below, under the heading on election-related violence).

The PPRC lacks strong enforcement powers to ensure that the political parties fulfil their responsibilities. As a consequence, political parties and candidates regularly fail to submit the mandatory post-election reports on their expenditures immediately preceding the elections, or are delinquent in their timely submission within the specified deadline for doing so. One

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<sup>411</sup> Section 34(4) of the constitution. This provision is elaborated in the Political Parties Act, 2002, Section 6.

focus group participant described the PPRC as a ‘toothless bulldog, because the PPRC Act has not given them the power to prosecute’ or ‘to push defaulting parties out’.<sup>412</sup>

### *Staffing*

The PPRC has also started to recruit its own staff, to lessen its dependence on staff deployed from the civil service. It has plans for 41 staff, of which about 15 have been deployed to serve in various capacities at headquarters and in the four regions. It plans to have a monitoring committee in each of the 14 electoral districts to monitor party political activities and mediate in conflict situation between and within the political parties. Like the NEC, the PPRC has secured a legal retainership to help with its legislation-related work and court cases.

### **Interlocking responsibilities**

The NEC and the PPRC have interlocking electoral responsibilities, which necessarily impel their cooperation. It is this realisation that informed the inclusion of the chief Electoral Commissioner on the membership of the Political Parties Registration Commission. The PPRC is in turn represented on the Electoral Commission’s Political Parties Liaison Committee, a forum for consultation and communication between the NEC and political parties, which aims to maintain cooperation and share information on all aspects of the electoral process. The Electoral Commission has placed its long and tested experience at the disposal and in support of the PPRC’s on-going programme to develop its structures.

Concretely, the areas in which the NEC and PPRC collaborate include holding various joint meetings with the political parties on strategies for credible and violence free elections, on declaration of their pre-election assets and liabilities and post-election expenditure, and on campaign schedules. In view of their shared responsibilities in consolidating democracy in the country, the Electoral Commission and the Political Parties Registration Commission also collaborate with the Anti-Corruption Commission, the National Human Rights Commission, the Law Reform Commission, and the National Commission for Democracy, all constitutionally established bodies. This collaboration typically takes the form of sharing of information, consultations, meetings and ‘in-kind’ contributions to the work of the NEC and PPRC from these other commissions. In the case of ‘in-kind’ contributions, these other commissions supplement the budget of the NEC and PPRC through their own budgeted democracy-promotion activities.

Nonetheless, the PPRC has relatively poor funding and inadequate staffing and logistical support, in contrast to the more robust funding, human resource capacity and logistical endowment of the NEC. For example, the new expansive secretariat of the NEC, right in the centre of Freetown, is almost completed and would soon be ready

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<sup>412</sup> Another observed that The PPRC ‘needs the legal strength to enforce certain things. For instance, after the 2007 elections, political parties were supposed to give records of their election-related financial accounts, and it took a very, long, long time for them to come up with that. The PPRC has to use the media, go to the radio and newspapers trying to cajole them, just to give account...’.

for the commission to move into, while the PPRC is still in a crowded and obviously inadequate building across the road from the imposing NEC secretariat. Reflecting its poor human resource and logistical endowment, the PPRC has been unable to publish as much data-based statistics as NEC has done, and has had to rely on others for logistical support. In the words of one focus group discussion participant: 'Political parties and the people will not listen to the PPRC because almost 90% of its logistics is coming from NEC. For example, during the [2007] elections, NEC provided vehicles to the PPRC and these have since been taken over from them after elections and this has gravely crippled PPRC's operations.'

The dominant perception is that the PPRC is a suitable complement to the NEC, although there is no consensus whether it was necessary to unbundle the set of functions and powers transferred to the PPRC from the NEC. But the general sense is that the partnership between the NEC and the PPRC in the electoral governance process has turned out to be a 'loose' uncoordinated one, with the PPRC obviously the 'junior' partner, and the NEC having generally succeeded in building more confidence and more respect for itself and its activities. As one focus group discussion participant commented: 'We have realised that NEC is more popular than PPRC, which in actual sense, should not be so ... We have also realised over the years that much respect had been accorded to the NEC than [to] the PPRC'. By 'popular', the participant was referring to the fact that the general public knows more about, and has a more positive perception of the NEC and its activities than it knows and does of the PPRC. Focus group discussions suggested that the relationship should be tightened through 'a kind of memorandum of understanding that would actually put them much more closely,' and thereby strengthen their cooperation.

## **Independence of EMBs in Sierra Leone**

Both the NEC and the PPRC are by constitutional provisions statutorily independent of the executive. They derive their authority from their entrenchment in the constitution, derogation from which requires amendment of the constitution. Their composition and membership provide further guarantees of independence.

### *National Electoral Commission*

The 1991 Constitution provides for the independence of the Electoral Commission in three important respects.

First, Section 32(1) makes it a public institution, separate from and independent of the executive and other arms of government, with implied powers to recruit its own staff. The National Electoral Commission Act 2002 made the implied powers in this respect explicit. It empowered the Commission to employ its own staff, thereby effectively removing it from the civil service and from the supervision of the Ministry of Internal Affairs. The National Electoral Commission Reform Programme 2005–2008 and the Commission's Resolution No. 1 of 2005 continued a process of restructuring and transforming the Commission dating back to 2001, to make it meaningfully independent and ensure staff loyalty and dedication

to the Commission.<sup>413</sup> As part of the restructuring, in August 2005 the civil servants in the Commission's employment recruited through the Public Service Commission, were redeployed to the Establishment Secretary's Office in the country's civil service for new postings within the civil service. The restructuring also gave the Commission as a whole greater oversight over the activities of its staff, a role previously performed exclusively by the executive secretary.<sup>414</sup> To further strengthen its independence from the executive arm of government, the Electoral Commission has secured the services of a firm of lawyers, instead of relying on the Office of the Attorney-General, a department of the executive branch, to provide legal advice and representation. The Commission also aims to strengthen its newly created legal unit.

Secondly, Section 32(11) further guarantees the NEC's independence by stipulating that in exercising functions vested in it by the constitution, the Electoral Commission shall not be subject to the direction or control of any person or authority.

Thirdly, the 1991 Constitution makes it much more difficult to remove members of the Electoral Commission than had been the case before; as illustrated in December 1964, when the Albert Margai administration summarily removed the chief Electoral Commissioner from office. The 1991 Constitution (Section 32[8-9]), stipulates conditions for the removal of an Electoral Commissioner, which are similar to those provided for the removal of a judge of the Superior Court of Judicature (High Court and above).

There is one important exception to this equivalent status. A superior court judge, subject to provisions of Section 137 of the 1991 Constitution, 'may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind or for ... misconduct'. There is a similar provision under Section 32(8) & (9) for the removal of an Electoral Commissioner. However, the judge, unlike the Electoral Commissioner, has additional guarantee of security of tenure: Section 137(5) provides for conditions under which 'the question of removing a Judge of the Superior Court of Judicature, other than the Chief Justice, under sub-section (4), ought to be investigated' by a tribunal, whose 'members ... shall be persons qualified to hold or have held office as a Justice of the Supreme Court'. Furthermore, if the tribunal recommends the removal of the judge, Section 137(7) (b) requires 'approval by a two-thirds majority in Parliament, before he can be removed from office by the President'. In the case of an Electoral Commissioner, his removal by the President is subject to neither investigation nor the approval of Parliament by a special majority. Unless there is strong moral and political opposition to his doing so, there is nothing to restrain a President bent on removing an Electoral Commissioner. This is because under the present constitutional provisions there are no requirements for:

- The President to state the reasons for the removal;

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413 The Reform Matrix is an indication of the NEC's 'determination on institutional capacity enhancement programmes that underpin upgrading staff and infrastructures to meet the challenges of the new millennium'. 'National Electoral Commission of Sierra Leone, *Annual Report*, 2008, pp.13 and 21–27; see also Momoh, B.H., *op.cit.*

414 National Electoral Commission of Sierra Leone, *Annual Report*, 2008, p.10.

- The reasons to be investigated by an independent body through due process; and
- The outcome of the investigation to be subject to parliamentary vote, requiring a special majority.

However, the National Electoral Commission Act, 2002, described as ‘Being an Act to make provision supplementary to Sections 32 and 33 of the constitution with respect to the National Electoral Commission,’ provides for conditions similar to those outlined above for the removal of a judge for the removal of a member of the Commission. It provides that, ‘When a member of the Commission is to be removed from office for misbehaviour under section (1), the statement of misbehaviour shall be addressed to a tribunal appointed by the President, adapting for that purpose, the provisions of paragraphs (a) and (b) of sub-section (5) of section 137 of the constitution and subsections (6) and (7) of that section shall apply, with the necessary modifications, to the removal of that member of the Commission’. It is, perhaps, significant that the reference in the Electoral Laws Act 2002 in this respect specifically is to removal from office ‘for misbehaviour,’ and not ‘for inability to discharge the functions of his office (whether from infirmity of mind or body or any other cause’. But it remains moot whether this kind of supplementary provision overrides the constitutional provision, or amounts to ‘altering any of the provisions’ of the constitution, which would require approval in a referendum as stipulated in section 108 of the constitution. What further complicates the conditions for the removal of a member of the Commission is the apparent ambiguity of the 1991 Constitution [Section 32(8)] in providing that the member ‘may be removed from office by the President for ‘any other cause’ than one ‘arising from infirmity of mind or body ... or for misbehaviour’, in that it raises the question ‘what is any other cause?’

Prior to this supplementary provision, it had been easy for the president to remove members of the Electoral Commission in 1992, without the encumbrance of due process, although he consulted with the registered political parties before removing them.<sup>415</sup> Even after the provision came into force, two members of the Commission were removed after the 2007 presidential elections in highly controversial circumstances. Two Electoral Commissioners, allegedly with sympathies towards the SLPP, walked out of the press conference where the Electoral Commission had assembled to declare the APC candidate winner of the presidential elections. They were the same commissioners who had objected to the application of the regulations invalidating results with more than 100% turnout (see above). The new president then removed the two commissioners from the Electoral Commission, apparently without due process; while the Commission’s executive secretary and a number of other top management staff members allegedly with sympathies to the two commissioners – notably the director of administration and finance, the electoral officer responsible for logistics, and the chief of administration, human resource management unit – were demoted in rank by the Commission, in a move that some of them characterised as a form

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415 Momoh, H.B., *op.cit.*

of 'psychological war' against them. The Secretary and the other demoted top management staff subsequently resigned from the Commission.<sup>416</sup>

The recourse to the courts to enforce such rights or to question whether the president acted in conformity with the letter and the intent of section 32 of the constitution is always medicine after death, given the overbearing might of the presidency and the slow and costly nature of the judicial process.

The system for appointment of commissioners specified in the constitution is more defective, leaving much to the discretion of the president, who before nominating the candidates is required only to consult with the leaders of all registered political parties. If the president's party also has the majority in Parliament, the approval of Parliament will not be hard to obtain. Following their contested defeat in the 2007 elections, the SLPP objected to the re-nomination of Dr Christiana Thorpe as chief Electoral Commissioner, submitting a minority report from the responsible parliamentary committee objecting to her reappointment.<sup>417</sup> In an interview for this report, the SLPP Chairman claimed that, contrary to 'undertakings' mutually entered into by the APC and the SLPP the President had not in fact 'consulted' the SLPP on the re-nomination of the NEC Chairperson to serve a second term. According to the SLPP Chairman consultation 'is not information; and a meeting allegedly called by the President to discuss the nomination never took place'.<sup>418</sup>

In practice, the Commission's autonomy has in many respects rested on the determination of its chairperson to live up to that ideal. The chief Electoral Commissioner in 1996, Dr James Jonah, a Sierra Leonean, who was before his appointment deputy secretary-general of the United Nations, was able to maintain a substantially high degree of autonomy for the commission against the desire of the junta to constrain it. This feat could not be attained by a pliable chief Electoral Commissioner in 2002, anxious to dodge possible indictment by the attorney-general for alleged misappropriation of the Commission's resources. In 2004, the chief Electoral Commissioner resigned amidst mutual allegations of vote rigging by the government and opposition during local government elections. The relatively credible and widely accepted results of the 2007 elections that saw the defeat of the government at the polls is to a large extent credited to the determination of the chief Electoral Commissioner to prevent vote rigging.<sup>419</sup>

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416 Kande, Jimmy D., 'Rogue Incumbents, donor assistance and Sierra Leone's second post-conflict elections of 2007', *Journal of Modern African Studies*, 2008, p.633, fn.16.

417 Sierra Leone Government, Third Session of the Third Parliament of the Second Republic of Sierra Leone, Minority Report on the Committee of Appointments and Public Service on Parliamentary Vetting of Dr Christiana Thorpe to Serve as Chief Electoral Commissioner of the National Electoral Commission, n.d., pp.1-2.

418 Interview with Chairman, SLPP, Freetown, 13 September 2010.

419 AfriMAP, *Sierra Leone: Democracy and Political Participation* (forthcoming).

### *Political Parties Registration Commission*

Section 34(5) of the constitution guarantees the independence of the PPRC by stipulating that '[i]n the exercise of any functions vested in it by [the] constitution, the Commission shall not be subject to the direction of any person or authority, save only as regards to the right to appeal contained in Section 35', which provides in subsection 7 that '[a]ny association aggrieved by a decision of the Political Parties Registration Commission under this section may appeal to the Supreme Court and the decision of the Court shall be final'.

## **D. Funding of elections in Sierra Leone**

The Electoral Commission and the Political Parties Registration Commission are funded by the Government of Sierra Leone, through budgeted remittances from the Ministry of Finance, and through 'in-kind' contributions from a number of government agencies.

A major source of funding for both commissions, managed through a project management unit within the United Nations Development Programme (UNDP) office in Sierra Leone, is from the international donor community, notably the UK's Department for International Development (DFID), Irish Aid, the European Union, Denmark and Norway.<sup>420</sup> By one estimate from a source in the Electoral Commission, since 1996 about 25% of funding for elections has come from the government of Sierra Leone, and roughly 75% from the international donor community.<sup>421</sup>

According to the Electoral Commission, the joint donor basket fund contribution to the 2008 local government elections amounted to 84.7% of the elections' total budget, with the government of Sierra Leone contributing 15.3%.<sup>422</sup>

Table 2 provides a comparative analysis of the 'actual comparative costs' in US\$ of the contributions of the Government of Sierra Leone, the Joint Donor Basket Fund/UNDP, and others to the budget of the NEC between 2005 and 2009.

Table 3 converts the contributions into comparative percentage costs for the period 2005 to 2009.

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420 Momoh, H.B., *op.cit.*

421 Interview with a member of the NEC, Freetown, February 2010.

422 National Electoral Commission of Sierra Leone, *Annual Report*, 2008, p.18.

Table 2: Actual comparative cost of contributions to NEC budget, 2005–2009

	2005	2006	2007	2008	2009	Total
Description	US\$	US\$	US\$	US\$	US\$	US\$
Government of Sierra Leone	288 375.28	2 062 395.48	3 880 430.23	2 206 945.00	1 273 854.74	9 712 001.11
Basket Fund/ UNDP	–	1 988 098.00	21 088 972.00	13 539 812.00	3 425 474.00	4 0042 356.00
Others*	–	63 882.46	1 072 647.00	–	–	1 136 530.37
Total	288 375.28	4 114 375.94	26 042 050.15	15 746 757.37	4 699 328.74	50 890 887.48

Source: National Electoral Commission of Sierra Leone.

\* Other sources include Peace Building Fund (2007), Japanese Government Electoral Support (2007), and German Government BEAC Programme (2006).

Table 3: Actual comparative percentage costs to NEC budget, 2005–2009

	2005	2006	2007	2008	2009
Description	%	%	%	%	%
Government of Sierra Leone		50	15	14	27
Basket Fund/ UNDP		48	81	86	73
Others		2	4		
Total		100	100	100	100

Source: National Electoral Commission of Sierra Leone.

Table 4 provides a cost per voter analysis for Sierra Leone for each of 2007 and 2008, and the average cost for the two years, based on the NEC budget for both years, but excluding the budget of the PPRC, and election-related expenditures by other public partner sector institutions in the country. These are relatively high costs per capita, as is often typical of new democracies.<sup>423</sup>

423 See *Getting to the CORE – A Global Survey on the Cost of Registration and Elections*, IFES, UNDP, June 2006.

Table 4: Cost per voter analysis, Sierra Leone, 2005–2009

	2005	2006	2007	2008	2009	Total
Description	US\$	US\$	US\$	US\$	US\$	US\$
Total cost	–	–	26 042 050.15	15 746 757.37	–	41 788 807.52
Total voters	–	–	2 619 569.00	2 761 243.00	–	5 380 812.00
Cost per voter	–	–	9.94	5.70		

Source: National Electoral Commission, Sierra Leone.

The high level of external contribution to the funding of elections is a source of major concern in Sierra Leone. Participants in focus group discussions and interviews conducted for this study expressed great discomfort over the vulnerability to which external funding exposes the country’s electoral governance process by making it too amenable to pressures from and the agendas of the international donor community. In the view of participants, the Commission’s over-dependence to donor funding could result in ‘donors stifling the activities of [the NEC] and the realisation of its goals and objectives’.

This point was poignantly illustrated by another participant, a member of the election basket fund’s steering committee in his recounting of some of the steering committee’s meetings he attended where ‘the NEC chair almost cried. The chair almost broke down because the Commission wanted work to go on but the donors were just not ready to release the funds. The chair almost dropped down; we Sierra Leoneans who were there helped the chair up’. He concluded that ‘Sierra Leone needs to make a double effort to get its own resources in the conduct of elections’.<sup>424</sup>

Inside sources within the Commission also recounted to the author of this study how the Commission lost the opportunity to procure a fully furnished and secured warehouse to serve as its secretariat in preparation for the 2007 presidential and parliamentary elections because of constraints put in its way by the administrator of the donor community election basket fund steering committee. The Commission has highlighted the following funding issues as those requiring attention if it is ‘to become an institution adequately resourced, professionally staffed and dedicated to the efficient delivery of credible elections to advance the course of democracy and good governance for sustainable development of Sierra Leone’:

- Inadequate funding and late arrival of funds leading to late execution of programmes;

424 Statement in a focus group discussion, Freetown, February 2010.

- Donor inflexibility and dependency threatening the independence and credibility of the NEC; and
- Acquisition of substandard and inappropriate electoral materials by donors due to limited involvement of NEC in procurement process'.<sup>425</sup>

Yet even with the external support, budget constraints mean that ad hoc election staff receive only very low remuneration, which makes them susceptible to bribery.<sup>426</sup>

## E. Electoral disputes in Sierra Leone

Sierra Leone's legal framework for the adjudication of electoral disputes is based on the provisions of Section 45 (for presidential elections) and Section 78 (for parliamentary elections) of the 1991 Constitution, and later amplified by the Electoral Laws Act, 2002, and the Electoral Laws Amendment Act, 2007. This is not to say that courts had not previously adjudicated electoral disputes. In fact, there had been cases dating to before independence where the courts entertained election petitions, exemplified in the increase in the parliamentary seats won by the United Peoples Party from one to four seats after the courts upheld its election petitions after the 1957 general elections.<sup>427</sup>

The 1991 Constitution (Section 45[2] [a–b]) provides for the country's Supreme Court to determine questions as to whether the election of a President under Sections 42 and 43 of the constitution or any law has been complied with; or 'any person has been validly elected as President under Section 42 of this constitution or any other law'. Any citizen can challenge the validity of the President's election by petition to the Supreme Court within seven days of the declaration of the result (Electoral Laws Act, 2002 [section 40(1)]). The High Court has jurisdiction over the determination of questions as to the validity the election of a Member of Parliament with appeal from the decision lying to the Court of Appeal, whose determination shall be final (Section 78). In 2007, the High Court was also given jurisdiction over election petitions 'complaining of undue return or undue election of a member of a local council'.<sup>428</sup> Petitions in these cases can be filed by any person with the right to vote or who was a candidate in the relevant election (Electoral Laws [Amendment] Act, 2007 [Part VIIA, Section 92(C) (1)(a–c)]).

The High Court must rule on the validity of the election of a Member of Parliament within four months of the commencement of proceedings; and the Court of Appeal must give judgement on it within four months after an appeal was filed (Constitution Section 78[4]). The 2007 amendments to the Electoral Laws Act provided that an appeal must be filed within 21 days of the High Court Ruling (Electoral Laws [Amendment] Act, 2007, Part

425 National Electoral Commission, *Strategic Plan, 2010–2014*, pp.17 and 20.

426 Focus group discussions and interviews, Freetown, February 2010.

427 Hayward, Fred M., and Kandeh, Jimmy, 'Perspectives on Twenty-Five Years of Elections in Sierra Leone', in Hayward, Fred M. (ed.), *Elections in Independent Africa*, Westview Press, Boulder and London, 1987, p.29.

428 Electoral Laws Amendment Act, 2007, Part VIIA, Section 92C (1).

V11A [section 92H (2)]). Election petitions have precedence over other cases (Electoral Laws [Amendment] Act, 2007, Part VIIA, Section 92[E]).

While these Election Petition Courts deal with election related civil cases for the setting aside of an election, the Electoral Laws Act, 2002 (Section 111) established the Election Offences Court, a division of the High Court, to try criminal cases arising from election offences committed under the Act.

The changes introduced by Electoral Laws (Amendment) Act 2007, and the formal inauguration/establishment of the Election Petitions Court and the Election Offences Court in the few months before the 2007 presidential and parliamentary elections, created a lot of misunderstanding in the aftermath of the 2007 elections. For example, there was confusion of where (to whom) and by what timeline/deadline, election petitions and complaints should be lodged.<sup>429</sup> The petition of the SLPP against the return of the APC candidate, Hon. Ernest Bai Koroma, as president was allegedly not only ‘time lapsed,’ as it was not filed within the seven days after the declaration of the result (as provided under subsection [2] section 40 of the Electoral Laws Act, 2002) but also wrongly filed at the High Court and not at the Supreme Court (Section 45[2] of the 1991 Constitution, and Section 41[1] of the Electoral Laws Act, 2002). The petition was thrown out of court and is now on appeal, despite serious misgivings which the SLPP has about the ‘fragile situation’ of the judiciary in Sierra Leone, and seeming ‘unseriousness with which election cases are treated by the courts’.<sup>430</sup>

## F. A critical assessment of electoral governance in Sierra Leone

### Voter registration

The Constitution of Sierra Leone (Section 33) provides that the responsibility for ‘the conduct and supervision of the registration of voters for, and of, all public elections and referenda’ lies with the National Electoral Commission, which is also given ‘the power to make regulations by statutory instrument for the registration of voters ...’ The constitutional provisions are further amplified in the country’s Electoral Laws Act 2002, especially in Part II (Registration of Electors by Wards) and Part III (Procedure for Registration of Electors).

The Electoral Laws Act 2002 (Section 2) empowers the Electoral Commission to divide the country into wards for the purpose of the registration of voters for presidential, parliamentary and local government elections. Those eligible for registration are citizens over 18, ordinarily resident in the ward where they wish to register and not in prison (Sections 4 and 7). An individual may only be registered in one ward; if he or she moves residence there is a process to apply for re-registration in the new ward (Section 5). The Act also allows for the Commission to make provision for the registration outside the country of non-resident

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429 EU Election Observation Mission, Preliminary Statement: Republic of Sierra Leone Second Round of Presidential Election 2007, 10 September 2007, p.5.

430 Interview with Chairman, SLPP, in Freetown, 13 September 2008.

citizens of Sierra Leone, with specific mention of refugees in Liberia and Guinea from the 1991–2002 civil war (Section 6).

The Electoral Commission conducted voter registration exercises in 1996, 2002, 2004, 2007 and 2008. By one estimate, during the 2007 exercise, about 91% of eligible voters (of which 49% were female, and 56% under 32 years old) registered to vote, in over 2 700 registration centres, with each centre given an upper registration limit of 2000 voters, with spill-over to be directed, where feasible, to nearby centres yet to reach the limit of 2000 registered voters.<sup>431</sup> Table 5 shows the registration figure for each of these years.

Table 5: Voter registration figures in Sierra Leone, 1996–2008

Year	Number of registered voters
1996	1 566 464
2002	2 348 657
2004	2 275 173
2007	2 619 565
2008	2 761 423

Source: Abstracted from, M.N. Conteh, *Sierra Leone Electoral Process: A Concise Introduction*, n.d., pp.5–6.

The voter registration exercises, although not unproblematic, have generally not generated acrimonious tension and conflict among the political parties. For example, in its report on the 2002 exercise, the Campaign for Good Governance (CGG), a civil society organisation in the country, observed that there were serious and widespread flaws in the exercise, but that the flaws and irregularities were neither systematic nor intended to favour any particular party or region. Its conclusion was that the flaws were due to lack of public/voter education and a combination of significant administrative problems and resource constraints.

An important voter registration-related issue raised in the focus group discussion conducted as part of this study was the inaccessibility of several registration centres and polling centres to prospective electors, especially in rural areas, necessitating their walking long distances, usually through tough and treacherous terrains to register or to vote. The concern was expressed as follows by a participant:

As a result of boundary delimitation, the people of Sierra Leone were disenfranchised. If you ask an old man, why he did not take part in [registration or] voting, he would say: ‘in those days this was the place we used to [register or] vote, but now

431 National Democratic Institute, NDI Final Report on Sierra Leone’s 2007 Elections, Washington, D.C. and Freetown, 2008, p.18.

they have moved the[registration or] voting post far off, and I cannot afford to walk three miles just to go and vote.<sup>432</sup>

Linked to the problem of delimitation is whether one should necessarily vote where one registered to vote, or vote anywhere one finds oneself in the country at election time, once one is in possession of a valid voter registration card. This problem was phrased in the following way by a participant:

Voting where you registered is also another very serious issue, which we need to review in the next election. For example, you register at Fourah Bay College, I think the requirement is that you vote there. I think we have to be a little bit flexible. Maybe that requirement needs to be reviewed.<sup>433</sup>

What this statement underscores is the need for vigorous voter education, including on the provisions of the Electoral Laws Act on change of residence and loss of registration card.

In its *Strategic Plan 2010–2014*, NEC noted that the existing voters’ register ‘is not accurate, because of the non-removal of dead voters from the roll, multiple registration, [and] registration of minors and non-citizens. To be able to conduct the 2012 elections, the Register would need to be replaced’.<sup>434</sup> Table 6 sets out the Commission’s goal, objectives and strategies regarding voter registration as a key focus area in its Strategic Plan, 2010–2014.

Table 6: Sierra Leone’s NEC strategic plan to improve voter registration in the country

Key focus area	Issues	Objectives	Strategies
Voter registration	<ol style="list-style-type: none"> <li>1. Inadequate IT systems to meet the challenges of Voter Registration.</li> <li>2. Registration Centres Locations not within convenient walking distances, especially in the rural areas – too far.</li> </ol>	To improve the compilation of the voters Register and issuance of Voter ID Cards using modern technology to enhance credibility and voter identification.	<ol style="list-style-type: none"> <li>1. Adopt the BIOMETRIC system of Voter registration.</li> <li>2. Conduct site visits to other EMBs to determine VR technologies ... appropriate for Sierra Leone.</li> <li>3. Procure VR equipment and materials.</li> <li>4. Conduct training for IT staff.</li> <li>5. Increase number of registration centres.</li> <li>6. Use mobile registration teams.</li> <li>7. Reinforce voter education during registration.</li> <li>8. Plan and conduct effective training for Voter Registration Staff.</li> <li>9. Conduct the Voter Registration Exercise.</li> <li>10. Conduct periodic Voter Registration exercises to update the register.</li> </ol>

Source: National Electoral Commission of Sierra Leone, *Strategic Plan, 2010–2014*, p.20.

432 Focus group discussions and interviews, Freetown, February 2010. Cf National Democratic Institute, NDI Final Report, op.cit., p.19: ‘one concern persistently voiced ... was the long distance some registrants had to travel to reach a registration center. ... Without vehicle transportation, the elderly, pregnant woman, women with young children, and people with disabilities were the most disadvantaged in these instances’.

433 Focus group discussions and interviews, Freetown, February 2010.

434 National Electoral Commission of Sierra Leone, *Strategic Plan 2010–2014*, pp.4–5.

## Election-related violence

A constant trend in electoral processes in Sierra Leone has been the propensity of political parties to mobilise the army of unemployed young people for election-related thug-gery and violence. There were worrying premonitions of election-related violence as early as 1944/45 and again in 1961, in isolated but not uncommon inter- and intra-party political violence in the urban and rural areas. However, the beginnings of large-scale electoral violence in Sierra Leone can be traced to the intervention of the military in 1967 to stop the swearing in as prime minister of the APC's Siaka Stevens, who had led his party to victory in the general elections of that year.<sup>435</sup> Electoral violence intensified during the 1969 parliamentary by-elections. It so worsened in the 1973 parliamentary elections that the opposition SLPP withdrew from the elections. Electoral violence continued unabated in the 1977 elections, particularly in the southern district of Bo. Though a one party state was subsequently enacted by the resulting APC-led parliament, the enactment did not lessen the intensity of electoral competition. In fact, elections held in 1982 witnessed high levels of violence in the Bombali and Pujehun districts. Elections held in 1986 were relatively peaceful, but the run up to proposed elections in 1992 following the re-introduction of a multi-party constitution in 1991 were dogged by numerous allegations of violence or preparations to unleash violence by the incumbent APC. A military coup prevented those elections from taking place.

Elections to return the country to constitutional multi-party rule were held in 1996 whilst the civil war was still raging. Violence was perpetrated by armed factions intent on stopping the elections. Politicians were beaten up by operatives of the junta government, there was an attempted assassination of the chief Electoral Commissioner,<sup>436</sup> the army threatened not to ensure security during polling day, and the RUF amputated the hands of would be voters. These events did not however deter the determination of Sierra Leoneans to cast their votes and elect a democratic government under a multi-party political system.

The country's history of electoral violence and the immense violence of the civil war led to grave concerns that the country's first post conflict elections of 2002 would be dogged by violence and that it would possibly lead to a resumption of the civil war. However, mediation efforts by the diplomatic community, the presence of the United Nations' biggest ever peacekeeping force at the time, activism against violence by civil society groups and the general determination of citizens for a violence-free election ensured that there were only isolated incidents of violence. The polls passed by relatively peacefully, and all parties accepted the results that were widely adjudged as reflecting the wishes of the Sierra Leonean electorate by both international and national observers.

The 2007 elections were intensely contested by three parties, the APC, PMDC, and

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435 See Cartwright, Joseph R., *Politics in Sierra Leone 1947–67*, University of Toronto Press, Toronto and Buffalo 1970, pp.43–181.

436 Kandeh, Jimmy, 'In Search of Legitimacy: The 1996 Elections', in Abdullah, I. (ed.), *Between Democracy and Terror: The Sierra Leone Civil War*, Codesria, Dakar, 2003.

the SLPP. Fears that they would be dogged by immense violence were widespread. Violent clashes between SLPP and APC supporters erupted in Bo, Kono, Kailahun, Kambia, Port Loko and Freetown, and between SLPP and PMDC supporters in Bo and Kailahun.<sup>437</sup> The tensions reached boiling point during campaigning for the presidential run-off elections between the APC and SLPP presidential candidates. Both presidential candidates recruited ex-combatants as bodyguards, leaving aside, or not fully trusting the state-supplied security officers. There was an attack on the opposition candidate as he tried to campaign in Kailahun. Bellicose language ricocheted on the radio stations of the two parties, and there were numerous reports of the political rivals massing up supporters for a violent show down.

Most of these incidents were heavily condemned by community radio networks, civil society groups, and also by national and international monitors. A number of civic-minded women and youth groups launched 'violence-free' election campaigns; the authorities imposed temporary curfews in the Kono and Kenema districts, and the President threatened to impose a state of emergency. Tensions calmed down after a conference facilitated by the President in advance of the September 2007 run-off elections during which both presidential candidates signed a communiqué to maintain the peace and restrain their supporters.<sup>438</sup>

Incidents of violence during 2009 showed the continuing distrust characterising inter-party relations between the ruling APC and the SLPP after the contested presidential results.

The first incident, which occurred in March 2009, was the political violence and arson that followed the local government bye-elections in Tongo, and the pre-by-election violence that necessitated the postponement of the by-election in Pujehun. In both cases local party offices, and those of prominent local party leaders of the APC and SLPP were either vandalised and/or burnt, with the police accused of partisanship in effecting the arrest of suspected culprits. The second incident, over the same weekend in March 2009, was the political violence that erupted in the wake of the protest of the SLPP over its non-involvement in the municipal commissioning ceremony of the newly re-furbished clock-tower, a major public landmark in Freetown, which been in desuetude for several years. The ensuing political violence witnessed the extensive vandalism and destruction of parts of the SLPP national headquarters in Freetown.<sup>439</sup>

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437 Final Report of the European Union Observation Mission of the 2007 Elections in Sierra Leone. p.20.

438 In the Communiqué, the two candidates stated that 'the use of ex-combatants and vigilante groups by political parties and the assignment of them of security roles in party activities have been found to be negative and counter-productive and it is hereby banned'. They also 'strongly condemn[ed] all actions of intimidation, harassment and the use of provocative language, physical violence directed at any person or persons or malicious destruction of property for any reason' and agreed 'to treat each other with respect and decorum and urged other political leaders and other followers to do the same'. Communiqué of a special meeting convened by His Excellency President Alhaji Dr Ahmad Tejan Kabbah of the two main political party leaders on the forthcoming run-off elections to be held on Saturday the 8th of September 2007, 2 September 2007.

439 See Denney, Lisa, 'Sierra Leone: Wave of violence or wake-up call?', *Pambazuka News*, 18 June 2009.

### *Code of conduct*

The initial assumption of the PPRC, in part derived from its membership, was that its mandate focused on interpreting the law and applying legal sanctions in cases of party misconduct. However, the Commission soon realised the limits of a legalistic interpretation of its mandate, as a notoriously weak and corrupt judiciary would make it difficult to impose legal sanctions on political parties that breached the law. Instead, the Commission worked towards establishing a relationship of trust with political parties through mediation rather than legal sanctions.<sup>440</sup>

These efforts culminated in the PPRC facilitating negotiations between all registered political parties to agree a voluntary code of conduct, which they signed on 23 November 2006. As part of implementation mechanisms, the National Code of Conduct Monitoring Committee (CMC) was established, with its membership consisting of a representative from each of the registered political parties, a representative of the NEC, two representatives from civil society, one from the police, one from the Inter-Religious Council and one from the National Commission for Democracy and Human Rights. The committee selected its chairperson from the non-political members. This committee became an effective platform for dialogue and problem-solving between political parties during the election period. It functioned as a forum for discussion of issues of common concern, including breaches of the code before, during and after the elections. One of its first decisions was to duplicate the structure at regional level and in each of the 14 districts. Thus the district code of conduct monitoring committees (DCCMCs) came into existence.

According to Clever Nyathi, who acted as the UNDP appointed technical adviser to the PPRC from 2006 to 2007, the DCCMCs made a substantial contribution to the peaceful elections of 2007. He pointed to 'credible evidence of their success in defusing potentially violent situations. They were able to meet and find collective solutions to situations that gave rise to tension. They have not been universally successful, but in the majority of cases that they have dealt with, violence was avoided'.<sup>441</sup>

The eruption of further violence in 2009 led the United Nations, through the good offices of the Executive Representative of the Secretary-General, the country's Presidency and the PPRC to broker a new agreement between the main parties, the Joint APC-SLPP Communiqué of 2 April 2009.<sup>442</sup> In the communiqué both parties:

- Pledge to work jointly in preventing all forms of political incitement, provocation and intimidation that could lead to the recurrence of events witnessed in March 2009, while agreeing to uphold the following, among other undertakings pertaining to relations between the two parties [Preamble].
- Agree on the need to maintain the operational independence and impartiality

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440 Odendaal, Andries, 'District Code of Conduct Monitoring Committees in Sierra Leone, a case study' (n.d.), available on the website of the Global Partnership for the Prevention of Armed Conflict, <http://www.gppac.net/>.

441 Ibid.

442 Office of the President of the Republic of Sierra Leone, Joint Communiqué: All Peoples Congress and Sierra Leone People's Party, Freetown, 2 April 2009.

of the police and to work together on improving the professionalism of and the respect for the Sierra Leonean Police as a national institution and recommend to the Government to speed up existing arrangements for the establishment of an Independent Police Complaints Board [Paragraph 4].

- Agree to work together to enhance the respective roles and responsibilities and to respect the independence of important democratic institutions such as the National Electoral Commission (NEC), the Political Parties Registration Commission (PPRC), the National Human Rights Commission (NHRC), the Anti-Corruption Commission and the Independent Media Commission (IMC) [Paragraph 5].
- Recommend as a confidence building measure that consultations be held with the opposition parties before the names of such candidates are submitted to Parliament for confirmation, without prejudice to the constitutional prerogative of the President to nominate candidates of his choice to head important independent democratic institutions [Paragraph 6].
- Recognise the dangers that heightened regional and ethnic divisions could pose to the peace and stability in Sierra Leone and stress the need to function as truly national parties that embrace all aspects of Sierra Leone's rich and diverse social fabric ... and will therefore, strive to maintain regional balance in the membership and representation of their respective parties as well as within State institutions [Paragraph 8].
- Recognise the problem of youth employment and, if not solved, the risk that this could pose for peace and stability in Sierra Leone. Both parties reaffirm their commitment to disband all youth task forces or any other militant youth groups and to refrain from inciting their respective party youth wings [Paragraph 9].
- Recognise the need for multi-party talks in order to build consensus on critical issues of national interest and to reduce tensions. They agree to regular multi-party talks to be held not only in Freetown but also in the regional centres of Makeni, Bo and Kenema, to be chaired by the Political Parties Registration Commission and the Executive Representative of the Secretary-General will be invited to act as Co-Chair [Paragraph 12].

## **Other electoral malpractices**<sup>443</sup>

### *Over-voting and ballot box stuffing*

In several districts during the 1996 elections, voter turnout of over 100% was recorded. These included an initial computer printout of 345% in the Pujehun District, 155% in Bonthe, 139% in Kailahun and 117 % in Kenema. These violations were decried by the United National People's Party (UNPP), the party of the losing candidate in the run-off elections.<sup>444</sup> Mediation efforts by the diplomatic community in the country, who feared that a court challenge to the

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443 The following is extracted from the forthcoming study commissioned by AfriMAP on democracy and political participation in Sierra Leone, by Mohamed Gibril Sesay.

444 Kandeh, Jimmy, *In Search of Legitimacy*, p.147.

results would provide a pretext for the military to hang on to power, resulted in UNPP acquiescence in the results, after over 170 000 surplus votes were deducted from the figure of the eventual winner of the elections, Ahmed Tejan Kabbah.

The deductions proved ineffectual in deterring over-voting as voter turnout of over 100% were similarly recorded in some districts won by the incumbent SLPP in the 2002 elections. The opposition APC and its presidential flag-bearer, Ernest Koroma alleged vote rigging but nonetheless accepted the results. It was however generally accepted that in spite of incidents of over-voting in some districts, the elections generally reflected the wishes of the majority of the electorate.<sup>445</sup> There were also several allegations of ballot box stuffing and over-voting in the 2004 local government elections by both the incumbent SLPP and the opposition APC.

In an effort to deter this persistent problem, the Electoral Commission adopted the following regulations for the 2007 Presidential and parliamentary elections:

- In cases where voter turn-out was between 95 to 100% in a polling state, the commission would mount an investigation where there is complaint from political parties or the district elections office;
- Where the turnout was exactly 100% the commission would mount an investigation even where there are no complaints; and
- In cases where voter turnout was more than 100% in a polling station the commission would automatically invalidate the results from that polling station.<sup>446</sup>

NEC subsequently invalidated the results of 477 polling centres where the voter turnout was more than 100% in the presidential run-off elections. It also mounted investigations on 74 polling stations where the voting was exactly 100%; these investigations did not result in any invalidation of results from the affected polling stations. 426 of the invalidated stations were the strongholds of the incumbent SLPP in the Southern and Eastern Provinces and 51 from stronghold of the opposition APC.<sup>447</sup>

Though the application of these regulations was highly controversial in 2007, as noted above, the aim of preventing ballot stuffing is surely a positive ambition for the Electoral Commission.

### *Abuse of state resources*

All elections in the country since the country's independence have been dogged by accusations of the abuse of state resources by incumbents. In the 1996 elections there were widespread reports of diversion of state resources to the campaign activities of the junta supporter, the National Unity Party. Similar abuses of state resources were reported for the

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445 Opinion polls conducted by the Campaign for Good Governance had earlier noted that most Sierra Leoneans wanted the SLPP to win the 2002 elections.

446 Final Report of the European Union Elections Observation Mission, p.33.

447 Another measure adopted by the commission to deter electoral fraud included the proscription/blacklisting of a number of election officials against whom there were credible cases of malpractices from ever serving the commission.

2002 and 2007<sup>448</sup> general elections and the 2004 and 2008 local government elections.<sup>449</sup> Abuses usually take the form of civil servants refusing to be non-partisan, state officials using office equipment and vehicles for political party activities and biased coverage of incumbent parties' activities in state controlled media.

### *The role of paramount chiefs*

Paramount chiefs have no statutory functions in elections. However, Sierra Leonean elections have been filled with accounts of chiefs abusing their powers and influence to deliver votes for incumbents and to make it difficult for opposition parties to campaign or monitor polling day activities. In the 2002 elections there were allegations that chiefs and traditional authorities had prevented opposition supporters, particularly the APC, from campaigning in the Eastern provincial district of Kono. Similar accounts of chiefs abusing their powers were prevalent in the 2007 presidential and parliamentary elections.<sup>450</sup> Several chiefs publicly pledged support for the incumbent vice-president and ruling party presidential candidate Solomon Berewa in the lead up to the polls. In spite of widespread condemnation of chiefs' partisan involvement in elections, they continued to abuse their powers to favour the incumbent party in the 2008 local government elections.<sup>451</sup>

## **Strengthening electoral governance in Sierra Leone**

The findings and conclusions in this section are informed by focus group discussions among a cross-section of state and non-state stakeholders on the NEC and PPRC, complemented with face-to-face interviews with officials of both institutions and a number of other stakeholders, in Freetown in February 2010 and September 2010.

There is much qualified appreciation of the remarkable progress towards democratisation in the post-conflict recovery of the country, exemplified in creditable, if controversial general elections in 1996, 2002 and 2007, in the peaceful transfer of power from one political party to another as a result of the 2007 general elections, and in the local government elections in 2008.

It is clear from the focus group discussion and the interviews that democratic reversal seems remote, and that a culture of democratic politics is gradually taking root in Sierra Leone. The chairperson of the Commission is particularly optimistic that the 2012 elections will be substantially smooth-sailing, in view of the fact that the Commission has continued to mobilise the grassroots and the electorate, through partnership with civil society organisations and other stakeholders in state and society, and through the work of the Commission's Institute for Electoral Administration and Civic Education – Sierra Leone (INEACE-

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448 The Final Report of the European Union Elections Observation Mission in Sierra Leone (2007), p.21, noted the use of government vehicles for partisan purposes by the incumbent party and the distribution of huge sums of money from the official residence of the vice-president who was the presidential candidate of the ruling SLPP.

449 National Elections Watch Report on the 2008 Local Government Elections.

450 Final Report of the European Union Election Observation Mission in Sierra Leone, 2007, p.20.

451 These accounts particularly relate to chiefs in Kono abusing their powers and influence to favour the ruling APC party.

SL). The strategic objective in this respect is to let the electorate understand and appreciate the electoral process, to emphasise their responsibility to ensure free and fair elections, and to impress on them the necessity of defending their electoral mandate.<sup>452</sup>

However, concerns continue to be raised that the mechanisms for ensuring and legitimising political succession remains as contested as ever. For example, rightly or wrongly, the leadership of the SLLP is convinced that the party was cheated of electoral victory in the 2007 presidential elections. Moreover, the leadership believes this was made possible by the active connivance of the donor community, which was keen on and saw regime change as an end in itself and at all costs, even if it meant denying the incumbent president his due as the rightful winner, as an index of democratic change. According to the SLPP leadership this objective of the donor community was allegedly achieved by means of pressure on the SLPP candidate and incumbent president, including ‘arm twisting’ him to concede victory to the APC candidate.<sup>453</sup> This grudge is deeply felt and continues to pollute inter-party relations and detract from the confidence of the mainstream SLPP leadership in the Electoral Commission and even in the judiciary. It was a major factor in the SLPP’s opposition to the approval by Parliament of the reappointment of the chair of the Commission for a second term. In submitting a minority report on the re-nomination of Dr Christiana Thorpe as chief Electoral Commissioner, the six SLPP members of the Parliamentary Committee on Appointment and the Public Service objected to and wanted the nomination to be put ‘in abeyance’ because of the ongoing court case about the election results, in which the chief commissioner was a defendant,<sup>454</sup> as well as asserting that certain documents had not been placed before Parliament for approval as required (that is, in particular the regulations on annulling results where there was more than 100% turnout), and that other documents and witnesses had not been made available.<sup>455</sup> SLPP concerns about the reappointment of the chief Electoral Commissioner have been reinforced by other recent presidential appointments, which the SLPP contend have continued a pro-Northern Region lopsidedness in ministerial, ambassadorial, security services and other appointments, despite the commitments made in the 2 April 2009 Joint Communiqué to avoid such a bias.<sup>456</sup>

While it may make the SLPP look or sound like bad losers – particularly given the fact that the Electoral Commissioner is from the western area and not a northerner and she was appointed by the current opposition SLPP when they were in government – the salience of perception as a force influencing political behaviour cannot be discounted; the more so if viewed in the broader context of abuse of incumbency (about which the SLPP itself was once accused). The controversy also reflected how the work of the Commission is often embedded in partisan party politics and ethno-regional politics. What it points to, however,

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452 Interview with Chairperson, NEC in Freetown, 14 September 2008.

453 Interview with Chairman, SLPP in Freetown, 13 September 2010.

454 *SLPP v Christiana Thorpe/NEC*, High Court MISC. App. No. 67/07/08 2007 S. No. 11.

455 Sierra Leone Government, Third Session of the Third Parliament of the Second Republic of Sierra Leone, Minority Report on the Committee of Appointments and Public Service on Parliamentary Vetting of Dr Christiana Thorpe to Serve as Chief Electoral Commissioner of the National Electoral Commission, n.d., pp.1–2.

456 Interview with Chairman, SLPP, Freetown, 13 September 2010.

is the need for a more skilful and statesmanlike management of inter-party affairs by a combination of party and other stakeholders.

Much can be done to strengthen NEC and PPRC so that they can:

- Each perform their statutory functions and exercise their powers more effectively and efficiently; and
- Work together with each other and other institutions in state and society to create conditions to facilitate the conduct of credible elections in the country.

### *Legal framework*

The generally favourable perception and positive public evaluation of the National Electoral Commission (despite the concerns of the SLPP) stands despite weaknesses in the legal framework for the electoral management system, which expose the electoral process to permanent risks of political crisis.

It is indicative of the proactive approach of the Electoral Commission that, as part of its strategic plan to confront the challenge of elections and registration regulations/laws, its objective is to ‘ensure clarity in the Legal Framework governing the conduct of credible elections by reviewing existing ambiguous and inadequate electoral laws and regulations to enhance their consolidation’.<sup>457</sup>

Among the areas that the research for this report identified as needing clarification and strengthening, which apply equally to the NEC as to the PPRC, are those on the appointment and removal of commissioners, the quorum for decisions, the commissions’ powers to make regulations and enforce them, to prosecute offences and to annul results, and the procedures for election dispute resolution.

The composition, tenure, status, powers and functions of the NEC and PPRC should be reviewed to strengthen their functional and fiscal autonomy. In particular, the power of the President to remove NEC members for ‘cause’ or ‘misbehaviour’, under Section 32 of the 1991 Constitution, and which is apparently not subject to investigation or special majority in Parliament vitiates the independence of the members of the Commission, in that it does not adequately protect them from the abuse of the power to remove them by the President. This is one area where constitutional reform can be used to strengthen the autonomy of NEC and further insulate it from political interference or partisanship. Similarly, there is need to resolve the status of the supplementary provisions of the National Electoral Commission Act 2002 on the removal of members of the Electoral Commission for misbehaviour.

Another area of reform is one brought to light by the re-nomination of the current chairperson of NEC for a second term of office, when the SLPP leadership contended that the party was not consulted, as required under the constitution and both the APC and SLPP agreed under the Joint Communiqué they signed in April 2009. What is ‘consultation’? Through what formal institutional process or mechanism is the ‘consultation’ to take place? Is there a way to prevent the possible abuse of the requirement of ‘consultation’ either by

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<sup>457</sup> National Electoral Commission, Strategic Plan 2010–2014, p.18.

the ruling party or the opposition parties, before the appointment of the members of the commission is made by the President, and thereafter submitted to Parliament for approval/confirmation? In short, the ambiguity surrounding what ‘consultation’ means, and how it is to be compacted is a major reason why the trend is now towards strengthening the independence of Electoral Commissions by placing more formal institutional checks on the executive/presidential prerogative of appointing them.

Regarding the composition of NEC, while regional representativeness is politically correct given the country’s geopolitics and in particular the historical divisions between the colony and protectorate, thought should also be given to appointing members on their own merit, and in a manner that will not turn them into watchdogs of ‘regional’ interests, which may effectively turn them into representatives or agents of the dominant parties in their regions of origin.

Another weakness lies in the ambiguities in the Electoral Laws Act 2002 over the power of the Electoral Commission to nullify elections results under certain conditions, such as when it is demonstrated that results from certain polling units exceed the registered number of voters for each polling unit. Similarly, the power conferred on the Commission to make regulations, under Section 33 of the constitution and Section 11 of the National Electoral Commission Act 2002, is not well understood or publicised.

One weakness of both the NEC and the PPRC is that they lack explicit powers to enforce their authority, and in particular to prosecute electoral offences in their own name, relying instead on the police to do so. Thus, although the PPRC was central to the development of the 2006 Code of Conduct for political parties and the establishment of monitoring committees to strengthen respect for its provisions, it is the responsibility of the police to prosecute those engaged in political thuggery and they have been slack in doing so. The NEC has its power to make regulations to give itself the role of annulling results in certain cases (such as when the turnout has been more than 100%), it does also not have the power to prosecute violations of the laws that provide the rules for elections.

It is in this respect that on-going discussion is welcome news, including a 2010 legal workshop, attended by stakeholders in state and society, to address how to reform the legal framework for the work of the PPRC and the NEC, among other independent democratic institutions in the country. The draft is apparently with the Law Reform Commission, preparatory to its being sent to Parliament for passage into law.<sup>458</sup> It is imperative that the reform process should be concluded early enough for parliamentary action and implementation well ahead of the 2012 presidential and parliamentary elections.

### *Resources*

Both the NEC and the PPRC need substantial funding to meet their operational (recurrent) and capital costs and to reduce their dependency on capricious funding from the donor community. The PPRC is particularly in a worse off situation than NEC, with its present

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<sup>458</sup> Interviews with Zainab Kamara and Josephine Lebbie of the PPRC, Freetown, 13 September 2010; and with Abimbola Orogade, Chief Technical Adviser, CTA, UNDP, Sierra Leone, Freetown, 14 September 2010.

comparatively low level funding impairing its already weak legal framework for its regulatory oversight of political parties, which is generally believed requires strengthening, and its general political education and awareness mandate. A more formal agreement between the two bodies on forms of collaboration may help to optimise use of resources while also ensuring more general cooperation.

### *Strengthening election management*

The NEC should urgently address a number of logistic and operational deficiencies, which emerged out of the focus group discussions as major deficits that had tended to erode the credibility of previous elections. These include problems arising from constituency and boundary delimitation, shortage of voter registration materials, hoarding of registration cards by party members, inadequacy of voter registration centres, especially in rural areas, and poor remuneration for ad hoc polling and electoral staff. Fortunately, the NEC is moving proactively and aggressively to address these issues and related ones as core issues in its *Strategic Plan, 2010–2014*.

### *Regulation of party politics*

In the view of focus group participants, the PPRC has not been sufficiently aggressive in ensuring that the political parties abide by the Code of Conduct it brokered with them, and that they address their internal political differences through faithful compliance with their internal democracy mechanisms. Working with the political parties and civil society organisations at the grassroots level, the PPRC should strengthen its local monitoring committees or groups to monitor the behaviour of political parties and party political activities at ward, local government and district levels. Focus group participants also emphasised the need for the PPRC to create, or encourage the political parties to create, an independent forum for regular inter-party dialogue on cross-cutting issues of common interest that affect them, like that provided by the Inter-Parties Advisory Committee in Ghana.

The PPRC's criteria for the registration of political parties came under the searchlight of the focus group discussion participants. The general consensus was that more stringent criteria should be used to prune down the number of political parties, by weeding out inactive ones. According to some participants, the proliferation of political parties 'has not created a suitable environment for political parties to mature within the country,' because 'most of the parties ... only come around when it is election time... And when election time is over and they do not see any head way or have representatives in parliament they go underground'.

However, other participants attributed the inactivity of political parties other than the three major ones – the APC, the SLPP and the PMDC – to the lack of state funding of political parties as is done elsewhere as an investment in democracy. It was noted that at a meeting with the PPRC, political parties strongly recommended that the government establish a financial support scheme to help political parties manage their institutions. Political party

representatives asserted that lack of public funding ‘prevents them from having complete control over their party supporters’ and from reining in political violence.<sup>459</sup>

Political parties have an important role to play in the improvement of the environment of electoral governance in the country. Consideration should be given to providing political parties with public grants, under certain conditions, as an investment in democracy. In addition, the PPRC should more aggressively engage the parties to ensure that they have and comply with their internal democracy and accountability mechanisms. Alongside its engagement with the political parties in this way, the PPRC should also engage stakeholders in state and society, particularly the NEC, civil society organisations, media, faith-based groups, among others in a nationwide civic and political education project. It is however not clear to what extent public funding alone could provide an answer to election-related political violence. Poverty and unemployment continue to be major constraints in the way of credible elections in the country.

### *Context*

The cultural, economic and political environment of electoral governance should be improved, through strengthening constitutional government, especially separation of powers, independence of the judiciary, and measures to sanction the abuse of the power of incumbency for unfair electoral advantage. This has several dimensions but the more salient ones arising from the analysis in the study are the issue of electoral violence; poverty and youth employment as fadders for fanning discontent and political violence; the issue of trust and constructive cooperation and competition among the two major parties, the APC and SLPP; and the issue of how to compact them in ways that will consolidate, sustain and strengthen competitive electoral politics and good governance, and contain ethno-regional fissures through balance in presidential public political appointments.

To this end the letter and spirit of the *Joint APC-SLPP Communiqué of 2 April 2009* must anchor inter-party relations and provide the basis for political and social trust, mutuality and reciprocity. At the same time, the issue of poverty and youth unemployment should be tackled, as a national emergency. In this respect, government’s establishment of the Youth Commission, as a major plank of its ‘Agenda for Change’, while a commendable step, should be backed up with concrete programmes on job creation and economic development.

## **G. Recommendations**

### **Commitment of the parties**

- The letter and spirit of the *Joint APC-SLPP Communiqué of 2 April 2009* must anchor inter-party relations. The leadership of the political parties must exercise political will to ensure adherence at all levels to the ‘undertakings’ they pledged to

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459 Focus group discussion, Freetown, February 2010.

respect in the Joint Communiqué and in the earlier *Code of Conduct of the Political Parties* they entered into in 2006. The parties must jointly take action to end the historic cycle of political violence and their leaders must be reminded of the significant import of being faithful to their undertaking that ‘while we must learn from our painful historical experiences, we maintain that we should not be haunted by those memories; instead we commit ourselves to building a peaceful, democratic and prosperous Sierra Leone for the benefit of all our people’ [Preamble to the Joint Communiqué].

### **Review of electoral laws**

The government should request the Sierra Leone Law Reform Commission to institute a review of electoral laws in the country, with a view to clarifying ambiguities in the law and ensuring that the Electoral Commission has full independence and adequate powers to fulfil its responsibilities. In particular, there is a need to review the law on:

- The appointment and removal of the commissioners to ensure their independence from political interference;
- The powers of the NEC and PPRC to make and enforce regulations and to prosecute offences;
- The powers of the NEC to annul results; and
- Election dispute resolution mechanisms.

### **Increased resources**

- The resources made available to the NEC and PPRC by government should be increased, insulated from political interference, and made stable, to reduce dependency on international development partners.

### **Improved management, including voter registration**

- The NEC should move swiftly to implement its strategic plan for the improvement of the technical management of elections, including voter registration.

### **Enforcement of the code of conduct**

- The PPRC should act more assertively to ensure that the political parties abide by the Code of Conduct, including by strengthening its local monitoring committees. It should review its priorities by focusing on ensuring that internal democracy is implemented within the various political parties. It should devote less time and effort to dealing with funding of political parties and corruption within the parties. Consideration should be given to moving this role to the Anti-Corruption Commission, which is better equipped to deal with it and has a more robust mandate.

# About the authors

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