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## ELECTION COMMISSIONS: RESPONSIBILITIES AND COMPOSITION

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### OVERVIEW

The Convention for a Democratic South Africa (CODESA) is currently discussing plans for a transition to democratic rule in South Africa. It is anticipated that elections in the near future will be part of the transition process. The question of who will administer these elections, however, has not yet been addressed.

The establishment of a legitimate electoral process begins with the adoption of an election law and the designation of a body responsible for administering the election. It is critical, particularly in a transition situation, for such a body to be impartial and to be perceived as acting in such a manner. Where the electoral body is viewed as partisan, the legitimacy of the election may be called into question and the transition process stalled or set back.

This memorandum discusses the different models that have been used for establishing a national body responsible for administering an election. The memorandum is based on the experiences of the National Democratic Institute for International Affairs (NDI), which has observed elections in more than 25 countries and has provided technical advice on election systems to several countries in different regions of the world. The emphasis of this memorandum is on countries in transition because the fears and suspicions in these countries are similar to those which may exist in South Africa.

The memorandum is divided into three sections. The potential responsibilities of a national election commission are considered in the first section. The second section identifies different approaches that have been used to form national election commissions. The final section lists some of the resources and expertise that such a commission will need in organizing elections.

At the outset, it is important to note that the situation in South Africa is different in several respects from other countries where NDI has worked. Sectors of the South African

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population, most notably the "white" population, have participated in multi-party elections for several generations. These elections reportedly have been conducted in an administratively fair manner, with few allegations of fraud associated with the process. Thus, some may argue that the legal framework and administrative procedures that have been used in previous elections should be adopted wholesale for future elections, with the obvious exception that the franchise will now be extended to the entire population.

This approach is problematic on a number of grounds. The election system contemplated for future elections -- a proportional representation system -- is quite different from the first-past-the-post system that South Africa has used for "white" elections. The adoption of a proportional elections system will require changes in the election law, including possibly changes in the procedures for balloting and for counting ballots. It is also unclear whether voter registration will be required. If registration is not required, it would again necessitate some changes in the procedures that have previously been used.

The most important factor to consider is that a majority of the population has never voted in an election nor been able to participate -- as candidates, political party agents or polling officials -- in an electoral process. This means that special consideration must be given to issues such as voter education and procedures to ensure that all sectors of society can cast ballots freely. The population also must be convinced that those administering the elections are committed to doing so in a fair and impartial manner, and that the announced results reflect the will of the people.

These considerations highlight the need to establish a national election commission that enjoys the confidence of the population. Thus, even if a previous arrangement has worked well in ensuring free and fair elections for a segment of society it must now be critically reviewed and perhaps rejected given the new circumstances in South Africa. It would be a tragedy for South Africa if, after the ballots are cast and counted, the future elections were not accepted as a legitimate exercise by significant sectors of society.

#### RESPONSIBILITIES OF A NATIONAL ELECTION COMMISSION

The responsibilities of an election commission range from country to country. In some countries the commission is responsible for all aspects of the electoral process, while in other countries the commission's role may be purely administrative and limited, for example, to ensuring the preparation of ballots and other paraphernalia used on election day. Also, in some countries, some of the responsibilities mentioned below are divided among different bodies (*e.g.* specialized commissions responsible for regulating the media, public financing and investigating intimidation and other specific election-related complaints, etc.).

Given the circumstances in South Africa, an expansive role for a national election commission would probably be appropriate. The following tasks might be assigned to such a commission:

- interpreting the electoral law and adopting electoral regulations;
- designating and training of regional election officials and polling officials;
- developing procedures for registering voters, implementing a voter registration process and publishing voter lists;
- regulating the election campaign;
- investigating and adjudicating complaints, including those presented directly to the Commission and appeals from subordinate bodies;
- developing an effective, nonpartisan civic education campaign;
- preparing materials necessary for election day;
- establishing mechanisms for reporting the results from polling sites to a central headquarters and for announcing the official results.

*In addition, the commission might be assigned the responsibility of promulgating the election law.* This procedure was used in Haiti in 1990; in other countries, such as Costa Rica, the election commission must review all laws related to the election process before they are voted on by the legislature.

While perhaps raising some jurisprudential problems, utilizing this procedure has several advantages. It allows for the election law to be developed by an independent body, which may be less subject to political considerations and which may have more expertise regarding the practicalities of organizing an election. Moreover, it may expedite consideration of the law, which otherwise may be overshadowed by debate regarding other fundamental issues (such as those currently being considered by CODESA), thus resulting in delay in beginning preparations for elections. Such delays might result in pressures to adopt rules and procedures that are not fully considered in terms of their impact on the elections, particularly given the circumstances mentioned above.

With respect to the other responsibilities that may be assigned to the commission, several points should be considered. The election law, even if adopted by the commission, will not cover all the contingencies that may arise. Thus, it is quite important, particularly in a first election, to afford the commission considerable latitude in interpreting the law and adopting additional regulations. Otherwise, the commission risks becoming a static body and confidence in its actions will be limited.

The role of the national election commission in designating and training subordinate officials is crucial but often overlooked. The magnitude of the task is considerable. Assuming a voting population of 18 million and a maximum of 1000 voters per polling site (a large but not

unprecedented number), a minimum of 18,000 polling sites will be required (in fact, the number will be larger, probably in the range of 20,000). Assuming further that a minimum of three polling officials will be assigned to each polling site (not including party agents), the total number of individuals who will be administering the balloting process on election day will be more than 55,000. Many of these individuals will have never voted, much less administered an election.

Of course, the national election commission will not be responsible for supervising directly every polling site. Instead, as is the case in most other countries, intermediate bodies will be appointed by the national election commission and these bodies will be directly responsible for supervising the polling site officials. Nonetheless, to avoid sharp variation in the procedures being used in different regions of the country, which might exacerbate tensions, the national election commission must prepare manuals for election officials and ensure that training seminars for polling officials are conducted throughout the country.

The national election commission also may be assigned the task of developing rules for the campaign (holding rallies, distributing campaign propaganda, using the media and raising funds) and ensuring compliance with them. Without discussing in detail the possible content of these rules, the following competing considerations should be noted: should the election law and regulations consciously attempt to ensure that all parties compete on a relatively level playing field or, to encourage an election campaign that may be more meaningful to individual voters, should the election law distinguish (based on estimates of party membership or some other criteria) between parties in terms of such issues as news coverage, media access and public financing?

The election commission's esteem will depend, in large measure, on its ability to handle election-related complaints. Again, given the fears and suspicions that exist in South Africa, the commission should be given the resources and jurisdictional ambit to meet the expectations of the population in ensuring free and fair elections.

As mentioned, a majority of the population in South Africa has never voted. The commission may be tasked with the responsibility of developing programs that explain voting procedures and highlight the importance of such matters as ballot secrecy and the role of election monitors. The commission may want to work with nongovernmental organizations and use the media in effectuating this effort. The important point to note is that without an effective voter education program turnout may be limited, as segments of the population feel unduly intimidated by the voting process and forego their franchise.

Developing balloting procedures and preparing voting materials are also tasks often assigned to a national election commission. A ballot design must be agreed upon (i.e. what should be included on the ballot? party names, symbols, names of candidates, name of party leader, other markings to ensure integrity of the process, etc.). This is often a controversial matter, particularly when a new system is being implemented and a large segment of the

population is illiterate. The commission must establish criteria for resolving competing requests submitted by different parties.

Ballots must then be prepared for all eligible voters and distributed in a manner that ensures polling sites will have enough ballots to service those voters authorized to vote at the site. Making such estimates is complicated if there are no voter registration lists, especially when one considers the number of migrant workers in South Africa.

Other materials that will be needed are voting booths that provide adequate secrecy for the voter, ballot boxes and the forms polling officials use in accounting for ballots on election day. Depending on the procedures adopted, the election commission may be required to provide voting cards for all potential voters and indelible ink to mark the fingers of voters as a safeguard against multiple voting.

The commission also may be required to decide whether balloting should occur over several days or be limited to a single day, where polling sites should be established and whether mobile stations should be used, and whether the counting of ballots should occur at the polling site or at some centralized point. In reaching these decisions, the commission should consider both administrative practicality and the confidence in the process that will be achieved by selecting a particular approach.

Finally, the commission must develop mechanisms for ensuring public confidence in the integrity of the process. Specific anti-fraud measures may be required. Also, the commission will need to develop regulations for domestic and international monitors, who play an important role in the context of transition elections.

## MODELS FOR ESTABLISHING A NATIONAL ELECTION COMMISSION

Countries use a variety of mechanisms for administering elections. This section reviews several of these approaches and highlights some of the advantages and disadvantages of each system.

*Government approach* - In some countries, a government ministry (e.g. Home Affairs or Interior) is assigned lead responsibility for administering elections. Other tasks may be assigned to other appropriate bodies (e.g. the judiciary would be responsible for adjudicating election related complaints). Polling officials generally would be designated from the ranks of the civil service, thus avoiding the difficulties involved in selecting individuals from the population at large who may not have the requisite skills for the various jobs. This approach works well where the civil service is respected as professional and neutral, but is more problematic in countries where the partisanship of the civil service is in question.

*Judicial approach* - A variation on the above is to assign the judiciary or selected judges the responsibility for administering elections. In Pakistan, for example, the Central Election Commission comprises three judges appointed by the President from the supreme and high courts

of the country. In Romania, seven Supreme Court judges were selected by lottery to serve on the Central Election Commission. Again, this works well if the judiciary is respected for its independence, but is problematic if the electoral contestants view the judiciary as partisan or, as in the case of South Africa, are all white.

*Multi-partisan approach* - A third model is to have all registered political parties designate representatives to the National Election Commission. This assures that various interests are represented on the commission and that each party can exercise some form of oversight concerning the operation of the commission.

There are two problems with this model. First, in a transition situation, the number of parties often proliferates. If all parties are allowed to designate members to the commission, the size of the commission may be unwieldy and hence prove ineffective. Second, the commission may be comprised of individuals who lack the requisite skills and/or experience to ensure the effective operation of the commission.

*Expert approach* - A fourth model is to designate, based on a consensus of the political parties contesting the elections, individuals with relevant experience and expertise who also have a reputation for independence and integrity. The obvious problem is developing a consensus on the identity of the appropriate individuals. Generally, such independent commissions range in size from three to 11 members. The idea is to avoid commissions that are unwieldy, but which are large enough to ensure for an effective division of responsibilities (see below).

#### PRIVILEGES AND AUTHORITY

The members of such an independent commission should be afforded various privileges and immunities. Often the status of commission members is the same as judges and, to ensure their independence, they can be removed only for gross dereliction of duty and for financial improprieties.

The authority of the commission also varies from country to country. In Costa Rica, for example, the Supreme Electoral Tribunal exercises *ultimate and exclusive authority* regarding all election related matters. In other countries, decisions of the election commission can be appealed through the judiciary. Finally, in some countries, the legislature is the ultimate authority in resolving challenges concerning the allocation of seats. In the South Africa context, the first approach seems the most appropriate.

As for enforcement of commission decisions, the usual practice is to rely on other government institutions, much as is the case with the judiciary. However, both for investigative purposes and for enforcement purposes, it may be appropriate to consider assigning some police officials to the commission. These officials would then be directly controlled by the commission, giving the commission an effective means for enforcing decisions.

## INTERNAL OPERATING PROCEDURES AND FUNCTIONAL EXPERTISE

Once a commission is designated and its mandate defined, the commission must begin developing working procedures. In some countries, these procedures are set forth in the law establishing the commission, while in other countries the commission is responsible for producing its own procedures. The procedures generally cover such matters as the timing of commission meetings, the method for reaching decisions and the establishment of functional committees.

Given the election schedule and the extensive responsibilities that the commission may be assigned, membership on the commission should perhaps be considered a full-time job from the time the commission is formed until two weeks after the elections. Obviously, the commission members should be remunerated for their work. Usually, the pay scale is similar to that of senior civil servants or members of the judicial branch. (If members of the judiciary or civil service are assigned the responsibility of administering the elections, they could simply be paid their regular salaries).

An important matter concerns how the commission reaches decisions. Generally, the majority principle is utilized, with commission members allowed to issue public dissents. The commission, however, should be encouraged to act by consensus because the more split decisions that emerge the less confidence the public will have regarding the nonpartisan nature of the commission.

Before a staff is recruited, the functional divisions of the commission must be established. These should include some or all of the following:

- a personnel division responsible for recruiting and training election officials throughout the country;
- a financial division responsible for developing a budget covering all aspects of the electoral process and for managing the funds provided to the commission by the government;
- a legal division responsible for developing (if necessary) and interpreting the election law, developing election regulations and procedures, and evaluating the legal aspects of complaints submitted to the commission;
- an investigative division responsible for reviewing all complaints submitted to the commission;
- a logistics division responsible for communications with election officials and for distributing election paraphernalia to polling sites throughout the country;

- a data processing division responsible for vote registration (if utilized), estimating the materials necessary for the elections and for tabulating the results;
- an information and publicity division responsible for developing a civic education program and for disseminating decisions issued by the commission; and
- a liaison division responsible for interacting with government bodies (e.g. police, security forces, judiciary, state broadcasting and local administrative bodies), political parties and domestic and international monitoring groups.

## CONCLUSION

The importance of establishing an independent election commission as soon as possible can not be overestimated. Indeed, given the circumstances in South Africa, the establishment of such a commission should perhaps precede the adoption of an election law with responsibility for developing the election law then placed in the hands of the election commission. Once in place, the commission will not only be in a position to prepare for future elections but will highlight the significance of these elections for a post-apartheid South Africa.