

ELECTORAL REFORMS: KENYA'S RECENT EXPERIENCES

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TABLE OF CONTENTS

	<u>PAGE</u>
1.0 INTRODUCTION	3
2.0 ELECTIONS MANAGEMENT IN KENYA	6
2.1 Legal Framework for Kenya’s Electoral System	
2.2 Institutional Framework for Elections in Kenya	
3.0 THE NEED FOR REFORMS	16
3.1 Reform in the Country’s Electoral System	
3.2 Kenya’s Electoral System	
3.3 Kenya's Electoral Process	
3.4 Electoral Reforms in the Proposed New Constitution (PNC)	
4.0 CONCLUSION	27

1.0 INTRODUCTION

Elections, open, free and fair, are the inescapable *sine qua non* of any modern democratic society; particularly because they enable citizens to grant authority to their governments and give them the mandate to implement their citizens' aspirations. They also form the basis for healthy political systems which allow citizens to engage in ongoing dialogues with government decision makers; facilitate the dissemination of information on policies and programs that are deemed essential for the citizens' welfare; and aid citizens in rendering judgment on the effectiveness or desirability of the government's decisions.

Regular elections, conducted in a political climate that encourages the free exchange of ideas and opinions, are a crucial element of the relationship between citizens and their government – not only facilitating their civic duties but also allowing them to acquaint themselves with the desired principles of effective governance.

For the past two decades or so, more and more Kenyans have expressed their desire for improvements to the system of democratic governance and the mechanisms through which they participate in government decision making processes. This desire is driven by the fact that the country has been in the grip of a democratic malaise evidenced by increasing ethnic tensions and disenchantment towards traditional forms of political participation; recently illustrated by the disputed 2007 General elections and the post-election violence that ensued. Undeniably, it is axiomatic that a large swathe of the citizens wants to have a real voice in decision making and would like to see more responsive, accountable and effective political institutions that will shepherd Kenya into a mature democracy.

The antecedents of Kenya's electoral system are traceable to its adoption of the Westminster Constitution and the political arrangements that went with it at its independence. The subsequent electoral system adopted was not a product of a broad-based internal debate in which Kenyans may have had a chance to make submissions on the kind of system they wanted to see in their country. Moreover,

subsequent limited changes that may have been introduced were hardly ever debated and in most cases were partial and cosmetic rather than comprehensive and substantive. The result of this was the farcical *mlolongo* elections in 1988, the ethnic clashes of 1992 and 1997 and the befuddling elections of 2007 in which, as the Kriegler Commission noted, it was difficult to know who actually won the presidential elections.

In the last two years, a consensus has emerged among political parties of all stripes, civil society and the general public that electoral system reforms is a good starting point for energizing and strengthening Kenya's democracy. Parliament's action to disband the former Electoral Commission, replacing it with an Interim Independent Electoral Commission, and the setting up of the Interim Boundaries Review Commission is indicative of Kenya's guided efforts to revamp its electoral process.

The 1963 Constitution of the newly independent Kenya created an autonomous Electoral Commission with a clear mandate to register voters, conduct elections, and delimit parliamentary electoral districts, among other electoral matters. Until 1991 the process for parliamentary and local authority elections came under the control of the Supervisor of Elections, an officer in the Attorney General's Chambers. However, notwithstanding the ECK's responsibility under the Constitution for different electoral matters, between 1963 and 1991 it only carried out one function – the review and establishment of electoral district boundaries.

The passing of the Elections Laws Amendment Act (No. 1 of 1992) reposed the responsibility of conduct of elections in the Electoral Commission of Kenya and abolished the office of the Supervisor of Elections. The 1992 Electoral Commission of Kenya consisted of 11 commissioners, all appointees of the President. These appointments, coupled with the fact that it was the same President who had the prerogative to set election dates, denoted the institution's lack of independence. The subsequent elections carried out were neither free nor fair and heralded the ethnic clashes in certain parts of the country.

In 1997 a cross-political party caucus, the Inter Parliamentary Parties Group (IPPG), made various recommendations for reforms to the electoral process that would guarantee a more democratic government and establish a freer and more level political playing field. The opposition political parties would nominate half of the ECK commissioners, albeit their appointment would still be done by the President. The IPPG negotiations led to the enactment of the Constitution of Kenya (Amendment) Act No. 9 extended the powers of the ECK to make it better equipped to “guarantee free and fair elections” and to “promote voter education throughout the country.” Though the opposition lost the 1997 General Elections, they were able to emphatically trounce the ruling party KANU in the 2002 General Elections due to the fact the elections were conducted within the aegis of the IPPG recommendations. Sadly, the IPPG proposals were merely a gentleman’s agreement and the law was never amended to entrench these provisions.

The Constitution still made the appointment of ECK commissioners an exclusive prerogative of the President and there was no provision to seek legal redress if the letter and spirit of the IPPG agreement was not respected. This lacuna allowed the Government of National Unity under President Mwai Kibaki, to choose not to honour it. The Report of the Independent Review Commission (IREC), popularly known as the *Kriegler* Report spelt out that the disputed elections of 2007 was as a result of this and the ensuing post-election violence was partly fuelled by the perception that the Electoral Commission was not impartial in its management of the elections.

2.0 ELECTIONS MANAGEMENT IN KENYA

The complexity and specialist skills necessary for electoral management require that an institution or institutions be responsible for electoral activities. Such bodies have a variety of shapes and sizes, with a wide range of title to match, which include 'Election Commission', 'Department of Elections', 'Electoral Council', 'Election Unit', or 'Electoral Board'. The term 'electoral management body' or EMB has been coined as a name to refer to the body or bodies responsible for electoral management whatever wider institutional framework is in place.

An EMB is an organization or body which has the sole purpose of, and is legally responsible for, managing some or all of the elements that are essential for the conduct of elections and of direct democracy instruments. The socio-economic and political history of a country determines the type of an electoral management body that it will have. There are three broad electoral management models in the world; namely Independent, Governmental and Mixed model.

The Independent Model of EMB

The Independent Model of electoral management exists in those countries where elections are organized and managed by an EMB which is institutionally independent and autonomous from the executive branch of government, and which has and manages its own budget. Under the Independent Model, an EMB is not accountable to a government ministry or department.

It may be accountable to the legislature, the judiciary, or the Head of State. EMBs under the Independent Model may enjoy varying degrees of financial autonomy and accountability, as well as varying degrees of performance accountability. They are composed of members who are outside the executive while in EMB office. Many new and emerging democracies have chosen the Independent Model of electoral management. Examples of EMBs under the Independent Model include Armenia, Australia, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Estonia, Georgia, India, Indonesia, Liberia, Mauritius, Nigeria, Poland, South Africa, Thailand, Uruguay, Ghana South Africa etc.

The Governmental Model of EMB

The Governmental Model of electoral management exists in those countries where elections are organized and managed by the executive branch through a ministry (such as the Ministry of the Interior) and/or through local authorities. Where EMBs under the Governmental Model exist at national level, they are led by a minister or civil servant and are answerable to a Cabinet minister. Their budget falls within a government ministry and/or under local authorities.

Countries whose EMBs fall into this model include Denmark, New Zealand, Singapore, Switzerland, Tunisia, the UK (for elections but not referendums) and the United States. In Sweden, Switzerland, the UK and the United States, elections are implemented by local authorities. In Sweden and Switzerland the central EMB assumes a policy coordinating role.

The Mixed Model of EMB

In the Mixed Model of electoral management, there are usually two component EMBs, and dual structures exist; a policy, monitoring or supervisory EMB that is independent of the executive branch of government (like an EMB under the Independent Model) and an implementation EMB located within a department of state and/or local government (like an EMB under the Government Model). Under the Mixed Model, elections are organized by the component governmental EMB, with some level of oversight provided by the component independent EMB. The Mixed Model is used in France, Japan, Spain and many former French colonies, especially in West Africa.

No matter which model is used, every EMB should be certain that it can ensure the legitimacy and credibility of the processes for which it is responsible. This can be done if electoral management is founded on the following fundamental guiding principles-

- independence;
- impartiality;
- integrity;
- transparency;

- efficiency;
- professionalism; and
- service-mindedness.

These guiding principles form the basis of electoral administration and are essential to ensure both the actual and the perceived integrity of the electoral process.

In Kenya, the body responsible for elections since 1992 has always been the Electoral Commission of Kenya (ECK), which was structured along the Independent Model of an EMB.

In 1963 the constitution of the newly independent Kenya created an autonomous electoral commission with a clear mandate to register voters, conduct elections, and delimit parliamentary electoral districts, among other electoral matters. This was the furthest the government went towards institutionalizing the ECK. Until 1991 the process for parliamentary and local authority elections came under the control of the supervisor of elections, an officer in the Attorney General's chambers. However, notwithstanding the ECK's responsibility under the Constitution for different electoral matters, between 1963 and 1991 it only carried out one function – the review and establishment of electoral district boundaries.

The Constitution was amended in 1991 to introduce a multiparty system and to change the structure and responsibilities of the ECK. Eleven commissioners were appointed by the President. This number was raised to 12 in 1993. The ECK was given exclusive powers to manage the conduct of national and local elections, including full responsibility for voter registration, candidate nominations and voter education.

Although the reforms introduced entailed significant change in the ECK's role, opposition political parties complained about its composition; that all its members were presidential appointees. Following the establishment of the IPPG in 1997, opposition parties received representation in the ECK through the addition of ten more commissioners. The IPPG also reviewed and brought in some laws which

made the ECK more independent. Under the Constitution, the ECK was not to receive or accept the direction of or instructions from any person or authority, but it had many difficulties realizing this independence in practice.

2.1 Legal Framework for Kenya's Electoral System

In addition to the Constitution, elections in Kenya are governed by several statutes which provide for how elections are to be conducted by the electoral body; the participation and regulation of political parties; participation by citizens; election offences; and the role of other state actors during the electioneering process.

The ECK was governed by the Constitution and the November 1997 National Assembly and Presidential Elections Act. The Constitution Amendment Act, no. 17 of 1990, re-established the ECK and provided for its tenure and functions. It also guaranteed its independent status, although an exception made through a Constitutional Amendment in 1997, empowered Parliament to make laws to regulate the effective conduct of the ECK's operations. Among the major issues covered by the Act are the registration of voters, nominations and campaigns and questions relating to the appointment of ECK staff, including a Code of Conduct for the staff. In addition, the Act empowered the ECK to make regulations governing the electoral process. Below are some of the laws that are directly intertwined in the election process.

National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya

Under the National Assembly and Presidential Elections Act, the Electoral Commission of Kenya has complete authority to appoint officials for the conduct of elections. The law also puts the Police on election duties under the direction and instruction of the Electoral Commission. The Electoral Commission and electoral officers are immune from any personal liability for actions done in good faith in the exercise of their functions.

The Election Offences Act, Cap 66 of the Laws of Kenya

The ECK's constitutional mandate was further supported by the 1998 Election Offences Act, designed to prevent election offences and illegal practices during

elections. The Act is intended to prevent election offences and corrupt and illegal practices at elections, and for any related matters. The offences range from unauthorized printing, use, or sell of voter's cards to corrupt practices of bribery and voter-buying.

The Political Parties Act, Cap 10 of 2007 of the Laws of Kenya

The Act provides for registration, regulation, and funding of political parties and for any related matters. It provides requirements for registration, dispute resolution mechanisms through an established tribunal and provides guidelines on the sources funds, the manner of funding and accounting for such funds.

The Public Officers' Ethics Act, Cap 183 of the Laws of Kenya

The Act is intended to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes. It specifically provides a guideline on how a public officer should behave while performing their duties. Values such as professionalism and the observance of the rule of law have been expressly provided for. Declaration of any conflict of interest has been emphasized and that a public officer is advised to, all times, avoid being in a position where his personal interest conflict with his official duties. This applies to all officials of an EMB in Kenya.

The Public Order Act, Cap 56 of the Laws of Kenya

The Act facilitates the holding of campaigns by political parties and candidates by removing the need for licenses and or permits .Those who want to hold campaign rallies are only required to notify the Officer Commanding the Police Station (O.C.S) nearest the area of the campaign in the prescribed form. The notice must be given not less than three days and not more than fourteen days before the holding of the meeting. The police can refuse to grant position or disperse the meeting if a breach of the law results from the meeting. This provision therefore allows the law enforcement agencies to use it at their discretion.

The Registration of Persons Act, Cap 107 of the Laws of Kenya

This Act mainly deals with registration of persons and issuance of Identity Cards. This Act directly links into the mandate of the EMB as regards registration of voters. Only persons with a valid Kenyan ID or valid Kenyan Passport are eligible to be registered and therefore vote. There has been a lot of debate on whether the law should be amended to allow the use of the certificate (the waiting card issued pending issuance of the actual ID) where actual ID is not available. There have also been calls to allow the military personnel to use their Service Cards. These Cards are issued to them against their National IDs. They indicate their service numbers as well as the National ID numbers. As the law stands today, registration and voting is against a valid ID or passport. There is therefore a need to address such issues.

The Local Government Act, Cap 265 of the Laws of Kenya

The Act provides that election for councilors would be held simultaneously with parliamentary and presidential elections. The Act expressly provides for qualification and disqualifications of candidates for positions of councilors and the EMB is mandated to make rules to guide such elections.

The Police Act (Cap 84) and The Penal Code (Cap 63) generally provide for maintenance of law and order at all times, this includes pre and during campaign periods, during nominations and elections and even in the post-election. As law enforcers, Police work closely with the EMB to ensure that order prevails during such exercises.

The Kenya Broadcasting Corporation Act

The Kenya Broadcasting Act stipulates that the Kenya Broadcasting Corporation (KBC) has the responsibility to ensure that, in its allocation of broadcasting hours, a fair balance among different political viewpoints is maintained. This also extends to the allocation of free airtime for all registered political parties participating in the election.

The Electoral Code of Conduct

In 1997, parliament amended the law governing election by, among other things, enacting the Electoral Code of Conduct. Paragraphs 5 and 6 state how political parties and candidates should relate to the Electoral Commission. They require that these -

- Accept the authority of the Commission
- Implement orders and directions of the Commission
- Attend parties Liaison Committee meetings
- Facilitate ECK's observers at political meetings; and
- Accept the final outcome of an election and the Commission's declaration and certification of the results. They may nevertheless petition against the results if they are dissatisfied with them.

Section 8 of the Act enabled the ECK to impose penalties and sanctions on parties, candidates and their supporters who violate the 1997 Electoral Code of Conduct.

2.2 Institutional Framework for Elections in Kenya

The defunct Electoral Commission of Kenya (ECK)

The Constitution provided for an Electoral Commission consisting of a Chairman and a maximum of 21 members appointed by the President. The Constitution defined the Commission's responsibilities as -

- the registration of voters and the maintenance and revision of the register of voters;
- directing and supervising the Presidential, National Assembly and local government elections;
- promoting free and fair elections;
- promoting voter education throughout Kenya; and
- such other functions as may be prescribed by the law.

The ECK also had the mandate to delimit parliamentary constituencies, with the responsibility to review the number, boundaries and names of the constituencies at intervals of between eight and ten years, and the power to alter the number, the boundaries or the names if it considers that desirable. There were also additional responsibilities to review local authorities' electoral areas, their boundaries,

numbers and names, as well as the determination of the ratio of party nominees and eligibility in respect of nominated Members of Parliament and Councilors.

The Chairperson and Vice-Chair of the ECK, for them to be considered for appointment, must have been Kenyan citizens and must have held or have been qualified to hold the office of Judge of the High Court or Judge of Appeal Court. There was a Code of Conduct for members of the Electoral Commission provided under the National Assembly and Presidential Elections Act. Electoral Commissioners were appointed by the President for a term of 5 years and were eligible for reappointment; they enjoyed security of tenure and could only be removed by a tribunal appointed by the President.

During elections the ECK appointed temporary election staff to assist in the administration of elections. These include Returning Officers and their Deputies, Presiding officers and their Deputies, Registrations Officers and Election Clerks. The secretariat had a staff of over 600 based at the headquarters and in the regional offices.

The Interim Independent Electoral Commission (IIEC)

Following the disputed elections of 2007, an African Union-sponsored Panel of Eminent African Personalities led by former United Nations Secretary General Kofi Annan brokered a settlement which heralded a government of national unity between the main political parties and a common commitment to urgent constitutional reform. The settlement included the appointment of two commissions, one to examine the violence and the other, the Independent Review Commission (IREC), popularly known as the *Kriegler* Commission, to examine the December 2007 Kenyan elections from various perspectives.

In the implementation of the recommendations of the Kriegler Report, Parliament then created two interim bodies to take over the functions of the ECK. These were the Interim Independent Boundaries Review Commission (IIBRC) and Interim Independent Electoral Commission (IIEC).

Following the establishment of the IIEC vide s. 41 of the Constitution and the appointment of the 9 Commissioners on 8th May 2009 who were sworn in on 11th May 2009, the Commission embarked on a mission to set up an efficient and effective Secretariat for the operationalization of the mandate set out by s. 41A of the Constitution.

This establishment of the Commission was the first step towards the implementation of the recommendations of the Kriegler Report. One of the key recommendations was to radically reform the then Electoral Commission of Kenya, or to create a new electoral management body, with a new name, image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process, interacting with a properly structured professional secretariat.

Unlike the previous practice and in order to ensure its independence, members of the Commission were appointed through a competitive process by the Parliamentary Select Committee and upon approval by the National Assembly. Such appointments took into consideration academic qualifications, moral integrity and probity of the candidates, as well as knowledge and experience in public administration and management.

Section 41A of the Constitution spelt out the following mandate for the IIEC, to-

- Reform of the electoral process and the management of elections in order to institutionalize free and fair elections;
- Establishment of an efficient and effective secretariat;
- Promotion of free and fair elections;
- Fresh registration of voters and the creation of a new voters' register;
- Efficient conduct and supervision of elections and referenda;
- Development of a modern system for collection, collation, transmission, and tallying of electoral data;

- Facilitation of the observation, monitoring and evaluation of elections and referenda;
- Promotion of voter education and culture of democracy;
- Settlement of minor electoral disputes during an election as may be provided by law;
- Performance of such other functions as may be prescribed by law.

The Commission's constitutional mandate is to last for 24 months starting from 28th December 2008 or three (3) months after the promulgation of the new Constitution, whichever is the earlier.

In order to decentralize the administration of the Commission and for effective coordination, the Commission divided the country into 17 administrative regions. 17 Regional Elections Coordinators (RECs) were therefore recruited. In addition, 210 Constituency Elections Coordinators (CECs) were also recruited, as opposed to the district election coordinators as was the case previously. In order to enhance the independence of the Commission, the RECs and the CECs were employed on permanent basis. The CECs would also double up as the Returning Officers in an election or in the upcoming Constitutional Referendum for their respective constituencies.

The transparent manner of appointment of the Commissioners and the recruitment of the Secretariat has not only enhanced the credibility of the Commission but has also greatly reduced chances of political interference. This has positively boosted the confidence of the public in the IIEC.

The Kriegler Report also noted that the conduct of the electoral process was hampered and the electoral environment was polluted by the conduct of many public participants, especially political parties and the media. IIEC has put in place measures to address this issue. One such measure is the structured engagements with key players in the electoral process, including the political parties and the media.

With regard to political parties, IIEC has established a Political Parties Liaison Committee under the Registrar of Political Parties, composed of representations from all registered political parties and IIEC. The Liaison Committee is at 2 levels; National and Regional - in each of the 17 IIEC Regions. As a link between Political Parties and the Commission, the Liaison Committee is intended to create understanding of the responsibilities of the Commission and to ensure party compliance to the Code of Conduct, which they developed and adopted. This engagement has borne fruit in terms of flow of communication and coordination of activities with political parties.

3.0 THE NEED FOR REFORMS

Most electoral systems, electoral laws, electoral institutions and constitutions that govern elections in most African countries were inherited from colonialism. Where limited changes have been introduced, they were hardly ever debated and in most cases they were partial and cosmetic rather than being comprehensive and substantive. For an electoral system to add value to democracy, it must enhance accountability of the elected representatives to their constituency while at the same time ensuring broader representation of key political forces in the representative bodies. In this way a political system becomes more inclusive and participatory and accords the rulers legitimacy to govern.

In order to help define the vision and objectives of the electoral reform process, writers and commentaries on electoral systems have outlined 10 key criteria that could prove useful to guide towards the achievement of these reforms -

- Ensuring a representative parliament and inclusive government;
- Making elections accessible and meaningful;
- Providing incentives for conciliation and constructive management of conflicts;
- Facilitating stable, transparent and efficient government;
- Holding the government accountable and responsive;

- Holding the elected representatives accountable and responsive;
- Encouraging “cross-cutting” political parties;
- Promoting legislative opposition and oversight;
- Making the election process cost-effective and sustainable; and
- Taking into account international norms and standards.

3.1 Reform in the Country’s Electoral System

An electoral system is the method used to determine how votes are cast and translated into seats won by parties and/or candidates. The electoral system thus consists of mediation between votes and representation as established by the electoral law. On the other hand, the electoral process refers to the management and administration of the whole electoral system.

An electoral system is determined by the following criteria -

- Does it convert votes into seats to reflect accurately popular choice, i.e. does it produce fair results?
- Does it provide representation of minorities?
- Does it lead to fair representation of women?
- Does it lead to a clear and close relationship between the elected official and his/her constituency?
- Does it lead to a stable and firm government, as for example by producing two major parties, one of them with a clear majority, particularly in parliamentary systems?
- Does it lead to a proliferation of parties?
- Does it lead to ethnic harmony or ethnic conflict?
- Does it lead to ethnically based parties or non-ethnic/multi-ethnic parties?

The most common of the Electoral Systems are -

(a) Plurality and Majoritarian Systems

A plurality system is based on single member constituencies in which the successful candidate is one who achieves the highest vote, even if that vote is not a majority vote.

A majoritarian system is also based on single member constituencies, but the winning candidate must have an absolute majority of votes, even if this is secured on a re-run of elections with only the two top candidates (as in France, a number of francophone African states, and Uganda for the presidential elections). Some consequences of plurality ('first-past-the-post') or majoritarian system include -

- Small number of parties are involved;
- The government may be elected on a minority of national votes;
- In plurality system an elected member may not enjoy the support of the majority of the voters in the constituency;
- Minorities tend to be under represented; minorities do not have their own parties but join 'mainstream parties';
- There is a close relationship between the member and the constituency.

(b) Proportional Representation System

There are many types of proportional representation system. Typically, a proportional representation system, which has to be based on multi-member constituencies, is one in which each a party wins seats in proportion to the number of votes it has obtained. Thus if it wins 40% of the votes, it would get 40% of the seats, which would be allocated to the top 40% of candidates on its list. Some consequences of proportional representation include -

- It is more representative than the plurality or majoritarian;
- It is 'good' for minorities since even a small minority (say no more than 10% of the population) will secure 10% of the seats if all its members vote for its party; but it tends to perpetuate ethnic/religious distinctions;
- It is also good for women, if political parties are prepared to list women candidates high on their list of candidates;
- It encourages the proliferation of parties, since even small parties are sure of some seats;
- It may encourage ethnically based parties;

- The link of elected member to constituencies is weak since several members represent one constituency;
- Party headquarters/bosses have greater control over candidates since they prepare the list of candidates, and the order of individual candidates in the list, to be fielded in each constituency than in single member constituencies
- Due to the proliferation of parties, governments tend to be a coalition of parties and consequently weak and unstable.

(c) The 'Mixed' System (Mixed Member Proportional System – MMP)

Since each system has its own characteristics, and good and bad points, the choice of the electoral system has to be related to the social, ethnic and economic circumstances and goals of the country. Each choice will involve some trade-offs. However, some systems try to combine the advantages of both the plurality system (in terms of clear cut results, stable governments, and stronger links of members with their constituents) with the proportional representation system (representation of minorities, fair representation). In this mixed systems, which was pioneered in Germany, half the seats are allocated to single member constituencies and the other half, as a kind of reserve, are based on party lists. Voters vote for a candidate in single member constituencies as in the plurality system, but they also vote for a party.

If a party fails to win the number of seats proportionate to its regional or national vote, it is compensated by the requisite additional members, who are not linked to any constituency, from the party list. The system has been copied in recent years in several states, including New Zealand, Italy and Mexico. Likewise, some states have modified the plurality/majoritarian and proportional representation system to ensure specific minority representation by reserving seats for minorities, to be voted on by members of the minority (Fiji, Hungary, Romania, colonial Kenya) or by everyone (as in India for scheduled castes and tribes).

An ideal electoral system should ensure or promote representation of the people and all major interests in a political system. The system operating in the framework of a republic should, therefore, be as inclusive as possible by making it

possible for as many of the divergent interests and concerns as possible to be represented.

The Principal functions of the electoral system therefore include the following -

- Promoting and ensuring effective representation in the Legislature and other organs of governance and decision-making;
- Registration of the people's views;
- Choice and formation of government;
- Provision of the mechanism for holding people's representatives and the government accountable;
- Providing people with choices about public policies, plans and programmes; and
- Promotion and facilitation of a competitive political and party system.

3.2 Kenya's Electoral System

Kenya currently uses a plurality–majority system [first-past-the-post], which requires that the winning candidate in an election, be it presidential, parliamentary or civic, obtains at least a plurality of the votes cast (It is called a first-past-the-post system because, in some respects, it resembles horse races where the winner is the one who crosses the finish line first). This *winner takes it all* system was attributed by the findings of *Kriegler* Report to be the genesis of Kenya's electoral problems. Indeed this system is inherently unfair as it-

- is overly generous to the party that wins a plurality of the vote, rewarding it with a legislative majority disproportionate to its share of the vote;
- allows the governing party, [with a legislative majority] to dominate the political agenda;
- promotes parties formed along regional lines, thus exacerbating Kenya's ethnic divisions;
- leaves large areas of the country without adequate representatives in the National Assembly;

- disregards a large number of votes in that voters who do not vote for the winning candidate have no connection to the elected representative, nor to the eventual make-up of the National Assembly;
- contributes to the under-representation of women, minority groups, and the marginalized; and
- favours an adversarial style of politics that is evidenced by the cataclysmic violence that Kenyan politics is infamous for.

3.3 Kenya's Electoral Process

An electoral process consists of all activities designed to ensure that the electoral system functions in a manner which truly reflects the people's will. The components of the process include the following -

(a) The right to vote and to stand as candidates. This is the prerequisite right in any democracy.

In the current Kenyan Constitution, the right to vote is not stated in the Bill of Rights, as is often the case in many countries but dealt with in the Chapter on Parliament (sec. 32(2)). It gives the vote only to a person who 'is registered in constituency as a voter in elections of elected members', subject to disqualifications for specified offences. This formulation makes registration rather than citizenship the criterion for voting, and thus gives the authorities responsible for making and administering rules for registration considerable discretion as to who can vote.

Complaints are frequently heard that these rules and procedures effectively disenfranchise many citizens, particularly among communities known to be supporters of opposition parties or from marginalized communities.

Compare the current Kenyan provision with the provision in other jurisdictions -

- Every Swedish citizen who has currently or who has ever had his habitual residence in Sweden has the right to vote in a Riksdag [i.e., Parliament] elections (Art. 3.2);
- An equivalent provision in Fiji which gives the right to be registered as a voter to all citizens who have reached the voting age and who have been resident in Fiji for the 2 years immediately before the application for registration (s. 55); or
- In the constitution of Ghana which makes the right to vote a constitutional right.

Other components of an electoral process include -

- (b) *Compilation of a Voters Register.* The IIEC has put in place measures that would ensure accuracy of the data collected with regard to the personnel and systems used. This will guarantee the credibility of the Voters Register;
- (c) *Nomination of candidates.* Through proper communication and coordination nomination exercises can be carried out transparently and without any drama;
- (d) *Timing of elections;*
- (e) *Accessibility of voting arrangements;*
- (f) *The electoral rules set to ensure free and fair elections.* There exists a multitude of rules on this front which requires stricter enforcement. Other reforms, especially on the election system have been addressed by the Proposed New Constitution (PNC). IIEC has also developed a draft Elections Bill, 2010, intended to be a one-stop statute on all electoral matters;
- (g) *Election campaigns and control of expenses.* The Political Parties Act and the Election Offences Act substantially provide for funding of registered political parties and the manner and timing of conducting campaigns;
- (h) *Systems of voting and counting of votes.* Counting of the votes would be done at the polling stations. IIEC will adopt a Results Management System which will guarantee transparency and speed in the transmission of the results by the Presiding Officers from every polling station to both the Returning Officers and to the Headquarters, simultaneously. The

Commission may use the system to display the trends of the results as they are gradually reported;

- (i) *Supervision of the conduct of political parties and disqualification or penalties for candidates or political parties.* The law is very clear on the dos and don'ts by political parties. IIEC is very alert on the errant parties and will be more vigilant during the upcoming by-elections and the Constitutional Referendum;
- (j) *Smooth and dignified succession to office.* This has been comprehensively addressed by the Proposed New Constitution;
- (k) *System of settling electoral disputes.* IIEC has established a dispute resolution mechanism; a Committee has been set up to deal with disputes in the upcoming by-elections. This was a resolution reached by the Political Parties Liaison Committee¹. The Political Parties Act also provides the setting up of a tribunal to resolve disputes; *and*
- (l) *Election observation.* IIEC has established a desk on Election Observation. Over 250 applications have so far been processed from foreign missions, professional bodies, faith-based and civil society organizations, among others.

Although detailed provisions on country's electoral process, including the procedure for delimiting boundaries and managing elections are usually found in ordinary legislation, an increasing number of constitutions now provide for these matters in articles dealing either with representation generally or, more often, election of representatives to legislative organs. For example –

- Chapter Five of the Constitution of Uganda provides, *inter alia*, for the right to vote, the establishment of an independent Electoral Commission, delimitation of constituency boundaries and system of voting.
- On the electoral system, Art. 66(1) of the Constitution of Tanzania provides categories of Members of Parliament which include elected members and others through proportional representation.

¹ a forum established by IIEC under the Registrar of Political Parties which brings together representatives from all political parties and IIEC

- Chapter Six of the Constitution of the Fiji Islands makes detailed provisions, *inter alia*, for distributing electoral seats among different electoral rolls, delimiting of electoral boundaries by a Constituency Boundaries Commission, voting and other matters, nominating candidates for elections, and composition of the House of Representatives and the Senate.

Similar provisions have been included in the constitutions of Nigeria, Ghana and South Africa, among others. These provisions also empower the Legislature to enact specific legislation on these matters. It is noteworthy to mention again that the PNC expressly provides for the right to vote under the Bill of Rights.

3.4 Electoral Reforms in the Proposed New Constitution (PNC)

Since election administration is a process that is as critical as the electoral outcome itself, certain questions need to be asked to determine specific areas of reform and how reforms should proceed. Identifiably, these specific areas include how elections are organized; their management; and the regulatory frameworks in place to ensure the credibility of the electoral process and the legitimacy of its outcomes. In this regard, IIEC has initiated a lot of reforms both in the electoral process and in the substantive laws. IIEC developed a draft Elections Bill, 2009 in liaison with the Law Reform Commission and the Parliamentary Committee on Legal Affairs, which is still under consultation. The draft Elections Bill is intended to be a one-stop statute dealing with all election matters.

The establishment of the Commission was the first step towards the implementation of the recommendations of the Kriegler Report. One of the key recommendations was to radically reform the then Electoral Commission of Kenya, or to create a new electoral management body, with a new name, image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process, interacting with a properly structured professional secretariat.

As IIEC embarked on the operationalization of one of its key mandates, *to develop a modern system for collection, collation, transmission and tallying of electoral data*, the Commission has been working on technical reforms and legal provisions for the use of electronic formats such as biometrics, electronic data collation, and real time transmission of data during elections. One such reform was the introduction of the electronic voter registration (EVR). This was piloted in 18 out of the 210 constituencies. This system will greatly enhance the accuracy and therefore the credibility of the Voters Register.

Another milestone on this mandate is the adoption of the regional V-SAT connections for data transmissions. This allowed access of the data forms through a V-SAT technology and provided the Commission the ability to upload the data to the headquarters once it has been scanned at the different 17 Regional Scanning Centres spread countrywide. This immediate transmission provided an opportunity to the headquarters to communicate to the scanning centres for instant clarifications. This channel ensures that data is coming from only the intended sources and therefore enhances credibility of this data.

To further enhance efficiency in communication between and amongst IIEC regional officers and the headquarters, the Commission installed blackberry connectivity service to all the regional officers. This initiative is intended to ease email and phone communication between and amongst IIEC staff. All the regional and constituency coordinators have been issued with a blackberry mobile phone especially configured for internal communication.

Latest in the line-up is the Electoral Results Management System that the Commission is now in the process of testing. This is a Parallel Vote Transmission (PVT) system which allows parallel result transmission by the Presiding Officers from every polling station, where results are simultaneously transmitted electronically to the Returning Officer at the constituency level and to the headquarters. This system will ensure speedy transmission of results and also manage public expectations, as Kenyans will have an opportunity to observe the trends as results are transmitted.

The PVT is intended to be parallel to the official transmission of results using the signed hardcopy Form 16A. In order to deal with some of the problems experienced in the 2007 general elections, IIEC has enhanced security features of these forms, such as serialization of the forms and pre-printing of the candidates names.

Most of the substantive reforms in the electoral system and process found their way into the PNC. A cursory glance at the PNC reveals the following –

Art. 38 expressly provides for a bundle of political rights for every citizen. It explicitly provides for the right to be registered as a voter and to vote in any election or referendum. Art. 23 provides a clear mechanism for the enforcement of such rights.

Art. 34(4) obligates the state-owned media to afford equal fair opportunity for the presentation of divergent views and dissenting opinions. Art. 92(a) further compels Parliament to enact legislation to this end. This means that a station such as KBC will have an obligation to give equal coverage to all opposing sides during campaign periods.

Chapter Seven of the PNC is dedicated to electoral system and processes. At a glance the Chapter provides for the following –

- General principles on the conduct of elections,
- Provides a threshold that all elective offices shall have two-thirds representation of either gender,
- Provides for independent candidates,
- Obligates Parliament to enact legislation providing for mechanisms for settling electoral disputes.

The Chapter also adopts a total shift in the electoral system for the country; from the current First-Past-The-Post to Mixed-Member-Proportional Representation, where each party will be required to present a party list reflecting regional and ethnic diversity of the country (save for county assemblies). This is provided for in the National Assembly nominated seats and in the membership of the Senate.

Over and above this, Chapter Eight on the Legislature compels Parliament to enact legislation to promote representation of marginalized groups in Parliament, including ethnic and other minorities, persons with disabilities, women, youth, and marginalized communities. Art. 136(2) finally settles the anxiety that has been experienced in the past on the election date, which currently is the preserve of the President. The section provides that Presidential and Parliamentary elections will be held on the second Tuesday in August of every 5th year or when a vacancy arises.

The much celebrated “Recall Clause” – the right of the electorates to recall their Member of Parliament also found its way under this Chapter. The mechanisms of the manner and the ground for recall will be worked out in an Act of Parliament.

4.0 CONCLUSION

The situation of the elections management body in Kenya is indeed quite unique and unprecedented. Between 28th December, 2009 and 8th May, 2009 (4½ months), there was no EMB in Kenya. IIEC as the EMB was therefore tasked with the heavy mandate while trying to also set up structure from a clean slate. IIEC had to deal with the challenges of limited time (2 years or shorter), staffing (setting up afresh), loss of institutional memory, legal challenges, lack of reforms in the electoral laws and mostly voter apathy and loss of confidence in the electoral body and of course high public expectation.

Another challenge is the wave by status quo proponents, who are willing to do anything to derail the reform agenda for their own selfish interests. Some of these proponents form part of the political class and therefore the non-committal political will in these reforms.

The move to disband the former ECK may have been motivated by the desire to break with the past and build a new institution for the future. However, the reality for IIEC set up to midwife the new recovery is one of extreme challenges and

punishing deadlines to deliver on its mandate in a race against time. It is indeed a herculean task that will require the support and co-operation of all the key stakeholders in the electoral process.

As the Chairman of IIEC, I must say that the Commission has served with diligence and commitment to successfully operationalize its mandate. The Commission found opportunities amidst all these challenges. For example, a clean slate to rebuild the credibility of the election management body in the country, an opportunity to put in mechanisms that will instill integrity in the people and in the electoral process, a chance to effectively carry out legal and constitutional reforms, a platform to embrace the use of ICT in elections management, and to rekindle the political will towards the reform of the electoral process and of course to reawaken the goodwill of the people and the development partners.

END