

**POLITICS OF BOUNDARIES, ELECTIONS AND
REPRESENTATION UNDER THE CONSTITUTION OF KENYA
2010: REALITIES, CHALLENGES, AND OPPORTUNITIES**

A Paper Prepared and Presented

By

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The Attorney General, Prof. Githu Muigai

Chairman, Constitution Implementation Commission,

Resident Director, FES Kenya, Dr. Peter Oesterdiekhoff,

Distinguished Guests,

Ladies and Gentlemen,

I am grateful for having been invited to this two day conference organized by Friedrich Ebert Stiftung in Collaboration with the University of Nairobi. In my invitation I was asked to share my thoughts on Boundaries and Elections. I was further advised to keep my thoughts focused on the topic: Boundaries, Elections and Representation under the Constitution of Kenya, 2010: Realities, Challenges and Opportunities. I will try to be faithful to this advice.

In this presentation, I don't have the ambition to bring solutions to all the questions that Kenyans have on their minds on the emotive issues of boundaries and elections. My intention today is to candidly share my personal views on the subject before us.

Ladies and Gentlemen,

Delimitation of boundaries is the process of drawing, adjusting and/or reviewing of electoral boundaries to ensure fairness in the electoral process. In this presentation terms 'delimitation' and 'delineation' will be used interchangeably.

In Africa, the politics of boundary delimitation is incorrigibly interwoven with the Continent's four historical epochs. The four epochs are: the Scramble for Africa, the Partition, Colonization and Independence.

Scholars have argued that political authority and property rights in Pre-colonial Africa extended over people more than land and, with a few exceptions such as Ethiopia (Clapham 1996), the concept of territorial delimitation of political control was by and large culturally alien (Herbst 2000). Instead of clearly delimited borders, fluid boundary zones existed between groups as jurisdiction faded from the center toward the periphery (assuming jurisdiction existed, which was not the case for many stateless societies). In addition, Islam, the largest unified religion in Africa, did not recognize sovereignty over specific territories (Joffe 1990).

The Scramble for Africa in the mid 19th century can be termed as the usher of the competitive phase of territorial acquisition. During this phase, Europeans carved out for themselves, wide spheres across the African continent.

The intense competition among European countries for a slice of Africa led to a negotiated solution of apportioning the Continent. Arguably, the Berlin Conference of November 1884 – February 1885 commenced the partitioning/delimitation of the Continent into assigned politico-geographical zones. The emergent zones as shown in Map 1 included:

- (a) The French dominated mostly in West Africa
- (b) The British, East and Southern Africa
- (c) The Belgian acquired the vast territory of the Congo
- (d) The German held four colonies on each of the realms regions
- (e) The Portuguese held small colony in West Africa and two large ones in Southern Africa.

Map 1: Colonial Enclaves in Africa



The men and women, who made ultimate decisions on the partition of Africa, were neither industrialists nor capitalists nor lobbyists but holders of state power – sovereigns, top ministers and a handful of high officials in major European countries.

In short, the partition of Africa was championed by politicians with no formula other than ‘effective occupation’

Commenting on the arbitrariness of colonial borders in Africa, Loisel (2004) states that:

Borders in Africa would be arbitrary and artificial, delineated by exogenous colonial powers with little knowledge of the local communities, dividing pre-existing and homogeneous ethnic groups and thereby stirring frustrations and conflicts

After the struggle for liberation and attainment of independence most African countries Kenya included undertook to correct the discordance in their electoral boundaries. In Kenya, a Royal Commission was appointed in 1962 with the mandate of dividing the country into substantially more or fewer than 100 parliamentary constituencies. The exercise took five months from 9th August 1962 to January 1963. The Independence Constitution set the lower limit of 110 constituencies and the upper limit of 130 constituencies for the Country. Due to Constitutional amendments between 1964 and 1966 constituencies rose to 158. By the time we went to elections in 2007, Kenya had a total of 210 constituencies.

Ladies and Gentlemen,

We cannot talk gainfully on the politics of electoral boundaries in Kenya without mentioning the work of the Independent Review Commission (IREC) and the Interim Independent Boundaries Review Commission (IIBRC). The IREC was tasked to investigate all aspects of the 2007 elections then make findings and recommendations to improve the electoral process in Kenya. IREC recommended for the establishment of an Independent Boundary Review Commission composed of non partisan members to establish, review and draw constituency boundaries. The term of such a Commission would end with the delimitation of new constituency boundaries. IREC further recommended that the function of delineating of boundaries should be separated from administration and management of elections. In IREC recommendations, parliament would have no say on the final work of the boundaries review commission. The model

recommended by IREC would have been similar to New Zealand, Australia and India. In these countries the work of boundary delimitation once completed by the respective Commissions cannot be changed by parliament.

In response to the IREC recommendations on boundaries, parliament in its wisdom, enacted the Constitution (Amendment Act) No 10 of 29th December 2010 which established the Interim Independent Boundaries Review Commission (IIBRC)

IIBRC was charged with making recommendation to Parliament on delimitation of boundaries for constituencies and local electoral units as well as recommendations to parliament on administrative boundaries including the fixing, reviewing and variation of boundaries of districts.

Ladies and gentlemen,

After the promulgation of the Constitution of Kenya on 27th August 2010, IIBRC continued to function as provided under section 27 of the Sixth schedule of the Constitution 2010 which stated that IIBRC continues as constituted in terms of sections 41B and 41C of the former commission but:

- (a) It shall not determine the boundaries of the counties established under the constitution
- (b) It shall determine the boundaries of constituencies using the criteria mentioned in the constitution
- (c) Members of the Commission shall be subject to Chapter seven of the constitution
- (d) The requirement in Article 89(2) that a review of constituency and ward boundaries shall be completed at least twelve months before a

general election shall not apply to the review of preceding the first elections under the constitution

- (e) The Commission shall not result in the loss of a constituency existing on the effective date.

In the forwarding letter of their report dated 27th November 2010 to the President, the Prime Minister and the Speaker of the National Assembly, the signatories stated of the IBRC Report stated, “We have carried out the task to the best of our abilities and in accordance with our constitutional mandate” (pv)

Ladies and gentlemen,

The IIBRC report was received with the public divided views. The report, had a caustic effect on the Parliamentary Committee on Justice and Legal Affairs. Still a way out of the divide had to be found.

The Constitution of Kenya 2010, Article 88 and 89 provides for the legal and institutional framework and criteria for the delimitation of electoral boundaries. These two articles establish and enshrine the core principle of representation being equality of the vote. Articles 89(5) together with 89(7) state that the IEBC shall progressively work towards ensuring that the number of inhabitants in each constituency is nearly as possible to the population quota

The constitution also provides for a systematic methodology through which the principle of progressive realization of the quota is to be followed. Article 89 acknowledges that in some situations there may be deviations from the ideal constituency population due to factors such as geographical features, urban centers, community of interest, and means of communication, historical, economic and cultural ties.

The Constitution further provides guidelines on deviation from the population quota either way by not more than forty percent for cities and sparsely populated areas and thirty percent for the other areas. Consultations with interested parties during the delimitation process is underscored. Article 89 empowers the Independent Electoral and Boundaries Commission (IEBC) to review names boundaries of Constituencies.

On 17th November 2010, the IIBRC published in the print media the list of all the two hundred and ninety constituencies. Then, three suits were filed to stop IIBRC from gazetting its report!

The Parliamentary Departmental Committee on Justice and Legal Affairs (JLA) intervened in the IIBRC Report stalemate with a view of providing a way forward. One of the JLA suggested options provided for the Constituting of IEBC as provided for under the constitution and giving it the responsibility of addressing outstanding issues from the IIBRC Report.

Ladies and gentlemen,

Allow me now to mention a few realities of the politics of electoral boundaries:

First – we must have 290 constituencies for the next elections

Second - as provided by the fifth Schedule of the IEBC Act 2011, IEBC must:

- (a) Resolve all issues arising from the first review and publish its report within four months
- (b) Use the Report of the former Boundaries Commission as its primary reference material
- (c) Use the Parliamentary Committee Report as its secondary reference material

Third IEBC must consciously and purposely adhere to international standards and best practice in boundary delimitation namely:

- (a) Impartiality – IEBC shall be nonpartisan, independent and professional
- (b) Representativeness – Constituencies shall be drawn taking in account communities of interest, geographic features and cohesiveness
- (c) Non-discrimination: the delimitation shall be devoid of electoral boundary manipulations/gerrymandering.
- (d) Transparency – the delimitation process shall be transparent and accessible to the public

Ladies and gentlemen,

One of the challenges we face as a Commission is the strict timetable provided by the constitution. We have to do several things concurrently. We initially were fearful of insufficient funds; but we have solid assurance from treasury and development partners that funds shall be available.

We see in the horizon potential legal suits against IEBC just as there for IIBRC. This prospect forearms us and compels us to work straight and within our legal mandate.

Politics is another big challenge. If there are no politics in the work of delimitation of boundaries, then taking care of geographical features and urban centers, community of interest, historical, economic, cultural ties and means of communication, IEBC shall deliver electoral areas whose inhabitants shall be as nearly as possible equal to the population quota. This will enhance the rights to Universal suffrage and the equality of the vote.

The Commission (IEBC) as its constituted exudes confidence because of the manner it was chosen. We have no political debts to pay. Before the eyes of our own families and the entire nation we passed the test of the Constitution and took the oath of office to: faithfully and fully, impartially and to the best of our ability, discharge the trust and perform the functions and exercise the powers devolving upon us by virtue of our appointments without fear, favor, bias, affection, ill-will or prejudice.

Ladies and gentlemen,

The memories of 2007 are permanently inscribed on our minds. As a Commission we know which side of history we would like to stand when the story of boundaries and elections in Kenya circa 2011 and beyond is written. We shall count on the support of all Kenyans to deliver peaceful, free and fair elections.

THANK YOU

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