

INTERIM INDEPENDENT ELECTORAL COMMISSION



**“THE DIASPORA: VOTING RIGHTS AND ROLE OF KENYAN
MISSIONS IN VOTER REGISTRATION IN KENYA”**

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1.0 Introduction

Senior Officials from the Kenya Government, your Excellency Ambassadors and High Commissioners, distinguished Guests, Ladies and Gentlemen, I salute you all.

It is a great pleasure and honour to be with you today in this conference whose theme is “Projecting Kenya’s Foreign Policy under the new Constitution Dispensation”.

I also thank the conveners of this Conference for providing a forum through which our Ambassadors and High Commissioners can interact with top Government Officials on strategic policy initiatives and goals. Specifically, I wish to thank them for extending this invitation to experts in National and International thematic areas of interest and to the Kenyan business Community. Further, I also thank the Conveners for finding it prudent to principally focus on the Constitution and its impact on Kenya’s Foreign policy, and exploring ways in which our missions can contribute towards its implementation.

As I congregate with you here and specifically on this presentation: “The Diaspora – voting Rights and the Role of Missions”, six main aspects will be enclosed in this paper. These are namely:

- the tasks that have been undertaken by the Commission;
- current engagements;
- the Constitution and Diaspora voting;
- registration of Voters in Diaspora elsewhere in the world
- the Role of Kenyan Missions abroad; and
- Proposals on Registration and Voting in Diaspora.

1.1 Tasks undertaken by the Commission

Ladies and Gentlemen,

The Interim Independent Electoral Commission was established after an amendment of **Section 41** of the immediate former Constitution. In line with the amendments, the Commission was given several mandates ranging from establishing a new voters register to creating confidence of Kenyans on the way elections are supposed to be handled. In its endeavor to execute its mandate, the Commission has faced several challenges but with far reaching successes that history will tell. The Commission can be credited for significant aspects it has done including and not limited to the following:-

- (i) Establishment of a secretariat to implement the Commission's programs;
- (ii) Establishment a new National Voter's Register which currently contains over 12.4 million registered voters;
- (iii) Infusion of technology in voter registration (EVR) alongside the traditional manual optical marker reader (OMR).
- (iv) Establishment of an election results transmission system that has enabled the electorates to know their leaders in less than six hours after voting;
- (v) Conduct of the National Constitutional Referendum with a record voter turnout of 73%;
- (vi) Conducted over 10 parliamentary by-elections and over 40 civic by-elections;
- (vii) Establishment of Political Parties Liaison Committees at national, regional and constituency levels;
- (viii) Establishment of mechanisms for settling minor electoral disputes during elections through Peace Committees and Conflict Management Panels;
- (ix) Development of a membership register of all registered political parties;
- (x) Established approach towards voter education and putting in place a standard national curriculum to be followed by all providers; and
- (xi) Establishment of strategic alliances with Key Stakeholders.

As a result of these significant aspects, the Commission has received several accolades in recognition of its good performance which includes: Uwiano Platform, the UN Award, the Best

Chairperson of the Year (ASK), and several other awards at the local level. However, with all the above the Commission is still on the run but within its mandate engaged several tasks.

1.2 Current engagements.

Ladies and Gentlemen,

The Constitution has clearly stated under **Article 88** that “there is established the Independent Electoral and Boundaries Commission”. However the **Sixth Schedule**, under the Transitional and Consequential Provisions, the Constitution stipulates that:

The Interim Independent Electoral Commission established under Section 41 of the Constitution shall continue in office in terms of the former Constitution for its unexpired term or until the Independent Electoral and Boundaries Commission established under this Constitution is established whichever is later”

With this in mind, it is important to note that there are several activities that are being undertaken as the country awaits for the ushering in of a new Independent Electoral and Boundaries Commission (IEBC). This process has already commenced with the enactment of the IEBC Act, 2011 and subsequent appointment of the Select Committee.

However, as stated above, there is no vacuum existing so as to slow down certain activities that are related to the implementation of the constitution or the development of the relevant legislations related to the running of elections in Kenya.

First, the Commission in collaboration with the State Law Office and the KLRC and in consultation with other stakeholders has developed such legislations that have either been forwarded to Commission for the Implementation of the Constitution (CIC) or are still undergoing discussions.

The IEBC Act was enacted on 18th July 2011. The Political Parties Bill, 2011 was published on 15th July and is now before the House for its second reading. The Elections Bill, 2011 has since been forwarded to the CIC for onward transmission to the Attorney General. These laws have to

be enacted within one year after the promulgation of the new Constitution, i.e. by 26th August 2011.

The Campaign Financing Bill, 2011 is a new legislation for the country. It is aimed at regulating the sources, the limits and manner of spending of campaign funds by candidate and parties. The Bill is undergoing stakeholder consultations.

Secondly, as it is within the public knowledge, IIEC is comparatively a new electoral management body. Although the Commission is to be taken over by IEBC in a few days time span, the responsibility bestowed on it by the country's Constitution is massive considering the importance attached to elections in the country. Against this kind of responsibility, it is imperative that the Commission learns from other established Electoral Management Bodies (EMBs) in order to improve on its operations. It is also important for the Commission to develop policies that guide some of its operations and responsibilities. There is also a need to establish the requisite administrative frameworks, regulations, policies and mechanisms for putting into force the legal imperatives. These are some of the activities that have put IIEC Commissioners and the Secretariat on the run.

Thirdly, it should be noted that the Kenyan elections are highly competitive. Thus, the need for adequate preparations cannot be understated. The 2012 elections are coming at a time after the 2007 post-election violence experience. This was violence that was sparked-off due to the highly contested presidential elections. Notwithstanding that, IIEC was set up as part of the key recommendations of reforming elections in Kenya and more importantly rebuilding voters' confidence. This mandate is in-line with Kenya's vision 2030 agenda of *promoting genuinely competitive and issue-based politics*. However, it is appropriate to note here that the 2012 elections will be multiple; with six elections expected to be held on a single day.

Similarly, the complexity of this new electoral processes and system demands adequate planning and trials of proposed procedures, materials, equipment and logistics before 2012. As part of the planning, the Commission has developed a Strategic Plan and Operation Plan leading up to the elections. Some of the key activities under this plan include capacity building of Commission

staff to handle enormous elections through study tours and exposure. The Commission has also identified a project (Mock Election) to simulate 2012 elections. The project is designed to cover most aspects of the electoral cycle. It will specifically look at the ballot design, general voting options and logistics requirements for various geographical areas, the procedures with respect to the new constitutional elections and administrative requirements, plans in procurement, training, mapping and community mobilization. However, the Constitution has its own demands still and which includes the Kenyans in Diaspora and their right to vote.

1.3 The Constitution and Diaspora voting

Ladies and Gentlemen,

In this age of economic globalization people have traversed international boundaries in search of gainful employment and thus become disengaged to their close family members including parents, spouses and children. Despite their absence, they maintain close ties to their home country and identify with it. It is with this recognition that the Constitution under Article 82(1) (e) stipulates legislation of a framework for the *‘progressive registration of citizens residing outside Kenya, and the progressive realization of their right to vote.*

Further Article 83(3) instructs that *‘Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election’.*

This Constitutional requirement is unprecedented in Kenya, it is an area that needs to be interrogated and policy decisions made to guide the registration and voting by Kenyans living outside the country (the Diaspora). As I stand here to make this presentation, the Commission is at an advanced stage in developing laws, policies, plans and other logistical frameworks on how the Diaspora can be reached in order to meet the demands of the Constitution. But I am also compelled to state clearly that this forum is important and equally effective in addressing this aspect. Why do I say that?

Ladies and Gentlemen,

No progressive registration of citizens residing outside the county or conduct of elections can succeed without the involvement of the offices of your Excellency, the Ambassadors and High Commissioners, seated here.

It is important to also note here, that voting rights for Diaspora citizens are a recent phenomenon and has been allowed in only 115 countries and territories in the world. The expansion of voting rights is one of the strongest forms of political empowerment that a country can give its Diaspora; but there are challenges that come with these rights.

Giving rights or for IIEC to give a ‘political voice’ through the ballot is not an easy engagement to implement. For instance, there appears to be a large amount of uncertainty and lack of knowledge in both Kenyan democratic fronts and among electoral stakeholders. The million-dollar question regarding the voting rights of Diasporas is: *‘What approaches and frameworks should IIEC adopt in registering and facilitating Diaspora voting and what impact shall it have on the Kenyan political landscape?’*

In 2009, a reputable international organization, IDEA, sought to break ground on this issue from an electorates’ perspective. Based on their survey, it was established that 83% of Kenyan voters would like to see Kenyans living in other countries participate in voter registration processes and elections. Many citizens felt that since these are Kenyans and may one day come back to their mother land, they should be involved in making political, leadership and governance decisions of their country. They even went ahead and suggested that the Diaspora could register and vote online if these systems are put in place or they should register through Kenyan Embassies in their respective countries abroad. The same survey revealed that 68% of eligible voters’ preferred online voter registration.

However, online voter registration would only favor 35% of the respondents who indicated that they have access to internet services and also know how to use computers and the internet.

Ladies and Gentlemen,

The obvious issues that need to be addressed in terms of developing structures for registering and facilitating Diaspora registration and elections must be well thought out. For example, a framework has to be developed that clearly stipulates among other issues the following –

- Which Kenyans among the various countries should be given priority to register and vote?
- Who qualifies to vote? How is this right guaranteed by the Citizenship Bill, 2011 which among other things, outlines the duties and responsibilities of a citizen?
- How shall this exercise be funded and implemented?
- Does the Commission have the capacity and the knowledge to handle this important task?
- What impact would such a system have on the domestic voters and political landscape?
- Does the Constitution provide for definition distinction of who is a Kenyan Diaspora as regards to voting other than mentioning their voting rights?
- It is obvious that the current provision in our constitution has underscored to the qualifiers of a Kenyan citizen but primarily has given no weighty focus on the manner which the extension of voter registration and election rights to Diaspora should be undertaken. In essence, this represents both an opportunity and challenge when contextualized within the time frame that Commission has to organize its logistics, human & financial resources.

1.4 Registration of Voters in Diaspora elsewhere in the world

Ladies and Gentlemen,

For purposes of enabling all of us in this Congregation make an informed decision on voter registration and voting by Kenyans in the Diaspora, I would wish to present three scenarios from our beloved continent and how they have done it.

1.4.1 Republic of Cape Verde

The Republic of Cape Verde is a small island country with a strong tradition of emigration, which goes back to the 19th century. Despite the emigration, citizens have strong ties to their home country. Their remittances are a big contribution to the national economy. The Diaspora population is given an opportunity to participate in the country's elections including those with dual citizenship. The following terms and conditions are a prerequisite for one to be allowed to register and vote in Diaspora:-

1. emigrated from Cape Verde not more than five years prior to the date of the beginning of voter registration; or
2. have and are providing for a child or children under 18 years of age or handicapped, or a spouse or older relative habitually residing in the national territory, at the date of the beginning of voter registration; or
3. they are serving in a state mission or a public service position recognized as such by the competent authority, or residing outside the national territory as the spouse of a person in that position; or
4. If they have been resident abroad for more than five years, they have visited Cape Verde. (Nuias & Chantre, 2007).

For registration purpose, citizens living abroad are divided into electoral districts according to their continent of residency and they vote in presidential and legislative elections. Registration takes place in county's consulates, embassies or diplomatic missions but the person in charge of the Consulate can open other centers so that each center does not exceed 800 persons. The Consulates promote registration of voters even outside the registration period by registering those who visit them seeking for other services and have not been registered as voters.

1.4.2 Republic of South Africa

The South African Constitution recognizes the rights of their citizens in Diaspora to participate in the electoral processes at national and provincial levels. The Independent Electoral Commission of South Africa provides for their registration and voting under the following conditions;

1. To register as a voter in their home voting district. This means one has to travel to South Africa to register except for those serving in South African Missions abroad who are facilitated to register and vote in South African missions abroad;
2. that one must not have lived away from South Africa for more than ten years;
3. that one does not hold dual citizenship; and
4. One has to make an application to the CEO of the Commission to be considered to participate in Diaspora voting.

N.B In South Africa Diaspora votes are only counted if the margins of the competing parties are too close to call.

1.4.3 Romania

In Romania it is estimated that two to three (2-3) million Romanian citizens live and work abroad, mainly in Western and Southern Europe. These citizens are registered in their municipalities of origin, but have the right to vote at the diplomatic and consular representations of Romania. However, only a small fraction of about 0.5% of them eventually turns out to vote. This fact makes the domestic voter registers highly inaccurate, and the validity proportions are also deformed.

At this juncture, therefore, a question can be posed – *which scenario should Kenya pursue in registering citizens outside Kenya and ensure their right to vote?*

1.5 The Role of Kenyan Missions abroad

Historically, it has been observed that labor migration from Kenya is not only taken up by highly-skilled workers alone, but also a significant number of low or semi-skilled Kenyans. Since legal migration of low-skilled Kenyans to developed countries is often restricted, many opt for the irregular route and end up settling in their host countries and become members of the Diaspora community (Ionescu, 2007).

Equally, Diaspora constitutes a wider population of namely expatriates based permanently abroad, second-generation nationals and people who acquire citizenship in their host country but nevertheless wish to continue to support their home.

In general it is right to point out that there are three categories of citizens abroad: firstly, citizens of Kenya who may be abroad on the day of voter registration and elections for business or personal reasons; secondly, there are Kenyan citizens who, for academic or employment purposes, spend a definite and temporary amount of time in another country, where they will reside for a given period; lastly, the third category comprises of Kenyan residing abroad for a much longer period of time, who may sometimes have double nationality due to marriage or birth and who settle down in the host country in a more permanent manner.

As we congregate here as Kenyans to discuss on the role that will be undertaken by our Kenyan Missions abroad it is important to that note that as the Commission with your inputs through consultations, focuses to bring to fore specific interests of the various groups, it is important to pose the following questions -

- Who can vote?
- What Registration procedures should be followed?
- How should elections be held in the Diaspora?
- Should voting be in person?
- Should voting be by post?
- Should voting by proxy be considered?
- Should electronic voting be considered?

But what does the Constitution say?

The most tempest part of the discussion in this paper is whether the Diaspora should be allowed to vote in all elective posts from their distant location? Some would say it is the right of a

Kenyan citizen to engage and take part in national elections. Others would limit this right to certain posts alone.

1.5. Proposals on Registration and Voting in Diaspora

It is the focus of this paper to state that the demand for Diaspora representation in elections must be balanced against the principle of electoral legitimacy. Kenyans abroad have continued to have interest in election outcomes as most of them often return to live in their mother land.

The issue of Diaspora voting is a consultative one. In an attempt to address this issue the Commission is fronting several proposals for the stakeholders' discussion which includes you and me in this Conference. The following proposals could guide the Commission's procedures for mobilizing, registration, educating and voting of Kenyans in Diaspora -

- A. In registering of voters, the Commission proposes that Diaspora may be requested to register in their native constituencies in Kenya, through post, or by filling in an e- form after which an e-form or hard copy voter's card shall be accorded to them. This shall ease confusion at the different missions and enable easy monitoring of Diaspora registration from within the country. This kind of restrictions of a formal nature or based on the voting procedure shall make it possible to exclude persons having no ties with the country of origin – who will probably not vote anyway. Again, the mere fact of requiring registration on an electoral roll, usually for a limited period, calls for action on the part of potential voters.

- B. The Commission proposes to enforce formal restrictions on the exercise of the right to vote of citizens residing abroad. As is done in other countries, restrictions may include:
 - (1) One should appear registered on the diplomatic missions electoral roll;
 - (2) They must also appear in their native constituency roll back in Kenya indicating that is abroad; and
 - (3) An individual must present a personally issued voter's card, a passport or resident's card.

- C. The Commission proposes that due to practical organizational difficulties, for example in drawing up electoral rolls, providing election materials and equipment or counting votes; and difficulties in guaranteeing that the election process is conducted in the proper way. It is important to restrict the voting procedures to Kenyan embassies or possibly to a number of specially designated polling stations. The only challenge with this is the fact that many will be denied the right to vote, since few voters may be living near these embassies/designated centres.
- D. Since no population census has been done for the Kenyan Diaspora, the Commission proposes to fix a quota system in each country for Kenyans residing there to qualify for registration and conduct of election.

However, each proposal has its own challenges. With respect to the opening up of Kenyan elections to citizens residing abroad, the number of Kenyans residing in a particular country must be subjected to vetting. However, the question will be, should these elections be conducted in countries of a relatively large size of Kenyans? What if it is noted that citizens residing in these countries abroad generally show little readiness to carry out the prior formalities for instance appearing in person for registration? Or these countries may have people living on a long-term basis outside their country of origin generally show little readiness to actually exercise the right to vote?

1.6 Conclusion

The legislation arising out of Article 18 of the Constitution shall set out duties and responsibilities of citizens generally, including any qualifications on the right to vote by Kenyans residing outside the country. The Commission would be required to organize their logistics and operations for registration and voting for the Diaspora taking into account any such qualifications.

International practices regarding the right to vote of citizens living abroad and its exercise are far from uniform. The Commission can only customize a Kenyan made, home grown solution out of lessons from the other countries. Even though the introduction of the right to vote for citizens

who live abroad commands the Commission to give all an opportunity to vote, it is important for the Commission to highlight that the obligation to vote in an embassy may in practice severely restrict the right to vote of many citizens living abroad. This restriction is justified on the grounds that, the other means of voting (postal vote, proxy voting, e-voting as practiced by other established democracies) may not be reliable and would require the Commission a longer time to implement fool proof mechanisms on the same.

THANK YOU

References

Association of European Election Officials (2009); a report on the Voter Registration System Study Visit in Romania. Bucharest: United Nations Democracy Fund (UNDEF).

IDEA (2009); Voting from Abroad. Stockholm: International IDEA.

IEC (2005); Electoral Democracy Development & Education Training Manual. Pretoria: IEC

IEC (2009); IEC Election Guide 2009. Pretoria: IEC.

Musanhu, B, and (Undated) Election Administrators: Building skills and Credibility.

Nuias and Chantre (2007);