INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

CHAIRPERSON'S OPENING REMARKS AT THE FORUM ON HANDLING OF ELECTION DISPUTES IN KENYA; EXPERTS MEETING AT INTERCONTINENTAL HOTEL 29TH NOVEMBER 2013.

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Observe protocol

I am greatly honored and humbled for the invitation and opportunity to share experiences from Kenya on strategies and mitigations for electoral disputes. Kenya successfully held General Elections on March 4th this year. ***Ladies and gentlemen,*** you will all agree with me there is no election without an element of dispute. But such disputes, which are the source of challenging an election, are not necessarily a reflection of weakness in the process or system.

If anything, its conduct and results, are a proof of the strength, vitality, and openness of the political system.

The increase in the variety and number of election-related disputes is partly a result of increased public understanding of the redress process. This trend is, however particularly challenging especially where the legal systems and the electoral administration are still developing, like in my country Kenya.

In the recent years, the international community has shown much interest on the issue of election disputes. This attention results from the political controversy and sense of distrust surrounding the complaints and appeals procedures in many countries. Not only have judicial systems and electoral bodies often been at odds with each other, but there have also been instances of discrepancies and loopholes in domestic laws that have resulted in dual appeals processes.

Research attributes the fundamental issues in election dispute resolution theories to the following three limbs:

1) The administrative action of election officials to correct a problem, which infers the right to seek redress for violations of suffrage rights.

2) the validity of the result, and therefore the right to challenge the outcome of elections,

3) Criminal prosecution against those who have corrupted or attempted to corrupt the election process.

This are however not mutually exclusive and can be used in conjunction with others. Beyond this simple demarcation, a variety of approaches and mechanisms, forged by different legal and political traditions, are used by governments in the resolution of election disputes.

In practical terms, the assessment of the manner in which election disputes are resolved and the extent to which they match certain minimum standards involves weighing up key elements on: **jurisdiction, timeliness, enforcement and prosecution**.

In the Kenya case, Article 88(4) (e) of the Constitution, 2010 vests the mandate to deal with disputes arising out of nomination on the

Independent Electoral and Boundaries Commission (IEBC). Section 74 of the Elections Act, 2011 further provides a time limit of seven days (7) at which such disputes shall be determined after their filing. Regulation 99 of the Elections (General) Regulations, 2012 further mandates the Commission to develop and publish Rules of Procedure providing for timelines in the resolution of such disputes.

To operationalize this mandate, the Commission established a Dispute Resolution Committee (DRC) as a permanent Committee of the Commission, to deal with disputes arising out of nominations from political party primaries as well as disputes arising out of the Commission nomination. This included disputes arising out of nomination and allocation of the special seats to qualifying political parties stipulated under Articles 97, 98 and 177 of the Constitution in the manner prescribed by Article 90.

Additionally the Commission published Rules of procedure on settlement of such disputes under the powers conferred by Regulation 99 of the Elections (General), Regulations, 2012 to operationalize the settlement of disputes arising out of political party nominations. This guidelines were effective and would be applied in

resolving over 233 disputes filed with the Commission after the conclusion of party primaries on 18th January 2013 and after the Commission Nomination on 24th, 25th and 26th January 2013, and over 600 disputes further filled, heard and determined after the elections.

Ladies and gentlemen: this process was however not without challenges, the biggest being the strict statutory timelines within which certain activities were to be undertaken. The amendment made by the 10th Parliament to push the end of party primaries too close to the Commission Nomination and election (45 days prior to the election) adversely affected the kind of remedies that the Dispute Resolution Committee (DRC) could grant to the parties. Secondly, the statutory timeline of 7 days to hear and determine over 233 cases was insufficient to fully embrace the due process of the law and would require further interrogation and amends.

Another big challenge was the disruptive nature of late Court of Appeal decisions and High Court injunctions to the electoral process. Lack of clarity in the overlapping jurisdiction to hear and determine

disputes arising out of nominations was yet another thorn in the flesh and would be marked as delay in the process.

Disputes Arising out of Party Lists Nominations

The Commission, after consultation with political parties, developed Rules of Submission to guide the manner and format of submitting the party lists. The lists were to be submitted on the day of the Commission Nomination and in the prescribed format. The Commission was then required to allocate names to the special lists by law within thirty days after the declaration of the results, in the order of priority, while taking into consideration the special interests such as Persons with Disabilities, the Youth and Marginalized Persons.

Once the Commission published the proposed names of nominees to be nominated members of County Assemblies, the National Gender Commission filed a Constitutional Petition seeking several orders from the Commission. It is this Petition that triggered the hearing of

disputes arising out of the nomination to County Assembly Special Seats. The Commission subsequently received over 964 complaints during a two-phased process that took at most five days each to hear and determine.

The biggest challenge that delayed the entire process of the nomination of persons to the special seats was the fact that political parties failed to strictly comply with the Rules of Submission and to adopt the prescribed format when they submitted their lists. This was so even after the Commission allowed them a second chance to correct their anomalies. This problem is what eventually led to incessant and windy disputes, which are pending to date, seven months after the declaration of the results!

Another problem attributable to windy litigations around the party lists is the dicey nature of the membership status of the members nominated in the party lists. Their membership kept shifting, as per the correspondences of the nominating political parties.

Ladies and Gentlemen, I conclude and note that it is obvious there is no single fit-all dispute resolution method that equally suits all countries. The model that gets endorsed largely depends upon the

degree of consolidation reached in the democratic process. However, a country's discretion in its choices is not unlimited and must be exercised consistently with international standards.

We call for review of the guiding laws as the core reference point to adjudicating best practices in dispute resolution.

We are called upon as custodians of the law to continually interrogate the best practices. Chris Jami said

> *"Peaceful disputes are maintained when men sincerely believe that they are morally, logically correct about the issues at hand. It is when neither side is really certain that wars are instigated".*

Since disputes will become part of our electoral process, learning from each other is one of the best ways to prepare for them.

Thank you. God Bless you