



INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

AN OPEN LETTER TO THE PEOPLE OF KENYA

ENHANCING ELECTORAL DEMOCRACY IN KENYA: THE VIEWS OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)

1. INTRODUCTION

Following a long period of the involvement of Parliament and the Executive in electoral management that dates back to 1963, the first two, and only so far, comprehensive review of Kenya's electoral scheme – the CKRC/Bomas Constitution review process of 2002 and Kriegler Report of 2008 – concluded that the electoral management should be shielded from political interference. In its own Report at Chapter 5, paragraph 79 the BBI itself makes a similar finding when it observes that the ethnic character and winner-takes-all political system yields *'Divisive elections are the result, with such enormous political pressure applied to the IEBC that it is almost certain to be judged a failure by one side or the other.'*

Political interference having been consistently determined as the constant *leif motif* that plagues our electoral management, it is essential that any reform process of Kenya's electoral regime should fortify the independence and integrity of the elections from political interference by eliminating rather than reinforcing the influence of the political class. Indeed, BBI's correct finding and premise should, therefore, lead to a logical conclusion, which is: a recommendation to create a more solid constitutive and operational distance between the IEBC and the political class. This has been the philosophy that has informed IEBC's proposals for reforms as detailed here below.

The success of Kenya's electoral body will only be guaranteed if: (a) it is shielded from politically-induced pressure both in its formation and operations; (b) it is granted operational and financial autonomy; (c) it maintains a permanent competent staff and secretariat on a long term basis; (d) the security of tenure of the Commissioners is secured; and (e) the electoral reforms policy and legislation are finalized at least two years before the elections. If these tests are not met, it will not matter how many Commissions are formed and disbanded.

In this document, we provide a chronology of electoral reform in Kenya to demonstrate the evolution of the electoral management body from the control of the political class into an independent agency, and conclude by highlighting the reform agenda that IEBC has prepared and proposed.

2. EVOLUTION OF ELECTION MANAGEMENT IN KENYA

2.1. Pre-Multiparty Era

The management of multi-party elections in Kenya dates back to 1963, when the Kenya Independence Order-in-Council created an Election Commission with the Speaker of the Senate and that of the House of Representatives as Chairman and Vice-Chairman respectively, and 9 members appointed by the Governor General.

The Constitution of Kenya (Amendment) (No. 4) Act of 1966 provided for an Election Commission headed by the Speaker of the National Assembly and whose membership included two members appointed by the president as well as one member for each of the provinces at the time. However, the actual conduct of electoral activities such as voting was placed under a Supervisor of Elections in the Attorney General's Chambers who engaged the then Provincial Administration, particularly the District Commissioners, and other civil servants as Returning Officers during elections. Undoubtedly, this arrangement occasioned manipulation of the electoral process by the Executive to its advantage.

The ideals of a free, fair and credible elections were over the years further violated, primarily by the proscription of the Kenya Peoples Union (KPU) in 1969 thus making Kenya a *de facto* one-party state; The enactment of the Constitution of Kenya (Amendment) Act No. 7 of 1982 that made Kenya *de jure* one-party state; and the introduction of the queue voting system (commonly referred to as *Mlolongo*) negated the secrecy of the vote. These developments seriously undermined the quest for democratic governance leading to agitation for a return to multi-party democracy.

2.2. Multiparty Era

The re-birth of multi-party democracy in Kenya was realized when the Constitution of Kenya (Amendment) (No. 2) Act, 1991 repealed Section 2 (A) of the Constitution, paving the way for the general elections held in 1992. These elections were conducted by the Electoral Commission of Kenya (ECK) whose members were solely appointed by the President. In the subsequent general election of 1997, the opposition political parties threatened to boycott the elections citing lack of impartiality of the ECK as it was managed by members appointed by the President. Following agitation by the opposition, the President appointed ECK Commissioners from names recommended by political parties under an Inter Party Parliamentary Group (IPPG) framework. However, despite the representation of political parties in the ECK, the presidential election results of 1997 ended up being disputed by the losing political parties, a scenario that was repeated in the 2007 general elections which escalated into the 2008 post-election violence. As part of resolving the 2007 political

dispute the National Accord Implementation Committee (NAIC) recommended, *inter alia*, the establishment of the Independent Review Commission (IREC), popularly known as the Kriegler Commission, that undertook a review of the electoral process.

The key recommendations of the Kriegler Commission included: an election management body with a lean policy-making structure and a professional and permanent secretariat; and review of the constitutional and legal framework to address the political and legal dynamics in the country. Subsequently, in 2008, Parliament amended Section 41 of the 1963 Constitution which led to the disbandment of ECK. This resulted in the creation of the Interim Independent Boundaries Review Commission (IIBRC) to review electoral boundaries, and the Interim Independent Electoral Commission (IIEC) to conduct and supervise elections. The IIEC conducted the 2010 referendum that birthed the Constitution of Kenya 2010 which established the Independent Electoral and Boundaries Commission (IEBC) in 2011.

3. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

The Independent Electoral and Boundaries Commission (IEBC) is one of the Constitutional Commissions established under Chapter 15 of the Constitution of Kenya 2010. The mandate of the Commission is provided for under Article 88 of the Constitution. The IEBC is responsible for conducting and supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.

Since its establishment in 2011, the IEBC has made substantial progress in the management of elections which has contributed to enhanced democracy in Kenya. Some of the notable achievements are:

- i) Conducted and supervised the 2013 and 2017 General Elections and the 2017 Fresh Presidential Election. Continuously conducted by-elections nationally, and other elections for organizations such as Law Society of Kenya (LSK), Kenya Red Cross Society, and LSK member to the Judicial Service Commission.
- ii) Established a professional and permanent secretariat with relevant competencies, knowledge and skills over the years in election management through capacity building in international best practices.
- iii) Devolved Commission operations prior to the 2017 general elections by establishing County Election Manager (CEM) offices in all the 47 counties. Each of the County offices have requisite staff and infrastructure ready to undertake elections at any given time.
- iv) Established and deployed electoral management infrastructure in the country including the Kenya Integrated Election Management System (KIEMS), Biometric Voter Registration (BVR) and Candidate Registration Management System (CRMS) in compliance with Section 44(1) of the Elections Act.
- v) Strengthened governance and control system through development and regular update of operational guidelines, policies and procedures to facilitate conduct of elections and guide the administrative functions of the Commission
- vi) Undertook voter registration and generated register of voters (complete with biometric data) which is maintained and updated through continuous voter registration.
- vii) Elevated the Commission on the continental and global platform as a reputable election management body. The height of this achievement was realized when the Commission successfully hosted the Association of African Election Authorities' (AAEA) General Assembly and the 6th Annual Continental Forum of Election Management Bodies (EMB) from 27th to 29th November, 2019. The event was attended by Chairpersons, Commissioners and Chief Executive Officers drawn from forty (40) member states, and the Department of Political Affairs (DPA) of the African Union Commission (AUC). During the forum, the Chairman of the IEBC was elected President of the General Assembly for a two-year term.
- viii) Spearheaded electoral legal reforms over the years which led to parliament enacting/amending such laws. Recently (October 2020), IEBC released its proposed electoral reforms in a report titled *'Electoral Law Reform in Kenya: The IEBC Experience'*. In addition, the Commission developed and submitted to the Justice and legal Affairs Committee of the National Assembly Referendum bill, 2020, IEBC (Amendment) Bill, 2020 and Election Campaign Financing (Amendment) Bill, 2019 for Parliament's consideration.
- ix) Formulated and implemented the 2015-2020 and 2020-2024 strategic plan and their respective operation plans; and the Boundaries Review Operations Plan (BROP) to guide the Commission's implementation of its five-year electoral cycle programmes.
- x) Successfully defended 292 election petitions out of 303 filed in various courts against the Commission after declaration of the results for the 2017 general elections, representing a success rate of 96.4%.

4. CHALLENGES ENCOUNTERED BY THE COMMISSION (IEBC)

The Commission, in the course of achieving the foregoing milestones, encountered a number of challenges that slowed achievement of the projected growth of election Management in Kenya. The Supreme Court Presidential Election Petition No. 1 of 2017 also cited systemic institutional problems. The Commission on its part addressed the internal systemic challenges through development and implementation of policies, procedures and operational guidelines. However, some of the key external systemic challenges that remain unaddressed include:

4.1. High Turnover of Commissioners and staff

Since the advent of multi-party democracy in 1992 there has been incessant demand for disbandment of the Electoral Management Body (EMB) and/or its leadership (Commissioners) following disputed elections, instead of identifying the real issues affecting management of elections in Kenya. For example, the petitioners in the Supreme Court Presidential Election Petition No. 1 of 2017 imputed wrongdoing by IEBC staff and Commissioners. However, the Court ruled: *'We are therefore unable to impute any criminal intent or culpability on either the 1st (IEBC) and 2nd (Chairman) respondents, or any other commissioner or member of the 1st respondent'*. The Court observed systemic institutional problems that should have formed the basis of electoral reform debate.

The present agitation to disband IEBC by removing existing Commissioners and staff as well as varying their terms from 6 to 4 years and from permanent to 3 year-contract respectively, as recommended by the final BBI Report, is a continuation of this trend. For instance, in a 5-year electoral cycle such as ours, if Commissioners are appointed for a duration of 4 years, they will plan for an election that they will not conduct whereas the new team that replaces them will conduct an election that they did not plan. Thus, ownership and accountability of the electoral process will be lost in the transition.

The perpetual disbandment of IEBC staff and Commissioners after every contested election often lead to loss of institutional memory and instability, high turnover of the decision-making body (the Commissioners), demotivation leading to loss of competent and experienced staff, and loss of incremental gains in electoral management. The net effect of meddling with the IEBC is inadequate preparedness for subsequent elections leading to electoral disputes especially for presidential results, a scenario that is likely to recur in 2022 general elections.

4.2. Highly Ethnicized and Divisive Politics

In Kenya, the combination of highly competitive elections and negative ethnicity always leads to divisive elections which often results into political violence, an observation also noted in the BBI Report. In most African Countries, Kenya included, ethnicity is the main currency of competitive elections and it usually mutates into conflicts between dominant competing ethnic tribes thus undermining national unity, security and stability. Such divisive elections have always led to enormous political pressure being applied on the EMB as it is judged as a failure by losing sides in the political contest. Moreover, during election season, staff and Commissioners of IEBC are always subject of ethnic profiling making them insecure and susceptible to attacks. Although the challenges posed by highly competitive elections and negative ethnicity are recognized by all stakeholders in Kenya, there has never been deliberate efforts to conclusively deal with the same. Instead, symptomatic treatments such as disbandment of the EMB and/or its leadership, which is also currently recommended by the BBI Report, has been routinely undertaken which has not led to a lasting solution.

4.3. Late Enactment of Electoral Laws

The persistent late enactment or amendment of electoral laws too close to elections undermines planning and implementation of electoral activities within the set electoral timelines. The international best practice is to cease enactment of electoral laws at least two years to a general election. This is also one of the key recommendations made by the Kriegler Commission.

During election season, some political players have a habit of filing numerous cases in courts in order to influence Commission decisions/operations. Unfortunately, pronouncements of some of the court decisions are made too close to election date thereby affecting Commission's preparedness.

4.4. Inadequate and Untimely Disbursement of Funding

The management of elections follows a 5-year electoral cycle, which continues from one election to the next, clustered into pre-election, election and post-election phases. Therefore, the conduct of elections is a process and not an event. Over the years, the Commission's funding has not been adequate and in tandem with the electoral cycle activities. The decision to allocate budget and release exchequer to IEBC is at the discretion of the National Treasury. This exposes the Commission to the risk of state capture.

Funding is usually provided by the National Treasury during the election year. However, after general elections funding of Commission's programmes is curtailed thereby constraining activities in subsequent phases. Activities constrained include regular maintenance of election technology in readiness for subsequent general election, continuous voter registration, voter education and staff capacity building. Moreover, delayed disbursements of funding for elections is responsible for rushed procurement of goods and services, often at inflated costs as vendors take advantage of the Commission's urgency to catch up with the electoral cycle activities. Such delayed procurements also negatively impact on training and deployment of electoral technologies.

4.5. High Cost of Elections

The cost of elections in Kenya has been on the rise over the years and is mainly attributed to over legislation aimed at dealing with lack of trust amongst political players and suspicions of electoral fraud. The main drivers of the high cost of elections in Kenya include: electoral technology prescribed by statutory laws, high number of polling stations occasioned by capping of number of voters per station, use of satellite technology for results transmission due to inadequate 3G network coverage nationwide; high number of security features on ballot papers; hire of transport and logistics; and high wage bill of temporary poll officials. The Commission, having recognized the rising cost of elections, is committed to instituting

possible measures to reduce costs without compromising the credibility of elections.

4.6. Erosion of Commission's Independence through Political Interference

The Constitution of Kenya, 2010 in its Article 88 as read together with Article 249 (2)(b) lays great emphasis on the independence of the Commission, both in decision making as well as operations. The International Convention on Civil and Political Rights (ICCPR) Treaty, which has been ratified by Kenya, provides for a framework on election management that demands of state parties to ensure that their EMBs act independently and free from the influence of government, political parties or candidates. Despite these clear legal provisions, politicians and political parties always attempt to undermine the independence of the Commission during elections. They also engage in false accusations against the Commission and its staff of political bias thereby denting the image of the IEBC well before elections are held.

The nomination of Commissioners by political parties, as recommended by the BBI Report, in a country with negative ethnicity and highly competitive politics and where most parties hardly last beyond a 5-year electoral cycle, will grossly undermine the independence of the Commission. Political parties are loyalty-based institutions and are unlikely to have non-partisan individuals in its membership. Thus, the actions of such political appointees may be motivated by political/party interests contrary to Article 88 of the Constitution of Kenya. Moreover, use of poll officials on short term contracts to oversee elections in an ethnicized political environment will not only undermine the independence of IEBC but will also be a recipe for disaster. Such officials will not have total loyalty to the Commission and are likely to be complacent in adhering to electoral processes and procedures. Besides, use of poll officials on short term employment goes against the recommendations of the Kriegler Commission on the 2007/8 post poll violence in Kenya. The Commission calls upon all Kenyans in the political processes as well as those sworn into office to uphold the Constitution in support of IEBC's endeavor to achieve total independence.

5. CONCLUSIONS

The IEBC is not any less interested in growing Kenya's constitutional democracy as are many other patriotic Kenyans. The Commission is even more heavily invested in building an effective, competent and accountable electoral management framework that would facilitate the realization of this objective. This is the reason why IEBC has spearheaded electoral legal reforms over the years which led to parliament enacting/amending such laws. Recently (October 2020), IEBC released its proposed electoral reforms in a report titled *'Electoral Law Reform in Kenya: The IEBC Experience'*. In addition, the Commission developed and submitted various proposed legislations for Parliament's consideration. It also formulated and implemented the 2015-2020 and 2020-2024 strategic plan and their respective operations plans; and the Boundaries Review Operations Plan (BROP) to guide the Commission's implementation of its five-year electoral cycle programmes. These initiatives demonstrate that the agency is sufficiently self-aware of the necessity and imperatives for reforms, especially those that strengthen its independence and operational efficiency.

To enable the Commission to function independently and uphold professionalism and accountability, the recommendations of both the Kriegler Commission and the Kofi Annan Foundation stating that an EMB must have a core cadre of permanent election officials in order to sustain institutional memory, continuous professional development and maintain a culture of learning, must be adhered to by all stakeholders involved in elections.

6. RECOMMENDATIONS TO ENHANCE ELECTORAL DEMOCRACY

The Commission having been the statutory institution charged with the responsibility of conducting elections, and based on experiences gained over the years in managing elections, makes the following recommendations in order to enhance electoral democracy;

- i) Maintain the current Independent expert model in appointment of the Chairperson and Commissioners of IEBC to guarantee impartiality. Stagger recruitment of Commissioners to facilitate transfer of knowledge, institutional memory and growth. Retain the current practice of hiring core professional and permanent secretariat staff for efficient, transparent and credible elections.
- ii) Address the root causes of negative ethnicity and mistrust amongst political players in order to reduce high costs associated with mitigating these challenges through electoral processes.
- iii) Conclude electoral legal reforms at least two years to elections, in line with international best practices, to provide for adequate time for implementation by the EMB. However, in the current circumstances the electoral legal reforms should be concluded not later than one year to the 2022 general elections.
- iv) Entrench the Independent Electoral and Boundaries Commission fund in the Constitution to give the Commission autonomy to manage its funds. However, at the very least funding for the Commission activities should be in tandem with its 5-year electoral cycle, as opposed to providing funds in the year of elections.
- v) Electoral laws should be reviewed with a view to making them less prescriptive and to enable the commission flexibility in administrative processes and reduction in cost of elections.
- vi) Enhance engagement between the IEBC and political parties through the Political Parties Liaison Committee with a view to enhancing electoral democracy in Kenya.



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