



**PRESENTATION BY THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION TO THE BUILDING BRIDGES TO UNITY ADVISORY TASKFORCE**

1. The Independent Electoral and Boundaries Commission is pleased to have been invited to this Consultative forum convened by the Building Bridges to Unity Advisory Taskforce.
2. As a Constitutional Commission responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution in the Republic of Kenya, we are pleased to make our submissions.
3. Elections in Kenya are a do or die affair. This is so because it appears to be the only avenue for acquisition of Political power and its attendant benefits and trappings. Anytime the country gears towards a General election, it almost grinds to a halt. Whereas economic activities slow down, cut throat political competition soars. Ethnic and regional balkanization become the indices of identification of one's political inclination.
4. Election Campaigns are often high octane laced with highly personalized and ethicized attacks. By the time Kenyans go to the polls, the social fabric that underpins patriotism and brotherhood is completely broken. What is often left is a highly poisoned and polarized political environment where acceptance of the outcome of a free, fair and credible election by the electorate and political class is a tall order.

5. Our election system is that of first past the post (FPTP) which is also christened *“The Winner takes it all.”* This type of electoral system is one in which the voters indicate on the ballot the candidate of their choice and the candidate who receives the most votes wins. This system has been inherited from the colonial regime and has existed in Kenya for decades. It is opined that it is the root cause of our highly divisive elections.
6. As an Election Management Body, it is our view that a panacea to such divisive elections should be explored. Maybe it is time that Kenyans had a conversation around our electoral system and explore other options such as proportional representation (PR) and mixed member representation (MMR) models.
7. Proportional representation is an electoral system in which parties gain seats in proportion to the number of votes cast for the parties. Proportional representation has been hailed for providing opportunities for strengthening of Political Parties. It is the most widely used electoral system in the world. It ensures that more focus is laid not on personalities but Political Parties as Institutions where leadership and democracy is nurtured. It also obviates marginalization on account of: -
 - (i) Gender
 - (ii) Persons with disability
 - (iii) Youth
 - (iv) Ethnic and other minorities
8. The mixed member representation model is an electoral system that combines first past the post with features of proportional representation most often based on party list. The mixed representation model has the advantage of blending the positives of both.
9. Article 81 of the Constitution provides general principles for the electoral system. It is a requirement that the electoral system must ensure that not more than 2/3 of the Members of elective public bodies shall be of the same gender.

In addition, Article 27 of the Constitution that speaks to equality and freedom from discrimination requires the state to take legislative and other measures to implement the principle that not more than 2/3 of the Members of elective or appointive bodies shall be of the same gender. There has been litigation around this issue and the courts have through judicial legislation decreed that it is a constitutional imperative which must be realized albeit progressively. Parliament has been directed to enact legislation to realize the 2/3 gender rule and the Commission has been enjoined in ensuring that this rule is realized.

10. Under the current FPTP electoral system it is difficult to realize the constitutional requirement of the 2/3 gender rule. However, the same can be achieved if either of the two models proposed above are explored.
11. Among major challenges faced by the Commission is inadequate funding throughout the electoral cycle. The electoral cycle covers *pre-election, election and post-election periods*. The cycle continues from one election to the other. Therefore, the conduct of election is a process and not an event. It therefore follows that resources are required throughout the election process and not just the election time. The Commission experiences rapid decline in funding immediately elections are over thereby constraining activities in subsequent phases. The present practice of providing funds towards election time leads to challenges related to non-compliance with procurement laws and regulations and inadequate time to test the electoral technologies prior to elections. For free, fair and credible elections to be realized, adequate time and resources must be invested throughout the electoral cycle.
12. The Commission, being a public institution, is dependent on the National Treasury for funding. Under Article 249 (2) (b) of the Constitution the Commission is independent and not subject to the direction or control by any person or authority. However, the Commission is entirely dependent on the National Treasury for budgetary allocation and exchequer releases thus compromising execution of its mandate.

This exposes the Commission to risk of state capture thereby compromising elections. To mitigate against this risk the Commission should be allocated adequate resources, in line with the electoral cycle, in one tranche at the beginning of the financial year and be given financial autonomy.

13. In the previous general elections, there has been review of electoral legal framework. However, the late enactment of the electoral laws poses a great challenge in the preparations of elections. The international best practice is such that no amendments are done to the election laws one year to a general election. Where amendments are done within one year, such amendments are deferred to subsequent elections.
14. A large number of Kenyan citizens reside outside the country. These citizens are entitled to participate in general elections in line with article 38 (3) of the Constitution. In fulfilment of this obligation, the Commission undertakes an expensive and cumbersome voter registration and voting exercise. The current legal framework does not provide for web-based voting which could not only potentially reduce the cost of diaspora voting but also allow many Kenyans living outside the country to vote.
15. The use of ICT in elections is increasingly becoming important in Kenya. However, only 78% of the geographical area in Kenya has reliable 3G mobile network coverage which is required for transmission of election results. There is need for the country to invest in telecommunication infrastructure, minimum 3G network, to facilitate results transmission in future elections.
16. The foundation of free, fair and credible party primaries is the basis for free, fair and credible elections in any country. The conduct of party primaries in Kenya is synonymous with chaos and allegations of rigging leading to disenfranchisement of aspirants resulting in numerous nomination disputes and high numbers of independent candidates.

This scenario may be as result of weak internal democracy within political parties. There is an urgent need for political parties to enhance governance and internal democracy.

17. In Kenya the recruitment of Commissioners for all Constitutional Commissions, including IEBC, is done at the same time. This is contrary to best practice in good governance where such appointments are staggered to ensure continuity of operations, institutional memory and succession management. The current scenario where there two Commissioners and Chairperson are in post, present an opportunity for staggering the appointment of Commissioners.
18. There are several electoral processes that require legal reforms, including
 - (a) Enhancement of time frame for the hearing and determination of presidential election petition from fourteen days to thirty days.
 - (b) Enactment of appropriate legislation to operationalize Articles 255-257 of the Constitution, on the conduct of referenda;
 - (c) Standardization of scrutiny processes, pursuant to court orders. This is informed by the haphazard manner with which scrutiny processes were conducted as ordered by the various courts in the recently concluded election petitions;
 - (d) Staggering of the elections for national and county elections to enhance efficiency and reduce pressure on the election systems and personnel;
 - (e) Enactment of timelines within which pre-election disputes, including procurement related suits, must be determined to avoid disputes dragging too close to the elections, which could interfere with proper conduct of elections;
 - (f) Enactment of a law on replacement of a deputy governor, should a vacancy occur in that office before a regularly scheduled election;
 - (g) Clarity on implementation of Chapter 6, of the Constitution in relation to clearance of candidates to contest in an elective position;

19. The Commission wishes to present to the Taskforce the Commission's Post Election Evaluation Report which contains a comprehensive review of the 2017 elections with a raft of recommendations for information and reference.


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CHAIRMAN

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