

**KENYA'S ELECTORAL SYSTEM AND PROCESS IN CONTEXT:
LESSONS LEARNT FOR THE FUTURE.**

**BY AHMED ISSACK HASSAN
CHAIRPERSON, IIEC**

Website: www.ahmedissackhassan.co.ke

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By: Ahmed Issack Hassan*

*(*Advocate, High Court of Kenya, former Commissioner of the Constitution of Kenya Review Commission (CKRC) and currently, the Chairperson of the IIEC)*

INTRODUCTION

The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people's representatives, but also to elect or determine government election or appointment. They demonstrate the people's sovereignty and accountability by politicians. They lend legitimacy to governments. For this to occur, a number of prerequisites must be in place, including agreement on the system of elections to be used, equitable delimitation of electoral boundaries and transparent management of the electoral process.

ELECTORAL SYSTEM

An electoral system here means the method used to determine how votes are cast and translated into seats won by parties and/or candidates. The electoral system thus consists of mediation between votes and representation as established by the electoral law. On the other hand, the electoral process refers to the management and administration of the whole electoral system.

An electoral system is judged by various criteria such as:

- Does it convert votes into seats to reflect accurately popular choice, i.e. does it produce fair results?

- Does it provide representation of minorities?
- Does it lead to fair representation of women?
- Does it lead to a clear and close relationship between the elected official and his/her constituency?
- Does it lead to a stable and firm government, as for example by producing two major parties, one of them with a clear majority, particularly in parliamentary systems?
- Does it lead to a proliferation of parties?
- Does it lead to ethnic harmony or ethnic conflict?
- Does it lead to ethnically based parties or non-ethnic/multi-ethnic parties?

Electoral Systems vary. The most common ones include:-

1. Plurality and majoritarian systems

A plurality system is based on single member constituencies in which the successful candidate is one who achieves the highest vote, even if that vote is not a majority vote.

A majoritarian system is also based on single member constituencies, but the winning candidate must have an absolute majority of votes, even if this is secured on a rerun of elections with only the two top candidates (as in France, a number of francophone African states, and Uganda for the presidential elections). **Some consequences of plurality ('first past the post') or majoritarian system are:**

- There are a small number of parties
- The government may be elected on a minority of national votes
- In plurality system an elected member may not enjoy the support of the majority of the voters in the constituency;

- Minorities tend to be under represented; minorities do not have their own parties but join ‘mainstream parties’
- There is a close relationship between the member and the constituency

2. **Proportional representation system**

There are many types of proportional representation system. Typically, a proportional representation system, which has to be based on multi-member constituencies, is one in which each party wins seats in proportion to the number of votes it has obtained. Thus if it wins 40% of the votes, it would get 40% of the seats, which would be allocated to the top 40% of candidates on its list. **Some consequences of proportional representation are:**

- It is more representative than the plurality or majoritarian
- It is ‘good’ for minorities since even a small minority (say no more than 10% of the population) will secure 10% of the seats if all its members vote for its party; but it tends to perpetuate ethnic/religious distinctions
- It is also good for women, if political parties are prepared to list women candidates high on their list of candidates
- It encourages the proliferation of parties, since even small parties are sure of some seats
- It may encourage ethnically based parties
- The link of elected member to constituencies is weak since several members represent one constituency;
- Party headquarters/bosses have greater control over candidates since they prepare the list of candidates, and the order of individual

candidates in the list, to be fielded in each constituency than in single member constituencies

- Due to the proliferation of parties, governments tend to be a coalition of parties and consequently weak and unstable.

3. The 'Mixed' system (Mixed Member Proportional system – MMP)

Since each system has its own characteristics, and good and bad points, the choice of the electoral system has to be related to the social, ethnic and economic circumstances and goals of the country. Each choice will involve trade offs. However, some systems try to combine the advantages of both the plurality system (in terms of clear cut results, stable governments, and stronger links of members with their constituents) with the proportional representation system (representation of minorities, fair representation). In this mixed systems, which was pioneered in Germany, half the seats are allocated to single member constituencies and the other half, as a kind of reserve, are based on party lists. Voters vote for a candidate in single member constituencies as in the plurality system, but they also vote for a party.

If a party fails to win the number of seats proportionate to its regional or national vote, it is compensated by the requisite additional members, who are not linked to any constituency, from the party list. The system has been copied in recent years in several states, including New Zealand, Italy and Mexico. Likewise, some states have modified the plurality/majoritarian and proportional representation system to ensure specific minority representation by reserving seats for minorities, to be voted on by members of the minority (Fiji, Hungary, Romania, colonial Kenya) or by every one (as in India for scheduled castes and tribes).

An ideal electoral system should ensure or promote representation of the people and all major interests in a political system. The system operating in the framework of a republic should, therefore, be as inclusive as possible by making it possible for as many of the divergent interests and concerns as possible to be represented.

The Principal functions of the electoral system include the following:-

- Promoting and ensuring effective representation in the Legislature and other organs of governance and decision-making;
- Registration of the people's views;
- Choice and formation of government;
- Provision of the mechanism for holding people's representatives and the government accountable;
- Providing people with choices about public policies, plans and programmes; and
- Promotion and facilitation of a competitive political and party system.

ELECTORAL PROCESS

The electoral process consists of all activities designed to ensure that the electoral system functions in a manner which truly reflects the people's will. The components of the process include:-

- The right to vote and stand as candidates;
- Compilation of a register of voters;
- Nomination of candidates;
- Timing of elections;
- Accessibility of voting arrangements;
- The electoral rules set to ensure free and fair elections;
- Election campaigns and control of expenses;
- Systems of voting and counting of votes;
- Supervision of the conduct of political parties and disqualification or penalties for candidates or political parties;
- Smooth and dignified succession to office;
- System of settling electoral disputes; and
- Election observation.

KENYA'S ELECTORAL SYSTEM

The right to vote

The right to vote is not stated in the Bill of Rights, as is often the case in many countries. The right to vote is dealt with in the chapter on Parliament (sec. 32(2)). It gives the vote only to a person who 'is registered in constituency as a voter in elections of elected members', subject to disqualifications for specified offences. This formulation makes registration rather than citizenship the criterion for voting, and thus gives the authorities responsible for making and administering rules for registration considerable discretion as to who can vote.

Complaints are frequently heard that these rules and procedures effectively disenfranchise many citizens, particularly among communities known to be supporters of opposition parties or from marginalized communities.

Compare the Kenya provision with the provision in the Swedish Constitution:

- Every Swedish citizen who has currently or who has ever had his habitual residence in Sweden has the right to vote in a Riksdag [i.e., Parliament] elections (art. 3.2)

Or equivalent provision in Fiji which gives the right to be registered as a voter to:

- All citizens who have reached the voting age and who have been resident in Fiji for the 2 years immediately before the application for registration (sec. 55).
- Or the constitution of Ghana which makes the right to vote a constitutional right.

ELECTORAL SYSTEMS AND PROCESS IN OTHER CONSTITUTIONS

Although detailed provisions on country's electoral process, including the procedure for delimiting boundaries and managing elections are usually found in ordinary legislation, an increasing number of constitutions now provide for these matters in articles dealing either with representation generally or, more often, election of representatives to legislative organs. For example, Chapter Five of the Constitution of Uganda provides, *inter*

alia, for the right to vote, the establishment of an independent Electoral Commission, delimitation of constituency boundaries and system of voting. On the electoral system, Article 66(1) of the Constitution of Tanzania provides, for example, categories of Members of Parliament which include elected members and others through proportional representation.

Chapter Six of the Constitution of the Fiji Islands makes detailed provisions, *inter alia*, for distributing electoral seats among different electoral rolls, delimiting of electoral boundaries by a Constituency Boundaries Commission, voting and other matters, nominating candidates for elections, and composition of the House of Representatives and the Senate. Similar provisions have been included in the constitutions of Nigeria, Ghana and South Africa, among others. These provisions also empower the Legislature to enact specific legislation on these matters.

THE MANAGEMENT AND ADMINISTRATION OF ELECTIONS

What is an EMB?

The complexity and specialist skills necessary for electoral management require that an institution or institutions be responsible for electoral activities. Such bodies have a variety of shapes and sizes, with a wide range of title to match, which include ‘Election Commission’, ‘Department of Elections’, ‘Electoral Council’, ‘Election Unit’, or ‘Electoral Board’.

The term ‘electoral management body’ or EMB has been coined as a name to refer to the body or bodies responsible for electoral management whatever wider institutional framework is in place.

An EMB is an organization or body which has the sole purpose of, and is legally responsible for, managing some or all of the elements that are *essential* for the conduct of elections and of direct democracy instruments.

MODELS OF ELECTORAL MANAGEMENT

The socio-economic and political history of a country determines the type of an electoral management body that it will have. There are three broad

electoral management models in the world; namely **Independent, Governmental and Mixed model.**

The Independent Model of EMB

The Independent Model of electoral management exists in those countries where elections are organized and managed by an EMB which is institutionally independent and autonomous from the executive branch of government, and which has and manages its own budget. Under the Independent Model, an EMB is not accountable to a government ministry or department.

It may be accountable to the legislature, the judiciary, or the head of state. EMBs under the Independent Model may enjoy varying degrees of financial autonomy and accountability, as well as varying degrees of performance accountability. They are composed of members who are outside the executive while in EMB office. Many new and emerging democracies have chosen the Independent Model of electoral management. Examples of EMBs under the Independent Model include Armenia, Australia, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Estonia, Georgia, India, Indonesia, Liberia, Mauritius, Nigeria, Poland, South Africa, Thailand, Uruguay, Ghana South Africa etc.

The Governmental Model of EMB

The Governmental Model of electoral management exists in those countries where elections are organized and managed by the executive branch through a ministry (such as the Ministry of the Interior) and/or through local authorities. Where EMBs under the Governmental Model exist at national level, they are led by a minister or civil servant and are answerable to a Cabinet minister. Their budget falls within a government ministry and/or under local authorities.

Countries whose EMBs fall into this model include Denmark, New Zealand, Singapore, Switzerland, Tunisia, the UK (for elections but not referendums) and the United States. In Sweden, Switzerland, the UK and the United

States, elections are implemented by local authorities. In Sweden and Switzerland the central EMB assumes a policy coordinating role.

The Mixed Model of EMB

In the Mixed Model of electoral management, there are usually two component EMBs, and dual structures exist; a policy, monitoring or supervisory EMB that is independent of the executive branch of government (like an EMB under the Independent Model) and an implementation EMB located within a department of state and/or local government (like an EMB under the Government Model). Under the Mixed Model, elections are organized by the component governmental EMB, with some level of oversight provided by the component independent EMB. The Mixed Model is used in France, Japan, Spain and many former French colonies, especially in West Africa.

Some Guiding Principles for All EMBs

No matter which model is used, every EMB should be certain that it can ensure the legitimacy and credibility of the processes for which it is responsible. This can be done if electoral management is founded on fundamental guiding principles:

Guiding principles for EMBs:

- independence
- impartiality
- integrity
- transparency
- efficiency
- professionalism; and
- service-mindedness

These guiding principles form the basis of electoral administration and are essential to ensure both the actual and the perceived integrity of the electoral process.

ELECTIONS MANAGEMENT IN KENYA

In 1963 the constitution of the newly independent Kenya created an autonomous electoral commission with a clear mandate to register voters, conduct elections, and delimit parliamentary electoral districts, among other electoral matters. This was the furthest the government went towards institutionalizing the Electoral commission of Kenya (ECK). Until 1991 the process for parliamentary and local authority elections came under the control of the supervisor of elections, an officer in the attorney general's chambers. However, notwithstanding the ECK's responsibility under the constitution for different electoral matters, between 1963 and 1991 it only carried out one function – the review and establishment of electoral district boundaries.

The constitution was amended in 1991 to introduce a multiparty system and to change the structure and responsibilities of the ECK. Eleven commissioners were appointed by the president. This number was raised to 12 in 1993. The ECK was given exclusive powers to manage the conduct of national and local elections, including full responsibility for voter registration, candidate nominations and voter education.

Although the reforms introduced entailed significant change in the ECK's role, opposition political parties complained about its composition; all its members were presidential appointees. Following the establishment of the Inter-Parties Parliamentary Group (IPPG) in 1997, opposition parties received representation in the ECK through the addition of ten more commissioners. The IPPG also reviewed and brought in some laws which made the ECK more independent. Under the constitution, the ECK was not to receive or accept the direction of or instructions from any person or authority, but it had many difficulties realizing this independence in practice.

The Legislative Framework

The ECK was governed by the constitution and the November 1997 National Assembly and Presidential Elections Act. The Constitution Amendment Act, no. 17 of 1990, re-established the ECK and provided for its tenure and functions. It also guaranteed its independent status, although an exception made through a constitutional amendment in 1997, empowered Parliament to make laws to regulate the effective conduct of the ECK's operations. Among the major issues covered by the act are the registration of voters, nominations and campaigns and questions relating to the appointment of ECK staff, including a Code of Conduct for staff. In addition, the Act empowered the ECK to make regulations governing the electoral process.

An Electoral code of Conduct was introduced in 1997. The ECK's constitutional mandate was further supported by the 1998 Election Offences Act, designed to prevent election offences and illegal practices during elections. This Act (section 8) enabled the ECK to impose penalties and sanctions on parties, candidates and their supporters who violated the 1997 Electoral Code of Conduct.

Institutional Structure

At the end of 2008 the ECK had 22 commissioners, including the chair and vice-chair, who were appointed by the president for a term of five years. The commissioners were eligible for reappointment and enjoyed security of tenure through special safeguards and procedures. They could only be removed from office by a tribunal appointed by the president. During elections the ECK appointed temporary election staff to assist in the administration of elections. These include returning officer, deputy officers, presiding officers, registrations officers and election clerks.

For administration purposes the ECK was supported by a secretariat and by district election coordinators (DECs) at the district level. The secretariat was headed by a Commission Secretary assisted by a deputy administrative secretary and by the various department heads.

Powers and Functions

The powers and functions of the ECK included boundary delimitation, voter registration and running of local and national elections. The law further mandated the ECK to register political party candidates for parliamentary

and local election and to determine the eligibility of candidates. The ECK was also responsible for voter education.

Financing

The ECK was funded by the government. It submitted its budget to Parliament for approval through the Ministry of Finance.

Relations with the Media and Other Institutions

The ECK's relations with the media improved significantly during the 2002 elections. For the first time the ECK set up a media centre with the purpose of disseminating information on the electoral processes to the media.

The ECK had taken measures to improve its relationship with the political parties, the police and civil society organizations, especially religious groups. Peace committees set up in all electoral districts have not only greatly improved the ECK's relations with key electoral stakeholders but also enhanced its capacity to enforce the Electoral Code of Conduct. Peace committees have also served as conflict management bodies and enhanced both communication and conflict management between the ECK and its electoral partners.

Accountability

The ECK was required to observe all financial regulations and accounting procedures in the management of its funds and the disbursements of funds. It was also subject to the Parliamentary Accounts Committee (PAC) for all accounting queries.

Dissolution of ECK and birth of IIEC

The ECK was disbanded by Parliament through a constitutional amendment which deleted the section that created the body. The Parliament then created two interim bodies to take over the functions of the ECK. These were the

IIBRC and IIEC. The new section 41 of the constitution provides the functions of IIEC as follows:

- Reform of the electoral process and the management of elections in order to institutionalize free and fair elections,
- Establishment of an efficient and effective secretariat,
- Promotion of free and fair elections,
- Fresh registration of voters and the creation of a new voters' register,
- Efficient conduct and supervision of elections and referenda,
- Development of a modern system for collection, collation, transmission, and tallying of electoral data,
- Facilitation of the observation, monitoring and evaluation of elections and referenda,
- Promotion of voter education and culture of democracy,
- Settlement of minor electoral disputes during an election as may be provided by law, and
- Performance of such other functions as may be prescribed by law.

The IIEC is composed of a Chairman and eight Commissioners appointed by the President in consultation with the Prime Minister and after approval by Parliament. They were recruited by the Parliamentary Select Committee on the constitution through a competitive process. The mandate of the IIEC is for 24 months from 28th December, 2008 or three (3) months after a new constitution comes into effect, whichever comes first.

RECOMMEDATIONS FOR ELECTORAL REFORMS IN KENYA

‘Electoral reform’ is a broad term that covers among other things, improving the responsiveness of electoral process to public desires and expectations.

There are three distinct areas of electoral reform, in each of which an EMB and its stakeholders may play different roles:

- (a) **Legal** – involving the amendment of the constitution, the electoral law, and/or related regulations and rules to enhance the integrity, relevance and adequacy of the legal framework within which the EMB delivers its services. This may include institutional reform of the EMB itself;
- (b) **Administrative** – the introduction within the EMB of new strategies, structures, policies, procedures and technical innovations that enable it to implement its legal responsibilities and deliver its services more efficiently, effectively and sustainably. These could include policies and practices on issues such as procurement, financial integrity or employment (such as gender balance and other diversities in the recruitment of EMB staff); making voting accessible to groups such as women, those living in remote areas, and the physically impaired; or introducing new technology for services such as voting, voter registration or electoral logistics; or
- (c) **Political** – changes which take place in the political environment within which an EMB operates, such as giving it more autonomy or creating a more effective and transparent framework for its funding and accountability.

On Electoral System and Process

- Not part of the contentious issues. We assume the Committee of Experts will adopt the Bomas draft or modified version as it relates to the electoral system and process ;
- To address the issue of the equality of votes and to avoid the wastage of votes, we propose we retain the current 210 constituencies with a provision for their increase subject to the report of the Boundaries commission. In the meantime, increase the nominated seats from 12 to 90 to make parliament 300. The 90 seats additional seats to be apportioned according to votes received by a party. Each party to prepare its list and give it to EMB before the elections. 30% should be women

(every no. 3 to be a woman if not EMB to re-organize the list), others for the disabled and marginalized communities;

- Mayors and Chairman of County Councils to be elected directly by the voters;
- Elections for parliament and president (if any) to be held separately from local government elections;
- Allow for independent candidates to run for elective office;
- Public policy – avoid unnecessary by-elections – an MP should not stand for the post of Speaker or Deputy Speaker.

(b) On the Electoral Process,

- The principal message of the Code of Conduct needs to be reflected in the Constitution.
- Severe penalties for a breach of the Code should be provided for;
- No use of Government facilities by candidates to campaign;
- Fair time on State media for all parties
- All State media should be required to ensure a balance between political parties; all parties should be required by law to broadcast and debate their policy messages through the State media;
- The Electoral Commission to ensure that polling booths are accessible to all and that all reasonable steps are taken to ensure that all voters can vote in secret;
- The Constitution should state that every citizen has a fundamental right to vote;
- Voting should be seen as both a right and a fundamental duty of every citizen and should not be abused but exercised responsibly for the common good;

- The State has a duty to enable every citizen to exercise his/her democratic right and duty to vote and to remove all impediments to voting;
- Proof of citizenship and age required for registration as a voter should be based on any credible evidence, not only the ID or passport;
- In nomadic pastoralist areas, the Electoral commission should establish mobile polling stations;
- Disciplined forces should be allowed to exercise their voting rights;
- The residence requirements should be retained but be subject to periodic reviews by the Electoral Commission, as election technology changes;
- Voters should be allowed to vote for the president anywhere in the republic;
- The Constitution should state that the electoral law may impose reasonable residence requirements, taking into account the devolved structures;
- The Constitution should guarantee citizens living, studying, visiting or working outside the country who satisfy the general rules, the right to vote in elections.

(c) On Candidature,

- Independent candidates for the presidency, the National Assembly and all councils should be permitted, i.e., it should not be necessary for nominations to be made by parties only;
- Persons seeking an elective position must satisfy some minimum academic requirements.

(d) On the Elections Management body

- Appointment to the Commission should follow after a short listing mechanism, vetting and approval by the National Assembly, and any appointment should be by the President, who must accept the names recommended.
- The Commission should be financially independent; the expenses should come from the Consolidated Fund (like judges – this means that there does not have to be a vote in Parliament and a debate and that payment is assured);
- The Commission should have its own accounting officer;
- It should have the corporate status – a separate legal person with the right to bring legal actions and defend them;
- Criteria for membership should be spelt out and should include having not been involved in any recent active political party activity;
- Political parties should not play any role in appointment, given political hostilities and the danger of bringing these to the Commission itself;
- The number of commissioners should be reduced to not less than seven not more than eleven – most countries have found it expedient to do with a smaller commission, much of the detailed work being done by a competent staff;
- The term of office should ensure that a commissioner sits through two elections, so experience is not wasted; membership should be staggered;
- The commissioners should have security of tenure; removal should be by an inquiry by a genuinely independent tribunal;
- The commissioners should be persons of personal integrity, proven good behaviour and conduct, a good measure of public service and an education level to be defined;
- That the results of a presidential election are to be declared by the Commission should be stated in the Constitution;

- The Constitution should accord the Commission adequate power to make rules aimed at improving effectiveness and efficiency by the electoral process;
- With regard to election disputes and electoral malpractices:-
 - All election petitions should be heard within one year from the date of election.
 - The EMB be given express powers to arrest and prosecute and to disbar candidates from standing for elections.

(e) On Electoral Boundaries

- A special Electoral Boundaries body should be appointed at intervals of ten (10) years to address:
 - The existing boundary disputes;
 - Petitions for new electoral (single member constituencies, location/ward boundaries; and
 - Creation of new electoral units as a result of devolution of power to the province, district, location and village levels.
- The Boundaries Commission should be allowed a deviation of approximately 30% either way from the norm; very exceptionally a wider deviation should be tolerated; candidates and MPs from geographically large constituencies (as in North Eastern Province, upper Easter or North Rift) should be provided with special logistical and financial assistance to cover the constituency; and
- The process of reviewing or delimiting electoral boundaries should occur every 10 years using the results of the population census and the area as a basic resource; the process should be transparent and opportunity for public consultation, debate and input should be guaranteed; the Constitution should make it difficult for Parliament and/or Executive to be able to change electoral boundaries at will.

CONCLUSION

The proposed reforms in the electoral systems and process do not depart in any material form from what is already proposed in the on-going constitution review process and legislative reforms. The Committee of Experts have not identified the recommendation in the Bomas draft on the electoral system and process as one of the contentious issues. It is hoped that the assumption by the Committee that there is consensus on this aspect of the new constitution will hold. Whatever is not contained in the proposed new constitution can be captured in new laws which has been developed by the Kenya Law Reform Commission subject to further consultations with the IIEC and the IIBRC. These proposed laws include the Election Bill which seeks to consolidate all laws relating to elections in Kenya and the Electoral Commission Bill which seeks to set out in greater detail the composition, powers and functions of the new electoral body.

THANK YOU

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