

**REPORT OF THE PROCEEDINGS OF THE GENDER FORUM
HELD AT THE NAIROBI SAFARI CLUB (LILIAN TOWERS),
NAIROBI ON 30TH JULY 2009
FROM 4.00 – 600PM**

“MAKING VOTES COUNT

– A GENDERED PERSPECTIVE ON ELECTORAL REFORMS”

Prepared By: Helene R. Namisi

TABLE OF CONTENTS

List of Abbreviations	2
List of Statutes	2
Executive Summary	3
Introduction	4
Welcome Remarks	4
Presentation	6
Making Votes Count	10
Wrap Up & Conclusion	17

LIST OF ABBREVIATIONS

HBF	- Heinrich Boll Foundation (East & Horn of Africa)
COE	- Committee of Experts
CMD – Kenya	- Centre for Multiparty Democracy
ECK	- Electoral Commission of Kenya
IIEC	- Interim Independent Electoral Commission

LIST OF STATUTES

Constitution of Kenya Review Act, 2008

Political Parties Act, 2007

EXECUTIVE SUMMARY

Electoral reform is not an event but a process that includes behavior change.

Electoral reform, like constitutional reform, is an issue that has plagued Kenya since the dawn of multi-party elections. This issue drew a lot of public attention and outcry following the disputed 2007 Presidential Elections, which saw the eruption of violence and prompted public debate on various issues including electoral reform.

The Kriegler Commission which was set up to investigate the 2007 General Elections recommended a complete overhaul of the country's electoral system, noting that Kenya's constitutional and legal framework on elections was flawed. The Commission went on to find that the defunct Electoral Commission of Kenya's capacity, independence, composition and management were compromised. In urging the country to implement measures to inject electoral integrity and empower future poll organization to carry out their constitutional functions, the Commission recommended that the ECK be reformed or replaced.

In the wake of a national conference on electoral reforms scheduled to begin on 11th August 2009, the topic selected for discussion at the Forum was appropriate and timely. The three-day meeting to be held in Nairobi, is aimed at winning greater support for the reforms spearheaded by the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundaries Review Commission. These talks are a follow up to recommendations made by the Kriegler Commission that investigated the 2007 General Election, whose disputed results sparked widespread violence.

It is against this backdrop that the Heinrich Boll Foundation held an insightful and highly-charged July forum based on the discussions and developments revolving around electoral reform in Kenya. In a break from the traditional format, the panelist engaged the audience in discussion and debate, facilitating an interactive and captivating discourse on electoral reform in Kenya, and particularly on the role of women in the reform process.

INTRODUCTION

In line with its agenda to engage in discourse on the broader issues of the Kenya Reform Agenda and building on the last Forum's discussion on the constitutional reform process, Heinrich Boll Foundation (HBF)'s theme for the July Forum was tailored to enable participants to interact and discuss issues relating to the electoral reform in Kenya. The discussion led by Njeri Kababeri, was anticipated to be thought-provoking and intended to bring out perspectives for both institutional and civic engagement on *inter alia*: -

- An evaluation of the intricacies of the current Kenyan electoral system
- A debate on what could be an ideal electoral system that guarantees the effective participation of all social minorities, more so women;
- Referencing to the similarly necessary institutional reforms within political parties, parliament, electoral laws and policies;
- An analysis of the general implementation trends of the Kriegler Report. How far are we down Kriegler's list?
- Anchoring onto the current constitutional review debate on systems of government, the need for strategic and preparatory interventions.

Welcome Remarks

Welcoming the panelists and the participants to the Forum, Ms. Wambui Kihui introduced the topic of the Forum and the panelist, Ms. Njeri Kababeri, Executive Director, Centre for Multiparty Democracy and welcomed the participants to what was expected to be a highly charged discussion on electoral reforms.

PRESENTATIONS

MAKING VOTES COUNT – A GENDERED PERSPECTIVE ON ELECTORAL REFORMS

- NJERI KABEBERI

Ms. Kabeberi began her presentation by expressing her expectation of a very interactive forum and called on the participants to freely express their views and opinion. Noting that electoral reforms is a topic that has drawn a lot of public outcry and debate, Ms. Kabeberi drew linkages between the electoral reforms and the constitutional reforms.

An inquiry on the number of persons who had directly or indirectly presented their views to the Committee of Experts¹ charged with the task of overseeing the constitutional review drew a negative response, with only a negligible number of participants having contributed to the constitutional reforms. Interestingly, all participants were of the opinion that Kenya needs a new constitution, although a negligible percentage expected the same to be complete by June 2010. Noting the alarming statistics, Ms. Kabeberi wondered how then did Kenyans expect a new constitutional dispensation if they are not interacting and engaging in the review process.

This remark by Ms. Kabeberi elicited various responses from the audience. One participant quipped that the Kenyan public has learnt to place its dreams and hopes at the lowest possible level, especially in view of the numerous previous failed attempts at constitutional review. The current Constitution was destroyed by reforms introduced between 1963 and 1967 by the Late Thomas Mboya². Therefore, the only way to redeem the Constitution was through the same process that destroyed the Lancaster constitution.

¹ Committee of Experts was established pursuant to section 5 of the Constitution of Kenya Review Act, 2008 as one of the organs of review. It is expected to complete its mandate within 12 months of the enactment of the Act.

² Thomas Joseph Mboya (1930 – 1969) was a prominent Kenyan politician during Jomo Kenyatta's government. He was founder of the Nairobi People's Congress Party, which later joined with Kenya African Union and Kenya Independent Movement, in 1960, to form the Kenya National African Union (KANU) in an attempt to form a party that would both transcend tribal politics and prepare for participation in the Lancaster House Conference where Kenya's constitutional framework and independence were to be negotiated. As Secretary General of KANU, Mboya headed the Kenyan delegation.

Another participant remarked that the current attempt to reform the constitution might just be yet another public relations gimmick. The politicians do not care much for our opinion. Why should we believe that this time their interest is genuine?

Subsequent remarks from the participants demonstrated a lack of confidence in the process and apathy by the public. In justifying the general mood, some participants attributed this to the fact that most of their proposals and suggestions are unlikely to be considered by the COE or by the leaders. These leaders seem to take public concerns very lightly. Noting that despite the gravity of issues being discussed at this Forum, and the fact that invitations were extended to the public, not even one leader was present at the Forum to participate in the discourse. Engaging and interacting with the COE would therefore be a waste of time.

Noting the desperation and lack of interest from the audience, Ms. Kabeberi reiterated the general hope and desire for a new constitution. In view of the sentiments expressed by the participants, Ms. Kabeberi then raised the question - How can you make your vote count?

In response, one participant intimated that he was anxiously waiting for the referendum in order to make his vote count. The general sentiments expressed by other participants were that there was need to change current electoral system whereby the winner takes all and that it is important for Kenyans to consider voting for ideologies rather than personalities, if change is to come to this country. The change must come from us, and not from the politicians. In addition, there is need to establish or strengthen existing institutions which can propel our votes to count. The power of the ballot is useless against the power of the bullet.

In a rejoinder, Ms. Kabeberi stated that not only had she participated and contributed to the COE through CMD-Kenya but also at an individual level. In a recap of the thematic issues for the Forum, Ms. Kabeberi observed that Kenya has had about 7 draft constitutions in the last 19 years. Indeed, it is true that Kenya has been on the road to constitutional reforms for a long time.

Ms. Kabeberi circulated a booklet titled 'Towards a Gender Responsive Constitutional Dispensation' published by CMD –Kenya, which interrogates the constitutional review process to date, the gains and challenges within the various drafts and in particular the gains for women. She expressed her hope that the COE, in coming up with its own draft, will not ignore the gains made by women in

the previous drafts. She urged the participants to read the booklet and to reiterate the sentiments expressed to the COE to strengthen the call for and preservation of these gains.

Comparing women representation in various national parliaments, Ms. Kabeberi presented the shocking statistics that place Kenya at position 103 out of 103 countries. Rwanda leads the pack, with 56.3% of its national assembly occupied by women. Sweden comes second with 47%. Uganda is at 21 and Tanzania at 23. Kenya is the lowest ranked in the East African region.

Explaining the reason for Kenya's low ranking, Ms. Kabeberi noted that the current electoral system in Kenya is 'first past the poll', in which the winner takes all. In the last few years, it has become evident that this system is unfriendly to women due to the violence and corruption involved. Women are not as financially able as their male counterparts, especially since most of the funds used for political campaigns are obtained from fraudulent or corrupt dealings. A glimpse at the list of individuals allegedly involved in most of the corruption scandals in the country will reveal that not a single woman appears on those lists. This, therefore, means that women do not have access to such funding.

In its report, the Kriegler Commission³ recommended a change in the electoral system and proposed that the nominated seats should be allocated to women. If this proposal is taken on board, together with the elected women, there would be a total of 27 seats in Parliament occupied by women. That would be approximately 11%. In comparison to Rwanda's 56%, the situation would still be wanting. Of course, there are also other considerations. Various other groups are clamoring for the nominated seats. These include the marginalized, persons with disabilities and the political loyalists.

The Kriegler Commission also recommended a proportional representation system. With the current system, one needs to belong to a constituency in order to be elected. Ms. Kabeberi submitted that an overhaul of the current system is required if more women are to secure seats in Parliament.

Observing that indeed, there is a nexus between the Constitution and the electoral system, Ms. Kabeberi reiterated her disappointment that very few Kenyans have participated in the current

³ The Independent Review Commission led by Justice Johann Kriegler, popularly referred to as the Kriegler Commission, set up to look into the conduct of the December 2007 controversial and violent general election in Kenya.

reform process. It is vital to use and completely exhaust the current process, since there is no other process in place. The only way to come up with an acceptable draft will be through our participation in the current process.

Despite the largest campaign in the history of the country, women now occupy a paltry 15 seats in Parliament. Comparing the immensity of the campaigns to the ensuing brutality and violence witnessed, Ms. Kabeberi submitted that the more brutal the electoral period, the worse it is for women.

In as much as the COE is tasked to consider the views of Kenyans and carry them on board its new draft, the Committee was not concerned with gender issues in the face of more pressing issues such as devolution. Therefore, there is a need for more and more women to participate in the review process to make their voices heard, and ensure that their concerns are taken on board.

Expounding on the efforts of a parallel committee supported by CMD- Kenya, Ms. Kabeberi briefly have the history of this committee, which initially had 5 women members, out of its 20 members. However, slowly the number of women members dwindled, leaving one woman. How then can one convince the committee that the gender issue is important if the women are not present to push their agenda? She called on women to participate and influence the process.

This parallel committee has designed a process, which includes a set of principles to guide a new constitution, in line with the South African model. The intention is that every clause of the constitution should be tethered against these principles, which are:

- Diversity and inclusivity
- Sovereignty of the people
- Popular participation
- Supremacy of the constitution
- Equity
- Equal protection of all before the law

In addition to the principles, the committee has recommended national values and goals, which embody the issue of separation of powers. In the past, there was a dictatorship of the Executive. We

have since moved onto a dictatorship of Parliament. The constitution must embody that clarity of separation of powers and have checks and balances. There is a need to design strong institutions, which will determine the effectiveness of the checks and balances.

In response to the principles highlighted by Ms. Kabeberi, there was consensus among the participants that these were generally a good idea and that it was necessary to have principles to guide the new constitution. However, whilst commenting on the principles, one participant submitted that whereas it is popular participation is encouraged, on many occasions, it is prudent to let the experts deal with issues since too much democracy can cause anarchy. Subsequent responses from other participants concurred with this view, suggesting that without the necessary checks and balances, democracy could promote anarchy. Democracy, which was defined by a participant as the freedom and right to do whatever one wishes but within a set of defined rules and regulations, would be considered to be too much if it is not premised on principles.

Concluding the brief discussion on democracy, Ms. Kabeberi noted that one important question that arises: Can there be complete separation of powers?

Restating the need to participate in the review process, Ms. Kabeberi emphasized the point that one cannot reject a draft which he has ignored. She implored the participants to participate in the process so that if they choose to reject the draft, it will be based on an informed and well- thought out decision. Kenyans have been demanded a constitution because they wanted to own it. How then can they own the constitution if they do not participate in the process?

Noting that in countries where there has been clear and distinct separation of powers, there has been limited chaos and anarchy. This is because there are institutions that effectively check each other. In the past in Kenya, there has been no clear and distinct separation of powers. For instance, the President appoints judges of the High Court of Kenya. The current method of appointment of organs does little to promote the separation of powers.

The Kriegler Commission assumed that the current electoral system will remain, and that representation by women could be increased within this system. In rebutting this assumption, Ms. Kabeberi noted that in the current system, votes do not count. Assuming that Kenya was to retain the one-house Parliament, the parallel committee recommends proportional representation and a

party list on which elections will be based. This will be similar to the system in South Africa, and is preferred to the constituency-based elections. On this list, each party will be required to field male and female candidates proportionately. It is hoped that this will work to increase women representation in Parliament.

Citing the example of Rwanda, Ms. Kabeberi noted that the country has legal quotas and the constitution guarantees 24 seats for women in the National Assembly and 30% in the Senate. Non-compliance with the rules results in party sanctions. This system calls for a very proactive electoral commission.

It was generally agreed amongst the participants that the recommendation to have party lists is advisable. The major challenge, however, would be how to come up with the lists. It was noted with great concern that women often lose at the constituency level, thus it is necessary to set in place mechanism that would ensure that they are included in the party lists. Some of the recommendations from the participants included:

- merging the party list and the constituency so as to have mixed proportional representation and a popular party list, which would be agreed upon by the respective parties
- media campaigns should be launched in conjunction with the civil society in order to sensitize the public on equal representation, including women and youth

Responding to a remark about the role of CMD-Kenya in funding political parties, Ms. Kabeberi clarified that CMD is a membership organization of the political parties in Kenya. Membership, however, is only taken following national elections. The 3 major political parties were not members of CMD since they only came into being just before the elections. The only way to avoid chaos and violence is to overhaul these political parties and the electoral system as a whole. The current situation is that once a politician is elected, he owes no allegiance to the party since he is free to move from one party to another. Fortunately, the enactment of the Political Parties Act has put an end to this.

Although Kenya is strong in terms of the civil society and in business, its weakest pillar lies within political parties. CMD was established for the purpose of strengthening these political parties. Ms. Kabeberi clarified that in the wake of the Political Parties Act, CMD no longer funds political

parties. It now focuses on training these parties on resource management in order to strengthen their internal structures that have been weak since time immemorial.

Another proposal by the parallel committee, which is rather controversial, is that the National Assembly should comprise of two houses. The composition of the second house would recognize the 56 different ethnic groups, each having 2 representatives to the house. The goal of this would be to address the issue of marginalization, since these representatives would be elected directly by their communities, with proportionate representation by both male and female candidates.

Responding to the remarks by Ms. Kabeberi, the general mood among the participants was that although the idea is a noble one, Kenya is not mature enough or ready for a 2nd House. Whilst some participants thought it would be better to incorporate the minority within the existing House, others were of the view that it would be difficult to supervise and enforce the gender issue, let alone the tribal aspect. Some candidates would be barred from vying for posts since they do not reside amongst their ethnic communities. It was felt that the first and paramount challenge for Kenya is to rectify the first house before embarking on establishing a second one.

Ms. Kabeberi submitted that devolution is a concept that will be entrenched in the constitution, come what may. It is important therefore to start devolving resources and giving credence to the different regions for what they already produce. In its recommendations, the parallel committee proposes 3 levels of devolution, namely, regional, sub-regional and local authorities. She urged women to ensure that they participate at all levels of devolution, to create a balance and promote proportionate representation at all levels.

She further called on the participants to demand accountability and foster the ideology of gender parity. A change of attitude and mindset is vital if reforms are to take place in this country. Continued reliance on the central government is not sustainable. In addition, in order to effect these changes, we need to be proactive and radical in our thinking. The constitution that we come up with needs to be one that will serve the country for centuries to come.

In conclusion, Ms. Kabeberi noted that there is great fear about ethnicity and the current presidential system. However, there is need to familiarize ourselves with the terms used in the constitutional reforms so as to be informed, to participate and to be prepared for the referendum.

The sovereignty of the people, in whatever form, is the most important element. We need to come up with systems that will not only work, but will also stand the test of time. In so doing, we must also advocate for gender parity in whichever way we can.

WRAP UP & CONCLUSION

From the vibrancy and enthusiasm of the participants, it is clear that electoral reforms are of great concern to most Kenyans. Bearing in mind the nexus between the constitutional and electoral reforms, and judging from the intensity of the discussion during the previous Forum, electoral reform, just like constitutional reform, is a topic that will continue to draw a lot of public attention and elicit tremendous reaction.

Wrapping up the edifying discussion, Ms. Kihiu thanked the panelist and participants for their valuable contribution. She called on the participants to be more proactive and engage in the constitutional reform process, since this was one sure way of bringing about electoral reforms.

END