

The background features a series of light green rectangular blocks of varying heights and widths, arranged in a stepped, staircase-like pattern that ascends from the bottom left towards the top right. The remaining background space is white.

Chapter 5

Divisive elections

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71. Our politics have taken on the aspect of a conflict that every five years threatens to destroy lives, and even puts the continuity of our country at risk. It allows those we charge with responsibility, from the high offices of State, to our schools, churches, and mosques, to manifest the worst in themselves and to degrade our trust even further.
72. In our rush to adopt, and even mimic, foreign models, particularly from the democratic West, we have forged a politics that is a contest of us versus them. And we have chosen our 'us' and 'them' on an ethnic basis, especially in competing for the Presidency.
73. The Presidency is the highest office in Kenyan politics. Competition for it is the leading contributor to divisive and destabilising elections. If we maintain the status quo, it will mean that every five years Kenyans will risk crisis, ethnic division, and possibly even violence. At the core of this challenge is the desire for inclusion in the governance of the country, at the highest levels, and representation to access resources.
74. Kenyans, by and large, believe that they will gain personally from being the clients of a successful political leader, with that success being gained by victory in elections. Despite the decentralisation of decision-making and resource allocation through devolution, there is still a strong belief across the country that winning the Presidency will lead to an unequal allocation of public resources and service delivery with the ethnic group of the winner taking a disproportionate share. One Kenyan who communicated his views to the Taskforce said, 'People want their own in power because resources go with the Presidency'.
75. The Taskforce learned that Kenyans overwhelmingly hope for elections that deliver predictable stability, peace, and an opportunity to reward good governance and relevant political platforms. The cycle of division, and the risk of political and even violent crises, every five years is roundly condemned throughout the country. Kenyans associate the winner-take-all-system with divisive elections and want an end to it.

Winner-take-all-system

76. The winner-take-all system, as it is understood by Kenyans, is a political system in which an alliance defined by ethnicity wins an election and the elected candidate proceeds to assume exclusive control of the National and County-level Executive and makes decisions that are perceived to exclude the interests of ethnic alliances that were on the losing side of the election.
77. Ironically, the aftermath of elections often brings perceptions that parts of the winning ethnic coalition are also excluded. Even where the winner appoints members

of different ethnic groups, including from the communities on the losing side, they are seen more as tokens rather than meaningful expressions of the political will of their communities. All the present constitutional and legal provisions for public participation and the division of powers between the Executive, Parliament, the judiciary and the host of independent commissions, have not succeeded in shifting Kenyans' perception that their country is governed by a winner-take-all system.

78. This is a challenge that Kenyans have recognised for the last twenty years. Prior to the 2010 Constitution, we had a plurality system in which the Presidential candidate won by having more votes than any other and at least 25% of the vote in five provinces. Recognising the need for a higher degree of representation, the present Constitution changed this to the 50%+1 system with provision for a run-off if the first vote does not attain the threshold. Even this has not satisfied Kenyans' desire for greater representation of their political interests in the Executive. Kenyans told BBI that they want not just to see the 'Face of Kenya' in ethnic terms included in the high table of power, at the National and County levels, but that they want those who take seats around it to be politically and socially accountable to them.
79. With the perceived high stakes of the winner-take-all system, elections for the President have taken the quality of a do-or-die affair, which leads to extreme scepticism and mistrust of the electoral process. The importance of the outcome for major politicians is so high that there is either the strong temptation either to rig votes or to reject the results of credible elections. 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. Unfortunately, since ethnicity is the main currency of such intense electoral competition, it eventually takes on the character of a conflict between ethnic groups, leading to the ethnic antagonism that has undermined national unity and compromised security and stability.

Delivering a system that addresses our unique needs

80. Kenyans told the Taskforce that they want to trust that Government will be guided by approaches that deliver equality and equity in governance and the utilisation of public resources. While the Constitution and law have attempted to deliver the oversight necessary to achieve this, and tried to address the need for inclusivity, the high level of corruption suggests that office holders still exercise a level of discretion that is open to abuse and the exclusion of other Kenyans.
81. Kenyans noted that few communities have had a chance to have their member as President because under the present system the Presidential election is in effect a form of ethnic census. For more Kenyans, drawn from different ethnicities, to have a chance to lead the country it is necessary for there to exist strong, multi-ethnic, and nationwide parties that permit leaders of stature to grow; these may come from any number of ethnic groups. Kenyans had different proposals on how to change the political system. Common to these proposals was a desire for greater inclusivity,

equality, fairness, equity, and accountability in the distribution of resources and for the top leadership table to seat not only their ethnic brethren but individuals who express their political will as expressed by parties and electoral outcomes.

82. Kenyans have been in a process of institutional reform for decades. The debates about the extent of change required in our political institutions have been extensive and have too often been guided by partisan and short-term political interests. The political class, whose members draw most of their political support from their leadership of ethnic communities, has been shy and hesitant to accept, in fundamental terms, that the transformative reform of Kenya into a truly united and successful country can only be achieved by meeting the ethnicization of political competition head-on. It is difficult for a political class that owes so much to ethnicity as a rallying tool to have the will to reduce its importance. There is a need for enlightened and determined leadership to shift this paradigm, and by doing so to lay the foundations for a stable politics for generations to come.
83. However, even as a new structure of the Executive is under consideration, it is useful to remember that the very size and inefficiency of Government is at the heart of the current debate. It is equally useful to bear in mind that a model that works for Kenya must entail cohesive and strong leadership that can offer decisiveness and democratic and accountable governance without the paralysis usually induced by bureaucratic infighting that arises where the constitutional parameters are ill-defined or open to multiple interpretation. It is therefore crucial that inclusivity and diversity in Executive power be balanced against the necessity for effective Government. We must make decisive changes to every other part of our system of selecting leadership and governance, if we are to overcome divisive elections.

MAJOR RECOMMENDATIONS

84. **An autochthonous national executive structure¹** — As a country, since we won independence, we have experimented with the three major Western models of executive government. Between 1963 and 1964, we had a pure Parliamentary system; we felt it was not serving us. Between 1964 and 2007, we had a hybrid semi-presidential system; we felt it was not serving us. Between 2008 and 2013, we had a hybrid cohabitation system under the National Accord; we felt it was not serving us. Since 2013, we have had a pure Presidential system; but Kenyans are agreed that they do not want a winner-take-all system. All these models since independence were borrowed and did not reflect our unique needs as Kenyans. Listening to Kenyans across the country and hearing their views reveals that they want a home-grown, inclusive system that reflects not only the pre-colonial political structure but also our day-to-day autochthonous system. Kenyans want to see the inclusion of different political, and identity interests in the Executive, while also wanting to

¹ Meaning a homegrown system

directly vote for their President. Kenyans told the Taskforce that while they appreciate the increased accountability of the parliamentary model, they also want to vote directly for a President holding executive power to offer decisive leadership. They also want to have a President who leads an Executive that enjoys overwhelming support from across the country, and from the bulk of ethnic communities. Kenyans also told the Taskforce that they want a strong opposition and a Parliament that will hold the Executive accountable through applied checks and balances.

The kind of autochthonous, home-grown executive structure that responds to our political realities, sought by Kenyans is broad-based and inclusive, and has the following characteristics:

- A. **Running for and winning the Presidency** — The President shall be elected through universal suffrage. For a candidate to be declared the winner of the Presidential election, he or she must win 50% + 1 of the Presidential votes and at least 25% of the votes cast in each of more than half of the Counties, as is now the case.
- B. **An Executive President** — The President will remain the Head of State and Government and the Commander-in-Chief. He or she shall be the central symbol of National Unity. The President will chair the Cabinet, which comprises the Deputy President, the Prime Minister, and Cabinet Ministers.
- C. The Executive, under the authority of the President, shall have the power to determine the policy of the Government in general, while the Ministers under the leadership of the Prime Minister, shall be collectively responsible in the National Assembly for the execution of the affairs of the Government.
- D. **Term limit** — Retain the present two-term limit for the role of President.
- E. **Deputy President** — The Deputy President is the running mate to the President. The Deputy President shall deputise the President.
- F. **Prime Minister** — Within a set number of days following the summoning of Parliament after an election, the President shall appoint as Prime Minister, an elected Member of the National Assembly from a political party having a majority of Members in the National Assembly or, if no political party has a majority, one who appears to have the support of a majority of MPs.
- G. **Approval by Parliament** — The nominee for Prime Minister shall not assume office until his or her appointment is first confirmed by a resolution of the National Assembly supported by an absolute majority vote of MPs. If the Prime Minister nominee is not confirmed, the President shall have another set number of days to make another appointment. This process shall continue until there is a successful nomination for Prime Minister. A measure to ensure that this process is not indefinite, and that governance is continuous should be considered. The Taskforce would also like to point out that some members of the public

expressed concern that the use of simple majorities may find it a challenge to guarantee inclusivity in Kenyan politics. There were proposals made for raising the bar and requiring higher majorities. The Taskforce members felt that this is a matter for a larger national conversation.

- H. **Dismissal** — The Prime Minister may be dismissed by the President or through a vote of no confidence in the National Assembly that wins an absolute majority.
- I. **Leader of the Official Opposition** — The runner-up of the Presidential election becomes an ex-officio Member of Parliament and the Leader of the Official Opposition if his or her party is not represented in the Government, or of a coalition of Parliamentary parties not represented in the Government.
- J. **Need for a strong opposition** — The party or coalition of parties that is not in Government shall be the Official Opposition.
- K. **Shadow Cabinet** — The Leader of the Official Opposition shall be enabled to have a Shadow Cabinet to challenge the Government's positions in Parliament. This will include the ability to have adequate provision of quality research on the policy and legislative agenda of the Government.
- L. **Question Time** — The Opposition will play a key role in Prime Ministerial and Ministerial Question Time sessions in Parliament. Question Time is an opportunity for MPs to question Government Ministers about matters for which they are responsible.

85. **The Role of the Prime Minister** —

- A. The Prime Minister shall have authority over the supervision and execution of the day-to-day functions and affairs of the Government.
- B. The Prime Minister shall be the Leader of Government Business in the National Assembly.
- C. On the President's tasking, the Prime Minister will chair Cabinet sub-committees.
- D. In the exercise of his authority, the Prime Minister shall perform or cause to be performed any matter or matters which the President directs to be done.
- E. The Prime Minister will continue to earn his or her salary as a Member of Parliament with no additional salary for the prime ministerial role.
- F. The Principal Secretary in the Office of the Prime Minister will chair the Technical Implementation Committee of Principal/Permanent Secretaries.
- G. To avoid the politicisation of the Public Service, the Permanent or Principal Secretaries will not be subject to Parliamentary approval. Their accountability will be strictly administrative and technical.

86. **A mixed cabinet** — The cabinet is a crucial part of the Executive arm of Government. Similarly, its structure is critical to an inclusive and efficient Government. The current debate on whether the Cabinet adds enough value in governance and delivery has revolved around three key issues. The first issue has been whether it ought to be a cabinet of technocrats (like the American system) or whether it should be composed of elected Members of Parliament (akin to the British parliamentary system). There is discontent with the current system, judging from what Kenyans told the Taskforce. The Taskforce proposes that the Cabinet be structured as follows:
- A. The President will appoint Cabinet Ministers after consultation with the Prime Minister.
 - B. The Ministers shall be responsible for the offices that the President establishes in line with the Constitution.
 - C. The Cabinet shall be drawn from both parliamentarians and technocrats, with the latter being made ex-officio Members of Parliament upon successful Parliamentary approval.
 - D. The Taskforce is recommending that the Cabinet Secretary be renamed Cabinet Minister.
 - E. To ensure more effective political direction and Parliamentary accountability, there shall be a position of Minister of State that will be appointed from members of the National Assembly and taking direction in their ministerial duties from Cabinet Ministers. These Ministers of State will continue to earn their salary as MP with no additional salary for their ministerial role.
 - F. Eliminate the post of Chief Administrative Secretary.
87. **Representation in the electoral system** — It is crucial that whatever form reforms to representation take, that they accord to the following principles if Kenyans are to be fairly and equally represented:
- A. That the people's choice, as reflected in the election of their representatives, including in Party primaries and nominations, shall be upheld through fair, free and transparent elections.
 - B. Individuals included in any Party lists shall initially have undergone a process that uses transparent public participation in the Counties even before any other vetting procedure is used.
 - C. That there shall be the equalisation of representation and equality of citizenship, as much as possible, by ensuring that each Kenyan vote has the same status and power, as envisaged in the Constitution.
 - D. Parties will be compelled through the Political Parties Act to be consistent with the Constitution to meet the Gender Rule and other Constitutional measures of inclusion

through their party lists. This will equalise both genders in political terms, rather than creating a parallel system that creates a sense of tokenism.

- E. Party lists for Members of County Assemblies shall follow the same principles and processes of public participation, elections and vetting as the National Assembly. This will ensure that the people and parties can ensure that there is accountability in a direct manner.
- F. All the existing 290 constituencies will be saved, including the protected seats because they have become key for representation of sparsely populated areas.
- G. Independent candidates -- There should be considered a standing legal political vehicle that is a party of independent candidates.
- H. Devolve political parties to have strong County based party branches that will allow the people to have the political forums and avenues to hold their elected leaders accountable throughout a term and not just during elections.
- I. The nomination lists through parties should be completed in a transparent process governed by the political parties overseen by the Registrar of Political Parties and the IEBC.

88. Changes to the Independent Electoral and Boundaries Commission —

- (a) A mechanism be devised that gives leaders of parliamentary political parties a role in the recruitment of Commissioners of IEBC. In nominating candidates to be Commissioners, the political party leaders should nominate individuals who are non-partisan, with a record of accomplishment and integrity, and who are not known political supporters or activists of the party.
- (b) From the views received from Kenyans by the Taskforce, faith in the IEBC remains low. The Taskforce therefore recommends that we go to the next election with a clean slate to strengthen faith in the institution.
- (c) All IEBC staff should be employed on a three-year contract, renewable only once, if their performance is good. Otherwise, it will be terminated. This will prevent the continuation of errors by enabling each Commission at one time in its term to make appointments.
- (d) Returning officers should be hired through a process like that used for commissioners, with the involvement of public participation. At the end of the process of recruiting returning officers, IEBC should receive reports on what their decision is and the basis on which they made the decision. This should be available to the public.
- (e) Returning officers should be contracted on a part-time basis and should not oversee more than one general election.

- (f) Any person with at least fifteen (15) years management experience at senior level should qualify to apply for Chairmanship of IEBC. It should not be the preserve of lawyers. However, one of the Commissioners should be a lawyer.
- (g) All current senior officers of IEBC should be vetted.
- (h) Separate the duties of Secretary and Chief Executive Officer; make the Chairman of the Commission the Chief Executive Officer.
- (i) The composition of the Commission must reflect the Face of Kenya on all levels.
- (j) Explore ways to enact provisions that reduce the disproportionately high costs of our elections. The party list system is one.
- (k) Reform present electoral system to ensure it is simple, accurate, verifiable, secure, accountable and transparent as mandated by Article 86 of the Constitution.