ELECTORAL COMMISSION OF KENYA

Telephone: lNairobi 222072
  When replying please address the
Chairman, Electoral Commission
of Kenya

Ref. No. **ECK/ROC/56A**
                      and date
To all Registered Political Parties

ANNIVERSARY TOWERS
6TH FLOOR
UNIVERSITY WAY
P.O. Box 45371
NAIROBI

...........**November 18**.........., 2004

RE: REVIEW OF PARLIAMENTARY CONSTITUENCIES

At the consultative meeting attended by representatives of registered political parties and the Electoral Commission of Kenya (ECK) held on 9/9/2004 and 22/10/2004 at Old Chamber of Parliament in Nairobi it was agreed that there was need for additional parliamentary constituencies to be created. Participants were not clear as to the number (of the increase) and how that could be determined. It was noted that parliament is solely responsible for increasing the number of parliamentary constituencies and determining that number in its own universal wisdom. However, the participants requested the ECK to provide the registered political parties with the formula it will put in use in determining the districts where such new parliamentary constituencies would be created.

The ECK does not have a magic formula. It has read and understood very clearly its constitutional mandate under section 42 (3) of the Constitution of Kenya. The section provides as follows:

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"(3) All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to the extent that it considers expedient in order to take account of-

> *(a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely-populated rural areas;*
>
> *(b) population trends;*
>
> *(c) the means of communication; -*
>
> *(d) geographical features;*
>
> *(e) community of interest; and*
>
> *(f) the boundaries of existing administrative areas,*

and, for the purposes of this subsection, the number of inhabitants of any part of Kenya shall be ascertained by reference to the latest census of the population held in pursuance of any law."

These provisions place priority on population i.e. equality of population between parliamentary constituencies. However there is clear recognition of the fact that strict application of the population index may lead to inadequate representation for areas that do not have large populations. These provisions impliedly empower the ECK to take into account the accessibility of the representation if it considers that will bring about adequate representation.

It is simple mathematics that in order to get the national population average per parliamentary constituency the total population of Kenya is 28,686,607 divided by the total number of parliamentary constituencies (210). That national average is 136,603 residents. Applying that national average to the present parliamentary constituencies these would fall under these categories:-

- 95 above the national average population
- 115below the national average population

Majority of the parliamentary constituencies that have population, which is below the national average are situated in rural districts characterized by large tracts of land with

sparse population, demanding means of communication, and with prohibitive geographical features. The element of community of interest is prominent in some of them. These aspects constitute the justification for the creation of such constituencies and their continued existence. That is what section 42 (3) (a) (b) (c) (d) (e) and (f) of the Constitution permits to happen.

In the light of the foregoing the ECK considers the size of a parliamentary constituency to be an essential geographical feature which must be considered. It therefore endeavoured to establish the national average size of the parliamentary constituencies and found it to be 2,770 sq. km. This is found by dividing the total surface area of Kenya (581,677 sq. km) by the total number of parliamentary constituencies (210). On this basis the current parliamentary constituencies fall under the following categories:

- those at or above the national average size –   48
- those below the national average size   -   162

Except in a few cases it is parliamentary constituencies whose populations fall *above* the national average that occupy an area *below* the average size. And generally parliamentary constituencies with above national average size have sparse population plus the other relevant factors which are specified section 42 (3) of the Constitution whose full text was reproduced at page 1.

Confronted by these matters the ECK had to devise a method which falls within the constitutional ambit. It noted that in most countries including Lesotho, Canada, Australia etc their Constitutions provide for the extent to which the population average can be deviated from. They provide a percentage e.g. 10%, 25% etc. This means deviating from the national average upwards or downwards by the prescribed percentage. In Kenya there is no such restriction. The matter is left to the ECK's good judgment guided by sense of fairness and responsibility. This is a heavy responsibility.

ECK can thus deviate from that national population average by any margin it considers fair and reasonable. It proposes to do so. But the size of the margin of that deviation will determine the number of new parliamentary constituencies that will be created. For example 10% deviation produces a smaller number of new parliamentary constituencies

than 40% deviation. Guided by this provide parliament can decide the number of new parliamentary constituencies to be created.

ECK proposes, for this purpose, to raise the average population for urban constituencies by that margin (10% or 15% or 25% or 40% depending on the number of seats to be increased). It intends to treat the Nairobi Area, Mombasa District and Nakuru Munipalities as the only urban centres with urban constituencies and apply that increased average to them. That way it will be possible to determine how many more parliamentary constituencies may be created in these three urban centres. Clearly the other constitutional factors have no place in the three areas above.

Then, for the same purpose, ECK proposes to lower the average population for rural districts by the same margin that applies to the three purely urban centres. This process will identify the districts where new parliamentary constituencies may be created. A system of weighting points to be earned by a district on the population average (i.e. at the lowered number) and the other constitutional factors will disclose fairly closely the districts which deserve new parliamentary constituencies. That will be the proper and fair way to deal with urban/rural municipalities like Kisumu, Nyeri and Eldoret whose populations may be large though their sizes are small. The population will compensate for the smallness of the sizes. At the same time the purely rural districts will score high on the sizes.

In dealing with sizes of the constituencies the ECK has again formulated a method so as to be as fair as possible. E CK will use the national average size formula (previously explained) to identify where new parliamentary constituencies will be created in the case of sparsely populated districts. Furthermore, a system of weighting of points amongst these will be necessary in order to ensure matters like density of population, the means of communication, geographical features other than size (e.g. water logged districts), community of interest and population trends (migratory etc) are properly considered. No weight will be placed on boundaries of existing administrative areas except so as to align those boundaries with parliamentary constituencies' boundaries

It ought to be added that in all cases where weighting of points may be employed population must be awarded a larger number of points than those to be awarded to the other constitutional factors.

Viewed from the foregoing it is clear that the methods which the ECK has devised do not favour any political party or communities or districts. Political parties' leaders and members can be able to determine in advance where the new parliamentary constituencies will be created on the basis of the methods illustrated in this letter..

The ECK appeals to Parliament to seize this responsibility which solely belongs to it and increase the minimum and maximum number of parliamentary constituencies, into which Kenya may be divided. That will then enable the ECK to determine the actual number to be created and distribute them fairly and in accordance with the constitution. The ECK would like to inform members of Parliament that when it went round the country in 2001 to review civic wards there were countless appeals from the sovereign people of this country for the number of parliamentary constituencies to be increased so as to improve parliamentary representation. That pressure has continued up to now. Thus ECK respectfully maintains that by acting as it proposes, Parliament will truly be mindful of the electoral welfare of all Kenyans.

The ECK would like to appeal to all the registered political parties to purge our parliamentary leaders that the country needs additional parliamentary constituencies for the 2007 general elections.

Please pay attention to the information contained in the documents attached to this letter.

Thank you.

Yours faithfully,

S. M. Kivuitu
Chairman

Encis

1.INCREASE OF CONSTITUENCIES – POSSIBLE JUSTIFICATION

a. **Current Position**

> The number of Constituencies is currently at the MAXIMUM – 210 as prescribed by Parliament under Section **42(2)** of the Constitution.

> It should be appreciated there has been concerns from leaders and the general public in various forums on the need to increase the number of constituencies.

> There have also been concerns on the need to reduce the representation gap.

> The country carried out a **National Census in 1999** and there has been no change to the maximum number of MPs as provided in the Constitution section **42(2).**

b. **Increase**

The Commission is of the considered view that the number of constituencies be increased in line with the population increase.

> Population Census was carried out in **1989** and the then total population was **21,448,774**. Number of MPs then was 188.

> Another Population Census was carried out in 1999 and then total population was 28,686,607.

> The percentage increase is $\underline{34} \times 188 = 63.92$
> $$100$$
> rounded up to 64 MPs.

> ECK carried out a constituency review in 1996 and added 22 seats to the 188 and hence the current 210.

> The increase should now be the 64 less 22 already added hence the current ECK recommendation of 42 seats to be increased.

2. **DISTRIBUTION OF CONSTITUENCIES**

a. It is generally accepted that the level of representation that achieves close quality is basically one based on population. In order to take

into account the accessibility to representation factor a formula to cater for both population and the constitutional allowance for the ECK to deviate from the population factor be put in place. The Commission has discussed the issue exhaustively and came up with the need to categorise the constituencies into two:-

> Urban - Constituencies which basically fall within towns and City of Nairobi.

> Rural - Constituencies which are Neither arid, semi arid nor urban and are not sparsely populated.

b **Constituency Quotient** This is the Average population of the National Population divided by the number of constituencies.
The resultant figure is the **quotient**.

❖ The current constituency **quotient** is

$$\frac{28,686,607}{210} = 136603$$

❖ The constituency quotient to be used if the constituencies were to be increased by the recommended **42** will change because the total number of MPs will increase to **252**.

❖ The resultant **quotient** will be
$$\frac{28,686,607}{252} = 113,396$$

C **Deviation**

The Commission now wishes to come up with a formula that will allow for **deviation** from the **population factor** to take into consideration **other factors as prescribed in the Constitution**.

The deviation which has been discussed and agreed upon is basically varying the current population quotient by 30% above for urban constituencies and the **30% below** the average for all the arid and semi arid and sparsely populated constituencies and have an area in sq km above the constituency average in size. The idea is borrowed from constitutions of other countries which have adopted a similar variation.

Note: **Please peruse Annex No.2 which explains the practice in Canada in dealing with the like problems.**

d **Resultant population average to be applied**

If the 30% factor is applied then the resultant population average to be applied per category **could** be as follows:-

RURAL **URBAN**

(30% below average) (30% above average)

Note: Those figures are hypothetical. They are intended to illustrate how the method works.

e **Variation**

The population figure and the percentage given under above may be varied upwards or downwards depending on the number of constituencies to be increased. The % and the variation will be quantitative and shall not give room for any manipulation.

CANADA

In Canada, the *Electoral Boundaries Readjustment* Act specifies that a Commission is to draw constituency boundaries in such a way that the population of each constituency is as close as possible to the quotient obtained by dividing the provincial population of eligible voters by the number of seats allocated to the province. No constituency is permitted to have a population smaller than 75% of this figure, or greater than 125%. Commissions may vary the size of constituencies within this range on the basis of "s pecial geographic considerations," such as the density of population in various regions of the province, and the accessibility, size and shape of such regions. Variations may also be allowed if "any special community or diversity of interests of the inhabitants of various regions" appears to warr ant them.

Another issue involves the distinction between rural and urban areas. It is accepted that urban constituencies could have a greater population than rural constituencies. There is some merit to treating the two differently: urban areas

are much more compact, whereas rural areas usually have much sparser populations, making communication and transportation more difficult.

After receiving maps and documentation on the relevant population data from the most recent decennial census from the chief electoral officer of Canada, commissions have one year to make proposals, hold public hearings and finalize their report. Guidelines for these enormous tasks are found in the Electoral Boundaries Readjustment Act of 1985. A look at the guidelines makes it clear that the readjustment exercise is not simply a mathematical computation but, rather, a delicate balancing act that must take into account human interests as well as geographic characteristics. In the course of their work, the commissions receive technical and administrative assistance from the staff of the chief electoral officer at Elections Canada.

The Commissions are charged with dividing the territory assigned to them into specified number of electoral districts, so that the population of each one will correspond "as closely as is reasonably possible" to the predetermined average (or "quotient"). But,, in fixing the

electoral district boundaries, they must also take into consideration.

The community of interest or community of identity in or the historical pattern of an electoral district.... And a manageable geographic size for districts in sparsely populated, rural or northern regions........

To accommodate these human and geographic factors, the commissions are allowed to deviate from the average population figure when setting their boundaries. While generally restricted to a tolerance of plus or minus 25 per cent from the quotient, a commission may exceed this limit "in circumstances viewed by the commission as being extraordinary.

REVIEW OF PARLIAMENTARY CONSTITUENCIES

Sam, the formula we use in demarcating constituencies is rather simple. We give a weight or value of one (1) to land size and nine (9) to population. This means that, in your case, the total land size of Kenya will carry a value of one (1), and the total population of Kenya a value of nine (9). This gives you a combined weight of ten (10).

Next, we express the land size of each region as a factor of one (1), as shown below

REGION	AREA (1)	QUOTA
Western	9,236	0 10
Central	3,815	0 04
Gt. Accra	995	0 01
Volta	7,943	0 09
Eastern	7,698	0 08
Ashanti	9,417	0 10
B. Ahafo	15,273	0 17
Northern	27,175	0 29
U/East	3,516	0.04
U/West	7,032	0 08
TOTAL	92,100	1 00

Similarly, we express the population of each region as a factor of nine (9) as shown below

REGION	POPULATION (9)	QUOTA
Western	1,924,577	0 92
Central	1,593,823	0 76
Gt. Accra	2,905,726	1 38
Volta	1,635,421	0 78
Eastern	2,106,696	1 00
Ashanti	3,612,950	1 72
B. Ahafo	1,815,408	0 86
Northern	1,820,806	0 87
U/East	920,089	0 44
U/West	576,583	0 27
TOTAL	18,912,079	9 00

Then, for each region we add up the quota for land size and the quota for population to get a combined or total quota, which is an expression of fraction of ten (10) as shown below

REGION	AREA (1)	QUOTA	POPULATION (9)	QUOTA	TOTAL QUOTA
Western	9,236	0 10	1,924,577	0 92	1.02
Central	3,815	0 04	1,593,823	0 76	0.80
Gt. Accra	995	0 01	2,905,726	1 38	1.39
Volta	7,943	0 09	1,635,421	0 78	0.87
Eastern	7,698	0 08	2,106,696	1 00	1.08
Ashanti	9,417	0 10	3,612,950	1 72	1.82
B. Ahafo	15,273	0 17	1,815,408	0 86	1 03
Northern	27,175	0 29	1,820,806	0 87	1 16
U/East	3,516	0 04	920,089	0 44	0.48
U/West	7,032	0 08	576,583	0 27	0 35
TOTAL	92,100	1.00	18,912,079	9 00	10 00

The total quota is the factor that we use to determine the distribution of seats, dependent, of course, on the number of seats in the legislature. If we assume that there are 200 parliamentary seats, the following outcome would emerge, using the following formula: 200 x factor (total quota) ÷ 10.

REGION	AREA (1)	QUOTA	POPULATION (9)	QUOTA	TOTAL QUOTA	RATIO (200)	SEATS
Western	9,236	0.10	1,924,577	0.92	1.02	20.40	20
Central	3,815	0.04	1,593,823	0.76	0.80	16.00	16
Gt. Accra	995	0.01	2,905,726	1.38	1.39	27.80	28
Volta	7,943	0.09	1,635,421	0.78	0.87	17.40	17
Eastern	7,698	0.08	2,106,696	1.00	1.08	21.60	22
Ashanti	9,417	0.10	3,612,950	1.72	1.82	36.40	36
B. Ahafo	15,273	0.17	1,815,408	0.86	1.03	20.60	21
Northern	27,175	0.29	1,820,806	0.87	1.16	23.20	23
U/East	3,516	0.04	920,089	0.44	0.48	9.60	10
U/West	7,032	0.08	576,583	0.27	0.35	7.00	7
TOTAL	92,100	1.00	18,912,079	9.00	10.00	200.00	200

Once each region's allocation of seats has been determined, we then follow the same principles and steps outlined above to distribute the seats among the districts of the region. At this level, we also make a distinction between an urban and a rural constituency. In our case, an urban constituency has greater population than a rural one. This practice has the merit of reducing huge imbalances in the geographical sizes of the constituencies. But it is entirely up to you to set up any such parameters, based on your close knowledge of the Kenyan situation.

I hope this information is useful. Good luck in reviewing your constituencies.

K. Afari-Gyan