

Rt. Hon. Speaker

The Report is recommended  
for your approval for  
tabling.



REPUBLIC OF KENYA

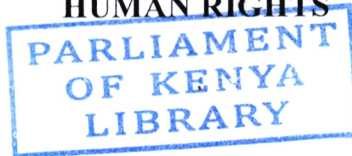
18/01/2023

THIRTEENTH PARLIAMENT | FIRST SESSION

PAPERS LAID	
DATE	19/1/2023
TABLED BY	Chair.
COMMITTEE	JLHRC
CLERK AT THE TABLE	David

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS



REPORT ON THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY  
BILLS NO. 49 OF 2022)

Approved for tabling  
*[Signature]*  
Rt. Hon. Speaker  
12/01/2023

Clerk's Chambers,  
The Senate,  
Parliament Buildings,  
NAIROBI.

January, 2023

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## **LIST OF ABBREVIATIONS/ACRONYMS**

CAF	County Assemblies Forum
COG	Council of Governors
IEBC	Independent Electoral and Boundaries Commission
LSK	Law Society of Kenya
NGEC	National Gender and Equality Commission
NYC	National Youth Council
PPLC	Political Parties Liaison Committee
PSC	Parliamentary Service Commission
PSC	Public Service Commission
PWDs	Persons living With Disabilities

## PRELIMINARIES

### Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under the Standing Orders of the Senate and is mandated *'to consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.*

### Membership of the Committee

The Committee is comprised of –

- |  |                    |
|--|--------------------|
| 1) Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson      |
| 2) Sen. Raphael Chimera Mwinzagu, MP       | - Vice-Chairperson |
| 3) Sen. Fatuma Adan Dullo, CBS, MP         | - Member           |
| 4) Sen. Samson Kiprotich Cherarkey, MP     | - Member           |
| 5) Sen. William Cheptumo Kipkiror, CBS, MP | - Member           |
| 6) Sen. Hamida Kibwana, MP                 | - Member           |
| 7) Sen. Catherine Muyeka Mumma, MP         | - Member           |
| 8) Sen. Veronica W. Nduati, MP             | - Member           |
| 9) Sen. Andrew Omtatah Okoiti, MP          | - Member           |

## FOREWORD BY THE CHAIRPERSON

**Hon. Speaker,**

The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) was published *vide* Kenya Gazette Supplement No. 174 of 2<sup>nd</sup> November 2022 and was introduced in the National Assembly by way of First Reading on 17<sup>th</sup> November, 2022. The Bill was considered by the National Assembly and passed without amendments, on 1<sup>st</sup> December, 2022.

Pursuant to Article 110(4) of the Constitution, the Bill was referred to the Senate where it was introduced, by way of First Reading, on Thursday, 8<sup>th</sup> December, 2022. Thereafter, the Bill stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration

In compliance with the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, the Committee proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the Daily Nation and Standard newspapers on Friday, 9<sup>th</sup> December, 2022 inviting members of the public to submit written memoranda to the Committee on the Bill. Additionally, the Committee sent invitations to key stakeholders inviting them to submit their comments on the Bill.

Following the call for submissions, the Committee received written memoranda from nine stakeholders, namely: Office of the Registrar of Political Parties, Council of County Governors, National Gender and Equality Commission, County Assemblies Forum, Katiba Institute, Kenya Conference of Catholic Bishops, National Youth Council, Independent Electoral and Boundaries Commission, and Mr. Eliud Matindi.

**Hon. Speaker,**

The Committee proceeded to consider the Bill at the length and held extensive discussions thereon including consultations with key stakeholders. Among the issues the Committee was particularly keen to resolve were –

- i) How to ensure that the selection panel complied with the High Court Judgment in Petition E364 of 2020 - *Okiya Omtatah Okoiti V Attorney General & 5 Others*;
- ii) How to ensure that the selection panel complied with Article 27(8) of the Constitution on the two thirds gender principle;
- iii) How to address concerns on the suitability of the Political Parties Liaison Committee (PPLC) to nominate a member to the selection panel, noting –
  - a) the PPLC comprised political parties, the IEBC and the ORPP, which presented potential conflicts of interest particularly on the part of the IEBC;

- b) the PPLC existed at the national level and the county level, and the Bill did not clarify which level would undertake the nomination to the selection panel;
  - c) the PPLC was a forum for dialogue, and it was not anticipated in the Political Parties Act that the PPLC would be called upon to make nominations as proposed in the Bill; and
  - d) the foreseeable difficulty that would arise in the PPLC trying to agree on a single nominee to the selection panel.
- iv) The need for uniformity and consistency in the drafting language of the Bill; and  
 v) How to balance the diverse interests while maintaining the membership of the selection panel at seven.

This Report and the amendments proposed by the Committee are therefore the product of extensive consultations that have taken place to ensure that we have a good law in place that will stand the test of time.

**Hon. Speaker,**

May I take this opportunity to commend the Members of the Committee for their devotion and commitment to duty, which made the consideration of the Bill successful.

I also wish to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to the Committee in undertaking this important assignment. Lastly, I wish to thank the stakeholders who submitted written memoranda which greatly aided the Committee in considering the Bill.

**Hon. Speaker,**

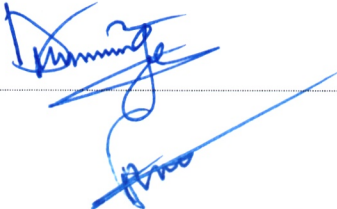

It is now my pleasant duty, pursuant to standing order 148(1) of the Senate Standing Orders, to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022).

Signed .....  ..... Date 18/01/2023 .....

**SEN. WAKILI HILLARY KIPROTICH SIGEL, MP  
 CHAIRPERSON, STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS  
 AND HUMAN RIGHTS.**

**ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 49 OF 2022**

**We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human rights, do hereby append our signatures to adopt this Report**

No	Name	Signature
1.	Sen. Wakili Hillary Kiprotich Sigei, MP <i>(Chairperson)</i>	
2.	Sen. Raphael Chimera Mwinzagu, MP <i>(Vice-Chairperson)</i>	
3.	Sen. Fatuma Adan Dullo, CBS, MP	
4.	Sen. Samson Kiprotich Cherarkey, MP	
5.	Sen. William Cheptumo Kipkiror, CBS, MP	
6.	Sen. Hamida Kibwana, MP	
7.	Sen. Catherine Muyeka Mumma, MP	
8.	Sen. Veronica W. Nduati, MP	
9.	Sen. Andrew Omtatah Okoiti, MP	



## CHAPTER ONE: INTRODUCTION

### 1.1 Introduction

1. The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) was published *vide* Kenya Gazette Supplement No. 174 of 2<sup>nd</sup> November 2022 and was introduced in the National Assembly by way of First Reading on 17<sup>th</sup> November, 2022. The Bill was considered by the National Assembly and passed without amendments, on 1<sup>st</sup> December, 2022. A copy of the Bill as passed by the National Assembly and referred to the Senate is attached to this Report as *Appendix 2*.
2. Pursuant to Article 110(4) of the Constitution, the Bill was referred to the Senate where it was read a First Time on Thursday, 8<sup>th</sup> December, 2022 and thereafter stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration. A copy of the Message from the National Assembly conveying the Bill to the Senate is attached as *Appendix 3*.

### 1.2 Background

3. The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) was necessitated by the Judgment of the High Court in Constitutional Petition E364 of 2020: *Okiya Omtatah Okiiti v Attorney General & 5 Others*, delivered on 29<sup>th</sup> November, 2021. A copy of the said Judgment is attached as *Appendix 4*.
4. In that case, the Court issued a declaration that, to the extent that section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act (No 18 of 2020) provided that the Parliamentary Service Commission shall nominate 4 out of 7 members of the Selection Panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringed on Article 10 of the Constitution and was therefore unconstitutional.
5. The Court proceeded to issue an order quashing the said section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act (No 18 of 2020).

### 1.3 Objects of the Bill

6. Arising from the said Judgment of the High Court in *Okiya Omtatah Okiiti v Attorney General & 5 Others*, the Independent Electoral and Boundaries

Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) seeks to change the composition of the Selection Panel that oversees the filling of vacant positions in the Commission.

7. The Bill seeks to reduce the current allocation of the Parliamentary Service Commission in nominating members of the Selection Panel from four to two, and to allow the Political Parties Liaison Committee and the Public Service Commission to each nominate one member to the Panel.

#### **1.4 Consequences of the Bill**

8. Once enacted, the Bill will enable the Political Parties Liaison Committee, established under section 38 of the Political Parties Act, No. 11 of 2011 and the Public Service Commission to each nominate one member to the Selection Panel.

#### **1.5 Overview of the Bill**

9. The Bill proposes the following amendments –

- a) **Clause 1** provides for the short title of the Bill.

- b) **Clause 2** provides for amendment of the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 at paragraph 1 by deleting sub-paragraph (2) and substituting therefor the following new sub-paragraph –

"(2) The Selection Panel shall consist of -

- (a) one man and one woman, nominated by the Parliamentary Service Commission;
- (b) one person nominated by the Public Service Commission;
- (c) one person nominated by the Political Parties Liaison Committee;
- (d) one person nominated by the Law Society of Kenya; and
- (e) two persons nominated by the Inter-religious Council of Kenya."

## CHAPTER TWO: PUBLIC PARTICIPATION ON THE BILL

### 2.1 Introduction

10. The Committee pursuant to the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the *Daily Nation* and *Standard* newspapers on Friday, 9<sup>th</sup> December, 2022 inviting members of the public to submit written memoranda on the Bill. The advertisement was also posted on the Parliament website and social media platforms. A copy of the advertisement is attached as *Appendix 5*.
11. Additionally, the Committee sent invitations by email to key stakeholders inviting them to submit their comments on the Bill.
12. In response to the advertisement and invitations, the Committee received written submissions from –
  - a) Office of the Registrar of Political Parties;
  - b) Council of County Governors;
  - c) National Gender and Equality Commission;
  - d) County Assemblies Forum;
  - e) Katiba Institute;
  - f) Kenya Conference of Catholic Bishops;
  - g) National Youth Council;
  - h) Independent Electoral and Boundaries Commission; and
  - i) Mr. Eliud Matindi.
13. Copies of the said submissions are attached as *Appendix 6*, with a summary thereon in the form of a matrix attached as *Appendix 7*.

### 2.2 Overview of Stakeholder Submissions on the Bill

#### *I. Office of the Registrar of Political Parties*

14. The Registrar of Political Parties made the following proposals –
  - i) That clause 2(2)(a) of the Bill on the proposal of the Selection Panel to consist of ‘one man and one woman nominated by the Parliamentary Service Commission’ be recrafted to ‘two persons of either gender nominated by the Parliamentary Service Commission’, to align with the need to use uniform language through the clause.

- ii) On the proposed nomination of one person by the Political Parties Liaison Committee (PPLC), as contained at clause 2(2)(c) of the Bill, that the Committee should consider whether PPLC appointing a representative to the Selection Panel would affect the nature and effect of the dialogue envisioned between ORPP, IEBC, and political parties under section 38 of the Political Parties Act; and whether it was intended to amend Section 38(4) of the Political Parties Act with respect to the role of the Registrar in prescribing functions for the PPLC.
- iii) That clause 2(2)(e) of the Bill on the proposal of the Selection Panel to comprise ‘two persons nominated by the Inter-religious Council of Kenya’ be recrafted to, ‘two persons of either gender nominated by the Inter-Religious Council of Kenya’, to ensure realization of the requirement of two-thirds gender principle under Article 27(8) of the Constitution.

## ***II. Council of County Governors***

- 15. The Council of County Governors proposed that clause 2(2) of the Bill be amended to include ‘two persons nominated by the council of county governments.’ This would ensure that the 47 County Governments were represented in the selection panel for commissioners of the IEBC.

## ***III. National Gender and Equality Commission***

- 16. The National Gender and Equality Commission proposed that sub-paragraph 2(e) of the Bill be deleted and replaced with new sub-paragraphs (e) and (f), whereby the Inter-religious Council of Kenya would nominate one person to the selection panel, with the other slot being allocated to a person nominated by the umbrella organization of persons with disability, to represent persons with disability.
- 17. NGENC further proposed an amendment to paragraph 5 of the First Schedule to the IEBC Act (No. 9 of 2011) by inserting the words ‘and interests of persons with disability’. This would ensure that the IEBC has the representation of Commissioners with disability.

## ***IV. County Assemblies Forum***

- 18. The County Assemblies Forum proposed amendments to sub-paragraphs 2(b) and (c) of the Bill to provide that the nominees each by the Public Service

Commission and the Political Parties Liaison Committee would not be of the same gender. This would ensure that the selection panel complied with the two-thirds gender principle under Article 27(8) of the Constitution.

***V. Katiba Institute***

19. Katiba Institute submitted that the provision in the existing law should be retained as it is including the gender prescriptions thereon. This was on the basis that the purpose for the proposed amendments had not been offered except for the changes in the composition and where the proposed nominees were to be drawn from.
20. Katiba Institute therefore proposed that the Bill be rejected or that it be amended to ensure that –
  - i) the Political Parties Liaison Committee selects a participant that is representative of the national and county levels of the Political Parties Liaison Committee and is independent of partisan influence;
  - ii) the built-in system for complying with Article 27 of the Constitution on two thirds gender principle is maintained; and
  - iii) the policy objective the Bill seeks to fill or the harm it intends to correct is explained.

***VI. Kenya Conference of Catholic Bishops***

21. The Kenya Conference of Catholic Bishops proposed that the Bill be amended –
  - i) at sub-paragraph (a), to provide that the two nominees by the Parliamentary Service Commission would be one each from the government side and the opposition, to ensure inclusivity and promote trust in the electoral management body by all players;
  - ii) at sub-paragraph (b), to re-allocate the position reserved for the Public Service Commission to civil society or faith-based institutions;
  - iii) at sub-paragraph (c), to provide that the nomination by the Political Parties Liaison Committee would also consider the non-parliamentary parties; and
  - iv) at sub-paragraph (e), to add one more nominee to the Inter-religious Council of Kenya and further provide that the two nominees should be representatives from different faiths.

### ***VII. National Youth Council***

22. The National Youth Council proposed the introduction of two nominees nominated by the NYC to represent the youth in the selection panel. This was on the basis that youth comprise the largest proportion of the population both as voters and consumers of the services offered by the IEBC.

### ***VIII. Independent Electoral and Boundaries Commission***

23. The Commission expressed support for the proposed amendments as they were in line with the High Court decision in Constitutional Petition E364 of 2020 - *Okiya Omtatah Okioti v Attorney General & 5 others*. The Commission also recommended that the nominating entities conduct the process of nominating members of the selection panel in an open and transparent manner.

### ***IX. Mr. Eliud Matindi***

24. Mr. Eliud Matindi submitted that the proposed composition of the selection panel comprising of five members nominated by State organs and two members nominated by non-state actors, as set out in the Bill, would be unconstitutional, null and void just like the provision which was held unconstitutional for having four out seven members picked by one entity. Further, the proposal would offend the national values and principles of governance as set out in Article 10 of the Constitution.
25. He further observed that the proposal to have the Political Parties Liaison Committee nominate one person to be a member of the selection panel was unconstitutional and a breach of the national values and principles of governance particularly on good governance, transparency and accountability. This was because under, section 38 of the Political Parties Act, 2011, PPLC is established at the national and county levels. This means there are forty-eight (48) established PPLC entities, and it was unclear which of the said entities would be the one nominating the one position.
26. Lastly, Mr. Matindi submitted that the Bill failed to meet binding constitutional requirements, including the duty imposed by Articles 21, 27 and 28 of the Constitution with regards to promoting and advancing gender equality.

## CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

### 3.1 Committee Observations

27. Having considered the Bill and the submissions received thereon, the Committee made the following observations –
- (a) That the Bill sought to comply with the Judgment of the High Court in Petition E364 of 2020 - *Okiya Omtatah Okoiti v. Attorney General and 5 Others*, in ensuring that no single entity nominated a majority of the members of the selection panel thus giving the entity undue power in the decision making of the selection panel.
  - (b) That there was need to have a balance in the selection panel in terms of members nominated to represent political interests vis-à-vis those who were expected to be politically neutral.
  - (c) That the concerns raised by stakeholders on the suitability of the Political Parties Liaison Committee (PPLC) to nominate a member to the selection panel were valid, and it was further observed that –
    - (i) the PPLC comprises of political parties, the IEBC and the Office of the Registrar of Political Parties, which presented a potential conflict of interest particularly on the part of the IEBC;
    - (ii) the PPLC exists at the national level and the county level, and the Bill did not clarify which level would undertake the nomination to the selection panel;
    - (iii) the PPLC is a forum for dialogue, and it is not anticipated in the Political Parties Act that the PPLC would be called upon to make nominations as proposed in the Bill; and
    - (iv) it was foreseeable that difficulties would arise in the PPLC trying to agree on a single nominee to the selection panel, hence the need to increase the number of persons nominated within the auspices of the PPLC.
  - (d) The Committee noted submissions by various stakeholders which, if adopted, would have the effect of expanding the membership of the selection panel from the current seven (7) to nine (9). This would ideally accommodate most sections of society including civil society and non-parliamentary political parties who are not represented in the panel. While the Committee was attracted to the proposal, it was furnished with a Legal Brief on the matter where it was noted that such an amendment was substantial and went beyond the scope of the Bill as published. Consequently, introducing the amendment at this stage would expose the

Bill, once passed, to legal challenges for incorporating the said amendments without having substantively subjected them to public participation. A copy of the Advisory is annexed to this Report as *Appendix 8*.

- (e) That there is need to ensure gender balance in the composition of the selection panel. All entities nominating more than one person should not nominate persons of the same gender.
28. The Committee further observed that, in considering Bills that had significant public interest and importance, it was important that consultations take place between the respective Committees of the two Houses of Parliament, and allow for consensus by the two Speakers, on the core aspects and text of the proposed legislation. This would in turn facilitate the expeditious processing of Bills once formally introduced for consideration before either House.
29. The Committee therefore observed that the following amendments to the Bill would be required –
- (a) that the Bill be amended at sub-paragraph 2(a), to reduce the nominees by the Parliamentary Service Commission from two to one;
  - (b) that the Bill be further amended at paragraph 2(c), to provide for two persons to be nominated by the majority and the minority parties represented at the Political Parties Liaison Committee. This will ensure that the conflict of interest posed by IEBC’s participation in the PPLC is eliminated by specifying that only political parties would be involved in nominating persons to the selection panel excluding IEBC and ORPP – who are members of the Political Parties Liaison Committee at the national level;
  - (c) That the two persons nominated by the political parties in sub-paragraph 2(c) be of opposite gender in order to promote gender equity; and
  - (d) That the two persons nominated by the Inter-Religious Council of Kenya in sub-paragraph 2(e) be of opposite gender in order to promote gender equity.
30. The text of the proposed amendments is attached as **Appendix 9**.

### **3.2 Committee Recommendations**

31. Having considered the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) and the submissions received thereon, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that the Senate **passes the Bill with amendments** as proposed by the Committee.

## LIST OF APPENDICES

- Appendix 1:* Minutes of the sittings of the Committee in considering the Bill
- Appendix 2:* The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022), as passed by the National Assembly and referred to the Senate
- Appendix 3:* Message dated 2<sup>nd</sup> December, 2022 from the National Assembly conveying the Bill to the Senate
- Appendix 4:* Judgment of the High Court in Constitutional Petition E364 of 2020: *Okiya Omtatah Okioti v Attorney General & 5 Others*, delivered on 29th November, 2021
- Appendix 5:* Advertisement published in the *Daily Nation* and *Standard* newspapers on Friday, 9<sup>th</sup> December, 2022
- Appendix 6:* Copies of submissions received on the Bill
- Appendix 7:* Matrix of submissions and Committee comments/ determination
- Appendix 8:* Legal Brief on the proposal to expand the membership of the selection panel
- Appendix 9:* Text of amendments proposed by the Committee to the Bill

*Appendix 1:*

Minutes of the sittings of the Committee in considering  
the Bill



**13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION**

**MINUTES OF THE THIRTEENTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 18<sup>TH</sup> JANUARY, 2023 AT 9.00 A.M. AT COMMITTEE ROOM 5, 1<sup>ST</sup> FLOOR PARLIAMENT BUILDINGS**

**PRESENT**

- |    |   |                                   |
|----|---|-----------------------------------|
| 1. | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. | Sen. Fatuma Adan Dullo, CBS, MP         | - Member                          |
| 3. | Sen. Catherine Muyeka Mumma, MP         | - Member                          |
| 4. | Sen. Veronica W. Nduati, MP             | - Member                          |
| 5. | Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |    |   |                    |
|----|---|--------------------|
| 1. | Sen. Raphael Chimera Mwinzagu           | - Vice Chairperson |
| 2. | Sen. Samson Kiprotich Cherarkey, MP     | - Member           |
| 3. | Sen. William Cheptumo Kipkiror, CBS, MP | - Member           |
| 4. | Sen. Hamida Kibwana, MP                 | - Member           |

**SECRETARIAT**

- |     |                       |  |
|-----|-----------------------|--|
| 1.  | Mr. Charles Munyua    | - Senior Clerk Assistant                       |
| 2.  | Ms. Josephine Kusinyi | - Principal Legal Counsel                      |
| 3.  | Ms. Lilian Waweru     | - Legal Counsel II                             |
| 4.  | Ms. Lynn Aseka        | - Clerk Assistant II ( <i>Taking Minutes</i> ) |
| 5.  | Mr. Josphat Ng'eno    | - Media Relations Officer III                  |
| 6.  | Ms. Ndindi Kibathi    | - Research Officer III                         |
| 7.  | Mr. Kennedy Owuoth    | - Fiscal Analyst III                           |
| 8.  | Mr. Joseph Otieno     | - Audio Officer III                            |
| 9.  | Ms. Judith Aoka       | - Audio Officer III                            |
| 10. | Mr. David Baraza      | - Serjeant at Arms                             |

**MIN. NO. 77/2023**

**PRELIMINARIES**

The Chairperson called the meeting to order at twenty-nine minutes past nine O'clock and opened with a word of prayer.

**MIN. NO. 78/2023**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Fatuma Adan Dullo, CBS, MP and seconded by Sen. Veronica W. Nduati, MP as follows –

1. Prayer
2. Adoption of the Agenda
3. Confirmation of Minutes of Previous Meetings
4. Matters arising from Minutes of the Previous Meetings
5. Consideration and adoption of the Committee Report on the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022)
6. Any Other Business
7. Date of the Next Meeting and Adjournment

**MIN. NO. 79/2023**

**CONFIRMATION OF MINUTES OF PREVIOUS MEETINGS**

The minutes of the 12<sup>th</sup> Sitting held on Tuesday, 17<sup>th</sup> January, 2022 at 8.00 a.m. were confirmed as a true record of proceedings, after being proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Veronica W. Nduati, MP.

**MIN. NO. 80/2023**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 49 OF 2022)**

The Committee considered the draft Report on the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022). Members made some proposals for incorporation in Chapter Three on Observations by the Committee.

Thereupon, the Committee adopted the Report, having been proposed by Sen. Veronica W. Nduati, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.

The Committee further considered the text of the proposed Committee amendments to the Bill, and approved the same as set out below –

**CLAUSE 2**

**THAT** the Bill be amended by deleting clause 2 and substituting therefor the following new clause –

Amendment of the First Schedule to  
2. The First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended in paragraph (1) by –

No. 9 of 2011. (a) deleting sub-paragraph (2) and substituting therefor the following new sub-paragraph –

(2) The Selection Panel shall consist of –

- (a) one person nominated by the Parliamentary Service Commission;
- (b) one person nominated by the Public Service Commission;
- (c) one man and one woman nominated by the majority and minority political parties represented in the Political Parties Liaison Committee at the national level;
- (d) one person nominated by the Law Society of Kenya; and
- (e) one man and one woman nominated by the Inter-Religious Council of Kenya.

(b) deleting the expression “(2)(b) and (c)” appearing immediately after the words “bodies under sub-paragraphs” in subparagraph (3) and substituting therefor the expression “(2)(b), (c), (d) and (e).”

**MIN. NO. 81/2023**

**ADJOURNMENT**

The Chairperson adjourned the meeting at twenty minutes past ten O'clock. The next meeting will be held on notice.

SIGNED: .....  .....

DATE: ..... 18/01/2023 .....



13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION

**MINUTES OF THE TWELFTH SITTING OF THE STANDING COMMITTEE  
ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY,  
17<sup>TH</sup> JANUARY, 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, 1<sup>ST</sup> FLOOR  
PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING  
PLATFORM**

**PRESENT**

- |    |   |                                   |
|----|---|-----------------------------------|
| 1. | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. | Sen. Raphael Chimera Mwinzagu           | - Vice Chairperson                |
| 3. | Sen. Fatuma Adan Dullo, CBS, MP         | - Member                          |
| 4. | Sen. Hamida Kibwana, MP                 | - Member                          |
| 5. | Sen. Catherine Muyeka Mumma, MP         | - Member                          |
| 6. | Sen. Veronica W. Nduati, MP             | - Member                          |
| 7. | Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |    |   |          |
|----|---|----------|
| 1. | Sen. Samson Kiprotich Cherarkey, MP     | - Member |
| 2. | Sen. William Cheptumo Kipkiror, CBS, MP | - Member |

**SECRETARIAT**

- |    |                    |  |
|----|--------------------|--|
| 1. | Mr. Charles Munyua | - Senior Clerk Assistant ( <i>Taking Minutes</i> ) |
| 2. | Ms. Lilian Waweru  | - Legal Counsel II                                 |
| 3. | Mr. Josphat Ng'eno | - Media Relations Officer III                      |
| 4. | Ms. Ndindi Kibathi | - Research Officer III                             |
| 5. | Mr. Kennedy Owuoth | - Fiscal Analyst III                               |
| 6. | Mr. Joseph Otieno  | - Audio Officer III                                |
| 7. | Ms. Judith Aoka    | - Audio Officer III                                |
| 8. | Mr. David Baraza   | - Serjeant at Arms                                 |

**MIN. NO. 71/2023**

**PRELIMINARIES**

The Chairperson called the meeting to order at twenty minutes past eight O'clock and opened with a word of prayer.

**MIN. NO. 72/2023****ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Hamida Kibwana, MP, as follows –

1. Prayer
2. Adoption of the Agenda
3. Confirmation of Minutes of Previous Meetings
4. Matters arising from Minutes of the Previous Meetings
5. Consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) - *resumption*
6. Any Other Business
7. Date of the Next Meeting and Adjournment

**MIN. NO. 73/2023****CONFIRMATION OF MINUTES OF PREVIOUS MEETINGS**

- a) The minutes of the 5<sup>th</sup> Sitting held on Tuesday, 6<sup>th</sup> December, 2022 at 9.00 a.m. were confirmed as a true record of proceedings, after being proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.
- b) The minutes of the 6<sup>th</sup> Sitting held on Tuesday, 6<sup>th</sup> December, 2022 at 11.30 a.m. were confirmed as a true record of proceedings, after being proposed by Sen. Hamida Kibwana, MP and seconded by Sen. Veronica W. Nduati, MP.
- c) The minutes of the 7<sup>th</sup> Sitting held on Tuesday, 6<sup>th</sup> December, 2022 at 2.30 p.m. were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Hamida Kibwana, MP.
- d) The minutes of the 8<sup>th</sup> Sitting held on Monday, 19<sup>th</sup> December, 2022 at 9.00 a.m. were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Veronica W. Nduati, MP.
- e) The minutes of the 9<sup>th</sup> Sitting held on Monday, 19<sup>th</sup> December, 2022 at 2.00 p.m. were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Catherine Muyeka Mumma, MP.
- f) The minutes of the 10<sup>th</sup> Sitting held on Wednesday, 11<sup>th</sup> January, 2023 at 8.00 a.m. were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.
- g) The minutes of the 11<sup>th</sup> Sitting held on Thursday, 12<sup>th</sup> January, 2023 at 8.00 a.m. were confirmed as a true record of proceedings, after being proposed by Sen. Wakili Hillary Kiprotich Sigei, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.

**MIN. NO. 74/2023**

**MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS**

- a) Under Min. No. 36/2022 (*Ex. Min. No. 28/2022*), Members were informed that a response from the Independent Electoral and Boundaries Commission was yet to be received on the Statement sought by Sen. Alexander Mundigi, MP regarding delayed payments to transport service providers in Embu County during and after the 2022 General Elections.
- b) Under Min. No. 37/2022, Members observed that the draft Constitution of Kenya (Amendment) Bill promoted by Sen. Beth Syengo, MP was still pending before the Committee. The Committee noted that, due to the nature of the Bill and the need to secure broad-based support for its passage in the two Houses, it would not be ideal that the Bill be introduced as a Private Member's Bill. Consequently, Members resolved to hold informal consultations with the promoter towards reaching an agreement on how to proceed.
- c) Under Min. No. 38/2022, Members were informed that the Parliamentary Powers and Privileges (Amendment) Bill (Senate Bills No. 5 of 2022), and the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill (Senate Bills No. 7 of 2022) were ready for consideration by the Committee once the Senate resumed from recess.
- d) Under Min. No. 42/2022, the Committee was informed that the various draft Bills which the Committee resolved to sponsor would be scheduled for consideration once the Senate resumed from recess.

**MIN. NO. 75/2023**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 49 OF 2022)**

The Committee resumed consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) and was taken through the draft Committee amendments to the Bill.

Following deliberations, the Committee approved the text of the amendments as set out below –

**CLAUSE 2**

**THAT** the Bill be amended by deleting clause 2 and substituting therefor the following new clause –

Amendment of the First Schedule to No. 9 of 2011. **2.** The First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended in paragraph (1) by deleting sub-

paragraph (2) and substituting therefor the following new sub-paragraph –

- (2) The Selection Panel shall consist of –
- (a) one person nominated by the Parliamentary Service Commission;
  - (b) one person nominated by the Public Service Commission;
  - (c) two persons of the opposite gender nominated by the majority and minority political parties represented in the Political Parties Liaison Committee at the national level;
  - (d) one person nominated by the Law Society of Kenya; and
  - (e) two persons of the opposite gender nominated by the Inter-Religious Council of Kenya.

Sen. Catherine Muyeka Mumma, MP registered reservations to the proposed Committee amendments, to the extent that the Parliamentary Service Commission would be entitled to nominate one person to the selection panel while the Inter-Religious Council of Kenya would nominate two. This was on the basis that the Parliamentary Service Commission, being a political institution, should have been allowed to nominate two persons, to ensure that there was once nominee each from either side of the political divide.

**MIN. NO. 76/2023**

**ADJOURNMENT**

The Chairperson adjourned the meeting at twenty minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 18<sup>th</sup> January, 2023 at thirty minutes past eight O'clock.

SIGNED: .....  .....

DATE: ..... 18/01/2023 .....



13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION

**MINUTES OF THE ELEVENTH SITTING OF THE STANDING COMMITTEE  
ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON  
THURSDAY, 12<sup>TH</sup> JANUARY 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, 1<sup>ST</sup>  
FLOOR PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING  
PLATFORM**

**PRESENT**

- |    |   |  |
|----|---|--|
| 1. | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson                          |
| 2. | Sen. Raphael Chimera Mwinzagu           | - Vice Chairperson ( <i>Chairing</i> ) |
| 3. | Sen. Fatuma Adan Dullo, CBS, MP         | - Member                               |
| 4. | Sen. Hamida Kibwana, MP                 | - Member                               |
| 5. | Sen. Catherine Muyeka Mumma, MP         | - Member                               |
| 6. | Sen. Veronica W. Nduati, MP             | - Member                               |
| 7. | Sen. Andrew Omtatah Okoiti, MP          | - Member                               |

**ABSENT WITH APOLOGY**

- |    |   |          |
|----|---|----------|
| 1. | Sen. Samson Kiprotich Cherarkey, MP     | - Member |
| 2. | Sen. William Cheptumo Kipkiror, CBS, MP | - Member |

**SECRETARIAT**

- |    |                       |   |
|----|-----------------------|---|
| 1. | Mr. Charles Munyua    | - Senior Clerk Assistant                        |
| 2. | Ms. Lilian Waweru     | - Legal Counsel II                              |
| 3. | Ms. Lynn Aseka        | - Clerk Assistant III ( <i>Taking Minutes</i> ) |
| 4. | Mr. Josphat Ng'eno    | - Media Relations Officer III                   |
| 5. | Mr. Constant Wamayuyi | - Research Officer III                          |
| 6. | Ms. Ndindi Kibathi    | - Research Officer III                          |
| 7. | Mr. Joseph Otieno     | - Audio Officer III                             |
| 8. | Ms. Judith Aoka       | - Audio Officer III                             |
| 9. | Mr. John Lekampule    | - Serjeant at Arms                              |

**MIN. NO. 67/2023**

**PRELIMINARIES**

The Vice Chairperson called the meeting to order at ten minutes past eight O'clock and opened with a word of prayer.

**MIN. NO. 68/2023**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Fatuma Adan Dullo, CBS, MP, and seconded by Sen. Catherine Muyeka Mumma MP, as follows –

1. Prayer
2. Adoption of the Agenda
3. Consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) - *resumption*
4. Any Other Business
5. Date of the Next Meeting and Adjournment

**MIN. NO. 69/2023**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 49 OF 2022)**

The Committee resumed consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) and was taken through a brief on the question whether the Committee could propose an amendment to a clause that was not in the original Bill as published.

Thereupon, having noted that this would leave the Bill, once passed, susceptible to legal challenges in Court, the Committee resolved to work within the existing composition of seven members of the selection panel for commissioners of the IEBC.


- Upon deliberations, the Committee resolved that the Bill be further amended –
- a) at paragraph 2(a), to reduce the nominees by the Parliamentary Service Commission from two to one;
  - b) at paragraph 2(c), to provide for two persons to be nominated by the majority party and the minority party; and
  - c) at paragraph 2(e), to reinstate the nominees by the Inter-religious Council of Kenya to two, instead of one.

The Committee tasked the Secretariat to finalize on the Committee Report and draft amendments for consideration and adoption at the next meeting.

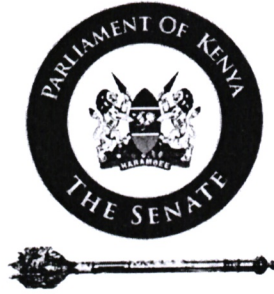
**MIN. NO. 70/2023**

**ADJOURNMENT**

The Chairperson adjourned the meeting at five minutes past nine O'clock. The next meeting was scheduled to be held on Friday, 13<sup>th</sup> January, 2023 at eight O'clock.

SIGNED:  .....

DATE:  .....



13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION

**MINUTES OF THE TENTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 11<sup>TH</sup> JANUARY 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, 1<sup>ST</sup> FLOOR PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM**

**PRESENT**

- |  |                                   |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. Sen. Fatuma Adan Dullo, CBS, MP         | - Member                          |
| 3. Sen. Hamida Kibwana, MP                 | - Member                          |
| 4. Sen. Catherine Muyeka Mumma, MP         | - Member                          |
| 5. Sen. Veronica W. Nduati, MP             | - Member                          |
| 6. Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |  |                    |
|--|--------------------|
| 1. Sen. Raphael Chimera Mwinzagu           | - Vice Chairperson |
| 2. Sen. Samson Kiprotich Cherarkey, MP     | - Member           |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member           |

**SECRETARIAT**

- |                          |   |
|--------------------------|---|
| 1. Mr. Charles Munyua    | - Senior Clerk Assistant                        |
| 2. Mr. Moses Kenyanchui  | - Legal Counsel I                               |
| 3. Ms. Lilian Waweru     | - Legal Counsel II                              |
| 4. Ms. Lynn Aseka        | - Clerk Assistant III ( <i>Taking Minutes</i> ) |
| 5. Mr. Josphat Ng'eno    | - Media Relations Officer III                   |
| 6. Mr. Constant Wamayuyi | - Research Officer III                          |
| 7. Mr. Joseph Otieno     | - Audio Officer III                             |
| 8. Ms. Judith Aoka       | - Audio Officer III                             |
| 9. Mr. John Lekampule    | - Serjeant at Arms                              |

**MIN. NO. 62/2023**

**PRELIMINARIES**

The meeting was called to order at twenty-nine minutes past eight O'clock followed by a word of prayer by the Chairperson.

**MIN. NO. 63/2023**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Hamida Kibwana, MP, as follows –

1. Prayer
2. Adoption of the Agenda
3. Confirmation of Minutes of the Previous Meetings
4. Matters arising from Minutes of the Previous Meetings
5. Consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) - *resumption*
6. Any Other Business
7. Date of the Next Meeting and Adjournment

**MIN. NO. 64/2023**

**CONFIRMATION OF MINUTES OF THE PREVIOUS MEETINGS AND MATTERS ARISING**

Confirmation of the Minutes of the previous meetings was deferred.

**MIN. NO. 65/2023**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 49 OF 2022)**

The Committee resumed consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) and was taken through the text of the proposed amendments arising from the previous meeting.

On the proposed nominees by the Political Parties Liaison Committee, Members resolved that the text be further amended to provide that the nominees would be persons representing the two parties constituting the majority party and minority party during that term.

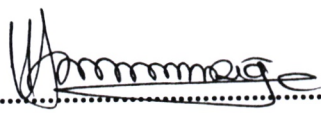
The Committee was then taken through the submissions by the Kenya Conference of Catholic Bishops (KCCB) whereby KCCB had proposed the inclusion, in the selection panel, of nominees representing civil society, faith-based organizations and non-parliamentary parties; and, further, that the two slots allocated to the Inter-Religious Council of Kenya be increased to three to enable the representation, in the selection panel, of persons from different faiths.

Thereupon, noting that this proposal would necessitate expanding the membership of the selection panel from the current seven members to at least nine members, the Committee resolved that a brief be prepared on the question whether the Committee may propose amendments to a clause that was not part of the original Bill.

MIN. NO. 66/2023

ADJOURNMENT

The Chairperson adjourned the meeting at sixteen minutes past nine O'clock. The next meeting was scheduled to be held on Thursday, 12<sup>th</sup> January, 2023 at eight O'clock.

SIGNED: .....  .....

DATE: ..... 17.01.2023. ....



13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION

**MINUTES OF THE NINTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON MONDAY, 19<sup>TH</sup> DECEMBER 2022 AT 2.00 P.M. AT WINDSOR HOTEL, IN KIAMBU COUNTY**

**PRESENT**

- |    |   |                                   |
|----|---|-----------------------------------|
| 1. | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. | Sen. William Cheptumo Kipkiror, MP      | - Member                          |
| 3. | Sen. Catherine Muyeka Mumma, MP         | - Member                          |
| 4. | Sen. Veronica W. Nduati, MP             | - Member                          |
| 5. | Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |    |                                     |                    |
|----|-------------------------------------|--------------------|
| 1. | Sen. Raphael Chimera Mwinzagu       | - Vice Chairperson |
| 2. | Sen. Fatuma Adan Dullo, CBS, MP     | - Member           |
| 3. | Sen. Samson Kiprotich Cherarkey, MP | - Member           |
| 4. | Sen. Hamida Kibwana, MP             | - Member           |

**SECRETARIAT**

- |    |                      |   |
|----|----------------------|---|
| 1. | Mr. Njenga Njuguna   | - Director, Governance and Accountability Committee |
| 2. | Mr. Charles Munyua   | - Senior Clerk Assistant                            |
| 3. | Mr. Moses Kenyanchui | - Legal Counsel I                                   |
| 4. | Ms. Lilian Waweru    | - Legal Counsel II                                  |
| 5. | Ms. Lynn Aseka       | - Clerk Assistant III ( <i>Taking Minutes</i> )     |
| 6. | Ms. Ndindi Kibathi   | - Research Officer III                              |
| 7. | Mr. James Wanga      | - Procurement Officer III                           |
| 8. | Ms. Joyce Chelang'at | - Audio Officer III                                 |
| 9. | Mr. John Lekampule   | - Serjeant at Arms                                  |

**MIN. NO. 58/2022**

**PRELIMINARIES**

The meeting was called to order at ten minutes past two O'clock.

**MIN. NO. 59/2022**

**ADOPTION OF THE AGENDA**

The program of the meeting was adopted having been proposed by Sen. Veronica W. Nduati, MP and seconded by Sen. Catherine Muyeka Mumma, MP, as follows –

1. Prayer
2. Adoption of the Agenda
3. Consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) – *resumption*
4. Any Other Business
5. Date of the Next Meeting and Adjournment

**MIN. NO. 60/2022**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022**

The Committee resumed its consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022).

Thereupon, the Committee was taken through and considered the submissions received from –

- a) The Registrar of Political Parties;
- b) The Council of County Governors;
- c) The National Gender and Equality Commission;
- d) The County Assemblies Forum;
- e) National Youth Council;
- f) Katiba Institute; and
- g) Eliud Matindi.

The Committee proceeded to deliberate on the key issues arising from the stakeholder submissions on the Bill, namely –

- i) How to ensure that the selection panel complied with the dictates of the High Court Judgment in Petition E364 of 2020 - *Okiya Omtatah Okioti V Attorney General & 5 Others*;
- ii) How to ensure that the selection panel is compliant with Article 27(8) of the Constitution on the two thirds gender principle;
- iii) How to address concerns on the suitability of the Political Parties Liaison Committee (PPLC) to nominate a member to the selection panel, noting –
  - a) the PPLC comprised political parties, the IEBC and the ORPP, which presented potential conflicts of interest particularly on the part of the IEBC;
  - b) the PPLC existed at the national level and the county level, and the Bill did not clarify which level would undertake the nomination to the selection panel;

- c) the PPLC was a forum for dialogue, and it was not anticipated in the Political Parities Act that the PPLC would be called upon to make nominations as proposed in the Bill; and
- d) the foreseeable difficulty that would arise in the PPLC trying to agree on a single nominee to the selection panel.
- iv) The need for uniformity/consistency in the drafting language of the Bill.

Arising from the deliberations, the Committee resolved that amendments be drafted to the Bill, as follows –

- a) paragraph (c) be amended to increase the number of nominees by the PPLC from one to two;
- b) paragraph (c) be further amended to clarify that the nomination would be done by the political parties – that is, excluding IEBC and ORPP – who are members of the PPLC at the national level; and
- c) paragraph (e) be amended to reduce the nominees by the Inter-Religious Council of Kenya from two to one.

The Committee therefore directed that the Secretariat proceeds to draft the amendments and the draft Report on the Bill for consideration at the next meeting.

**MIN. NO. 61/2022**

**ADJOURNMENT**

The Chairperson adjourned the meeting at forty minutes past three O'clock. The next meeting will be held on notice.

SIGNED: .....  .....

DATE: ..... 17.01.2023. ....



**13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION**

**MINUTES OF THE EIGHTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON MONDAY, 19<sup>TH</sup> DECEMBER 2022 AT 9.00 A.M. AT WINDSOR HOTEL, IN KIAMBU COUNTY**

**PRESENT**

- |    |   |                                   |
|----|---|-----------------------------------|
| 1. | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. | Sen. William Cheptumo Kipkiror, MP      | - Member                          |
| 3. | Sen. Catherine Muyeka Mumma, MP         | - Member                          |
| 4. | Sen. Veronica W. Nduati, MP             | - Member                          |
| 5. | Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |    |                                     |                    |
|----|-------------------------------------|--------------------|
| 1. | Sen. Raphael Chimera Mwinzagu       | - Vice Chairperson |
| 2. | Sen. Fatuma Adan Dullo, CBS, MP     | - Member           |
| 3. | Sen. Samson Kiprotich Cherarkey, MP | - Member           |
| 4. | Sen. Hamida Kibwana, MP             | - Member           |

**SECRETARIAT**

- |    |                      |   |
|----|----------------------|---|
| 1. | Mr. Njenga Njuguna   | - Director, Governance and Accountability Committee |
| 2. | Mr. Charles Munyua   | - Senior Clerk Assistant                            |
| 3. | Mr. Moses Kenyanchui | - Legal Counsel I                                   |
| 4. | Ms. Lilian Waweru    | - Legal Counsel II                                  |
| 5. | Ms. Lynn Aseka       | - Clerk Assistant III ( <i>Taking Minutes</i> )     |
| 6. | Ms. Ndindi Kibathi   | - Research Officer III                              |
| 7. | Mr. James Wanga      | - Procurement Officer III                           |
| 8. | Ms. Joyce Chelang'at | - Audio Officer III                                 |
| 9. | Mr. John Lekampule   | - Serjeant at Arms                                  |

**MIN. NO. 53/2022**

**PRELIMINARIES**

The meeting was called to order at ten minutes past nine O'clock followed by a word of prayer by the Chairperson.

**MIN. NO. 54/2022**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Veronica W. Nduati, MP and seconded by Sen. Catherine Muyeka Mumma, MP, as follows –

1. Prayer
2. Adoption of the Agenda
3. Confirmation of Minutes of the Previous Meeting
4. Matters arising from Minutes of the Previous Meeting
5. Consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022)
6. Any Other Business
7. Date of the Next Meeting and Adjournment

**MIN. NO. 55/2022**

**CONFIRMATION OF MINUTES OF THE PREVIOUS MEETING AND MATTERS ARISING**

Confirmation of the Minutes of the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Sittings held on Tuesday, 6<sup>th</sup> December, 2022 was deferred to the next meeting.

**MIN. NO. 56/2022**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022**

The Committee commenced substantive consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022).

Thereupon, the Committee was taken through and noted –

- a) the Judgment of the High Court in Petition E364 of 2020 - *Okiya Omtatah Okoiti V Attorney General & 5 Others*, which necessitated the proposed amendments; and
- b) the Digest on the Bill, incorporating the introduction, background and overview of the Bill.

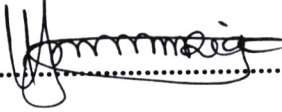
The Committee deliberated on the matter at length and observed that –

- i) there was need to have a balance in the selection panel in terms of members nominated to represent political interests via-a-vis those who were expected to be politically neutral;
- ii) the selection panel, once constituted, should act independently of the nominating entities;
- iii) there was need to ensure gender balance in the composition of the selection panel; and
- iv) where provision was made for nomination of members of the selection panel by political parties, then the process ought to be clarified in law so as to avoid paralysis whenever the need to nominate members to the panel arose.

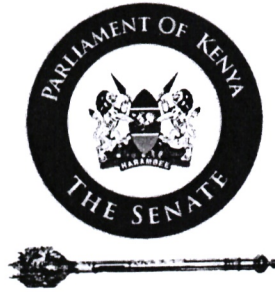
MIN. NO. 57/2022

ADJOURNMENT

The Chairperson adjourned the meeting at thirty minutes past twelve O'clock. The Committee would reconvene on the same date and venue at two O'clock.

SIGNED: .....  .....

DATE: ..... 17. 01. 2023 .....



13<sup>TH</sup> PARLIAMENT | 1<sup>ST</sup> SESSION

**MINUTES OF THE SEVENTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 6<sup>TH</sup> DECEMBER 2022 AT 2.30 P.M. AT PRIDE INN PLAZA HOTEL, IN MACHAKOS COUNTY**

**PRESENT**

- |  |                                   |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. Sen. Raphael Chimera Mwinzagu, MP       | - Vice Chairperson                |
| 3. Sen. Fatuma Adan Dullo, CBS, MP         | - Member                          |
| 4. Sen. Hamida Kibwana, MP                 | - Member                          |
| 5. Sen. Catherine Muyeka Mumma, MP         | - Member                          |
| 6. Sen. Veronica W. Nduati, MP             | - Member                          |
| 7. Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |  |          |
|--|----------|
| 1. Sen. Samson Kiprotich Cherarkey, MP     | - Member |
| 2. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |

**SECRETARIAT**

- |                           |  |
|---------------------------|--|
| 1. Mr. Njenga Njuguna     | - Director, Governance and Accountability Committees |
| 2. Dr. Johnson Okello     | - Director, Legal Services                           |
| 3. Mr. Ahmed Odhwa        | - Principal Clerk Assistant II                       |
| 4. Mr. Charles Munyua     | - Senior Clerk Assistant                             |
| 5. Ms. Mercy Thanji       | - Senior Legal Counsel                               |
| 6. Mr. Moses Kenyanchui   | - Legal Counsel I                                    |
| 7. Ms. Lilian Waweru      | - Legal Counsel II                                   |
| 8. Ms. Lynn Aseka         | - Clerk Assistant III ( <i>Taking Minutes</i> )      |
| 9. Mr. Josphat Ng'eno     | - Media Relations Officer III                        |
| 10. Ms. Joyce Chelang'at  | - Audio Officer III                                  |
| 11. Ms. Ndindi Kibathi    | - Research Officer III                               |
| 12. Mr. Constant Wamayuyi | - Research Officer III                               |
| 13. Mr. Kennedy Owuoth    | - Fiscal Analyst III                                 |
| 14. Mr. John Lekampule    | - Serjeant at Arms                                   |

**MIN. NO. 46/2022**

**PRELIMINARIES**

The meeting was called to order at thirty minutes past two O'clock.

**MIN. NO. 47/2022**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Hamida Kibwana, MP, as follows –

1. Prayer
2. Adoption of the Agenda
3. Consideration of –
  - a) the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 42 of 2022)
  - b) the Citizens Accountability Audit by the Auditor-General on Public Participation in the County Budget Making Process
  - c) the Parliamentary Joint Ad Hoc Committee on a Legislative Proposal to Amend the Constitution to Entrench Certain Specialized Funds
4. Consideration of the Induction and Work Planning Retreat for the Committee (*Committee Paper No. 19*)
5. Any Other Business
6. Date of the Next Meeting and Adjournment

**MIN. NO. 48/2022**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 42 OF 2022)**

The Committee was informed that the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 42 of 2022) was passed by the National Assembly on Thursday, 1<sup>st</sup> December 2022 and referred to the Senate for consideration. The First Reading of the Bill was scheduled to be done during the Special Sitting of the Senate proposed to be held on Thursday, 8<sup>th</sup> December, 2022.

The Committee resolved that, upon First Reading of the Bill, a newspaper advertisement inviting stakeholder submissions thereon be published on Friday, 9<sup>th</sup> December 2022.

**MIN. NO. 49/2022**

**THE CITIZENS ACCOUNTABILITY AUDIT BY THE AUDITOR-GENERAL ON PUBLIC PARTICIPATION IN THE COUNTY BUDGET MAKING PROCESS**

The Committee was informed that the captioned Report was tabled in the Senate on 23<sup>rd</sup> November 2022, wherefore it was committed to the Standing Committee on Finance and Budget and the Standing Committee on Justice, Legal Affairs and Human Rights. The Committees were directed to scrutinize the Report and make observations and recommendations, by way of a report submitted to the Senate, within 60 days.

The Committee considered the matter and resolved that a detailed Paper on the matter be prepared for consideration by the Committee, noting that the findings and observations thereon would be relevant to the Committee in considering the Public Participation Bill.

**MIN. NO. 50/2022**

**THE PARLIAMENTARY JOINT AD HOC COMMITTEE ON A LEGISLATIVE PROPOSAL TO AMEND THE CONSTITUTION TO ENTRENCH CERTAIN SPECIALIZED FUNDS**

The Committee was informed that the Parliamentary Joint Ad Hoc Committee was established by concurrent resolutions of the National Assembly and the Senate as adopted on 24<sup>th</sup> November 2022 and 1<sup>st</sup> December 2022, respectively. In the case of the Senate, the nine Members of the Standing Committee on Justice, Legal Affairs and Human Rights were all members of the Parliamentary Joint Ad Hoc Committee, where they would be joined by four other Senators.

Members were further informed that, following consultations with the Co-Chairperson on the National Assembly side, the first sitting of the Parliamentary Joint Ad Hoc Committee would be held on Wednesday, 7<sup>th</sup> December 2022 at 11.30 am, in the Mini Chamber at County Hall.

To prepare for the joint meeting, the Committee resolved that a briefing for the Senate members of the Joint Ad Hoc Committee be held at the same venue at 11.00 am.

**MIN. NO. 51/2022**

**INDUCTION AND WORK PLANNING RETREAT FOR THE COMMITTEE**

Members were briefed on two key changes relating to the Induction and Work Planning Retreat for the Committee, namely, the reduction of working days from three to two, and the change of venue from Mombasa to Naivasha. Arising from this, two sessions where the Committee was to meet with non-state actors had been dropped from the Retreat program.

The Committee considered the matter and resolved to hold a one-day meeting with the non-state actors prior to the induction and work-planning retreat.

**MIN. NO. 52/2022**

**ADJOURNMENT**

The Chairperson adjourned the meeting at ten minutes to four O'clock. The next meeting will be held on notice.

SIGNED: .....

DATE: ..... 17.01.2023 .....

*Appendix 2:*

The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022), as passed by the National Assembly and referred to the Senate



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REPUBLIC OF KENYA

PARLIAMENT

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**NATIONAL ASSEMBLY BILLS**  
*(Bill No. 49 of 2022)*

**THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION  
(AMENDMENT) BILL, 2022**

(A Bill published in the Kenya Gazette Supplement No. 174 of 2022 and passed by the National Assembly, without amendments, on December 1<sup>st</sup>, 2022)

N.A. /B/No. 49/2022

1229

**THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION (AMENDMENT)  
BILL, 2022**

**A Bill for**

**AN ACT of Parliament to amend the Independent Electoral and Boundaries Commission Act and for connected purposes**

**ENACTED** by Parliament of the Republic of Kenya, as follows—

1. This Act may be cited as the Independent Electoral and Boundaries Commission (Amendment) Act, 2022.

Short title.

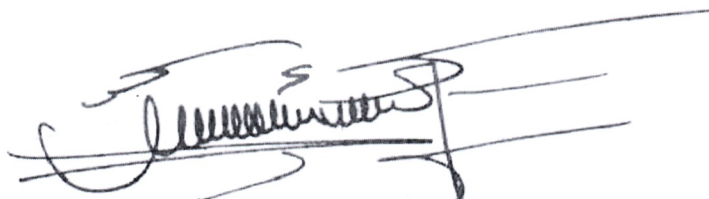
2. The First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended in paragraph (1) by deleting sub-paragraph (2) and substituting therefor the following new sub-paragraph—

Amendment of the First Schedule to No. 9 of 2011.

“(2) The selection panel shall consist of—

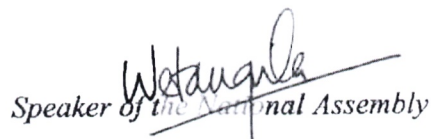
- (a) one man and one woman, nominated by the Parliamentary Service Commission;
- (b) one person nominated by the Public Service Commission;
- (c) one person nominated by the Political Parties Liaison Committee;
- (d) one person nominated by the Law Society of Kenya; and
- (e) two persons nominated by the Inter-religious Council of Kenya.”

I certify that this printed impression is a true copy of the Bill passed by the National Assembly on Thursday, 1<sup>st</sup> December, 2022.

A handwritten signature in black ink, appearing to be 'J. M. M. M.', written over three horizontal lines.

*Clerk of the National Assembly*

Endorsed for presentation to the Senate in accordance with the provisions of Standing Order 142 of the National Assembly Standing Orders.

A handwritten signature in black ink, appearing to be 'W. Taung', written over three horizontal lines.

*Speaker of the National Assembly*

**PRINTED BY THE CLERK OF THE NATIONAL ASSEMBLY**

*Appendix 3:*

Message dated 2<sup>nd</sup> December, 2022 from the National Assembly conveying the Bill to the Senate

We pride ourselves in being the largest economy in East and Central Africa. We have a good country. It is our prayer that we will keep it going. We only have a small amount compared to Colorado of about US\$210 billion GDP. However, we hope that we can grow our economy better.

I hope that Denver and Nairobi cities can become sister cities. I know that used to be the case many years ago.

I thank you for your time and I hope you will enjoy.

**The Speaker** (Hon. Kingi): Hon. Senators, I do have two Messages to deliver to you.

### MESSAGES FROM THE NATIONAL ASSEMBLY

#### PASSAGE OF THE COUNTY GOVERNMENTS ADDITIONAL ALLOCATIONS (NO.2) BILL, (SENATE BILLS NO.4 OF 2022)

**The Speaker** (Hon. Kingi): Hon. Senators, I wish to report to the Senate that pursuant to Standing Order 46(3) and (5), I received the following Message from the Speaker of the National Assembly regarding the passage by the National Assembly of the County Governments Additional Allocations (No. 2) Bill (Senate Bills No. 4 of 2022).

The Message which is dated Thursday, 1<sup>st</sup> December, 2022 was received on 2<sup>nd</sup> December, 2022, while the Senate was on recess and was transmitted to all Senators on Monday, 5<sup>th</sup> December, 2022.

Pursuant to the said Standing Order, I now report the Message-

“PURSUANT to the provisions of Article 110(4) of the Constitution and Standing Order No.41 of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly-

WHEREAS, the Senate considered the County Governments Additional Allocations (No.2) Bill (Senate Bill No.4 of 2022) on 22<sup>nd</sup> November, 2022 and thereafter referred the Bill to the National Assembly for consideration pursuant to the provisions of Article 110(4) of the Constitution;

FURTHER WHEREAS, the National Assembly considered the said Bill on Wednesday, 30<sup>th</sup> November 2022, and passed it on Thursday, 1<sup>st</sup> December 2022 without amendments and in the form passed by the Senate;

NOW THEREFORE, in accordance with the provisions of Article 110 of the Constitution and Standing Orders 41(1) and 144 of the National Assembly Standing Orders, I hereby convey the said decision of the National Assembly to the Senate.”

Hon. Senators, I have transmitted the Bill to His Excellency the President for Assent.

I thank you.

#### PASSAGE OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, (NATIONAL ASSEMBLY BILLS NO.49 OF 2022)

**The Speaker** (Hon. Kingi): Hon. Senators, I wish to report to the Senate that pursuant to Standing Order 46(3) and (5), I received the following Message from the

Speaker of the National Assembly regarding the passage by the National Assembly of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022).

The Message which is dated Friday, 2<sup>nd</sup> December, 2022, was received on Monday, 5<sup>th</sup> December, 2022, while the Senate was on recess.

Pursuant to the said Standing Order, I now report the Message-

“PURSUANT to the provisions of Standing Orders 41(1) and 142 of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly-

WHEREAS the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 49 of 2022) was published vide Kenya Gazette Supplement No.174 of 2<sup>nd</sup> November 2022, as a Bill proposing to amend the Independent Electoral and Boundaries Commission Act, 2011 to change the composition of the Selection Panel that oversees the filling of vacant positions in the Independent Electoral and Boundaries Commission;

AND WHEREAS the National Assembly considered the Bill in all stages and passed it on Thursday, December 1, 2022 without amendments, in the form attached hereto;

NOW THEREFORE, in accordance with the provisions of Article 110(4) of the Constitution and Standing Order 142 of the National Assembly Standing Orders, I hereby refer the said Bill to the Senate for consideration.”

Hon. Senators, Standing Order 163 requires that a Bill originating in the National Assembly be proceeded with by the Senate in the same manner as a Bill introduced in the Senate by way of First Reading in accordance with Standing Order No.144.

As you may have observed, the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No.49 of 2022) has been listed in today’s Order paper to be read a First Time.

I thank you.

Next Order

## BILLS

### *First Reading*

#### THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 49 OF 2022

**The Speaker** (Hon. Kingi): The Senate Majority Leader, you have you can proceed.

*(The Clerk consulted the Speaker)*

**[The Speaker** (Hon King)]

Next order.

***Appendix 4:***

Judgment of the High Court in Constitutional Petition E364 of 2020: *Okiya Omtatah Okiiti v Attorney General & 5 Others*, delivered on 29th November, 2021

**Okoti v Attorney General & 5 others (Constitutional Petition E364 of 2020)**  
**[2021] KEHC 439 (KLR) (Constitutional and Human Rights) (29 November 2021) (Judgment)**

*Okoya Omtatah Okoti v Attorney General, National Assembly Senate, Parliamentary Service Commission, Law Society of Kenya & Inter-Religious Council of Kenya*

Neutral citation: [2021] KEHC 439 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**CONSTITUTIONAL PETITION E364 OF 2020**  
**AC MRIMA, J**  
**NOVEMBER 29, 2021**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**SENATE ..... 3<sup>RD</sup> RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**LAW SOCIETY OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**INTER-RELIGIOUS COUNCIL OF KENYA ..... 6<sup>TH</sup> RESPONDENT**

**Section 2(2)(a) of the Independent Electoral and Boundaries Commission Amendment Act, on the nomination by the Parliamentary Service Commission of 4 out of 7 members of the selection panel for the appointment of the Independent Electoral and Boundaries Commission, is unconstitutional.**

Reported by Ribia John

*Statutes – interpretation of statutes – principles that guided the court in interpretation of statutes - what principles did the court consider in interpreting the Constitution; interpreting statutory provisions; and, interpreting statutory provision vis-à-vis constitutional provisions – what principles were applicable in construction of statutes.*

*Constitutional Law – Legislature – independent commissions – Parliamentary Service Commission – powers of Parliament vis-à-vis the Parliamentary Service Commission - whether Parliament and the Parliamentary Service Commission were the same entity - whether the Parliamentary Service Commission’s role of providing services and facilities to ensure the efficient and effective functioning of Parliament inter alia made it a subordinate of Parliament - what was the role of the Parliamentary Service Commission – Constitution of Kenya, 2010, article 253; Independent Electoral and Boundaries Commissions Amendment Act No. 18 of 2020 sections 2(2)(a) and 3.*



**Constitutional Law** – separation of powers – independence of constitutional commissions – where Parliament passed a law granting the Parliamentary Service Commission the power to appoint 4 out of 7 members in the selection panel in charge of nominating candidates for appointment as commissioners of constitutional commissions - whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers - whether Parliament erred in legislating for one organ to occupy 4 out of 7 slots in the selection panel to nominate persons to be appointed as commissioners of independent commissions - whether a selection panel which had majority of its members nominated by one entity could pass the threshold of being portrayed as independent and fair - whether, with an election 5 months away, the court could order that the selection panel that appointed commissioners of the Independent Electoral and Boundaries Commission was illegally constituted and order for the re-composition of the selection panel and the nullification of the appointment of the commissioners - Constitution of Kenya, 2010, articles 10, 38, 127(6), 250 and 253; Independent Electoral and Boundaries Commissions Amendment Act, No. 18 of 2020, sections 2(2)(a) and 3.

**Constitutional Law** – constitutional timelines – timelines on the general elections - power of the court to vary constitutional timelines – where the High Court was expected to nullify the appointment of commissioners of the Independent Electoral and Boundaries Commission months before a general election – where such a measure would have the effect of altering the constitutional timelines to host a general election - whether constitutional timelines could be varied - whether the High Court could stop or vary a timeline set out in the Constitution - whether, with an election 5 months away, the High Court could order that the selection panel that appointed commissioners of the Independent Electoral and Boundaries Commission was illegally constituted and order for the re-composition of the selection panel and the nullification of the appointment of the commissioners – Constitution of Kenya, 2010, articles 10, 38, 127(6) and 250.

**Constitutional Law** – fundamental rights and freedoms – right to equality – freedom from discrimination - national values and principles - rule of law – where a law was being contested for not following the rule of law - section 2(2)(a) and 3 of the IEBC Amendment Act that provided for a selection panel to nominate candidates for appointment as commissioners would have 4 of its 7 panelists appointed by the Parliamentary Service Commission – whether such provisions was unconstitutional to the extent that it violated the rights to equity, equality, non-discrimination and fairness and violated political rights of Kenyans – whether such provision was unconstitutional to the extent that it infringed the rule of law, was an abuse of power, violated the independence of constitutional commissions – Constitution of Kenya, 2010, article 10, 27 and 253; Independent Electoral and Boundaries Commissions Amendment Act, No. 18 of 2020, sections 2(2)(a) and 3.

### **Brief facts**

The petitioner impugned sections 2(2)(a) and 3 of the Independent Electoral and Boundaries Commissions Amendment Act No. 18 of 2020 (IEBC Amendment Act) on grounds that it unconstitutionally assigned four out of the seven slots in the selection panel for the selection of the nominees for the appointment of members of the IEBC (the selection panel) to the Parliamentary Service Commission (PSC). The petitioner contended that that section 3 of the IEBC Amendment Act unconstitutionally assigned the PSC with administrative responsibilities of co-ordinating the IEBC Commissioners' recruitment process and at the same time, the same body, was vested with the duty of appointing four members of the selection panel.

The petitioner contended that the impugned provisions violated the rule of law, the principles of separation of powers and further contended that Parliament in enacting the IEBC Amendment Act abused its power and failed to adhere to the principle of good governance.

### **Issues**

- i. What principles did the court consider in:
  1. Interpreting the constitution?
  2. Interpreting statutory provisions?
  3. Interpreting statutory provision vis-à-vis constitutional provisions?
- ii. What principles were applicable in the construction of statutes?



- iii. Whether Parliament and the Parliamentary Service Commission were the same entity.
- iv. Whether the Parliamentary Service Commission's role of providing services and facilities to ensure the efficient and effective functioning of Parliament *inter alia* made it a subordinate of Parliament.
- v. What was the role of the Parliamentary Service Commission?
- vi. Whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers:
- vii. Whether sections 2(2)(a) and 3 of the IEBC Amendment Act that provided for a selection panel to nominate candidates for appointment as commissioners would have 4 of its 7 panelists appointed by the Parliamentary Service Commission were unconstitutional to the extent that it infringed rule of law, was an abuse of power, violated the independence of constitutional commissions.
- viii. Whether sections 2(2)(a) and 3 of the IEBC Amendment Act that provided for a selection panel to nominate candidates for appointment as commissioners would have 4 of its 7 panelists appointed by the Parliamentary Service Commission was unconstitutional to the extent that it violated equity, equality, non-discrimination and fairness and violated political rights of Kenyans.
- ix. Whether Parliament erred in legislating one organ to occupy 4 out of 7 slots in the selection panel to nominate persons to be appointed as commissioners of an independent commission.
- x. Whether the High Court could stop or vary a timeline set out in the Constitution.
- xi. Whether a selection panel which had majority of its members nominated by one entity could pass the threshold of being portrayed as independent and fair.
- xii. Whether a court could grant a specific relief when the relief had not been pleaded.
- xiii. Whether, with an election 5 months away, the court could order that the selection panel that appointed commissioners of the Independent Electoral and Boundaries Commission was illegally constituted and order for the re-composition of the selection panel and the nullification of the appointment of the commissioners.
- xiv. Whether a court could issue orders against third parties not included as parties to the suit.

**Held**

1. The Constitution was a document *sui generis*. It was the ultimate source of law in the land. It commanded superiority and dominance in every aspect and its interpretation as of necessity had to be in a manner that all other laws bowed to. The Constitution was to be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. The Constitution was to be interpreted in a holistic manner, within its context, and in its spirit. Holistic interpretation meant interpreting the Constitution in context.
2. The contextual analysis of a constitutional provision meant reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution had to be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation did not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.



3. The principles of interpretation also applied to the construction of statutes. There were other important principles which applied to the construction of statutes as well as to the construction of a Constitution such as:
  1. presumption against absurdity – a court was to avoid a construction that produced an absurd result;
  2. the presumption against unworkable or impracticable result - a court was to find against a construction which produced unworkable or impracticable result;
  3. presumption against anomalous or illogical result - a court was to find against a construction that created an anomaly or otherwise produced an irrational or illogical result;
  4. the presumption against artificial result – a court was to find against a construction that produced artificial result and,
  5. the principle that the law should serve public interest – the court was to strive to avoid adopting a construction which was in any way adverse to public interest, economic, social and political or otherwise.
4. The Constitution had to be read as an integrated whole with no one particular provision destroying the other so as to effectuate the harmonization principle. In determining whether a statute was constitutional, the court had to determine the object and purpose of the impugned statute for it was important to discern the intention expressed in the Act itself. In examining whether a particular statutory provision was unconstitutional, the court had to have regard not only to its purpose but also its effect.
5. Both purpose and effect were relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect could invalidate legislation. All legislation was animated by an object the legislature intended to achieve. That object was realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, were clearly linked, if not indivisible. Intended and achieved effects had been looked to for guidance in assessing the legislation’s object and the validity.
6. The Constitution was to be given a purposive, liberal interpretation that promoted the rule of law and had jurisprudential value that had to take into account the spirit of the Constitution.
7. In ascertaining the manner in which a limitation to a right or fundamental freedom may be justified, courts were to consider a three-pronged criteria;
  1. the objective which the limitation was designed to serve;
  2. the means chosen to attain the objective must be reasonable and demonstrably justified, the proportionality test; and,
  3. the effect of the limitation.
8. To establish that a limit was reasonable and demonstrably justified in a free and democratic society, the objective, which the measures responsible for a limit on a right or freedom were designed to serve, had to be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard had to be high in order to ensure that objectives which were trivial or discordant with the principles integral to a free and democratic society were not upheld. It was necessary, at a minimum, that an objective related to concerns which were pressing and substantial in a free and democratic society before it could be characterized as sufficiently important.
9. On the proportionality test, one had to show that the means chosen were reasonable and demonstrably justified. That involved a form of proportionality test: although the nature of the proportionality test would vary depending on the circumstances, in each case courts would be required to balance the



interests of society with those of individuals and groups. There were three important components of a proportionality test: -

1. The measures adopted had to be carefully designed to achieve the objective in question. They were not to be arbitrary, unfair or based on irrational considerations. They had to be rationally connected to the objective.
  2. The means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question.
  3. There had to be a proportionality between the effects of the measures which were responsible for limiting the charter right or freedom, and the objective which had been identified as of sufficient importance.
10. On the third test, the effect of the limitation, the general effect of any measure impugned would be the infringement of a right or freedom.
11. Even if an objective was of sufficient importance, and the first two elements of the proportionality test were satisfied, it was possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure would not be justified by the purposes it was intended to serve. The more severe the deleterious effects of a measure, the more important the objective had to be if the measure was to be reasonable and demonstrably justified in a free and democratic society.
12. Chapter 15 of the Constitution was on commissions and independent offices. The Parliamentary Service Commission (PSC) was among the commissions. Under article 253 of the Constitution, each commission was a body corporate with perpetual succession and a seal. It was capable of suing and being sued in its corporate name. In discharging their mandates, commissions and independent offices were independent and not subject to direction or control by any person or authority, but were only subject to the Constitution and the law.
13. There was a deliberate pattern of design adopted in the Constitution relating to the arms of government and the commissions associated with the mandates of aiding such arms of government to properly operate. Such commissions were usually provided for under the same chapter as the arm of government. For instance, the Judicial Service Commission was closely associated with the Judiciary as the arm of government. That commission was provided for under chapter 10 of the Constitution which dealt with the Judiciary. Likewise, the PSC was provided for under chapter 8 on the Legislature. Another example was the Office of the Attorney General and that of the Director of Public Prosecutions which were provided for under chapter 9 of the Constitution which was on the Executive.
14. Resulting from such a constitutional formatting, it appeared as though such commissions and organs were subordinate to the respective arms of government. That was not the position. Each of the commissions, independent offices or state organs were independent and only subject to the Constitution and the law.
15. Whereas the PSC's main role was to provide services and facilities to ensure the efficient and effective functioning of Parliament, that did not make it subordinate to Parliament. PSC remained independent and was only subject to the Constitution and the law. Whereas PSC and Parliament were inter-dependent, they were distinct constitutional entities.
16. The court would be reluctant to question parliamentary procedures, as long as they did not breach the Constitution. Parliament was guided by both the Constitution and the Standing Orders in its legislative process. The functions of Parliament and the PSC were different. There was nowhere any of their powers overlapped.
17. To adopt an interpretation that PSC was a subordinate of Parliament would be to adopt a formalistic or positivistic approach. Courts while interpreting the Constitution, were to favour a purposive approach as opposed to formalism.



18. The unique circumstances of the instant case did not support the contention that Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers. Parliament discharged its constitutional duty in enacting the IEBC Amendment Act.
19. A petitioner ought to demonstrate with some degree of precision the right it alleged had been violated, the manner it had been violated, and the relief it sought for that violation. A party invoking article 22(1) of the Constitution had to show the rights said to be infringed, as well as the basis of his or her grievance. The petitioner had failed in proving that the IEBC Amendment Act infringed the rule of law.
20. Under the impugned IEBC Amendment Act, PSC nominated four out of the seven nominees for appointment into the Selection Panel for the selection of the nominees for the appointment of members of the Independent Electoral and Boundaries Commission (IEBC). The composition of the selection panel was provided for in the first schedule to the Act. The Selection Panel comprised of 7 members. None of them was nominated by the PSC. The IEBC Act was later amended by the enactment of Election Laws (Amendment) Act, No. 36 of 2016. Then, the Independent Electoral and Boundaries Commission (Amendment) (No. 3) Bill, 2019 proposed some other amendments to the selection panel. The Bill was dealt with by both Houses of Parliament. It then resulted into the enactment of the IEBC Amendment Act.
21. Unlike in the Election Laws (Amendment) Act, No. 36 of 2016 where 4 out of 9 of the members were nominated by PSC and in the Independent Electoral and Boundaries Commission (Amendment) (No. 3) Bill, 2019 where 4 out of the 11 members were to be nominated by PSC, the IEBC Amendment Act provided that out of the 7 members, 4 of them were to be nominated by PSC.
22. One of the reasons why previously the number of nominees by PSC into the selection panel was not more than one half of the nominees was that the perception of independence of the selection panel. A selection panel which had majority of its members nominated by one entity could not pass the threshold of being portrayed as *inter alia* independent and fair. The dominance of the members appointed by one entity into the selection panel definitely raised legal eye brows.
23. On the objective test, it was necessary, at a minimum, that an objective related to concerns which were pressing and substantial in a free and democratic society before it could be characterized as sufficiently important.
24. From the history of constitution making in Kenya and the quest for free and fair elections, the objective of the IEBC Amendment Act ought to further the realization of the goal that IEBC would eventually conduct fair, free and credible elections and referenda. The IEBC Amendment Act ran counter that objective. The IEBC Amendment Act instead created a scenario of suspicion not only on the commissioners to be appointed, but also the eventual independence of the IEBC. The selection panel was dominated by the nominee selected by PSC. That dominance ran contrary to good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity among like principles.
25. It was not far-fetched to imagine the likelihood of the majority of the members of the selection panel nominated by PSC to favour some candidates during the nomination process. Such preferred candidates could eventually become commissioners of IEBC and their independence would be put to question.
26. The Constitution gave Parliament powers to allocate any other functions to PSC through legislation. The IEBC Amendment Act did not infringe the principle of rule of law.
27. The objective of the impugned composition of the membership of the IEBC Amendment Act was not to address the concerns which were pressing and substantial in a free and democratic society. Instead, the membership of 4 out of 7 members nominated by PSC favoured a process which did not fully uphold the Constitution. The membership of the IEBC Amendment Act failed the objective test. The proportionality and the effect of the statutory provision, could not be subject of further



discussion once the statute or the provision failed to pass the objective muster. Section 2(2)(a) of the IEBC Amendment Act variously offended the principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity.

28. There was need for a legislation that would take such principles into account without losing sight of the fact that Kenyans were looking upon Parliament to pass legislations which would foster free, fair and credible elections and referenda. To the extent that section 2(2)(a) of the IEBC Amendment Act provided for the nomination of 4 out of 7 members of the selection panel, then the impugned section 2(2)(a) of the IEBC Amendment Act was unconstitutional.
29. Even in instances where a party failed to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief. Even in instances where there were express provisions on specific reliefs a court was not precluded from making any other orders under its inherent jurisdiction for the ends of justice to be met. Article 23 of the Constitution did not expressly bar the court from granting conservatory orders where a challenge was taken on the constitutionality of legislation.
30. While protecting fundamental rights, the court had power to fashion new remedies as there was no limitation on what the court could do. Any limitation of its powers could only derive from the Constitution itself. Not only could the court enlarge old remedies, it could invent new ones as well if that was what it took or was necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. The court was always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects were to be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court.
31. The selection panel completed its mandate and recommended persons who were eventually appointed as commissioners of IEBC. The said persons were in office. One of the reliefs expected in the instant matter in view of the declaration of unconstitutionality of section 2(2)(a) of the IEBC Amendment Act had to do with the aftermath of what the selection panel yielded. The court declined to nullify the nomination process and to nullify the appointment of the commissioners on grounds that they were deemed as fruits of a poisoned tree. The court declined to order Parliament to come up with a new law and to order that the nomination process be undertaken again for reasons related to non-joinder and on the effect of such orders to the country.
32. On non-joinder, the petition was filed when the IEBC Amendment Act had been passed into law, but the selection panel was yet to be appointed. Later, the selection panel was put in place. On learning of that development, the petitioner filed the notice of motion dated April 27, 2021. There was no attempt to amend the petition. The petitioner was using the application to expand the petition without properly amending it. The status of the members of the selection panel sought to be served through the Hon. Attorney General was not clear.
33. The correct procedure to have been adopted by the petitioner was to apply to court to amend the petition and introduce the new cause of action which was the appointment of the selection panel. The petitioner would then have indicated how the members of the selection panel would participate in the matter and the amended petition would have had concise prayers for the new cause of action. The petitioner would have taken the game to a level playing field. As the petitioner failed to do so, the court did not find any justification to deal with that application first or to issue any interim conservatory orders. The court directed that the application be heard together with the petition.
34. Given that the members of the selection panel were not enjoined as parties in the instant matter, the court could not, at the tail-end of the proceedings, issue any orders to the detriment of any of them. If the court did so then it would infringe on the members' right to a fair trial which was guaranteed



- under article 50(1) of the Constitution. The right to a fair trial was one of the rights which could not be limited in any manner whatsoever as provided for under article 25 of the Constitution.
35. IEBC was at the heart of preparing for the next general elections. The elections were expected to be conducted in the next 8 months. If the court made an order that the four new commissioners vacate office, IEBC would lack quorum to conduct its affairs. The effect of such an order would mean that Parliament would have to come up with another piece of legislation and the process of selecting the four commissioners would begin afresh. If the court allowed that to happen, then the chances that IEBC would not be able to prepare and conduct the next general elections would be high.
  36. The general elections were constitutionally-provided and no court could tamper with constitutional timelines. If the court put IEBC in a situation where it could not prepare and conduct the next general elections, then it would be creating a constitutional crisis. A court of law had to uphold the Constitution. A court was not to create a constitutional crisis. It remained the cardinal duty of a court to foresee such a crisis and take steps to avoid it.
  37. The fact that four commissioners of IEBC resigned and their positions remained vacant for a while, was due to the fact that there was no law in place on how other commissioners were to be appointed. The scenario resulted from the amendments which were made through section 6 of the Election Laws (Amendment) Act, No. 36 of 2016, which stated that the selection panel shall stand dissolved upon the requisite appointments being made under paragraph 4. The selection panel was wound up when the seven commissioners (which included the chairperson) were appointed on January 17, 2017. The next law on the appointments was the IEBC Amendment Act which came into effect on November 13, 2020. Interestingly, the Selection Panel provided for in the IEBC Amendment Act also stood dissolved on the appointment of the four commissioners.
  38. There was no standing selection panel for nominees for appointment as IEBC Commissioners. Whenever a vacancy in the IEBC Commissioners arose, Parliament would first have to come up with the law on the next selection panel. There was need for Parliament to relook at the law on the selection panel. Even though the selection panel did not necessarily have to be a standing committee, the law could provide for the manner in which the next selection panel could be constituted without the need to first enact a new law to that end.
  39. In order to aid IEBC to operate without any legal hitches on its quorum, there was need for Parliament to consider the period within which any vacancies which may arise in IEBC Commissioners had to be filled.

*Petition partly allowed.*

#### **Orders**

- i. *The notice of motion filed on April 27, 2021 was dismissed.*
- ii. *A declaration issued that to the extent that section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No. 18 of 2020 provided that the Parliamentary Service Commission was to nominate 4 out of 7 members of the selection panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringed article 10 of the Constitution and was unconstitutional.*
- iii. *An order was issued quashing section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No. 18 of 2020.*
- iv. *The Hon. Deputy Registrar of the court was to transmit certified copies of the judgment to both speakers of Parliament.*
- v. *No orders as to costs.*

#### **Citations**

#### **Cases**

*East Africa;*



1. *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR — (Explained)
2. *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR — (Mentioned)
3. *Okeyo, Erick v County Government of Kisumu & 2 others* [2014] eKLR — (Mentioned)
4. *Wanjohi, George Mike v Steven Kariuki & 2 others* [2014] eKLR — (Mentioned)
5. *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR — (Mentioned)
6. *In the Matter of Kenya National Commission on Human Rights Reference 1 of 2012*; [2014] eKLR — (Followed)
7. *In the Matter of the National Land Commission* [2015] eKLR — (Explained)
8. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion Application No 2 of 2012*; [2012] eKLR — (Explained)
9. *Kariuki, James Gacheru & 10 others v County Government of Mombasa & 56 others* [2019] eKLR — (Mentioned)
10. *Mwau, John Harun v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR — (Mentioned)
11. *Mwau, John Harun v Andrew Mulei & others* Civil Appeal No 175 of 2009; [2009] eKLR — (Mentioned)
12. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & another* [2017] eKLR — (Mentioned)
13. *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR — (Mentioned)
14. *Law Society of Kenya v Anne Kananu Mwenda & others* [2021] eKLR — (Explained)
15. *Law Society of Kenya v Attorney General & another* [2021] eKLR — (Mentioned)
16. *In the Matter of the National Land Commission Advisory Opinion No 2 of 2014*; [2015] eKLR — (Explained)
17. *Mugambi Imanyara & another v Attorney General & 5 others* [2017] eKLR — (Mentioned)
18. *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & others* Petition No 3 of 2011; [2011] eKLR — (Mentioned)
19. *National Assembly of Kenya & another v Institute of Social Accountability & 6 others* [2017] eKLR — (Explained)
20. *Okoiti, Okiya Omtatah v Public Service Commission & 73 others* Constitutional Petitions No 33 and 42 of 2018 (Consolidated); [2021] eKLR — (Mentioned)
21. *Pharmacy and Poisons Board v George Wang'anga & 5 others* [2020] eKLR — Mentioned
22. *Republic ex parte Chudasama v Chief Magistrate's Court, Nairobi & another* Civil Case No 473 of 2006; [2008] 2 EA 311 — (Explained)
23. *Momanyi, Samuel v Attorney General & another* Petition No 341 of 2011; [2011] eKLR — (Mentioned)
24. *Kitbeka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* [2018] eKLR — (Mentioned)
25. *Speaker of the Senate & another v Attorney General & 4 others* Reference No 2 of 2013) — (Explained)
26. *Council of Governors v Inspector General of Police & 3 others* [2015] eKLR — (Mentioned)
27. *The Institute of Social Accountability (TISA) & another v National Assembly & 4 others* [2015] eKLR — (Mentioned)
28. *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR — (Mentioned)
29. *Trusted Society for Human Rights Alliance v Attorney General & 2 others* [2012] eKLR — (Mentioned)
30. *Ndyanabo v Attorney General* [2001] EA 495 — (Explained)
31. *Tinyefuza v Attorney General* [1997] UGCC 3 — (Explained)

#### **South Africa;**

1. *Fose v Minister of Safety & Security* [1977] ZACC 6 — (Explained)



2. *National Coalition for Gay and Lesbian Equality & others vs Minister of Home Affairs & others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) — (Followed)
3. *Economic Freedom Fighters v Speaker of the National Assembly & others; and Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 11 — (Mentioned)
4. *Minister of Health & others v Treatment Action Campaign & others* [2002] 5 LRC 216 — (Explained)

#### **United Kingdom;**

1. *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) — (Explained)
2. *Blackburn v Attorney General* [19171] 1 WLR 1037 — (Mentioned)

#### **Canada**

*R v Big Drug Mart Ltd* 1 SCR 295, 18 DLR (4th) 321, 3 WWR 481, 18 CCC (3d) 385, 37 Alta LR (2d) 97— (Explained)

#### **Statutes**

##### **East Africa;**

1. Constitution of Kenya, 2010 articles 1(1); 2(4); 10; 20(4); 38; 73; 81; 88(5); 92; 94(4)(5); 95(4)(b)(c); 96; 97(1)(a)(b); 98(a); 101(4); 109; 127(6)(e)(ii); 165(3)(d)(i)(ii); 248(2)(d); 249(2)(b); 250(1)(2)(a); 252(1); 259(1) — (Interpreted)
2. Election Laws (Amendment) Act, 2016 (Act No 36 of 2016) section 2(2)(a); 38 — (Interpreted)
3. Evidence Act (cap 80) sections 107(1)(2); 109 — (Interpreted)
4. Independent Electoral And Boundaries Commission Act, 2011 (Act No 9 of 2011) — section 1(6) — (Interpreted)
5. Law society of Kenya Act, 2014 (Act No 21 of 2014) section 4 — (Interpreted)

#### **Advocates**

Mr Kuria Thande for the 1st respondent

Mr Mwendwa for the 2nd respondent

Miss Thanji for the 3rd respondent

Mr. Wambulwa for the 4th respondent

Mr Osiemo for the 5th respondent

## **JUDGMENT**

### **Introduction**

1. In Kenya, elections and referenda are conducted by the Independent Electoral and Boundaries Commission (hereinafter referred to as “the Commission” or “IEBC”).
2. In discharging its mandate, the Commission is governed by the Constitution and various legislations. One of such legislations is the Independent Electoral and Boundaries Commission Act, No 9 of 2011 (hereinafter referred to as “the IEBC Act”).
3. The Petition subject of this judgment seeks to challenge some amendments made to the IEBC Act on grounds of unconstitutionality. The changes were introduced to the IEBC Act vide the Independent Electoral and Boundaries Commission (Amendment) Act, No 18 of 2020 (hereinafter referred to as “the IEBC Amendment Act”).

### **The Parties:**

4. The petitioner, Okiya Okiiti Omtatah, describes himself as a law-abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for



Justice and Development Trust, a legal trust, incorporated in Kenya with the purpose of promoting democratic governance, economic development and prosperity.

5. The 1<sup>st</sup> respondent, The Attorney General, is the principal legal adviser of the Government of Kenya. It is enjoined in this suit on the basis of article 156 of the Constitution.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the two Houses of Parliament, the National Assembly and the Senate respectively. They are sued for violating the Constitution by enacting the impugned IEBC Amendment Act.
7. The 4<sup>th</sup> Respondent, Parliamentary Service Commission (hereinafter referred to as “the PSC”) is one of the independent commissions in Kenya. It is established under article 127 of the Constitution of Kenya to ensure smooth functioning of the Houses of Parliament. It is sued for its role under the impugned IEBC Amendment Act.
8. The 5<sup>th</sup> respondent is the Law Society of Kenya (hereinafter referred to as “the LSK”) and the 6<sup>th</sup> respondent is the Inter-Religious Council of Kenya (hereinafter referred to as the “IRCK”). Both are likewise sued for their respective roles under the impugned IEBC Amendment Act.

#### **The Petition:**

9. The Petition is dated 3<sup>rd</sup> November, 2020. It is supported by the Affidavit of the petitioner sworn on even date. Together with the filing of the Petition was a Notice of Motion also evenly dated. It sought conservatory orders to restrain the IEBC Amendment Act from coming into force.
10. The application was heard *inter-partes* and disallowed vide a ruling rendered on 16<sup>th</sup> November, 2020.
11. Later, the petitioner filed another application by way of Notice of Motion again seeking conservatory orders against the implementation of Kenya Gazette No 4004 of 26<sup>th</sup> April, 2021 where the President appointed seven members of the Selection Panel for the selection of the nominees for the appointment of members of the IEBC. The application was dated 27<sup>th</sup> April, 2021.
12. On directions of this court, the application dated 27<sup>th</sup> April, 2021 was subsumed into the main Petition and both were heard together.
13. The petitioner impugned the *IEBC Amendment Act* on several grounds. First, it was contended that section 2(2)(a) thereof unconstitutionally assigned four out of the seven slots in the Selection Panel for the selection of the nominees for the appointment of members of the IEBC (hereinafter referred to as ‘the Selection Panel’) to the PSC.
14. Second, that section 3 of the IEBC Amendment Act unconstitutionally assigns the PSC with administrative responsibilities of co-ordinating the IEBC Commissioners’ recruitment process and at the same time, the same body, is vested with the duty of appointing four members of the Selection Panel. Further, PSC receives names from other agencies nominating their members to the Selection Panel and transmits them to the President for appointment.
15. The third ground is that the IEBC Amendment Act infringed the principle of separation of powers. The Petitioner posited that despite the constitutional mandate to Parliament to legislate under article 88(5) of the *Constitution*, to oversight vetting and approval of nominees under article 250(2)(a) of the Constitution, allocating funds to the Commission under article 95(4)(b) & (c) of the Constitution and to initiate the removal process of the IEBC Commissioners, Parliament violated the constitutional edict on separation of powers by passing legislation that allowed Parliament to have effective control over the selection process of the Commissioners of the Commission.



16. Fourth, the petitioner averred that the IEBC Amendment Act violated the principle of rule of law. He pleaded that other than hiring parliamentary staff, neither does the Constitution nor the Parliamentary Service Commission Act allocate the PSC the power to select or control the selection of members of constitutional commissions and independent commissions including the IEBC. As such, parliament violated the rule of law by developing legislation whose purpose or effect is to provide Parliament and Parliamentary Service Commission with the control on selection of IEBC Commissioners.
17. On a fifth ground, the petitioner averred that Parliament in enacting the IEBC Amendment Act abused its power and failed to adhere to the principle of good governance in contravention of articles 94(4) and 73 of the Constitution that required it to protect the Constitution and promote democratic governance and the exercise of authority in a manner that brings honour to the nation and dignity to the office.
18. While stressing the fifth ground, the petitioner posited that the IEBC Amendment Act brought about a selection process that was heavily controlled by Parliament and PSC which in effect compromised the independence of or perception of independence of IEBC in violation of articles 81, 88 and 249 of the Constitution that peremptorily required IEBC to be independent.
19. The petitioner vehemently claimed that the IEBC Amendment Act unfairly and unconstitutionally elevated the status of Parliament by creating the impression that IEBC primarily exists to service it, demeaning many other state and public organs that depend on IEBC to conduct or oversee their elections, including the County Governments.
20. It was the petitioner's further case as ground six that Parliament created an unconstitutional situation of inequality and discrimination in violation of article 10 of the Constitution by legislating that one organ occupies four out of seven slots in the IEBC Commissioners' Selection Panel.
21. On infringement of article 38 of the Constitution as the seventh ground, the petitioner averred that the failure to constitute an independent electoral and management body had direct effect of enjoyment of political rights as constitutionally guaranteed.
22. The petitioner expounded the foregoing seven grounds in the Petition.
23. He averred that the IEBC Amendment Act is unconstitutional as it concentrated power in a small clique of individuals who have more in common with each other (that is the four people all nominated by the PSC) than the other three members of the selection panel, one nominated by the Law Society of Kenya and two by the Inter-Religious Council of Kenya.
24. The petitioner further posited that the IEBC Amendment Act was actuated by mischief intended to undermine the independence of IEBC despite the fact that under the 2010 constitutional dispensation, it was not open for Parliament to grant the PSC any functions whose purpose and or effect was outside the constitutional dictates.
25. The petitioner further pleaded that the role of PSC under section 1(6) of the First Schedule of the *IEBC Act* is to provide secretariat services and as such, nominating members into the selection panel cannot be part of providing secretariat services.
26. He deponed that to both nominate members of the selection panel and at the same time provide the secretariat services and facilities required by the selection panel amounts to gross conflict of interest and breach of the Constitution.
27. The petitioner also hinted on the delay by the President to announce vacancies in the IEBC after the resignation of some Commissioners and to set in motion recruitment process. He pleaded that such



amounted to abuse of power and dereliction of the constitutional duty. He further stated that the abuse was aided and abetted by Parliament which failed in its constitutional duty to hold the Executive to account for these vacancies on behalf of the People of Kenya.

28. As a result of the foregoing, the Petitioner averred that having sat on their hands for years and refused to declare the four vacancies in the IEBC or be held accountable, the President and Parliament mischievously sought to unconstitutionally influence the outcome of the selection process for the Commissioners of IEBC, to suit their own political interests.
29. The Petitioner further stated that it is the duty of this court to ensure that the public is left in no doubt that the Commissioners of IEBC are appointed into office in accordance with the Constitution as opposed to extraneous considerations, including political patronage. He claimed that the PSC ought not to be used to undermine the independence of IEBC, a creature of the Constitution.
30. The petitioner posited that there was no reason why the vacancies in the Commission could not have been filled using the selection procedure in section 38 of the First Schedule of the *Election Laws (Amendment) Act, 2016*. It was his case that the IEBC Amendment Act did not comply with the Constitution and were enacted for extraneous considerations.
31. On the foregoing, the petitioner invited the court to determine the question whether, sections 2(2)(a) and 3 of the IEBC Amendment Act are unconstitutional; whether the PSC is conflicted and it should not participate in any way in the appointment of the IEBC Chair and Commissioners and whether the IEBC Amendment Act is unconstitutional and, therefore, invalid, null and void.
32. In the main, the petitioner prayed for the following reliefs: -
  - a. A declaration be and is hereby issued that section 2(2)(a) and section 3 of the *Independent Electoral Boundaries Commission (Amendment) Act* No 18 of 2020 are unconstitutional.
  - b. A declaration be and is hereby issued that the Independent *Electoral and Boundaries Commission (Amendment) Act* No 18 of 2020 is unconstitutional.
  - c. A declaration be and is hereby issued that the Respondents should be condemned to pay the costs of this motion.
  - d. An Order be and is hereby issued that section 2(2)(a) and section 3 of the Independent Electoral Boundaries Commission (Amendment) Act No 18 of 2020 are unconstitutional.
  - e. An Order be and is hereby issued that the Independent Electoral Boundaries Commission (Amendment) Act No 18 of 2020 is unconstitutional.
  - f. An order be and is hereby issued compelling the respondents to bear the costs of this Petition.
  - g. Consequent to the grant of the prayers above the honourable court be pleased to issue any other or further remedy (directions and orders) that the honourable court shall deem necessary to give effect to the foregoing orders, and/or favour the cause of justice.
33. The petitioner also filed written submissions in further support to the Petition. The submissions were dated 24<sup>th</sup> November, 2020.
34. In his submissions, the petitioner mainly reiterated the averments of the Petition.
35. In urging this court to allow the Petition, the petitioner submitted that both article 2(4) and 165(3) (d)(i) & (ii) of the Constitution gives this court the power to invalidate any law, act or omission that is inconsistent with the Constitution. Reliance was placed on the decision in *Coalition for Reform*



*and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR* where several provisions of the Security Laws (Miscellaneous Amendment) Act 2015, an omnibus bill providing for amendments to various security and related laws were struck down for violating the Bill of Rights.

36. Reference was also made to the decision in *The Institute of Social Accountability (TISA) & another v National Assembly & 4 others [2015] eKLR* and *Council of Governors & 3 others v Senate & 53 others [2015] eKLR* where the County Development Act, No 30 of 2013 and County Governments (Amendment) Act 2014 were voided for breaching fundamental principles of the Constitution.

37. On the basis of the foregoing, the Petitioner submitted that Parliament in enacting sections 2(2)(a) and 3 of the *IEBC Amendment Act* violated article 10 of the Constitution on separation of powers; checks and balances; rule of law; good governance; equity and equality, inclusiveness and non-discrimination.

38. In describing how separation of powers was violated, the Petitioner stated that the Commission is an independent commission ought to be an independent institution. He argued that since PSC is an organ of the Legislature under chapter 8 of the Constitution and selects four out of the seven members of the Selection Panel, it would have an overbearing control and effect of those recommended for nomination to be Commissioners of the IEBC.

39. To buttress the principle of separation of powers, reliance was placed on Supreme Court in *In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011* where it was held that: -

.... Separation of powers is an integral principle in Kenya's Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary . . .

the essence of separation of powers, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.

40. Reference was also made to the decision in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR*. where it was observed thus: -

... When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.

41. To further demonstrate that Parliament had control in the process towards the selection of the IEBC Commissioners, it was submitted that under article 250(1) of the Constitution it was still the Parliament (in this case the National Assembly) which vets and approves the persons nominated to be IEBC Commissioners.

42. In closing, the petitioner stated that a law that directly or indirectly vested Parliament with a substantially dominant role in the selection of the IEBC Commissioners not only undermined the principle of separation of powers but blurs the constitutional requirement of checks and balances.

43. On the limb of equity, equality and inclusiveness, the Petitioner submitted that since the IEBC is also responsible for the elections of Governors and County Assemblies, equity, equality and inclusiveness demanded that some of the slots assigned to PSC to appoint members of the Selection Panel be



nominated by organs of County Governments, such as the Service Boards of County Assemblies and the Council of Governors.

44. On the requirement that the law should yield good governance, the rule of law and accountability, the Petitioner submitted that in enacting the impugned legislation, Parliament failed to uphold article 10 of the Constitution and the findings in *Economic Freedom Fighters v Speaker of the National Assembly & others; and Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 11, where it was observed that the foregoing principles and values strengthen and sustain constitutional democracy.
45. The Petitioner also submitted that the IEBC Amendment Act ran counter the provisions of articles 15 and 17 of the African Charter on Democracy Elections and Governance which required State parties to establish public institutions that promote and support democracy and ensure that the independence or autonomy of the said institutions are guaranteed by a defined constitutional order.
46. It was also submitted that the *IEBC Amendment Act* threatened article 38 of the Constitution on political rights.
47. The Petitioner urged the court to look at the purpose and effect of the IEBC Amendment Act and declare it unconstitutional. To buttress the point, reference was made *The Institute of Social Accountability & another -vs- National Assembly & 4 others case (supra)* where the Court observed as follows: -

[58] ...Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows:

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

48. In submitting on the need to preserve operational independence of Commissions and Independent offices, the petitioner made reference to Advisory Opinion Reference No 2 of 2014 - *In the Matter of the National Land Commission* [2015] eKLR where it was stated that: -

Operational independence: this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition of the commission; and procedures of the commission.

49. Further reliance was placed on *the Matter of the Interim Independent Electoral Commission* Sup Ct Application No 2 of 2011; [2011] eKLR where the Supreme Court observed that: -

..... [T]he real purpose of the „independence clause?, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of Government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of Government, even as it irreparably trespassed upon



the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the „independence clause?.

50. It was the petitioner's further submission that to the extent that the IEBC Amendment Act vested power in Parliament to determine who becomes the IEBC Chair and member, it violated the general public's legitimate expectation in the rule of law and constitutionalism. The Supreme Court decision in *Communication Commission of Kenya v Royal Media Services & 5 others, Supreme Court of Kenya, Pet 14A, 14B & 14C of 2014 [2014] eKLR* was referred to where the test for legitimate expectation was set out as follows: -

[269] The emerging principles may be succinctly set out as follows: (a) There must be an express, clear and unambiguous promise given by a public authority; (b) The expectation itself must be reasonable; (c) The representation must be one which it was competent and lawful for the decision-maker to make; and (d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.

51. On costs, the Petitioner made two submissions. The first one was that he be awarded costs of the Petition. On this point, he submitted that since the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were sued in their capacities as public institutions established under the Constitution for enacting an unconstitutional legislation, then they should pay costs. Support was found in *Erick Okeyo v County Government of Kisumu & 2 Others [204] eKLR*.
52. The second submission on costs was that in the event the Petition was disallowed, the Petitioner ought not to be condemned to costs.
53. In the end, the petitioner urged the court to grant additional appropriate reliefs further to the ones prayed for in the Petition. Support was found in the South African Constitutional Court in *Minister of Health & others v Treatment Action Campaign & others (2002) 5 LRC 216* where it was as held that: -

...appropriate relief will in essence be a relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.

54. The 5<sup>th</sup> respondent herein, the LSK, supported the Petition. As such, I will deal with its case before venturing into the parties who opposed the Petition.

#### **The 5<sup>th</sup> Respondent's Case:**

55. The LSK supported the Petition through its written submissions dated 14<sup>th</sup> December, 2020.



56. LSK posited that pursuant to section 4 of the *Law Society of Kenya Act, No 21 of 2014*, it had the obligation to assist the Government and courts in matters relating to legislation, the administration of justice, upholding the Constitution and advancing the rule of law.
57. Given its objects, LSK submitted that it supported the Petition on the basis that its participation in the recruitment of the IEBC Commissioners was of paramount national importance and that it had a duty to ensure that the Selection Panel was a true reflection of the spirit of the Constitution. However, it flouted that Petitioner in suing it as a Respondent instead of an Interested Party.
58. On the constitutionality of the IEBC Amendment Act, LSK submitted that Parliament violated the principles of the Constitution in amending the IEBC Act.
59. It was its case that the IEBC Amendment Act failed the principle of separation of powers since Parliament exercised both the selection and oversight authority over IEBC contrary to article 249(2) (b) of the Constitution that require members of Commissions and holders of independent offices not to be subject to direction or control of any person or authority. LSK buttressed the argument in relying in *Judicial Service Commission v speaker of Parliament & 8 others*.
60. The 5<sup>th</sup> respondent further submitted that the IEBC Amendment Act violated article 10 of the Constitution. To that end, it referred to The Interim Independent Electoral Commission Constitutional Application No 2 of 2011 and the Canadian Supreme Court in *R v Big M Drug Mart Ltd*, 1985 1 SCR 295 where it was the court's finding that implementation of an impugned legislative would bring an unconstitutional effect by giving the executive arm a discretion that was not intended by the Constitution.
61. In sum, the 5<sup>th</sup> respondent pitched that section 2(2) and (3) of IEBC Amendment Act were enacted in flagrant violation of the Constitution and as such the entire IEBC Amendment Act ought to be struck down.
62. Having dealt with the parties supporting the Petition, I will now deal with those who opposed the Petition.

**The 1<sup>st</sup> Respondent's case:**

63. The honourable Attorney General opposed to the Petition through written submissions dated 5<sup>th</sup> May 2021.
64. The 1<sup>st</sup> respondent asserted that there is no prayer sought in the main challenging constitutionality of the Gazette Notice appointing the members of the Selection Panel. It went ahead to identify the issues for determination as whether the participation of the Parliamentary Service Commission in the selection panel of the IEBC Commissioners is unconstitutional and Whether sections 2(2) and 3 of the amendments to the IEBC Act meet the constitutional muster.
65. As to whether the participation of the PSC in the selection panel of the IEBC Commissioners was unconstitutional, the 1<sup>st</sup> Respondent submitted that the Petitioner erroneously infuses two distinct constitutional institutions; Parliament and the PSC into one institution in order to convince the Court that Parliament deliberately made legislation for the ulterior purpose of controlling the selection exercise of the IEBC Commissioners and eventually the entire IEBC.
66. It was the 1<sup>st</sup> respondent's case that the PSC and the Parliament are two distinct institutions. It stated that Parliament is established under article 94 of the Constitution and comprise of the National Assembly and the Senate under articles 95 and 96 of the Constitution respectively whereas the PSC is



one of the Independent Commissions established under Chapter 15 of the Constitution and at article 248(2) d.

67. The 1<sup>st</sup> respondent further shed light on the differences in the PSC and the Parliament in that the duty of the commissions and independent offices, unlike the legislative role of Parliament, is to protect the sovereignty of the people, ensure that all State organs adhere to and observe the democratic values and principles, promote constitutionality and that Commissions, and the holders of independent offices, are subject only to the Constitution and the law, and are independent, and not subject to the direction or control by any person or authority.
68. The 1<sup>st</sup> respondent referred to the scholarly works of Professor PLO Lumumba and Professor Francheschi in *The Constitution of Kenya, an Introductory Commentary, 2014*, at page 19, where it was observed that the newly-formed commissions and independent offices carry out functions which were previously performed by the traditional arms of Government; and hence the framers of the Constitution must have deliberately intended that certain Government functions be separated from the familiar arms of Government, in order to promote transparency, fairness and objectivity.
69. In light of the foregoing, the 1<sup>st</sup> respondent submitted that the functions of the PSC according to article 127(6) of the Constitution do not permit the PSC to participate in the nomination process of IEBC Commissioners and cannot be conflicted in nominating members to the Selection Panel.
70. The 1<sup>st</sup> respondent maintained that the allocation of 4 slots to the PSC in the Selection Panel by sections 2(2) and 3 of the IEBC Amendment Act is constitutional when looked in the lenses of article 127(6) (e) of the Constitution.
71. The 1<sup>st</sup> Respondent further stated that the amendments meet the constitutional muster and do not in any manner limit the rights enshrined under article 38 of the Constitution. It claimed that it does not restrict the right to form, join or participate in the activities of an association.
72. The petitioner was faulted for not demonstrating any shortcomings of the composition of the Selection Panel. In urging the Court to interrogate the objects and purpose of the IEBC Amendment Act the Court's attention was drawn to the decision in *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR* and also in *Samuel G Momanyi v Attorney General and Another High Court Petition No 341 of 2011*.
73. The 1<sup>st</sup> Respondent further stated that legislation is a constitutional function of Parliament and as such Court should be hesitant to declare such statutes or amendments to statute unconstitutional without interrogating the mischief that the legislature wanted to cure. Court was invited to find persuasion in the US Supreme Court in *US vs Butler, 297 US 1[1936]* and the Supreme Court in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR* where in the latter it was observed thus: -

.... This judgment has raised important questions regarding the role of this Court in determining issues relating to the legislative process and we have determined that whereas under article 165(3) (d) of the Constitution as read with articles 22(1) and 23(1), the High Court has wide interpretative powers donated by the Constitution, it must be hesitant to interfere with the legislative process except in the clearest of cases. The words of Nzamba Kitonga, SC must therefore ring in the ears of all; that the High Court should not be turned into an alternative forum where losers in Parliamentary debates rush to assert revenge on their adversaries. It would render parliamentary business impossible if the deliberate disruption of legislative proceedings by a member or members unhappy with decisions of



the speaker was to lead to invalidation of legislation by the courts. In saying so, we maintain that the doors of the courts shall remain open and deserving litigants will always obtain relief from the fountain of justice....

74. In rebutting the claim that the IEBC Amendment Act had limited political rights under article 38 of the Constitution, the 1<sup>st</sup> respondent submitted that there was no demonstration of how the amendments affected the Petitioner's right to make political choices including the right to form political parties, participate in formation and activities of political parties, recruit members campaign for a political party.
75. In the end, the 1<sup>st</sup> respondent submitted that the Petition was speculative since the role of the Selection Panel is to recruit, shortlist and interview Kenyans who wish to apply for membership of IEBC. It was stated that the IEBC Amendment Act do not stipulate that the said nominees must come from the membership of the PSC itself.
76. The 1<sup>st</sup> respondent submitted that the Petition was premised on misapprehension of the law and had failed to demonstrate unconstitutionality of the IEBC Amendment Act. It prayed that the Petition be dismissed with costs.

#### **The 2<sup>nd</sup> Respondent's Case:**

77. The National Assembly opposed the petitioner through the Replying Affidavit of Michael Sialai, the Clerk of National Assembly.
78. He deponed that the National Assembly's mandate to enact, amend and repeal laws is derived from the Constitution and as such the Petitioners' claims seek to threaten and restrict the legislative role of Parliament under articles 1(1), 94, 95 and 109 of the Constitution.
79. He further deponed that the IEBC Amendment Bill was subjected to regular parliamentary process. He pointed out that on 8<sup>th</sup> May, 2019 the Bill was published, it was read for the first time on 9<sup>th</sup> May, 2019 and thereafter committed to Departmental Committee on Justice and Legal Affairs pursuant to Standing Order 127 and article 118 of the Constitution.
80. It was also deponed that the Bill was then advertised in local daily newspapers of 29<sup>th</sup> May, 2019 and invited members of public to make presentations on it in compliance with article 118 of the Constitution.
81. It was his disposition that the Justice and Legal Affairs Committee received submissions and memoranda from the IEBC and having taken into account concerns of different stakeholders, it compiled its report on the consideration of the impugned Bill and thereafter went into the second reading.
82. The Clerk deponed that the Bill was then subjected to the Third Reading and passed on 24<sup>th</sup> September, 2019. The Bill was then referred to the Senate for consideration and was accordingly subjected to the rigours of due process.
83. It was posited that the Senate made several proposals including the reduction of the Commissioners, removed some clauses and qualification of the members of the Selection Panel, among others.
84. It was further posited that on 15<sup>th</sup> September, 2020 the National Assembly considered and approved the Senate's proposals and then forwarded the Bill for the Presidential assent in accordance to Article 115 of the Constitution. The Bill was assented into law on 13<sup>th</sup> November, 2020.



85. On the foregoing recount of events, the 2<sup>nd</sup> Respondent deponed that the IEBC Amendment Bill was subjected to requisite legislative procedure under the Constitution and Courts have no mandate to nullify a constitutionally valid statute. He stated that the Petition contravenes the presumption of constitutionality of legislation enacted by Parliament and the onus was on the Petitioner to prove to Court the manner in which the Constitution had been violated as required in the case of *Anarita Karimi Njeru v Republic and Court of Appeal decision in Mumo Matemu & another v Trusted Society of Human Rights*.
86. In reference to the Court of Appeal decision in *Civil Appeal No 175 of 2009; John Harun Mwau v Dr Andrew Mulei & others*, Mr Sialai deponed that courts ought not to interfere with operations of other arms of Government. It was his case that the Petition was an affront to the doctrine of separation of powers and an encroachment to the legislative mandate.
87. Mr Sialai also deponed that courts should not question each and every procedural infraction that may occur in either House of Parliament. He relied of the Supreme Court in *The Speaker of Senate & another v Attorney General & 4 others*.
88. It was also deposed that the IEBC Amendment Bill was made as a result of the lacuna in the First Schedule of the IEBC Act which only applied to the recruitment of the current Commissioners and as such there was need to enact legislation for subsequent appointments.
89. In urging the court to dismiss the Petition, Mr Sialai deponed that the Petitioner had not adduced any cogent evidence to demonstrate that his rights had been infringed upon.
90. In its written submissions dated 10<sup>th</sup> December, 2020, the 2<sup>nd</sup> Respondent largely reiterated the contents of the Replying Affidavit of Mr. Sialai.
91. It was submitted that under articles 94 and 109 of the Constitution, the 2<sup>nd</sup> Respondent exercised its constitutional mandate and that there were no procedural gaps in the enactment of the impugned IEBC Amendment Act.
92. As regards the contention that the IEBC Amendment Act threatened Political Rights under article 38, it was submitted that the effect and purpose of the amendment could not be faulted. To that end, reliance was placed on the Canadian Supreme Court decision in *R v Big Drug Mart Ltd*. Reference was also made to the decision in *Mugambi Imanyara & another v Attorney General & 5 Others* (2017) eKLR where it was held that courts must examine the direct and inevitable effect of law and the legislative history of the statute.
93. It was reiterated in the submissions that the IEBC Amendment Act was constitutional and the burden was on the party challenging it to prove violation of Constitution. Reliance was placed on the decision of the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* (2001) EA 495 where it was observed: -
- Until the contrary is proved, a legislation is presumed to be constitutional. It is sound legal principle of constitutional construction that, if possible, a legislation should receive such a construction that will make it operative and not inoperative.
94. To further buttress the foregoing, the 2<sup>nd</sup> Respondent relied on *Kenya Human Rights Commission v Attorney General & Another* (2018) eKLR, *The Council of Governors v Inspector General of Police & 3 Others* (2015) eKLR.
95. It was submitted that the Petitioner had not discharged his burden for the granting of the declaration of invalidity of the impugned IEBC Amendment Act.



96. In submitting that allowing the Petition would amount to violation of the principle of separation of powers, reference was made to *James Gacheru Kariuki & 10 others v County Government of Mombasa & 56 others* (2019) eKLR and *Trusted Society for Human Rights Alliance v Attorney General & 2 others* (2012) eKLR where in the latter, the Court observed as follows: -

.... Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the courts must defer to the decisions made by those coordinate branches of government.....

97. In the end the 2<sup>nd</sup> respondent submitted that the prayers in the Petition were tantamount to asking the Court to amend or repeal legislation. It stated that such invitation should be exercised with restraint as was observed by the Court of Appeal in *Pharmacy and Poisons Board v George Wang'anga & 5 others* [2020] eKLR.

**The 3<sup>rd</sup> respondent's case:**

98. The 3<sup>rd</sup> respondent, The Senate, opposed the Petition through the Affidavit of Jeremiah Nyegenye, the Clerk to the Senate, deponed to on 16<sup>th</sup> December, 2020.

99. He deponed that Parliament has power to make laws under article 94(5) of the Constitution which are subsequently presumed constitutional and the burden of demonstrating unconstitutionality is on the person contesting.

100. In reference to article 250 of the Constitution that requires composition of Commissions and Independent offices to be identified and recommended for appointment in a manner prescribed by national legislation, the 3<sup>rd</sup> respondent deposed that the IEBC Amendment Act was constitutional.

101. He deposed that under article 127(6)(e)(ii) of the Constitution, the PSC could perform any roles assigned to it by national legislation.

102. He opposed the petitioner's claim of conflict of interest and stated that the PSC's role in appointing the Selection Panel and providing secretariat services have been in existence even in legislation; the Elections (Amendment) Act 2016.

103. In its written submissions dated 11<sup>th</sup> January, 2021 the 3<sup>rd</sup> Respondent stated that every legislation is presumed to be constitutional and to justify its nullification, there must be a clear and unequivocal breach of the Constitution. Reference was made to *Commission for Implementation of the Constitution v Parliament of Kenya and Another* High Court No 454 of 2012 where it was stated: -

I adopt the words of court in *v Varty* [1972] 1 WLR 534, as cited in *Application by Babadur* [1986] LRC 545 (Const.), where it was stated, "I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown..." In the same vein I will reiterate that this court will start from the presumption that a statute as enacted by Parliament is constitutional, is fair unless the contrary is proven.

104. It was stated that under article 250 of the Constitution, national legislation provides for composition, appointment and terms of office of Constitutional Commissions and Independent Offices.

105. In the end, it was submitted that the petitioner had not demonstrated unconstitutionality of the IEBC Amendment Act. It urged the Court to dismiss the Petition.



#### The 4<sup>th</sup> Respondent's case:

106. The 4<sup>th</sup> respondent opposed the Petition through Grounds of Opposition dated 11<sup>th</sup> November, 2020 and the Replying Affidavit of Jeremiah Nyegenye deposed to on 14<sup>th</sup> December, 2020.
107. In the Grounds of Opposition, it was its case that the Petition was an affront to the legislative role of Parliament under article 1(1), 92, 94, 95 and 96 of the Constitution.
108. It claimed that under article 127 of the Constitution, the PSC has the mandate to provide services and facilities to ensure efficient and effective functioning of Parliament and performing other functions as prescribed by legislation.
109. The 4<sup>th</sup> respondent stated that if the Petition were allowed, there will be no procedure for the appointment of IEBC Commissioners or filling of vacancies that may arise contrary to Article 250(2) of the Constitution.
110. It urged that the Petition lacked merit, was argumentative and an outright abuse of court process.
111. In the Replying Affidavit, the dispositions of Mr Nyegenye were a replica of his deposition on behalf of the 3<sup>rd</sup> Respondent.
112. The 4<sup>th</sup> respondent filed written submissions dated 14<sup>th</sup> December, 2020. It restated and emphasized the averments in the Replying Affidavit of Jeremiah Nyegenye.
113. It added that the petitioner had not demonstrated as per the principles established in *Anarita Karimi* case how the IEBC Amendment Act had violated the Constitution.
114. In respect of the claim on separation of powers, it was submitted that PSC is an independent constitutional commission under article 127 of the Constitution contrary to the allegations by the petitioner that the PSC is an appendage of Parliament.
115. It further stated that the impugned the IEBC Amendment Act had introduced parameters for appointment of the members of the Selection Panel that was not there before and made the requirement that members appointed to the Selection Panel to take and subscribe to the oath of office before assuming office. As such, it submitted that the members of the Selection Panel will discharge their mandate independently regardless of the appointing authority.
116. The 4<sup>th</sup> respondent further submitted that the Court had the obligation to consider historical developments, purpose and interest that led to the enactment of the IEBC. To that end, reference was made to the *Matter of the National Land Commission* Advisory Opinion No 2 of 2014 (2015) eKLR where the Supreme Court stated that: -

The Constitution is to be interpreted in a holistic manner that entails reading alongside other provisions and considering the historical perspective purpose and interest of the provisions in question.

117. While referring to the decision of Salmon LJ in *Blackburn v Attorney General* (1917) 1 WLR 1037 it was submitted that the Petition is a textbook example of litigation aimed at influencing the outcome of political decisions.
118. It was also argued that the process of appointing the Selection Panel to recommend persons for appointment as Commissioners of the IEBC is a political process that was arrived at after political compromises between various players in the political and electoral sector in the country. Support was



found in *National Assembly of Kenya & Another v The Institute of Social Accountability & 6 others* (2017) eKLR where the Court of Appeal stated that: -

Furthermore, questions such as division of functions, divisions of revenue, legislative process and budget process are essentially political questions which fall within political question doctrine and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolutions.

119. The 4<sup>th</sup> respondent contended that if the Petition is allowed, there would be no procedure for the appointment of IEBC Commissioners or filling of nay vacancy that may arise contrary to article 250(2) of the Constitution which is against public interest in view of the fast-approaching elections.
120. In response to the contention that there was violation of separation of powers, the 4<sup>th</sup> respondent stated that pure separation of power does not exist. He stated that there always are incidences of overlap.
121. In the end, it submitted that the petitioner had not demonstrated how the role of PSC in appointing its members to the Selection Panel and to provide secretarial services offended the principle of separation of powers. It urged the court to dismiss the Petition for lack of merit.

#### **Issues for Determination**

122. From my reading of the court documents filed and consideration of the submissions of the parties, I have identified the following issues for discussion: -
  - i. Principles of constitutional and statutory interpretation.
  - ii. Whether Parliament and Parliamentary Service Commission are distinct constitutional entities.
  - iii. Whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers.
  - iv. Whether the IEBC Amendment Act or section 2(2)(a) and 3 of the IEBC Amendment Act are unconstitutional to the extent that they infringe article 10 of the Constitution in being counter the rule of law, are an abuse of power and good governance, violates the independence of IEBC, violates equity, equality, non-discrimination and fairness and also violates article 38 of the Constitution.

#### **Analysis and Determination:**

123. I will deal with the issues sequentially.

##### **i. Principles of constitutional and statutory interpretation:**

124. The Petition herein raises various constitutional issues. The issues border on the manner in which the Constitution and the law ought to be interpreted.
125. In such instance, a look at the settled principles in constitutional and statutory interpretation becomes imperative. That, needless to say, shall lay a firm basis for consideration of the rest of the issues with ease.
126. The Constitution is a document sui generis. It is the ultimate source of law in the land. It commands superiority and dominance in every aspect and its interpretation as of necessity must be in a manner that all other laws bow to.



127. In *Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okiiti v Public Service Commission & 73 Others* (2021) eKLR, this court discussed the principles of constitutional interpretation at length. It observed as follows: -

54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).

55. Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

56. Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21<sup>st</sup> December, 2011 in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR discussed the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The court stated as under: -

[86] .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20 (4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

[88] ..... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

[89] It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.



57. On the principle of holistic interpretation of the Constitution, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR affirmed the holistic interpretation principle by stating that:

This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in *In the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -

...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

59. In a Ugandan case in *Tinyefuza v Attorney General*, [1997] UGCC 3 (25 April 1997) the court was of the firm position that the Constitution should be read as an integrated whole. The court observed as follows: -

.... the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.....

60. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

[21] .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction



which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

63. In Advisory Opinion Application No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR , the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.

64. The Court went ahead and gave further meaning of the term purposive by making reference to the decision in the Supreme Court of Canada in *R v Drug Mart* (1985) when it made the following remarks: -

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

65. The Supreme Court, while referring to the South African Constitutional decision in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), went further and stated that a purposive approach is ‘a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.’

66. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in *S v Zuma* (CCT5/94) 1995 when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

67. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

68. The Court of Appeal while dealing with holistic interpretation of the Constitution in Civil Appeal 74 & 82 of 2012, *Centre for Rights Education and Awareness & Another v John*



*Harun Mwau & 6 others* [2012] eKLR stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

128. In discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, *Institute of Social Accountability & another v National Assembly & 4 Others* [2015] eKLR remarked as follows: -

[I]n determining whether a statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security & others* Nairobi Petition No. 3 of 2011 [2011] eKLR, *Samuel G Momanyi v Attorney General and Another* (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows: -

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

[59.] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court In *Re The Matter of the Interim Independent Electoral Commission Constitutional Application* (supra) at para 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and.... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in *The Speaker of the Senate & Another v Attorney-General & another & 3 Others - Advisory Reference No 2 of 2013* [2013] eKLR.



129. Recently, in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v The Attorney General and Another* (2021) eKLR this court in furthering the discussion on the constitutionality of a statute expressed itself as follows: -

110. I will also look at the decision in *R v Oakes*. The brief facts are that the respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that the Respondent was in possession of a narcotic, the Respondent brought a motion challenging the constitutional validity of s 8 of the Narcotic Control Act. That section provides that if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he or she must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether s 8 of the Narcotic Control Act violated s 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s 11(d) of the Charter had been violated, was the issue of whether or not s 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter.

111. The appeal was dismissed and the constitutional question answered in the affirmative. In so holding, the Supreme Court of Canada, then presided by the Chief Justice in a Seven-Judge bench discussed the criteria in ascertaining the manner in which a limitation to a right or fundamental freedom may be justified. The Court came up with a three-pronged criteria. First, the objective which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.

112. On the objective test, the Supreme Court stated as follows: -

67. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, ..... the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

113. On the proportionality test, the Supreme Court stated that: -

70. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd, supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully



designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd.*, *supra*, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

114. On the third test, that is the effect of the limitation, the Supreme Court stated that: -

71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

130. Lastly, the Court of Appeal in *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General [2019] eKLR* had the following to say on the constitutionality of statutes: -

27. Here the question we have to answer is whether the learned Judge erred by not declaring section 10 of the Political Parties Act unconstitutional? The cardinal rule in interpretation of statute is to check whether it complies with the constitutional mandate. This is a rule that has gained traction in several jurisdictions as stated in the case of, *US v Butler*, (*supra*) which was relied on by the appellant. It was held that a duty of a court in determining the constitutionality of a provision of a statute should take the following as a guidance: -

When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.



Also in *The Queen v Big M Drug Mart Ltd*, 1986 LRC (Const) 332, the Supreme Court of Canada stated that;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

28. Bearing in mind the above principles we are of the view that although the Constitution does not make any provisions for political mergers or coalitions, Parliament is mandated under article 92 to make Legislation to provide inter alia for the regulation of political parties, the roles and functions of political parties and other matters necessary for their management thereto. We are cognisant of the fact that enactment of legislation involves a lengthy process that involves people's representative as well as public participation. A party seeking to strike a provision of a statute must demonstrate how the particular enactment is unfair, irrational and patently against the values or the spirit of the Constitution.....
131. Having had a detailed discussion in the manner in which courts ought to deal with the interpretation of the Constitution and the constitutionality of statutes, and as said, that discourse now lays a basis for the consideration of the rest of the issues. I will now consider the other issues.

**ii. Whether Parliament and Parliamentary Service Commission are distinct constitutional entities:**

132. The Parliament and the PSC are both provided for in the Constitution. I will, therefore, look at what the Constitution says on each of them.
133. I will begin with the Parliament. Chapter 8 of the Constitution establishes the Legislature. Part 1 is on the establishment and role of Parliament. It provides as follows: -

Chapter Eight – The Legislature

PART 1 – Establishment and the Role of Parliament

93. Establishment of Parliament

- (1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.
- (2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.

94. Role of Parliament

- (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.
- (2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.



- (3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.
- (4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.
- (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
- (6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

95 Role of the National Assembly

- (1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.
- (2) The National Assembly deliberates on and resolves issues of concern to the people.
- (3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.
- (4) The National Assembly—
  - (a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;
  - (b) appropriates funds for expenditure by the national government and other national State organs; and
  - (c) exercises oversight over national revenue and its expenditure.
- (5) The National Assembly—
  - (a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and
  - (b) exercises oversight of State organs.
- (6) The National Assembly approves declarations of war and extensions of states of emergency.

96. Role of the Senate



- (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.
- (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.
- (3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.
- (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

134. Part 2 deals with composition and membership of Parliament. Part 3 is on Offices of Parliament. Part 4 provides for the Procedures for enacting legislation while Part 5 deals with Parliament's General Procedures and Rules whereas Part 6 is on Miscellaneous matters which includes the establishment of the PSC.

135. The PSC is established under Article 127 of the Constitution. Sub-Articles 1, 2 and 3 thereof provides as follows: -

127. Parliamentary Service Commission

- (1) There is established the Parliamentary Service Commission.
- (2) The Commission consists of—
  - (a) the Speaker of the National Assembly, as chairperson;
  - (b) a vice-chairperson elected by the Commission from the members appointed under paragraph (c);
  - (c) seven members appointed by Parliament from among its members of whom—
    - (i) four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and
    - (ii) three shall be nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and
  - (d) one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.
- (3) The Clerk of the Senate shall be the Secretary to the Commission.

136. Sub-article 4 is on the vacation of office of a member of the PSC. Sub-article 5 is on the term of office of a member of PSC who is a Member of Parliament.

137. Article 127(6) of the Constitution is on the functions of PSC. It states as under: -

127(6) The Commission is responsible for—



- (a) providing services and facilities to ensure the efficient and effective functioning of Parliament;
- (b) constituting offices in the parliamentary service, and appointing and supervising office holders;
- (c) preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;
- (d) undertaking, singly or jointly with other relevant organisations, programmes to promote the ideals of parliamentary democracy; and
- (e) performing other functions—
  - (i) necessary for the well-being of the members and staff of Parliament; or
  - (ii) prescribed by national legislation.

138. Having set out the establishment and mandates of the Parliament and the PSC, I will, further, look at the PSC as a constitutional Commission.
139. Chapter 15 of the Constitution is on Commissions and Independent offices. PSC is among the commissions.
140. Under Article 253 of the Constitution, each commission is a body corporate with perpetual succession and a seal. It is capable of suing and being sued in its corporate name.
141. The objects of the commissions and independent offices are provided for under article 249 of the Constitution as to protect the sovereignty of the people; to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.
142. In Article 252(1) of the Constitution, the following further functions and powers of the commissions and independent offices are provided: -
- (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
  - (b) has the powers necessary for conciliation, mediation and negotiation;
  - (c) shall recruit its own staff; and
  - (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.
143. In discharging their mandates, commissions and independent offices are independent and not subject to direction or control by any person or authority, but are only subject to the Constitution and the law.
144. There is a deliberate pattern of design adopted in the Constitution relating to the arms of Government and the commissions associated with the mandates of aiding such arms of Government to properly operate. The design is that such commissions are usually provided for under the same chapter as the arm of Government. For instance, the Judicial Service Commission is closely associated with the Judiciary as the arm of Government. That commission is provided for under Chapter 10 of the Constitution which deals with the Judiciary. Likewise, the PSC is provided for under Chapter 8 on the Legislature.



Another example is the Office of the Attorney General and that of the Director of Public Prosecutions which are provided for under Chapter 9 which is on the Executive.

145. Resulting from such a constitutional formatting, it may appear as though such commissions and organs are subordinated to the respective arms of Government. However, that is not the position. The prevailing and constitutionally-anchored position is that each of the commissions, independent offices or state organs are independent and only subject to the Constitution and the law.
146. Deriving from the foregoing, whereas the PSC's main role is to provide services and facilities to ensure the efficient and effective functioning of Parliament, that does not make it subordinated to Parliament. PSC always remains independent and is only subject to the Constitution and the law.
147. Having said so, the issue under consideration can be firmly settled in the affirmative. In other words, whereas PSC and Parliament are inter-dependent, they remain distinct constitutional entities.

### **iii. Whether Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers:**

148. In the preceding issue, I have established that Parliament and PSC are distinct institutions. However, the petitioner contended that given the relationship between the Parliament and PSC then Parliament ought not to have included any nominee of PSC as part of the Selection Panel.
149. According to the petitioner, the inclusion of the nominees from PSC in the Selection Panel compromises the independence of the Selection Panel or it creates a reasonable perception of compromise. As a result, the Petitioner argued that the eventual Commissioners who will be appointed courtesy of that process will owe allegiance to PSC and Parliament and, hence, that will compromise the independence of or perception of independence of the IEBC.
150. The petitioner, therefore, posited that that PSC is conflicted and it should not nominate its members to be part of the Selection Panel otherwise the veil of separation of powers is ruptured.
151. The Respondents are of the contrary position.
152. The legislative process of Parliament and the concept of separation of powers were discussed by the Supreme Court in Petition 32 of 2014, *Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR*. The decision in Reference No 2 of 2013 *Speaker of the Senate & another v Attorney General & 4 others*, was referred where the Learned Judges observed as follows: -

[59] Also quite relevant is this court's decision in *Speaker of the Senate & another v Attorney General & 4 Others*, Reference No 2 of 2013; [2013] eKLR. The court, in that case, signalled that it would be reluctant to question parliamentary procedures, as long as they did not breach the Constitution. In reference to article 109 of the Constitution, which recognizes that Parliament is guided by both the Constitution and the Standing Orders in its legislative process, the court thus held [paragraphs 49 and 55]:

Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution...



153. The apex court made further reference to its earlier decision in *In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR*, where the rule of law was discussed to be intricately intertwined with the principle of separation of powers in the following way: -

The effect of the Constitution's detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the Executive branch.

The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.

154. I have already enumerated the functions of Parliament and PSC. The functions are clearly different. There is nowhere any of such powers overlap.

155. Article 88(5) of the Constitution mandates Parliament to provide for national legislation to aid IEBC discharge its mandate. The provision states as follows: -

The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

156. To, therefore, adopt an interpretation that favours the Petitioner's view in the circumstances of this case will be to adopt a formalistic or positivistic approach. *In the Matter of Interim Independent Electoral Commission [2011] eKLR*, the Supreme Court emphasized the need for courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism.

157. The unique circumstances of this case do not, hence, support the contention that Parliament in enacting the IEBC Amendment Act violated the principle of separation of powers. In fact, Parliament discharged its constitutional duty in enacting the IEBC Amendment Act.

158. The issue is answered in the negative.

**iv. Whether the IEBC Amendment Act or section 2(2)(a) and 3 of the IEBC Amendment Act are unconstitutional to the extent that they infringe article 10 of the Constitution in being counter the rule of law, are an abuse of power and good governance, violates the independence of IEBC, violates equity, equality, non-discrimination and fairness and also violates article 38 of the Constitution:**

159. The petitioner's and respondents' arguments on this issue have already been comprehensively captured in this judgment.

160. It is now a well settled principle that a petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation.

161. The burden of proof on a petitioner in a constitutional Petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 others [2014] eKLR* as follows: -

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be



infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

162. The conduct of constitutional Petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in section 2 thereof. The provision provides as follows: -

- (1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator.
- (2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

163. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. *Proof of particular fact*

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

164. Turning back to this matter and on whether the IEBC Amendment Act infringes the rule of law, suffice to say that the petitioner based the contention on the understanding that PSC was an organ of the Legislature. (See paragraph 106 of the Petition).

165. This court has, however, demonstrated the otherwise position.

166. The petitioner has, hence, failed in proving that the IEBC Amendment Act infringes the rule of law.

167. There is also the argument that Parliament erred in legislating one organ to occupy 4 out of 7 slots in the Selection Panel. To that end, it was argued that the principles of equity, equality, non-discrimination and fairness were violated.

168. It is a fact that in the impugned IEBC Amendment Act, PSC nominates four out of the seven nominees for appointment into the Selection Panel. Perhaps it is important to reproduce the IEBC Amendment Act in whole and as under: -

**The Independent Electoral and Boundaries Commission (Amendment) Act, 2020**

No 18 of 2020

Date of Assent: 28th October, 2020



Date of Commencement: 13th November, 2020

**AN ACT of Parliament to amend the Independent Electoral and Boundaries Commission Act, 2011 and for connected purposes.**

ENACTED by the Parliament of Kenya, as follows —

1. This Act may be cited as the Independent Electoral and Boundaries Commission (Amendment) Act, 2020.
2. The First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended —
  - (a) in paragraph 1(1) by deleting the words "such persons as Parliament shall determine" appearing immediately after the words "consisting of and substituting therefor the words "seven persons;
  - (b) by deleting paragraph 1(2) and substituting therefor the following new subparagraph —
    - (2) The selection panel shall consist of —
      - (a) two men and two women nominated by the Parliamentary Service Commission;
      - (b) one person nominated by the Law Society of Kenya; and
      - (c) two persons nominated by the Inter-religious Council of Kenya.
      - (d) by inserting the following new paragraph immediately after paragraph 1 (2)—
    - (2A) A person is qualified for appointment as a member of the selection panel if such person —
      - (a) is a citizen of Kenya;
      - (b) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution; and
      - (c) holds a degree from a university recognized in Kenya.
      - (d) by deleting paragraph 1(3) and substituting therefor the following new subparagraph—
- (3) The respective nominating bodies under subparagraph (2)(b) and (c) shall, within seven days of the declaration of a vacancy in the office of the chairperson or member of the Commission, submit the names of their nominees to



the Parliamentary Service Commission for transmission to the President for appointment.

169. To be able to address this sub-issue comprehensively, I will take a tour of the composition of the Selection Panels since 2011. The first Selection Panel was pursuant to section 5(2) of the IEBC Act, No 9 of 2011.
170. The said provision established the composition of the Selection Panel in the First Schedule. Section 1 of the First Schedule provided as follows: -

**Selection Panel.**

1. Within fourteen days of the commencement of this Act, the President shall, in consultation with the Prime Minister and with the approval of the National Assembly, appoint a Selection Panel comprising –
    - (a) two persons, being one man and one woman, nominated by the President;
    - (b) two persons, being one man and one woman, nominated by the Prime Minister;
    - (c) one person nominated by the Judicial Service Commission;
    - (d) one person nominated by the Kenya Anti-Corruption Advisory Board; and
    - (e) one person nominated by the Association of Professional Societies of East Africa.
171. The Selection Panel comprised of 7 members. None of them was nominated by the PSC.
172. The IEBC Act, No 9 of 2011 was later amended by the enactment of Election Laws (Amendment) Act, No 36 of 2016. The amendment was assented on 13<sup>th</sup> September, 2016 and became operational on 4<sup>th</sup> October, 2016.
173. The Election Laws (Amendment) Act, No 36 of 2016 amended the First Schedule on the procedure for appointment of Chairperson and members of the IEBC. The amendment provided the following 9 members: -
  - (a) Four persons, being two men and two women, nominated by the Parliamentary Service Commission;
  - (b) One person nominated by the Kenya Conference of Catholic Bishops;
  - (c) One person nominated by the National Council of Churches of Kenya;
  - (d) One person nominated by the Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and the Council of Imams and Preachers of Kenya;
  - (e) One person nominated by the Evangelical Alliance of Kenya; and
  - (f) One person nominated by the Kenya Conference of Catholic Bishops;
174. In this scenario, out of the 9 members of the Selection Panel, 4 of them were nominated by PSC.



175. There was then a Bill by the National Assembly which proposed some other amendments to the Selection Panel. It was the Independent Electoral and Boundaries Commission (Amendment) (No 3) Bill, 2019. In that Bill, the composition of the 11 - member Selection Panel was proposed as follows: -
- (a) Four persons, being two men and two women, nominated by the Parliamentary Service Commission;
  - (b) One person nominated by the Public Service Commission;
  - (c) One person nominated by the Ethics and Anti-Corruption Commission;
  - (d) One person nominated by the Law Society of Kenya;
  - (e) One person nominated by the National Gender and Equality Commission;
  - (f) One person nominated by the Attorney General;
  - (g) One person nominated by the Kenya National Commission on Human Rights; and
  - (h) One person nominated by the Inter-Religious Council of Kenya.
176. Only 4 out of the 11 members were to be nominated by PSC.
177. The Bill was dealt with by both Houses of Parliament. It then resulted into the IEBC Amendment Act.
178. Unlike in the Election Laws (Amendment) Act, No 36 of 2016 where 4 out of 9 of the members were nominated by PSC and in the Independent Electoral and Boundaries Commission (Amendment) (No. 3) Bill, 2019 where 4 out of the 11 members were to be nominated by PSC, the IEBC Amendment Act provided that out of the 7 members 4 of them were to be nominated by PSC.
179. There must have been good reasons why previously the number of nominees by PSC into the Selection Panel was not more than one half of the nominees. Indeed, the reasons are many. One of them is the perception of independence of the Selection Panel. A Selection Panel which has majority of its members nominated by one entity cannot pass the threshold of being portrayed as *inter alia* independent and fair. The dominance of the members appointed by one entity into the Selection Panel definitely raises legal eye brows.
180. Having said so, I will, nevertheless, apply the three tests of the objective, proportionality and the effect of a statutory provision as developed by the Supreme Court of Canada in *R v Oakes* case (*supra*) to the impugned IEBC Amendment Act.
181. On the objective test, the Supreme Court held that ‘... it is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
182. From the history of Constitution-making in Kenya and the quest for free and fair elections, the objective of the IEBC Amendment Act ought to further the realization of the goal that IEBC will eventually conduct fair, free and credible elections and referenda.
183. In this case, the IEBC Amendment Act runs counter that objective. The IEBC Amendment Act instead creates a scenario of suspicion not only on the Commissioners to be appointed, but also the eventual independence of the IEBC. It is clear beyond any peradventure that the Selection Panel was dominated by the nominees by PSC. That dominance runs contrary to good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity among like principles.



184. It is not far-fetched to imagine the likelihood of the majority of the members of the Selection Panel nominated by PSC to favour some candidates during the nomination process. Such preferred candidates may eventually become Commissioners of IEBC and their impudence would naturally be put to question.
185. The respondents did not give any reasons for the impugned membership of the Selection Panel in the IEBC Amendment Act. In other words, no justification was tendered against the serious contention raised. The much the respondents did was to hold that the Constitution gave Parliament powers to allocate any other functions to PSC through legislation. That is true and it is the reason why this court has already found that the IEBC Amendment Act did not infringe the principle of rule of law.
186. The unresolved contention is, however, that the membership of the Selection Panel infringes *inter alia* various constitutional principles in article 10 of the Constitution.
187. Going by the guidance in *R v Oakes* case (*supra*), this Court finds that the objective of the impugned composition of the membership of the IEBC Amendment Act was not to address the concerns which are pressing and substantial in a free and democratic society. Instead, the membership of 4 out of 7 members nominated by PSC favoured a process which did not fully uphold the Constitution. The membership of the IEBC Amendment Act, hence, fail the objective test.
188. From the discussion in *R v Oakes* case (*supra*), the rest of the tests, that is the proportionality and the effect of the statutory provision, cannot be subject of further discussion once the statute or the provision fails to pass the objective muster.
189. In this case, therefore, it is the finding of the court that section 2(2)(a) of the IEBC Amendment Act variously offends the principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity.
190. There is now the need for a legislation that will take such principles into account without losing sight of the fact that Kenyans are looking upon Parliament to pass legislations which will foster free, fair and credible elections and referenda.
191. In sum, this court finds and holds that to the extent that section 2(2)(a) of the IEBC Amendment Act provides for the nomination of 4 out of 7 members of the Selection Panel, then the said section 2(2)(a) of the IEBC Amendment Act is unconstitutional.

#### **Remedies:**

192. The foregoing discussion has resulted to the success and failure of the Petition dated 3<sup>rd</sup> November, 2020 in equal measure. Whereas the petitioner failed to prove that Parliament and Parliamentary Service Commission are not distinct constitutional entities and that the IEBC Amendment Act violated the principles of separation of powers and the rule of law, he has, on the other side succeeded to prove that section 2(2)(a) of the IEBC Amendment Act is unconstitutional.
193. Since the Petition is partly successful, this court is duty-bound to grant the most appropriate reliefs in the circumstances of this case. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief.
194. Courts have severally rendered on reliefs. The Court of Appeal in *Total Kenya Limited v Kenya Revenue Authority (2013) eKLR* held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others (2018) eKLR* held that article 23 of the Constitution



does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

195. In *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No 473 of 2006*, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3<sup>rd</sup> Edn) by Michael Fordham at 361.

196. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

197. There is no doubt that the Selection Panel completed its mandate and recommended persons who were eventually appointed as Commissioners of IEBC. The said persons are now in office.

198. One of the reliefs expected in this matter in view of the declaration of unconstitutionality of section 2(2)(a) of the IEBC Amendment Act has to do with the aftermath of what the Selection Panel yielded. It is expected that a further declaration will issue nullifying the nomination process and orders will then follow nullifying the appointment of the Commissioners who are deemed as fruits of a poisoned tree. The court is then expected to order Parliament to come up with a new law and that the nomination process be once again undertaken.

199. This court agrees to that general expectation. However, in the unique circumstances of this case, the court will decline the invitation for two reasons. The first reason is on non-joinder and the second one is on the effect of such orders to the country.

200. On the issue of non-joinder, the Petition was filed when the IEBC Amendment Act had been passed into law, but the Selection Panel was yet to be appointed. Later, the Selection Panel was put in place. On learning of that development, the petitioner filed the Notice of Motion dated 27<sup>th</sup> April, 2021. The application sought to stay or suspend the appointment of the Selection Panel which had been constituted vide Kenya Gazette Notice No 4004 of 26<sup>th</sup> April, 2021. The application also sought for service of the application upon the members of the Selection Panel through the Hon Attorney General.



201. This court heard Counsel on the best way forward in respect to the application. The court then directed that the application be heard together with the Petition which had by then been fixed for hearing.
202. One of the reasons why this court made that direction on the application was that the application did not in any way seek to enjoin the members of the Selection Panel as parties to the Petition. Likewise, there was no attempt to amend the Petition. The result was that the Petitioner was using the application to expand the Petition without properly amending it. Further, the status of the members of the Selection Panel sought to be served through the Hon Attorney General was not clear. Were they coming on board as respondents or Interested Parties or otherwise?
203. The correct procedure to have been adopted by the Petitioner was to apply to court to amend the Petition and introduce the new cause of action which was the appointment of the Selection Panel. The petitioner would then have clearly indicated how the members of the Selection Panel would participate in the matter and the amended Petition would have had concise prayers of the new cause of action. By doing so, the Petitioner would have taken the game to a level playing field.
204. As the petitioner failed to do so, this court did not find any justification to deal with that application first or to issue any interim conservatory orders. The court directed that the application be heard together with the Petition.
205. Given that the members of the Selection Panel constituted vide Kenya Gazette Notice No 4004 of 26<sup>th</sup> April, 2021 were not enjoined as parties in this matter, this Court cannot, at the tail-end of the proceedings, issue any orders to the detriment of any of them. If the Court does so then it will infringe on the said members' right to a fair trial which is guaranteed under article 50(1) of the Constitution. Suffice to say, the right to a fair trial is one of the rights which cannot be limited in any manner whatsoever as provided for under article 25 of the Constitution.
206. The second reason why the expected orders cannot issue is on the effect of such orders to the country. At the moment, the IEBC is at the heart of preparing for the next general elections. The elections are expected to be conducted in the next 8 months.
207. If this court makes an order that the four new Commissioners do vacate office, then going by binding precedents IEBC will lack quorum to conduct its affairs. The effect of such an order will mean that Parliament will have to come up with another legislation and the process of selecting the four Commissioners to begin afresh. If this court allows such to happen, then high are the chances that IEBC will not be able to prepare and conduct the next general elections.
208. This Court ought to be cautiously reminded that the general elections are constitutionally-provided and no court can temper with constitutional timelines. The position was affirmed by the Supreme Court in Civil Application No 6 of 2014 *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR . In the case, the Court was confronted with the question as to whether it could stop the constitutionally triggered timeline under article 101(4) of the Constitution which made it a requirement that a by-election shall be held within 90 days of the occurrence of a vacancy in the office of a member of National Assembly elected under article 97(1)(a) or (b) or of the Senate elected under article 98(a) of the Constitution.
209. In making the finding that constitutional timelines must be kept sacred, the Learned Judges made the following finding: -
- [45] Consequently, any statutory process or act done ultra vires the provisions of the Constitution, this court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the Court cannot do is to



extend the 90 days' period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this court, a creature of the Constitution, cannot extend it.

210. In essence, if this court puts IEBC in a situation where it cannot prepare and conduct the next general elections, then it will be creating a constitutional crisis. As I stated in Petition No E019 of 2021 *Law Society of Kenya v Anne Kananu Mwenda & others* (2021) eKLR: -

41. A court of law must, as a primary duty and in public interest, uphold the Constitution. A court must not in any manner whatsoever create a constitutional crisis. It remains the cardinal duty of a court to foresee such a crisis and take steps to avoid it.

211. Before I end this discourse, I wish to point out that despite the fact that four Commissioners of IEBC resigned, the positions remained vacant for such a while. The reason was that there was no law in place on how other Commissioners were to be appointed. The scenario resulted from the amendments which were made through section 6 of the Election Laws (Amendment) Act, No 36 of 2016 which stated that: -

6. The selection panel shall stand dissolved upon the requisite appointments being made under paragraph 4.

212. The above selection panel was wound up when the seven Commissioners (which included the Chairperson) were appointed on 17<sup>th</sup> January, 2017. The next law on the appointments was the IEBC Amendment Act which came into effect on 13<sup>th</sup> November, 2020. Interestingly, the Selection Panel provided for in the IEBC Amendment Act also stood dissolved on the appointment of the four Commissioners.

213. As at now, there is no standing Selection Panel for nominees for appointment as IEBC Commissioners. It, therefore, means that whenever a vacancy in the IEBC Commissioners arises, Parliament will first have to come up with the law on the next Selection Panel.

214. There is, hence, the need for Parliament to relook at the law on the Selection Panel. Even though the Selection Panel may not necessarily have to be a Standing committee, the law may provide for the manner in which the next Selection Panel may be constituted without the need to first enact a new law to that end.

215. Further, in order to aid IEBC to operate without any legal hitches on its quorum, there is need for Parliament to consider the period within which any vacancies which may arise in IEBC Commissioners must be filled.

216. In the end, in the course of the tour of navigating the issue of the appropriate reliefs, this court will bear the foregoing in mind.

**Disposition:**

217. As I come to the end of this judgment, this court wishes to apologize to the parties for the late delivery of this decision. The delay was mainly occasioned by the pressure of work within the Constitutional and Human Rights Division of the High Court.

218. The court, thereby, wishes to thank the parties and their counsel in the patience they extended to the court and their courteous participation in this matter.

219. In the end, the Petition partly succeeds and the following final orders hereby issue: -



- (a) The Notice of Motion dated 27<sup>th</sup> April, 2021 be and is hereby dismissed.
- (b) A declaration hereby issues that to the extent that section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No 18 of 2020 provides that the Parliamentary Service Commission shall nominate 4 out of 7 members of the Selection Panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringes article 10 of the Constitution and is, therefore, unconstitutional.
- (c) An order hereby issues quashing section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act No 18 of 2020.
- (d) The Hon Deputy Registrar of this court shall transmit certified copies of this judgment to both Speakers of Parliament.
- (e) There shall be no orders as to costs as the matter is a public interest litigation.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2021**

**A. C. MRIMA**

**JUDGE**

**JUDGMENT VIRTUALLY DELIVERED IN THE PRESENCE OF:**

**OKIYA OMTATAH OKOITI, THE PETITIONER IN PERSON.**

**MR. KURIA THANDE, LEARNED STATE COUNSEL INSTRUCTED BY THE HONOURABLE ATTORNEY GENERAL FOR THE 1<sup>ST</sup> RESPONDENT.**

**MR. MWENDWA, LEARNED COUNSEL FOR THE 2<sup>ND</sup> RESPONDENT.**

**MISS. THANJI, LEARNED COUNSEL FOR THE 3<sup>RD</sup> RESPONDENT.**

**MR. WAMBULWA, LEARNED COUNSELS FOR THE 4<sup>TH</sup> RESPONDENT.**

**MR. OSIEMO, LEARNED COUNSEL FOR THE 5<sup>TH</sup> RESPONDENT.**

**ELIZABETH WANJOHI – COURT ASSISTANT**



*Appendix 5:*

Advertisement published in the *Daily Nation* and *Standard* newspapers on Friday, 9<sup>th</sup> December, 2022

**REPUBLIC OF KENYA**



**THIRTEENTH PARLIAMENT | FIRST SESSION  
THE SENATE**

**INVITATION FOR SUBMISSION OF MEMORANDA**

At the sitting of the Senate held on Thursday, 1<sup>st</sup> December, 2022, the Bills listed at the second column below were introduced in the Senate by way of First Reading and thereafter stood committed to the respective Standing Committees indicated at the third column.

Pursuant to the provisions of Article 118 of the Constitution and standing order 145(5) of the Senate Standing Orders, the Committees now invite interested members of the public to submit any representations that they may have on the Bills by way of written memoranda.

The memoranda may be submitted to the Clerk of the Senate, P. O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk of the Senate, Main Parliament Buildings, Nairobi or emailed to [clerk.senate@parliament.go.ke](mailto:clerk.senate@parliament.go.ke) and copied to the email addresses of the respective Committee indicated at the fourth column below; to be received on or before **Friday, 23<sup>rd</sup> December, 2022 at 5.00 p.m.**

Bill	Committee Referred To	Email Address
a) The Parliamentary Powers and Privileges (Amendment) Bill (Senate Bills No. 5 of 2022)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senatejlahrc@parliament.go.ke">senatejlahrc@parliament.go.ke</a>
b) The Natural Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022)	Standing Committee on Land, Environment and Natural Resources	<a href="mailto:landenvironcommittee.senate@parliament.go.ke">landenvironcommittee.senate@parliament.go.ke</a>
c) The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill (Senate Bills No. 7 of 2022)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senatejlahrc@parliament.go.ke">senatejlahrc@parliament.go.ke</a>

The Bills may be accessed on the Parliament website at <http://www.parliament.go.ke/the-senate/senate-bills>.

**J.M. NYEGENYE, CBS,  
CLERK OF THE SENATE.**

**REPUBLIC OF KENYA**



**THIRTEENTH PARLIAMENT | FIRST SESSION  
THE SENATE**

**The Independent Electoral and Boundaries Commission  
(Amendment) Bill, 2022 (National Assembly Bill No. 49 of 2022)**

**INVITATION FOR SUBMISSION OF MEMORANDA**

At the sitting of the Senate held on Thursday, 8<sup>th</sup> December, 2022, the Independent Electoral and Boundaries Commission (Amendment), 2022 Bill (National Assembly Bill, No. 49 of 2022) was read a First Time in the Senate and thereafter stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights.

Pursuant to the provisions of Article 118 of the Constitution and standing order 145(5) of the Senate Standing Orders, the Committee now invites interested members of the public to submit any representations that they may have on the Bill by way of written memoranda.

The memoranda may be submitted to the Clerk of the Senate, P. O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk of the Senate, Main Parliament Buildings, Nairobi or emailed to [clerk.senate@parliament.go.ke](mailto:clerk.senate@parliament.go.ke) and copied to [senatejlahrc@parliament.go.ke](mailto:senatejlahrc@parliament.go.ke); to be received on or before **Friday, 16<sup>th</sup> December, 2022 at 5.00 p.m.**

The Bill may be accessed on the Parliament website at <http://www.parliament.go.ke/the-senate/house-business/bills-national-assembly>.

**J.M. NYEGENYE, CBS,  
CLERK OF THE SENATE.**

*Appendix 6:*

Copies of submissions received on the Bill



REPUBLIC OF KENYA

Telephone: +254(0)204022000  
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Website: [www.orpp.or.ke](http://www.orpp.or.ke)



Lion Place, 1<sup>st</sup> & 4<sup>th</sup> Floor  
Off Waiyaki Way  
P.O. Box 1131-00606  
Sanit Centre, Nairobi.

**Ref:** RPP/ADM/4/1/1 VOL III

**Date:** 13<sup>th</sup> December, 2022

Clerk of the Senate  
Main Parliament Buildings  
P.O. Box 41842-00100  
NAIROBI

Dear Sir,

**RE: MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
(AMENDMENT) BILL, 2022**

Reference is made to the above subject matter and your letter dated 28<sup>th</sup> November, 2022 whose content is duly noted.

Annexed herewith is a comprehensive memorandum on the Independent Electoral and Boundaries Commission(Amendment) Bill, 2022.

This Office remains available for any further consultations.

Yours faithfully,

**Ann N. Nderitu, CBS**  
Registrar of Political Parties



@ORPPKenya

[www.orpp.or.ke](http://www.orpp.or.ke)



ORPPKenya

## MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022

1.The Office of the Registrar of Political Parties (ORPP) was established in 2011 under Section 33 of the Political Parties Act, 2011(PPA). The functions of the ORPP are stipulated under Section 34 of the PPA and across the Act.

2.The ORPP urges consideration of the the following remarks;

PROVISION	CONTENT	REMARKS
<b>Clause 2(2)(a)</b>	The Selection Panel shall consist of— (a)One man and one woman nominated by the Parliamentary Service Commission. (b)... (c)... (d)... (e)...	The Committee should consider recrafting the clause to;  <b><i>“two persons of either gender nominated by the Parliamentary Service Commission”.</i></b>  The proposal aligns with the need to use uniform language through the clause.
<b>Clause 2(2)(c)</b>	The Selection Panel shall consist of— (a)... (b)... <b><i>(c)One person nominated by the Political Parties Liaison Committee</i></b> (d)...	The Political Parties Act, 2011 under Section 38 establishes the Political Parties Liaison Committee (PPLC) to provide a platform for dialogue between the Registrar (herein ORPP), Commission (herein IEBC) and political parties.  It therefore follows that the PPLC comprises ORPP, IEBC, and political parties. The proposal does not address how the three bodies would arrive at a nominee to the Selection Panel.  In terms of the PPA and best practices from other jurisdictions, the primary role of PPLC is to facilitate dialogue (especially once an

		<p>election has been called), the Committee should consider whether PPLC appointing a representative to the Selection Panel would affect the nature and effect of the dialogue envisioned between ORPP, IEBC, and political parties.</p> <p>The Committee should consider whether it is its intention to amend Section 38(4) of the PPA with respect to the role of the Registrar in prescribing functions for the PPLC.</p>
<b>Clause 2(2)(e)</b>	<p>The Selection Panel shall consist of—</p> <p>(a)...</p> <p>(b)...</p> <p>(c)...</p> <p>(d)...</p> <p>(e) two persons nominated by the Inter-religious Council of Kenya</p>	<p>The Committee should consider recrafting the clause to</p> <p><b><i>“two persons of either gender nominated by the Inter-Religious Council of Kenya”.</i></b></p> <p>This proposal contributes to realization of the requirement under Article 27(8) of the Constitution which provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.</p>

  
**Ann N. Nderitu, CBS**

Registrar of Political Parties/CEO



## COUNCIL OF GOVERNORS

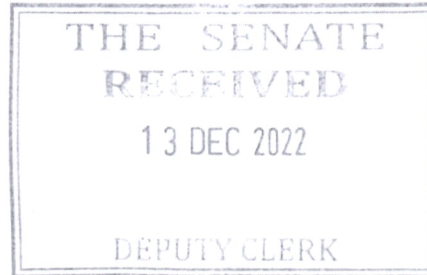
Westlands Delta House 2<sup>nd</sup> Floor, Waiyaki Way,  
P.O. BOX 40401-00100,  
Nairobi.

Tel: (020) 2403314, 2403313  
E-mail: [info@cog.go.ke](mailto:info@cog.go.ke)

**Our Ref: COG/7/6 (69)**

13<sup>th</sup> December 2022

**Mr. Jeremiah M. Nyegenye, CBS**  
Clerk of the Senate  
Parliament Building  
**NAIROBI**



Dear Mr. Nyegenye,

### **SUBMISSION OF MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL NO. 49 OF 2022**

Reference is made to the above matter and to your invitation for submissions on the Bill dated 9<sup>th</sup> December 2022.

Having reviewed the aforementioned Bill, the Council notes that the objective of the Bill is to amend the Independent Electoral and Boundaries Commission No. 9 of 2011, aimed at changing the composition of the Selection Panel that oversees the filling of vacant positions in the Commission.

The Council, therefore, submits its comments as per the attached Legislative Memorandum.

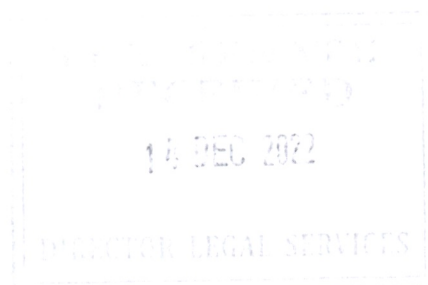
Thank you for your continued support.

Yours sincerely,

**Mary Mwiti**  
Chief Executive Officer

Copy: **All Excellency Governors**

**All County Attorneys**



DHS  
DGAC

Kindly deal:

14/12/2022



**COUNCIL OF GOVERNORS**

**LEGISLATIVE MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL NO. 49  
OF 2022**

**FROM**

**THE COUNCIL OF GOVERNORS**

**MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL NO. 49 OF 2022**

The Council of Governors,

**In recognition** of Article 1(4) of the Constitution of Kenya, that sovereign power of the people is exercised at the national level and the county level;

**In further recognition** of Article 6 (2) that governments at the national and county levels are distinct; and

**Aware** of the need for coordination and consultation between the National Government and County Governments to ensure that legislation responds to the key issues facing devolution, and further reflects the spirit and objects of devolution.

**Noting and appreciating** the importance of representation and inclusion of County Governments in key decisions processes.

The Council therefore notes as follows on The Independent Electoral and Boundaries Commission (Amendment) Bill No. 49 of 2022

**Specific Concerns**

Clause	Provision	CoG's proposal	Rationale/Justification
2(2) Amendment of the First Schedule to No 9 OF 2011	The Selection panel shall consist of – a) One man and one woman nominated by the Parliamentary Service Commission b) One person nominated by the Public Services	Amend the clause to read “ two persons nominated by the Council of County Governments”	This is to ensure representation by the 47 County Governments in the Selection panel.  The representation of the County Governments is necessary in key decision processes that affect the country. The person/s to be selected as member/s of the Commission serve the interest of the national and county governments. It is

	<p>Commission</p> <p>c) One Person nominate by the Political Parties Liaison Committee</p> <p>d) One Persons nominated by the Law Society of Kenya; and</p> <p>e) Two persons nominated by the inter- religions Council of Kenya</p>	<p>therefore imperative that both levels of Government are involved at all levels including at the selection/ filling of the vacant positions.</p>
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National Gender and Equality Commission  
 1st Floor, Solution Tech Place, 5 Longonot Road, Upper Hill, Nairobi  
 P.O. OX 27512-00506 Nairobi, Kenya  
 Landline: +254 (020)3213100  
 Mobile: +254 (020)375100  
 Toll Free: 0800720187  
 www.ngeckkenya.org  
 Email: info@ngeckkenya.org

When replying please quote

Ref: No: ...NGEC/CS/NAS/.005/VOL.I (75)

16<sup>th</sup> December 2022

**Jeremiah M. Nyegenye, CBS**

Clerk of the Senate  
 Clerk's Chambers  
 Parliament Building  
 P.O. Box 41842-00100  
**NAIROBI**

*csenate@parliament.go.ke*  
*senatejlahrc@parliament.go.ke*

Dear Mr. Nyegenye,

**SUBMISSION OF MEMORANDA ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL 2022 (NATIONAL ASSEMBLY BILLS NO 49 OF 2022)**

Reference is made to your call for the submission of representations on the Independent Electoral and Boundaries (Amendment) Bill 2022 by way of written memoranda.

The National Gender and Equality Commission (NGEC) is a Constitutional Commission with the mandate of promoting and ensuring gender equality, principles of equality and non-discrimination for all persons in Kenya, with a focus on Special Interest Groups (SIGs) who include women, children, Persons with Disabilities (PWDs), youth, older members of society and minority and marginalized groups.

Section 8 (b) of the National Gender and Equality Commission Act, No. 15 of 2011 mandates the Commission to, *'monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;*

In line with its mandate, the Commission wishes to submit the attached memorandum on the bill.

Yours sincerely,

Betty Sungura, MBS  
**COMMISSION SECRETARY/ CEO**

Encl.



**MEMORANDUM WITH COMMENTS ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL 2022 (NATIONAL ASSEMBLY BILLS NO 49 OF 2022)**

Submitted to: [cenate@parliament.go.ke](mailto:cenate@parliament.go.ke); [senatejlahrc@parliament.go.ke](mailto:senatejlahrc@parliament.go.ke)

No.	Clause	Proposed amendment	Justification
1.	<p>First Schedule</p> <p>(2) The selection panel shall consist of –</p> <p>(a) one man and one woman nominated by the Parliamentary Service Commission;</p> <p>(b) one person nominated by the Public Service Commission;</p> <p>(c) one person nominated by the Political Parties Liaison Committee</p> <p>(d) one person nominated by the Law Society of Kenya; and</p>	<p>The Commission proposes a further amendment as follows-</p> <p>Amend paragraph 2 (e) by deleting “two” and substituting with “one” before the word persons.</p> <p>Amend by inserting a new sub section (f) as follows-;</p> <p>(f) one person representing persons with disability nominated by the umbrella organization of persons with disability.</p>	<p>The selection panel lacks representation of a person representing the interests of people with disabilities in line with Article 54 (2) of the Constitution of Kenya. This shall ensure inclusion of Persons with Disability (PWD) in appointive bodies including selection panels.</p> <p>The proposed amendment seeks to ensure compliance with Article 54(2).</p>

	(e) two persons nominated by the Inter-religious Council of Kenya.		
2.	<p>5. Gender equity and regional balance</p> <p>In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender and shall ensure regional balance.</p>	<p>The Commission proposes a further amendment to Paragraph 5 on gender equity and regional balance of the first schedule as follows-</p> <p>Amend paragraph 5 by inserting the words “and interests of persons with disability” after the words” regional balance”</p>	<p>The provisions of the first schedule and specifically paragraph 5 are not in compliance with the provisions of Article 54(2) on inclusion of Persons with Disability in appointive positions.</p> <p>The provisions in the substantive IEBC Act are silent on the issue of inclusion of PWDs.</p> <p>Amending the paragraph as proposed will not prejudice the provisions in the substantive Act but will serve the purpose of ensuring that the IEBC has the representation of Commissioners with disability.</p>

**General comment.**

With consideration of the proposed recommendations from the Commission, we support the Bill.



COUNTY ASSEMBLIES FORUM

CAF MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION (AMENDMENT) BILL (NO.49 OF 2022)

---

**TO:** Mr. Jeremiah Nyegenye, CBS  
Clerk of the Senate, Parliament of Kenya

**FROM:** The County Assemblies Forum.

**DATE:** 16<sup>th</sup> December 2022.

## MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NO.49 OF 2022)

---

### 1.0. INTRODUCTION

- 1.1. The County Assemblies Forum (CAF) is the coordinating body of the 47 County Assemblies in Kenya. The primary mandate of CAF is to promote networking and synergy among the 47 County Assemblies, coordinate intergovernmental relations and enhance good practice in legislative development. Our Mission is to provide effective leadership and coordination of the 47 County Assemblies and through policy and legislative action, promote a conducive working environment for all members, and in that way deliver quality services to the people.
- 1.2. As one of the pillars of the devolved government system, CAF is committed to engage in processes that lead to the further strengthening of Constitutional Bodies such the IEBC.

### 2.0. BACKGROUND

- 2.1. The Bill seeks to amend the First Schedule of Independent Electoral and Boundaries Commission Act to provide for a new constitution criteria of the selection panel provided under sub-clause 2 of the schedule.
- 2.2. The amendment bill proposes to replace sub-clause 2 which provides: -  
The selection panel shall consist of: -
  - a) Two men and two women nominated by the Parliamentary Service Commission;
  - b) One person nominated by the Law Society of Kenya; and
  - c) Two persons nominated by the Inter-religious Council of Kenya.

With the following amendment: -

- a) One man and one woman nominated by the Parliamentary Service Commission.
- b) One person nominated by the Public Service Commission.
- c) One person nominated by the Political Parties Liaison Committee.
- d) One person nominated by the Law Society of Kenya.
- e) Two persons nominated by the Inter-religious Council of Kenya.

### 3.0. CAF GENERAL COMMENTS

- 3.1. CAF appreciates the Senate for the opportunity to give views on this Amendment Bill which seeks to restructure the Selection Panel mandated to select the members of the Independent Electoral and Boundaries Commission
- 3.2. CAF appreciates the opportunity to contribute to this Bill and on the basis of the foregoing proposes the following amendments:

#### 4.0. SUMMARY MATRIX OF THE PROPOSED AMENDMENTS.

CLAUSE	PROPOSAL	JUSTIFICATION
<p><b>CLAUSE 2: Amendment of the First Schedule</b></p> <p>The selection panel shall consist of —</p> <p>a) One man and one woman nominated by the Parliamentary Service Commission.</p> <p>b) One person nominated by the Public Service Commission.</p> <p>c) One person nominated by the Political Parties Liaison Committee.</p> <p>d) One person nominated by the Law Society of Kenya.</p> <p>e) Two persons nominated by the Inter-religious Council of Kenya.</p>	<p>Amend to include: -</p> <p>The selection panel shall consist of —</p> <p>a) One man and one woman nominated by the Parliamentary Service Commission.</p> <p>b) One person nominated by the Public Service Commission and who shall not be of the same gender as the as person nominated from the Political Parties Liaison Committee.</p> <p>c) One person by the Political Parties Liaison Committee.</p> <p>d) One person nominated by the Law Society of Kenya.</p> <p>e) Two persons nominated by the Inter-religious Council of Kenya.</p>	<p>Article 27(8) of the Constitution of Kenya provides that: -</p> <p>“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”</p> <p>In light of the foregoing, The Forum is concerned over the gender balance of the selection panel. The reduction of two women to be selected from the Parliamentary Commission to one woman is against the principles of gender inclusivity. We propose that the nominees from the Public service Commission or the Political Liaison Committee should not be of the same Gender.</p>

Thank you.

Yours sincerely,



HON. PHILEMON K. SABULEI

CHAIRPERSON, CAF

16 December 2022

The Clerk of the Senate  
PO Box 41842-00100  
Nairobi

Sent via email

**Re: The Independent Electoral and Boundaries Commission  
(Amendment) Bill, 2022 (National Assembly Bill No. 49 of 2022)**

### **Background**

Katiba Institute (KI) is a research and litigation institution established in 2011 with the mission of supporting the implementation of Kenya's 2010 Constitution, helping to resist efforts to undermine that Constitution, and generally to assist in developing a culture of constitutionalism in Kenya. It undertakes constitutional research, comments on policy and laws from a constitutional perspective, and publishes books and other material on the Constitution. Much of its work is going to court to enforce rights under the Constitution and ensure the proper performance of constitutional duties and responsibilities.

KI also fosters the spirit of constitutionalism in the East African region by promoting the exchange of academic discourse on constitutional issues and working with like-minded organizations to secure greater freedoms in the East African Region.

### **Summary and General Remarks**

The Bill proposes amendments to the Independent Electoral and Boundaries Commission Act by changing the composition of the Selection Panel that oversees filling vacant positions in the Commission. The selection panel is currently comprised of four individuals chosen by the Parliamentary Service Commission (PSC), one chosen by Law Society of Kenya, and two chosen by the Inter-religious Council of Kenya members, The Bill would reduce the number of panellists selected by the PSC by two and give the Political Parties Liaison Committee (PPLC) and the Public Service Commission one nominee each.

KI has three primary concerns regarding the Bill:

- a. The constitutional and practical consequences of allowing the PPLC to select a panellists
- b. The risk that the amended system for selecting panellists will invite violations of Article 27(8) and the requirement that no more than two-thirds of the panellists be of the same gender
- c. The absence of an explanation as to why the Bill is necessary or how the Bill improves upon or addresses flaws in the existing law

### **Discussion**

#### *a. Allowing the PPLC to select a panellist*

The PPLC is established under the Political Parties Act. The PPLC is established at both national and county levels. The Political Parties Act states that the principal function of the PPLC is ‘to provide a platform for dialogue between the Registrar [of Political Parties], [Independent Electoral and Boundaries] Commission and political parties’. It may also perform ‘such other functions as may be prescribed by the Registrar’.

The Office of the Registrar of Political Parties states on its website that the functions (aims and objectives) of the Political Parties Liaison Committee are as follows:

- i. To champion and advocate for free, fair, peaceful and transparent electoral environment and processes in Kenya;
- ii. To provide a platform for structured multiparty dialogue between Political Parties and the Electoral Management Body on issues relating to the organization and conduct of elections and the electoral environment generally;
- iii. To enhance genuine interaction, experience sharing and information exchange between political parties and the Electoral Management Body (EMB) as a way of building trust and confidence in the electoral process;
- iv. To identify gaps and shortcomings in the electoral law and process and adopt a consultative and proactive approach in making suggestions for improvement;

v. To carry out any other objective as the Political Parties Liaison Committee shall deem necessary.

However, neither the Political Parties Act nor any subsidiary legislation identifies who are members of the PPLC, how they are chosen, and the extent to which the members are beholden to the interests of their respective political parties. It is unclear how the PPLC will select a panelist and the degree to which those participating in that process will comply with Article 27 requirements. Finally, there is no mechanism to ensure that those who make the selection will do so based on an independent assessment of the best candidate instead of a party preference.

In short, the Bill transforms the PPLC from a committee tasked with liaising with the IEBC to one that plays a significant role in establishing who will be a part of the IEBC. Given that the members of the PPLC are there because they are representatives of a political party, the Bill fundamentally interferes with the political independence of the selection panel charged with overseeing the filling of vacant positions in the IEBC. The IEBC, in turn, oversees elections in Kenya, where these politicians and their political parties will play an adversarial role. The amendment risks altering the constitutionally guaranteed right of all Kenyans to free, fair and democratic elections run by a body that is independent of political influence.

Equally as concerning, the manner in which the PPLC would identify a panellist is opaque, at best. The legislation does not ensure that the panellist will be chosen from a representative group of all political parties or by the parties that are the largest and therefore have the greatest voting power. This concern is even further exacerbated by the existence of coalition political parties, which may garner enough authority to select a person who will be beholden to that party's partisan agenda. If the legislation were to continue, it would first need to be redrafted to address that gap and clarify who would be making the selection on the Committee's behalf and to what extent partisan leanings would influence that person or persons.

Finally, we are concerned about how the panellist selection would incorporate participation from both the national and county levels of the PPLC. For the selection to truly be representative of the membership of the PPLC, it would also need to include county-level participation. Under the current legislation, there is

no structure to ensure county participation. The recent election of the steering committee members for the National PPLC comprised members drawn from various political parties. Still, there is no indication whether the same structure exists for county governments. And there is no indication that the representatives from county governments will have a say in who participates in appointing a panellist. These concerns are not only practical, but may require the National Assembly to work with the Senate on determining whether this is a bill that would affect the counties under Article 110.

*b. Compliance with the two-third gender principle under Article 27*

Under the current Act, the Parliamentary Service Commission chooses four of the seven panellists. Two of those chosen by the Parliamentary Service Commission must be women. This requirement helps ensure that the selection panel meets the two-thirds gender requirement.

By limiting the number of panellists, the Bill does away with this inbuilt mechanism for ensuring that the panel meets Article 27's two-thirds gender requirement. As the Bill stands, there is no mechanism for ensuring compliance. If the other parties do not select candidates that ensure the two-thirds gender requirement is met, the selection panel will have to be rejected.

The risks here are two-fold: first, it could create a crisis in which the panellists are rejected and the parties compelled to make different picks. Second, it risks undermining compliance with Article 27. The built-in safeguard of requiring the Parliamentary Service Commission to pick two male and two female panellists avoided these problems. It ensured that the panel would meet the two-third gender requirements while allowing the other selectees freedom to choose the person who they thought was best for the job. By doing away with this in-built mechanism, the Bill courts political and constitutional crises.

*c. The rationale for the amendment*

Finally, there is no offered purpose for the proposed amendments. The Bill does not identify the problem it intends to fix or explain why the selection committee envisioned under the Bill would be better suited to select positions at the IEBC. Without explaining the benefit of the amendments, it creates an impression of an

ulterior motive by the mover of the Bill, who is the leader of the majority, particularly when the Commission is in crisis with two opposing factions set out.

We do not suggest that self-dealing exists, but without a clear indication of why the amendments are an improvement to the existing system, Parliament risks further undermining an embattled and beleaguered IEBC. If there is a rationale other than giving the political party with the greatest power influence over the IEBC, it is incumbent on Parliament to set it out. Without such information, there is no clear understanding of why this amendment would improve the independence or the functioning of the IEBC.

#### **Detailed review of the Bill and Recommendations**

<b>No.</b>	<b>Ref.</b>	<b>Comments</b>	<b>Recommendations</b>
1.	General Comment on the purpose of the amendments	The purpose for the proposed amendments has not been offered except for the changes in the composition and where the proposed nominees are to be drawn from.	The reason for the proposed amendments should be clearly stated so that the public understands the implications of the proposed changes and can offer their views.
2.	New Subparagraph (2)	Reduces the current allocation to the Parliamentary Service Commission, which nominates four persons to the selection panel, two women and two men, to two nominees and allows the Political Parties Liaison Committee and The Public Service Commission, one nominee each. Introduces the Political Parties Liaison Committee which is established under Section 38 of the Political Parties Act and is to be	The provision should be retained as is and the gender prescriptions retained.

		<p>established under the national and county levels.</p> <p>Comments:</p> <p>There are no principal functions of the Committee save for the vague principal function of providing a platform for dialogue between the Registrar, the Commission and political parties; and any other functions as prescribed by the Registrar of political parties.</p> <p>It is unclear where the proposed nominee will come from, whether at the national or county levels.</p> <p>Notably, the Bill concerns county governments in line with Article 110(1)(a) of the Constitution.</p> <p>Secondly, it is unclear on the criteria through which the nominee shall be selected and from which party to avoid having partisan interests represented in the selection panel, hence increasing the potential interference with the affairs of the panel and the independence of the IEBC.</p> <p>The Bill proposes to have one person nominated by the Public Service Commission, following a</p>	
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		<p>reduction of the current four representatives of the Parliamentary Service Commission. The Parliamentary Service Commission and the Public Service Commission are both constitutional commissions made up of civil servants. There is no justification for the particular distinction of having members nominated by the Parliamentary Service Commission as opposed to the Public Service Commission as proposed in the Bill.</p>	
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**Conclusion**

For the reasons explained above, we believe that the Bill should either be rejected or fundamentally revised in order to 1) ensure that the PPLC selects a participant that is representative of the national and county levels of the PPLC and is independent of partisan influence; 2) ensure that the built-in system for complying with Article 27's two-thirds gender principle is maintained; and 3) explain what policy objective the Bill attempts to fulfil or what harm it intends to correct.

On behalf of Katiba Institute:

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VERY URGENT

20 JAN 2022

DEPUTY CLERK



20 JAN 2022

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Kindly deal

20/01/22

**KENYA CONFERENCE OF CATHOLIC BISHOPS-PARLIAMENTARY LIASION DESK**

**DEEPENING DEMOCRACY BY FACILITATING AND PARTICIPATING IN PUBLIC POLICY FOR THE COMMON GOOD.**

**Memo on Political Parties Amendment Bill 2021 and Elections Act 2011**

**Submitted to Senate**

**19/1/2022**

<i>The Section in the Political Parties (Amendment) Bill 2021</i>	<i>The Proposal in the Section</i>	<i>Rationale for our Position</i>	<i>KCCB-PLDs Position</i>
<b>Political Parties Act</b>			
2	Delete the term "Political Parties" and replace with  1. An association of citizens with an identifiable ideology or programme that is constituted for the purpose of influencing public policy or nominating candidates to contest elections	There exists a legal mechanism for registering associations interested in influencing public policies. They can register as NGOs, Societies, Trust, Companies or Community Base Organization. They need not be registered as a political party.	This should be amended to ensure that only Associations that are mandated to nominate candidates and participate in the elections are considered.
	2. Include coalition political party	The tribal, clan and regional nature of Kenya has been the cause of divisions which have at times led to violence. The idea of the political parties formed and with strong	We support this amendment

		support in some regions than others coming together under an umbrella of a coalition political party is good move towards the promotion of dialogue unity and peaceful coexistence in Kenya.	
	Insert new definitions 1. Coalition Party “ means a coalition party that is registered as a party by the Registrar”	The registration of a coalition party gives it the legality it requires	We support the insertion of the new definition
	2. Direct nomination ‘ means a process by which a political party nominates its registered members elects its candidates for an election”	This is good because the decision will be made by the registered members and not a few party officials. However there is need to cultivate democracy within political parties in order for all members to trust the process.	We support the insertion of the new definition of direct nomination but with recommendation that political parties enhance internal democracy.
	3. Indirect nomination means “ the process by which a political party through the use of delegates selected from registered members of the political party and interviews, select its candidate for election.	Most parties find it difficult to conduct direct nominations because of lack of finances required to fund the exercise. Indirect nominations will ensure that the costs of nominations are affordable. However it should be conducted in a democratic way upheld by all party members.	We support the insertion of the new definition of Indirect nomination.
	4. Statement of Ideology means “ a statement setting out the doctrine, ethical ideals, and principles of the party”	For a long time, Kenyans have decried the lack of clear ideology in political parties. The statement of ideology will greatly help in identifying the party philosophy	We support the insertion of a new definition on statement of ideology

4	<p>Insert a new section 4 A</p> <p>A Political Part may</p> <ul style="list-style-type: none"> <li>a) Recruit and enlist members</li> <li>b) Nominate candidates for elections</li> <li>c) Promote representation in Parliament and County Assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities</li> <li>d) Sensitize the public on the functioning of the political and electoral system</li> <li>e) Promote and enhance national unity</li> <li>f) Mobilize citizens into participating in political decisions</li> <li>g) Solicit and articulate public policy priorities as identified by its members and</li> <li>h) Shape and influence public policy</li> </ul>	<p>This further clarifies the functions of a political party</p>	<p>We support the new insertion of s 4 A</p>
	<p>Insert s 4 B</p> <p>1 An association of persons may in writing apply to the Registrar</p>	<p>This provides for the process of reserving the name, symbol of slogan of a political party</p>	<p>We support the new insertion in 4 B</p>

	<p>for the reservation of a name, symbol or slogan of the proposed party</p> <p>2. If the name, symbol or slogan has not been reserved by another association of party, the Registrar shall reserve the name, symbol or slogan for ninety days</p> <p>3 The Registrar shall in writing notify the applicants of the availability of the name, symbol and slogan within fourteen days</p>		
5	<p>Inserting a new 5 (1) (A)</p> <p>An application for provisional application may be made after notification by Registrar under 4 A(3)</p> <p>Provided that if the application is not made within the time set in 4 A (2), it lapses</p>	<p>This provides for the process and time frames for notification and applications</p>	<p>We agree with the insertion of new 5 (1) (A)</p>
	<p>In subsection (5) deleting the words "one hundred and eighty days" and substituting therefore the words "two hundred and seventy days"</p>	<p>This gives the parties more time</p>	<p>We agree with the deletion and the insertion</p>
6	<p>In subsection 2 insert a new paragraph (da) "be accompanied by a statement of ideology of the proposed party"</p>	<p>This will make the proposed political parties to provide their statement of ideology</p>	<p>We support the insertion of new (2) (da)</p>
	<p>In subsection 3 insert the word "and slogan"</p>	<p>Its in order</p>	<p>We support the insertion of the "and slogan"</p>
7	<p>In subsection 2 f adding</p>	<p>This will ensure digital</p>	<p>We support the</p>

	the following new item after item (iv) " The address of the official website of a political party"	access to information by members including those are far from the office	insertion of new item
	Adding the following new subsections immediately after subsection 5:		
	A coalition party shall not be required to comply with section 5 and 6		We agree with the proposal
	(7) The Registrar shall upon deposit of a coalition agreement for the formation of a political party, issue the coalition party with certificate of full registration		We agree with the proposal
	(8) The governance of a coalition party shall be in accordance with the provisions of the Act relating to the governance of a coalition and the regulations made in this regard		We agree with the proposal
	(9) A member of a coalition shall not be a member of another coalition		We agree with the proposal
8	Section 8 is amended by : a) In the opening statement inserting the word "the slogan" immediately after the word name b) In paragraph (c) insert the word slogan	This is good because it will stop use of slogans that can cause hatred, or violence	We agree with the proposed amendments and insertions

	<p>immediately after the word name</p> <p>c) By adding the following new paragraphs immediately after paragraph (c) -</p> <p>d) Is similar to or associated with a group of association that has been proscribed under any written law, or</p> <p>e) Is against public interest</p>		
S 10	<p>S 10 is amended In subsection (1) by inserting the words " or a coalition political party" immediately after the words " form a coalition" and</p> <p>By adding the following proviso to subsection 2 -</p> <p>Provided that the in the case of a coalition political party, the coalition political party shall submit the coalition agreement six months before a general election</p>	This will provide for the coalition political party	We agree with the proposal
14	<p>Deletion of subsections (5),(5A),(6) and (8)</p>		
	<p>Insertion of new 14 A</p> <p>1. A person who while being a member of political party shall be deemed to have resigned from that party if that person:</p> <p>(a) Forms another</p>	<p>There has been a lot of confusion in the past with members of a political party rebelling and promoting the interest of another or other parties. This will ensure discipline across</p>	<p>We agree with the insertion of new 14(A)(1)</p>

	<p>political party</p> <p>(b) Joins in the formation of another political party</p> <p>(c) Joins another political party</p> <p>(d) In any way publicly advocates the formation of another political party</p> <p>(e) Promotes the ideology, interests or policies of another political party</p> <p>2. A political party shall before deeming a member to have resigned</p> <p>(a) Notify the member that he or she has been deemed to have resigned from the political party and the political party intends to remove him or her from the list of members</p> <p>(b) Afford the member opportunity to be heard in accordance with the procedures set out in the constitution of the party</p> <p>3. A Political party which deems a</p>	<p>political parties.</p>	
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	<p>member to have resigned shall notify the registrar in writing the members resignation and request the Registrar to remove the name of the member from the register of members of that political party</p> <p>4. Upon notification the Registrar may where satisfied that the political party has complied with the procedures, remove the member from the register of members within seven days of notification and notify the member in writing that he or she has ceased to be a member of that political party</p> <p>5. Where the Registrar is not satisfied, the Registrar shall refer the matter back to the concerned party for reconsideration</p> <p>6. Subsection 1 (c), (d) and (e) shall not apply to a member of a party which enters into a merger or a coalition with</p>		
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	another political party		
	<p>14 B (1) A person may be expelled from a political party if that person contravenes any of the provisions of the political party</p> <p>(2) A political party shall before expelling a member, afford such a member a fair opportunity to be heard in accordance with the internal party resolution mechanism prescribed in the constitution of the party</p>	The parties should be given the leeway to discipline errant members	We agree with the amendment and insertion for expelling members
16	<p>Amended in subsection 4 by inserting the words " and in the political parties official websites" immediately after the word " circulation"</p>	It's good to make the information available online	We agree with the proposed amendment and insertion
20	<p>In subsection 2 by deleting the word "two" and substitution with the word "one"</p> <p>Inserting the words "and in the political party official websites", immediately after the word "circulation"</p> <p>Add the following subsections:</p> <p>(4) An objection to the proposed change amendment or alteration shall be dealt with in accordance with the constitution of the political party and the political party shall</p>	This provides for procedure of changing the name, logo or slogan	We agree with the proposed amendment

	<p>inform the registrar of the manner in which the objection was dealt with</p> <p>(5) Where the registrar is satisfied that the political party has complied with the provisions, the Registrar shall within fourteen days of the notification, notify the political party in writing that the change, amendment or alteration has been made to the constitution of the party</p>		
21	<p>Amended by deleting the marginal note and replacing with the following marginal note " suspension and deregistration of a political party"</p> <p>In subsection1 by inserting the word "suspend" immediately after the word "may"</p> <p>Inserting the following new subsections:</p> <p>1 A Where a registered political party contravenes the provisions of section 1, the Registrar may</p> <p>(a) Serve the party with a notice in writing specifying the nature of the contravention requiring the</p>	<p>This provides for a procedure of suspension and deregistration of political parties</p>	<p>We agree with the proposed amendment</p>

	<p>political party to redress the contravention within the specified period in the notice. Provided that the notice shall not exceed three months.</p> <p>(b) Where the political party fails to comply with the notice, within the specified period, suspend the political party for a period not exceeding one year.</p> <p>(c) Where after the expiry of the period, the party fails to remedy the contravention and persist in the contravention, deregister the party</p> <p>(d) In subsection 2 insert the words "suspending and" immediately after the word "before"</p> <p>(e) By deleting subsection 3</p> <p>(f) By inserting a new subsection.</p> <p>(4A) A political party that is</p>		
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	<p>dissatisfied with the decision to suspend it, may within thirty days of receiving the suspension apply to the registrar for review.</p> <p>(g) By inserting the following new subsection (6) –</p> <p>A political party which is dissatisfied with the decision of the Registrar may appeal to the Tribunal against the decision</p>		
22	<p>Deleting subsection 2 and substituting therefore the following new subsection:</p> <p>(2) A member of a deregistered political party, holding an elective office established by the constitution shall continue to hold office for the remainder of the term as a member of another political party or independent of any political party</p> <p>Deleting subsection 3</p>	<p>This provides for options for a member of a deregistered political party who is holding an elective office, after the deregistration</p>	<p>We agree with the proposed amendment</p>
25	<p>Section 25 is amended:</p> <p>(a) by deleting subsection (1) and substituting therefore the following new</p>	<p>This provides for the procedure for qualifying and sharing of the political parties' fund. This will help in reducing conflicts</p>	<p>We agree with the proposed amendment</p>

	<p>subsection</p> <p>(1) The fund shall be distributed as follows:</p> <p>(a) Seventy percent of the fund proportionate by reference to the total number of votes secured by each political party</p> <p>(b) Fifteen percent of the fund proportionate to political parties based on the number of candidates of the political party from the special interest groups elected in the preceding general election</p> <p>(c) Ten percent of the fund proportionate to political parties based on total number of representatives from the political party elected in preceding election, and</p> <p>(d) Five percent for the administration of the fund.</p> <p>(b) In the opening words of subsection (2) by inserting the words “ under subsection (1) (a)” immediately after the words “from the fund”</p> <p>(c) By inserting the following new section after subsection (2 A)</p> <p>(2B) Despite subsection (1), a political party shall not be entitled to receiving funding from the fund under subsection I (a) or 1 (b) if,</p>	<p>between member Parties in a coalition</p>	
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	<p>(a) more than two thirds of its registered office bearers are of the same gender</p> <p>(b) the party does not have, in its governing body, representation of special interest groups.</p> <p>(c) The party does not have have -</p> <p>(i) An elected member of the National Assembly</p> <p>(ii) An elected member of the Senate</p> <p>(iii) An elected Governor</p> <p>(iv) An elected member of the County Assembly</p>		
26	<p>Section 26 is amended by inserting the following new subsection, immediately after subsection (1):</p> <p>(1A) The moneys allocated to a coalition party shall be distributed by the registrar in accordance with the coalition agreement</p>		We agree with the proposed amendment
29	<p>Amended in subsection(2) by</p> <p>(a) Deleting the word "two" and substituting therefore "one"</p> <p>(b) Inserting the words "and in the political parties official</p>	<p>This will help save on cost, by advertising only on one newspaper with national circulation; It is also allowing digital access to the information</p>	We agree with the proposed amendment

	website" immediately after the word "circulation"		
30	Amended in subsection (1) by deleting the word "sixty" and substituting therefore the words "one hundred and twenty"	This will allow the registrar adequate time to process the register of members and statement of assets and liabilities submitted by the parties	We agree with the proposed amendment
31	Amended by deleting subsection (3)	This removes the requirement o annual audit of the political parties' accounts by the Auditor general. It is important to allow the Auditor General to annually audit the moneys allocate to the political parties for accountability and transparency purposes	This subsection should be retained
34	Amended by (a) Inserting a new paragraph after paragraph (d) (da) Keep and maintain a register of members of registered political parties (b) in paragraph (f) by deleting the word "his" appearing immediately after the words "the commission of" and substituting therefore the word "the" (c) By inserting the following new paragraphs after paragraph "f" (fa) Certify that an independent candidate is not a member of any registered political party (fb) certify that the		We agree with the proposed amendment

	<p>symbol intended to be used by the independent candidate in an election does not resemble the symbol of a registered political party</p> <p>(fc) certify that the names appearing in the party lists are the names of members of the party presenting the party list.</p> <p>(fd) Regulate political party nominations in accordance with the Political Parties Act</p> <p>(fe) Train political party election agents</p>		
34 A	<p>Amended by adding the following new subsections after subsection 34 A</p> <p>34 B (1) subject to this section, there is established a political parties management information system</p> <p>(2) The Registrar shall use the system established under subsection (1) for processing political parties records for the purpose of the Act</p> <p>(3) The Registrar shall use the system established under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent</p> <p>(4) The Registrar shall make Regulations for the better carrying into effect the provisions of this section</p>	<p>This requires the political parties to an information management system. Currently all the parties do not have updated information o the party</p>	<p>We agree with the proposed amendment</p>

	<p>34 C (1) The Registrar may make changes to the records of political parties submitted to the Registrar under this Act where</p> <p>(a) the application by a provisionally registered party for full registration has not been granted</p> <p>(b) a political party has been deregistered</p> <p>(c) a member of a political party resigns or is deemed to have resigned from the political party and the Registrar has been notified of the registration</p> <p>(d) a member of a political party has been expelled from the political party and the Registrar has been notified of the expulsion</p> <p>(e) A member of the political party dies</p> <p>(f) A member of the political party has ceased to be a citizen of Kenya</p> <p>(g) A political party has merged with another political party</p> <p>(h) The constitution of the political party has been amended, changed or altered or</p> <p>(i) any other event that justifies the change</p> <p>(2) The changes contemplated under subsection (1) may</p>		
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	<p>include</p> <ul style="list-style-type: none"> <li>(a) amendment of the register of members of a political party</li> <li>(b) amendment, change or alteration of the constitution of a political party</li> <li>(c) addition or deletion of records</li> <li>(d) addition, change or deletion of names, and</li> <li>(e) any other change that is consistent with the Act</li> </ul>		
38	<p>Amended by inserting the following new subsection after section 38</p> <p>38 A A Political party may conduct party nominations using any of the following methods</p> <ul style="list-style-type: none"> <li>(a) Direct party nomination methods</li> <li>(b) Indirect party nominations</li> </ul> <p>38 B (1) When conducting party nominations, a political party shall</p> <ul style="list-style-type: none"> <li>(a) Establish mechanisms for resolution of disputes arising out of the nominations</li> <li>(b) Designate the person who shall issue nomination certificates to candidates after the nominations</li> <li>(c) Prescribe the functions of the body within the political</li> </ul>	Provides for procedures of conducting direct and indirect nominations	We agree with the proposed amendments

	<p>party that shall be responsible for conducting nominations</p> <p>38 C (1) A registered member of a political party shall be entitled to participate in the nominations conducted by the political party</p> <p>(2) A political party that intends to conduct political party nominations shall use certified register of members for nominations</p> <p>(3) A political party that intends to conduct political party nominations under the Act shall apply in writing to the Registrar for a certified copy of the register of members for at least twenty one days before the date of nominations.</p> <p>(4) The Registrar shall issue the political party with a certified copy of the register of the political party's members within seven days after the application under subsection (3)</p> <p>(5) A Political party shall not allow any person who is not a registered member of a political party to participate in the party nominations</p> <p>38 D A political party shall ensure that the register of members used in nominations is</p>		
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	<p>accessible to the registered members of the party</p> <p>38 E (1) A Political party shall not more than seven days before the date of nominations, notify the Registrar in writing of</p> <p>(a) The method by intends to use in conducting party nominations, which method which nominations shall be in accordance with the nomination rules of the party</p> <p>(b) The date of the party nominations</p> <p>(c) The venue or venues for party nominations</p> <p>(d) The list of members of the political party who wish to be nominated, by the party</p> <p>(2) At least seven days before the date of nominations, the</p> <p>(a) A political party shall publish in the official website of the political party, the dates and venues of nominations, and</p> <p>(b) The Registrar shall publish in the Registrars websites the dates and venues of the nominations</p> <p>39 F (1) A political party that intends to conduct direct party nominations shall</p> <p>(a) post in a</p>		
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	<p>conspicuous place within each venue where the nominations will be held the list of the members of the party who are eligible to participate in the nominations in that venue, and</p> <p>(b) Provide at each polling venue essential election materials including –</p> <ul style="list-style-type: none"> <li>(i) ballot papers</li> <li>(ii) ballot boxes</li> <li>(iii) a copy of the register of the members of the party</li> <li>(iv) pens, and</li> <li>(v) nominations results slips</li> </ul> <p>(2) Apolitical party that intends to use direct nominations method shall submit to the Registrar the</p> <ul style="list-style-type: none"> <li>(a) particulars of the body within the party that shall conduct the nominations ; and</li> <li>(b) procedure intended to be used in direct nomination</li> </ul> <p>38 G (1) A political party that intends to conduct indirect party nominations shall –</p> <ul style="list-style-type: none"> <li>(a) select delegates who shall participate in the party nominations from among the registered members of the party</li> <li>(b) Submit the list of delegates to the Registrar at least seven days before the date of</li> </ul>		
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	<p>party nominations</p> <p>(c) Specify the date and venue of the delegates meeting</p> <p>(d) Specify the polling process (to be) used by the delegates during the nominations</p> <p>(e) Specify the mode of interviews</p> <p>(f) Specify the body within the party that shall conduct the interviews of the potential candidates</p> <p>(2) The procedure for selection of the delegates to participate in the indirect party nominations shall be provided for in the party nomination rules of the political party</p> <p>(3) The list of delegates shall contain the names, addresses and identifying particulars of the delegates</p> <p>38 H A political party conducting party nominations shall ensure that each candidate who is nominated</p> <p>(a) makes and deposits a self declaration for in the prescribed form in the leadership and integrity Act, 2012</p> <p>(b) Possesses the qualifications to hold elective office as specified in the</p>		
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	<p>constitution and any other relevant written law, and  (c) Meets such other requirements as may be prescribed by the constitution and nomination rules of the party</p> <p>38   Any political party shall resolve any dispute arising out of the party nominations within thirty days after the date of party nominations</p>		
40	<p>Section 40 is amended :</p> <p>(a) In subsection (1) by (i) deleting the words “ a political party and a political party” appearing in paragraph (b) and substituting therefore the words “ a political party and the political party” (ii) by deleting the words “ party primaries” appearing in paragraph (fa) and substituting therefore the words “ party nominations”</p> <p>(b) In subsection (2), by deleting the expression “ paragraphs (a), (b), (c) or (e)” and substituting therefore the expression (a), (b), (c),(e) or (fa)</p> <p>(c) By inserting the following new subsections  Immediately after subsection (1)</p>	Provides for the procedures concerning party disputes	We agree with the proposed amendments

	<p>(3) Notwithstanding subsection (1) the Tribunal shall not hear or determine disputes between members of a coalition political party</p> <p>(4) A coalition agreement shall provide for internal dispute resolution mechanisms.</p> <p>(5) Where a member of a coalition political party is dissatisfied by the decision of a coalition political party internal dispute resolution mechanism it ( he or she) may appeal against that decision to the High court</p> <p>(6) The High Court shall (a) in the case of an appeal relating to a dispute that occurred before the general election hear and determine the appeal before the deadline for registration of candidates in the general election; and (b) in the case of an appeal that occurs after a general election, hear and determine the appeal within three months</p> <p>(7) A person who is dissatisfied with the decision of the High court may appeal to the Court of Appeal</p> <p>(8) The Court of Appeal</p>		
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	shall hear and determine an appeal under subsection (7) within three months from the date it was filed and the decision of the Court shall be final		
45	Amended by inserting the following new subsection immediately after subsection (1)  (1A) A person who enlists another person to be a member of a political party without obtaining the consent of that other person commits an offence.	Many people have been enlisted as members of political parties without their knowledge and consent	We agree with the proposed amendment
49	Amended ins subsection (2) by inserting the following new paragraph after paragraph (c)  (Ca) Prescribing the manner of holding political party nominations		We agree with the proposed amendment
Second Schedule	Amended by inserting the following new paragraph after paragraph 5  (5a) The address of the official website of the political party		We agree with the proposed amendment
<b>Election Act 2011</b>			
27	(a) Amend by inserting the following new subsection immediately after subsection (1) (1A) The Registrar of political parties shall certify the nomination submitted under (1)	This will enhance coordination between the IEBC and the Registrar of political parties	We agree with the proposal

28	<p>Amend by inserting the following new section immediately after section 28</p> <p>28 A (1) A political party that nominates a person for election under the Election Act shall at least fourteen days before submitting membership list to the commission under 28 (1), submit the party membership list to the Registrar of political parties for certification</p> <p>(2) The Registrar shall verify the names contained in the membership list submitted under subsection (1) and where the names are of members of that political party ,certify the membership list within seven days after receiving the application under subsection (1)</p>	This will enhance coordination between the IEBC and the Registrar of political parties	We agree with the proposal
35	<p>Amend by inserting the following new section immediately after section 35</p> <p>35 A (1) A Political party intending to submit a party list to the commission, shall at least fourteen days before the submission of the party list to the commission under section 35, submit the</p>	This will enhance coordination between the IEBC and the Registrar of political parties	We agree with the proposal

	<p>party list to the Registrar for certification</p> <p>(2) The Registrar shall verify that the names appearing in the party list belong to registered members of the political party and certify the party list within seven days after application under subsection (1)</p> <p>(3) Any dispute arising out of the certification of a party list under this section shall be referred to the Political Parties Dispute Tribunal for determination.</p>		
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Prepared By,

KCCB-Parliamentary Liaison Desk,

Mr.Eusebius Atamallo,

PLD Manager.



REPUBLIC OF KENYA



NATIONAL YOUTH COUNCIL

**NATIONAL YOUTH COUNCIL**  
**ABSA TOWERS 12<sup>TH</sup> FLOOR, P.O. BOX 23677-00100 GPO,**  
**NAIROBI, Tel:(020)2013920**

**Email: [info@nationalyouthcouncil.go.ke](mailto:info@nationalyouthcouncil.go.ke), [www.nationalyouthcouncil.go.ke](http://www.nationalyouthcouncil.go.ke)**

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*“Sauti ya Vijana”*

**MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
(AMENDMENT) BILL, 2022**

**National Assembly Bill No. 49 of 2022**

**VISION**

To be a dynamic institution championing Youth empowerment for National Stability and Prosperity

**MISSION**

To enhance youth capacity to actively participate in economic, social and political spheres for prosperity through strategic consultations, engagements and partnerships

**CORE VALUES**

Equity

Professionalism

Integrity

Transparency

Innovativeness

Teamwork

**MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
(AMENDMENT) BILL, 2022**

**National Assembly Bill No. 49 of 2022**

**Introduction**

The National Youth Council is the legally mandated organization to champion for youth empowerment as per the NYC Act No. 10, 2009. NYC is also tasked with:

- ❖ **Coordinating** activities being undertaken by the youth
- ❖ **Lobbying** for legislation on issues; promoting the inclusion of the youth agenda in public policy.
- ❖ **Promoting** youth representation in decision-making bodies and promoting government empowerment initiatives targeting youth.
- ❖ Acting as a **'voice and bridge'** to ensure that the government and other policy-makers are kept informed of the views and aspirations of the youth.

The gist of this presentation has been informed by the following Kenya Youth Development Policy priority areas;

- (i) Nurture value driven, morally upright, ethical generation of patriotic youth for transformative leadership;
- (ii) Effective civic participation and representation among the youth
- (iii) Promote a crime free, secure, peaceful and united Kenya where no young Kenyan is left behind

Our submission is as follows;

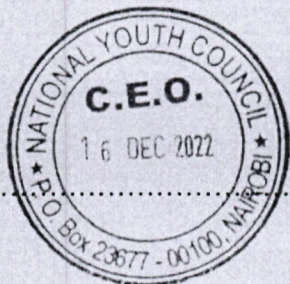
SECTION/PART	OBSERVATION	REMARKS	RECOMMENDATIONS
Paragraph 1 sub paragraph 2 of the First Schedule	The amendment seeks to substitute the provision as presently constituted in the principal act with a new provision that gives a new recommendation on the constitution of the IEBC selection panel	The constitution of the selection panel provides for representation of the following; a. the Parliamentary Service Commission; b. Public Service Commission; c. Parties Liaison Committee; d. Law Society of Kenya; and e. Inter-religious Council of Kenya; noteworthy, there is no provision for youth representation.	We propose that the amendment considers introducing representation of two youth nominated by NYC. This is in consideration that the youth form the largest proportion of the population constituents both as voters and consumers of services offered by IEBC.

### Conclusion

The amendment is timely as it comes immediately after the 2022 elections and gives sufficient room for IEBC to restructure before 2027. Consideration of our proposed additions will ensure that the youth of Kenya feel sufficiently represented at the decision making table.

**Submitted by:** National Youth Council

**Stamp:** .....





*DGAC & DKS*

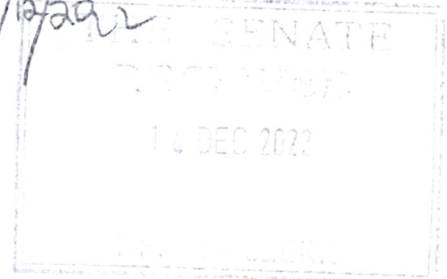
*kindly deal*

Ref: IEBC/CS/CEO/13/12/2022 (1)

13<sup>th</sup> December, 2022

The Clerk of the Senate  
Parliament Buildings  
P. O. Box 41842 – 00100  
NAIROBI

*14 DEC 2022*  
*14/12/2022*



**RE: COMMISSION VIEWS ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022 – NATIONAL ASSEMBLY NO.49 OF 2022**

Reference is made to the newspaper notice inviting the interested members of public to submit any representations that they may have on the Bill by a way of written memoranda.

The Commission appreciates the invitation by yourselves to submit its views on the aforesated Bill. Indeed, this provides an opportunity for public participation particularly for an institution such as ours that is responsible for the conduct of elections.

The Commission reckons that the subject Bill published on 2<sup>nd</sup> November, 2022 seeks to change the composition of the selection panel responsible for the recruitment of the Chairperson and members of the Independent Electoral & Boundaries Commission.

The Bill seeks to attain a two pronged objective;

1. Reduce from four to two the slots hitherto available to the Parliamentary Service Commission to nominate persons to be members of the selection panel.
2. Bring on board the Political Parties Liaison Committee and the Public Service Commission by affording each to nominate one member of the selection panel.

The Commission is cognizant of the Judgement of the High Court of Kenya at Nairobi (Milimani Law Court), Constitutional Petition number E364 of 2020, Okiya Cmtatah Okoiti versus The Hon. Attorney General, National Assembly, Senate, Parliamentary Service Commission, Law Society of Kenya and Inter-religious Council of Kenya.

The said Petition impugned the IEBC Amendment Act no. 18 of 2020 under whose auspices the Parliamentary Service Commission had statutory power to nominate four



out of seven nominees for appointment to the selection panel for the selection of nominees for appointment as Chairman and Members of the Commission.

The Court opined that the dominance of the members appointed by one entity into the selection panel definitely raised legal eyebrows. It held that a selection panel with a majority of its members nominated by one entity could not pass the threshold of being portrayed as independent and fair. As it were, the membership could not pass the objective muster and would be an outright infringement of the provision of Article 10 of the Constitution on National Values and Principles of Good Governance, and in particular transparency, social justice, equity, equality, inclusivity, integrity, patriotism and National Unity.

The Commission agrees with the judgement under reference and supports the proposed amendments on the composition of the selection panel and the nominating entities.

The Commission advises that even then, the nominating entities must conduct the process of nominating the members of the selection panel in an open and transparent manner. It is only then that the independence of the Commission will be guaranteed.

Thank you for your continued support.



OBADIAH KEITANY  
FOR: COMMISSION SECRETARY/CEO

Copy to: Chairman - IEBC

Mr. J.M. Nyegenye

Clerk of the Senate of Kenya

Nairobi

Kenya

Via E-mail to: [clerk.senate@parliament.go.ke](mailto:clerk.senate@parliament.go.ke) and [senatejlahrc@parliament.go.ke](mailto:senatejlahrc@parliament.go.ke)

Dear Mr Nyegenye,

**Ref: Independent Electoral and Boundaries Commission [Amendment] Bill, 2022 – National Assembly Bills No. 49 - Invitation to Submit Memoranda.**

- 1.** I refer to your recent public notice inviting members of the public to submit representations they may have on the above Bill. Please find below my representations.
- 2.** Since the Bill transmitted to the Senate was passed by the National Assembly as published without amendments, I am making largely the same representations I submitted to the National Assembly. It appears the National Assembly chose to ignore my submissions.
- 3.** In my opinion and, in view of the judgement of the High Court of Kenya in **Okoti v Attorney General & 5 others (Constitutional Petition E364 of 2020) [2021] KEHC 439 (KLR) - <http://kenyalaw.org/caselaw/cases/view/224173>** -, the proposed composition of the Selection Panel for the recruitment of IEBC commissioners as set out in the Bill would be unconstitutional, null and void.
- 4.** Legislating for **five** [5] of the **seven** [7] positions to be nominees of State agencies and public organs, with just **two** [2] positions being reserved for a non-State body, offends the national values and principles of governance as set out in **Article 10** of the Constitution, including but not limited to:
  - a. Sharing and devolution of power;

- b. Democracy;
- c. Equity;
- d. Social justice;
- e. Inclusiveness;
- f. Equality;
- g. Non-discrimination;
- h. Protection of the marginalised;
- i. Good governance;
- j. Integrity;
- k. Transparency and;
- l. Accountability.

**5.** Just as the previous changes that reserved four [4] of the seven [7] positions to one State organ were held to breach binding principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism and national unity, the proposal to reserve five of the seven available slots to State agencies and public body nominees likewise breach the Constitution.

**6.** In the judgement cited above, the court held that:

*“179. There must have been good reasons why previously the number of nominees by PSC into the Selection Panel was not more than one half of the nominees. Indeed, the reasons are many. One of them is the perception of independence of the Selection Panel. **A Selection Panel which has majority of its members nominated by one entity cannot pass the threshold of being***

*potrayed as inter alia independent and fair. The dominance of the members appointed by one entity into the Selection Panel definitely raises legal eye brows*

...

*182. From the history of Constitution-making in Kenya and the quest for free and fair elections, the objective of the IEBC Amendment Act ought to further the realization of the goal that IEBC will eventually conduct fair, free and credible elections and referenda.*

*183. In this case, the IEBC Amendment Act runs counter that objective. The IEBC Amendment Act instead creates a scenario of suspicion not only on the Commissioners to be appointed, but also the eventual independence of the IEBC. It is clear beyond any peradventure that the Selection Panel was dominated by the nominees by PSC. That dominance runs contrary to good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity among like principles.*

*184. It is not far-fetched to imagine the likelihood of the majority of the members of the Selection Panel nominated by PSC to favour some candidates during the nomination process. Such preferred candidates may eventually become Commissioners of IEBC and their independence would naturally be put to question."*

- 7.** The fears expressed by the Court with regards to the outcome of the recruitment process carried out under the impugned process came to pass. The four commissioners recruited under the flawed process are currently the subject of proceedings under **Article 251** of the Constitution, seeking their removal from office.
- 8.** In addition to the above, providing that one [1] position in the Selection Panel will be a nominee of the Political Parties Liaison Committee is, in my considered opinion, unconstitutional and a breach of the national values and principles of governance already set out, particularly on good governance, transparency and accountability.

**9.** This is because, under **Section 38, Political Parties Act, 2011**, the Political Parties Liaison Committee is established at the national and county levels. This means there are **forty-eight [48]** established Political Parties Liaison Committee entities.

**10.** It is unclear which of the forty-eight entities will be the one nominating the allocated position on the Selection Panel nor how the nominee would be identified/selected. There are strong grounds to suspect that the intended beneficiary and nominating body for this position is in fact the Registrar of Political Parties.

**11.** The Bill as passed by the National Assembly further fails to meet binding constitutional requirements, including the duty imposed by **Articles 21, 27 and 28** of the Constitution with regards to promoting and advancing gender equality. This is because it fails to address a reasonably foreseeable risk and require that the two persons nominated under Clause 2[e] by the Inter religious council of Kenya shall be of opposite gender.

**12.** Kindly bring my submissions to the attention of the Departmental Committee on Justice and Legal Affairs.

Yours sincerely,

*matindi eliud*

Eliud Matindi

[Bavance13@gmail.com](mailto:Bavance13@gmail.com)

**12.12.2022**

*Appendix 7:*

Matrix of submissions and Committee comments/  
determination

THE SENATE



MATRIX

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
2	Office of the Registrar of Political Parties (ORPP)	<p>1. Amend the proposed new paragraph (2)(a) to read –</p> <p>(a) two persons of either gender nominated by the Parliamentary Service Commission.</p> <p>2. One person nominated by the Political Parties Liaison Committee.</p> <p>Consider whether PPLC appointing a representative to the Selection Panel would affect the nature and effect of the dialogue envisioned between ORPP, IEBC, and political parties under section 38 of the Political Parties Act.</p> <p>Also consider whether it is intended to amend Section 38(4) of the</p>	<p>To ensure use of uniform language throughout the clause.</p> <p>Section 38 of the Political Parties Act, 2011 establishes the Political Parties Liaison Committee (PPLC) to provide a platform for dialogue between ORPP, IEBC and political parties.</p> <p>Therefore, the PPLC comprises ORPP, IEBC, and political parties. The proposal does not address how the three bodies would arrive at a nominee to the Selection Panel.</p>	<p><b>Section 38 of the Political Parties Act</b>, establishes a Political Parties Liaison Committee at the national and county levels.</p> <p>The principal function of the PPLC to provide a platform for dialogue between the Registrar, Commission and political parties. It may also perform such other functions</p>

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
		<p>Political Parties Act with respect to the role of the Registrar in prescribing functions for the PPLC.</p> <p>3. Amend the proposed new paragraph (2)(e) to read –</p> <p>(e) two persons of either gender nominated by the Inter-Religious Council of Kenya.</p>	<p>In terms of the Political Parties Act and best practices from other jurisdictions, the primary role of PPLC is to facilitate dialogue (especially once an election has been called).</p> <p>To ensure the realization of the requirement under Article 27(8) of the Constitution which provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.</p>	<p>as may be prescribed by the Registrar.</p>
2	Council of County Governors (COG)	<p>Amend the clause to read –</p> <p>“two persons nominated by the council of county governments”</p>	<p>To ensure that the 47 County Governments are represented in the selection panel.</p> <p>The representation of the County Governments is necessary in key decision making processes that affect the country. The persons to be selected as members of the Commission serve the interest of the national and county governments. Hence, both levels of Government ought to be involved at all levels including at the selection and filling of the vacant positions.</p> <p>COG made reference to Article 1(4) of the Constitution on exercise of</p>	

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
			<p>sovereign power at the national and county levels of government, and Article 6(2) of the Constitution which provides that the governments at the national and county levels are distinct.</p>	
	<p>National Gender and Equity Commission (NGEC)</p>	<p>1. Delete paragraph (2)(e) and substitute with the following paragraphs –</p> <p>(e) one person nominated by the inter-religious council of Kenya;</p> <p>(f) one person nominated representing persons with disability nominated by the umbrella organization of persons with disability.</p> <p>2. Amend paragraph 5 on gender equity and regional balance of the first schedule by inserting the words “and interests of persons with disability” after the words” at the end of the paragraph.</p>	<p>To ensure compliance with Article 54(2) of the Constitution by the inclusion of persons with disability in appointive bodies including selection panels.</p> <p>The selection panel lacks representation of a person representing the interests of people with disabilities in line with Article 54(2) of the Constitution.</p> <p>The first schedule and specifically paragraph 5 is not in compliance with the provisions of Article 54(2) on inclusion of Persons with Disability in appointive positions. The provisions in the substantive IEBC Act are silent on the issue of inclusion of PWDs. The proposed amendment will not prejudice the provisions in the substantive Act but will ensure that the IEBC has the representation of Commissioners with disability.</p>	

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
	The County Assemblies Forum (CAF)	Amend paragraph (2)(b) to provide that the person nominated by the Public Service Commission shall not be of the same gender as the person nominated by the Political Parties Liaison Committee.	<p>To ensure compliance with Article 27(8) of the Constitution of Kenya provides that –</p> <p>In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.</p> <p>The selection panel lacks the gender balance as required by the Constitution.</p>	
	Katiba Institute (KI)	The provision should be retained as is and the gender prescriptions retained.	<p>There are no principal functions of the Political Parties Liaison Committee save for the vague principal function of providing a platform for dialogue between the Registrar, the IEBC and political parties and any other functions as prescribed by the Registrar of political parties.</p> <p>It is unclear where the proposed nominee will come from, whether at the national or county level as the Bill concerns county governments in line with Article 110(1)(a) of the</p>	

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
			<p>Constitution.</p> <p>It is unclear on the criteria through which the nominee shall be selected and from which party to avoid having partisan interests represented in the selection panel, hence increasing the potential interference with the affairs of the panel and the independence of the IEBC.</p> <p>The Parliamentary Service Commission and the Public Service Commission are both constitutional commissions made up of civil servants. There is no justification for the particular distinction of having members nominated by the Parliamentary Service Commission as opposed to the Public Service Commission as proposed in the Bill.</p>	
	Kenya Conference of Catholic Bishops	<ol style="list-style-type: none"> <li>1. Amend 2(2)(a) to provide that the nominees should be one each from the Government and the opposition.</li> <li>2. Delete 2(2)(b) and the slot be allocated to the civil society or faith-based institutions.</li> </ol>	<p>To ensure inclusivity which is a key consideration as it will promote trust in electoral management body by all players.</p> <p>civil society organisations and faith-based institutions are many and have influence. They are also objective and their decision is for the common good.</p>	

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
		3. Amend 2(2)(c) to provide that the nominee should also consider the non-parliamentary Parties.  4. Amend 2(2)(e) to add one more slot and provide that the nominees should be representatives from different Faiths.	Considering the many religions in Kenya and their mandate.	

## GENERAL AND OTHER SUBMISSIONS

### 1. The Independent Electoral and Boundaries Commission

The Commission supports the proposed amendments as it is in line with the **Okiya Omtatah Okioti v Attorney General & 5 others (Constitutional Petition E364 of 2020) [2021] KEHC 439 (KLR)**. The Commission also recommends that the nominating entities conduct the process of nominating members of the selection panel in an open and transparent manner.

### 2. Eliud Matindi

Made submissions similar to the ones he made to the National Assembly to the effect that the proposed composition of the selection panel comprising of five members nominated by State organs and two members nominated by non-state actors for the recruitment of IEBC commissioners as set out in the Bill would be unconstitutional, null and void just like the provision which was held unconstitutional for having four out seven members picked by one entity. The proposal would offend the national values and principles of governance as set out in Article 10 of the Constitution.

Additionally, the proposal that Political Parties Liaison Committee nominates one person to be a member of the selection panel is unconstitutional and a breach of the national values and principles of governance particularly on good governance, transparency and accountability. This is because under **section 38, Political Parties Act, 2011**, the Political Parties Liaison Committee is established at the national and county levels. This means there are forty-eight [48] established Political Parties Liaison Committee entities. It is therefore unclear which of the forty-eight entities will be the one nominating the one position.

The Bill fails to meet binding constitutional requirements, including the duty imposed by Articles 21, 27 and 28 of the Constitution with regards to promoting and advancing gender equality and it is unclear which among the forty-eight Political Parties Liaison Committees will be the nominating the one position Political Party Liaison Committee.

**3. The National Youth Council - NYC** (established under the National Youth Council Act to champion youth empowerment including promoting youth representation in decision making bodies)

Proposes introduction of two representing the youth nominated by the NYC for the reason that the youth comprise largest proportion of the population both as voters and consumers of the services offered IEBC.

**4. Katiba Institute (KI)**

KI is of the view that the purpose for the proposed amendments has not been offered except for the changes in the composition and where the proposed nominees are to be drawn from. There is need to explain the purpose of the proposed amendments so as to enable the public understands the implications of the proposed changes and can offer their views.

As such, KI proposes that the Bill be –

- a) rejected; or
- b) fundamentally revised to ensure that -
  - i. the Political Parties Liaison Committee selects a participant that is representative of the national and county levels of the Political Parties Liaison Committee and is independent of partisan influence;
  - ii. the built-in system for complying with Article 27 of the Constitution on two thirds gender principle is maintained; and
  - iii. the policy objective the Bill seeks to fill or the harm it intends to correct is explained.

*Appendix 8:*

Legal Brief on the proposal to expand the membership of the selection panel

REPUBLIC OF KENYA



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THIRTEENTH PARLIAMENT | FIRST SESSION

JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS COMMITTEE

PAPER ON THE AMENDMENT OF BILLS BY PARLIAMENT DURING  
COMMITTEE STAGE

Clerk's Chambers,  
Parliament Buildings,  
**NAIROBI.**

**JANUARY, 2023**

## **Introduction**

1. On 10<sup>th</sup> January 2023, during a sitting of the Justice, Legal Affairs and Human Rights Committee to consider the Independent Electoral and Boundaries Commission (Amendment) Bill, 2022 (National Assembly Bill no. 49 of 2022), an issue arose as to whether the Committee or a Senator can propose an amendment to the Bill which seeks to amend a new section of the Principal Act not sought to be amended by the published Bill.
2. The principal object of the Bill is to amend the First Schedule of the Independent Electoral and Boundaries Commission Act, No.9 of 2011, to change the composition of the selection panel that oversees the filling of vacant positions in the Commission.
3. The Bill was informed by the courts decision in **Okoti V Attorney General & 5 Others (Constitutional Petition E364 of 2020) [2021] KEHC 439 (KLR)**, where the High Court held that to the extent that section 2(2)(a) of the IEBC Amendment Act, 2020 provides for the nomination of 4 out of 7 members of the Selection Panel, then the said section 2(2) (a) of the IEBC Amendment Act is unconstitutional.
4. The Bill therefore seeks to reduce the number of members nominated by the Parliamentary Service Commission to the selection panel from four to two, and allowing the Political Parties Liaison Committee and the Public Service Commission to each nominate one person.
5. While considering the Bill, it was proposed that the number of members of the selection panel be increased from seven to nine, and therefore the question arose as to whether such an amendment would be permissible.

## **Legal background**

6. Article 1(2) of the Constitution of Kenya provides that the sovereign power of the people may be exercised either directly or through their democratically elected representatives.
7. Article 94 of the Constitution provides for the vesting of the legislative authority of the Republic upon Parliament. In exercise of these powers, Parliament therefore has authority to make new laws and amend any existing laws.

8. The law making process is conducted in accordance with the Constitution, while the Standing Orders give guidance on the procedural aspects such as the various stages that the Bill undergoes before it becomes law.
9. This paper examines whether a Bill can be amended once published, and the scope of amendments that can be made to the Bill. Various pronouncements of the Kenyan Courts on such amendments will be referred to.

#### **Amendment of Bills in Parliament**

10. Pursuant to Standing Order 145 of the Senate Standing Orders, once a Bill is read a First Time, it stands committed to the Relevant Standing Committee. The Committee then considers the Bill, facilitates public participation and submits its report to Senate within thirty days of committal of the Bill to the Committee.
11. Once a Bill has been subjected to public participation, Parliament has the power to amend the Bill before passing it. This was reiterated in **Pevans East Africa Ltd and Another vs. Chairman, Betting Control and Licensing Board and others (Civil Appeal No. 11 of 2018)** where the Court of Appeal held as follows –

*It must be appreciated that the National Assembly has heard the views of the Members of Public and industry stakeholders on a Bill. It is not precluded from effecting amendments to the Bill before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have been heard so long as the views have been taken into account. In our view, it would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate if after having facilitated public participation on a Bill Parliament is required to adjourn its proceedings every time a Member proposes an amendment to the Bill so that further public participation can take place on the particular proposed amendment.*

12. Amendments to Bills can be moved either by the Committee (Standing Order 147) or by a Senator (Standing Order 152(2)). Such amendments are considered during the Committee of the Whole House.

13. However, it is important note that the power to amend a Bill is not unrestricted. Courts have on several occasions nullified Acts for want of public participation in instances where such Acts were amended during the process of enactment by Parliament.

14. Standing Order 152(5) provides as follows –

*No amendment shall be permitted to be moved to a Bill if the amendment deals with a different subject or topic or unreasonably or unduly expands the subject of the Bill or is not appropriate or is not in logical sequence to the subject matter of the Bill.*

15. The courts, through various judgements, have sought to interpret the above provision and set the parameters as to what amendments are permissible, particularly in the context of public participation under Article 118 of the Constitution.

16. In doing so, the courts appear to have come up with a test to determine whether the amendments made to a published Bill are substantive, and if the amendments fit within the objects and purposes of the Bill as published or they introduce new matters altogether that the public has not had a chance to consider and make representations on. Some of the key decisions of courts are as below –

(a) **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** where the Petitioner sought to challenge the Constituencies Development Fund Act 2013, it was noted that a committee stage amendment was introduced in one of the amendment bills prepared to align the Act to the Constitution to amend Section 20 of the Act to provide for the manner of equitable sharing of the fund among constituencies and to entrench the constitutional principle of equalization as set out at Article 204 of the Constitution. The Court, while noting that sufficient public participation had been carried out and that the said amendment emanated from those consultations, held that –

We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved

must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation.

- (b) **Law Society of Kenya v Attorney General & another [2016] eKLR** where the court held that –

245. Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input....

250. Therefore by introducing totally new and substantial amendments to the Judicial Service Act, 2011 on the floor of the House, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution.

- (c) **Republic v National Assembly, Speaker of National Assembly & 6 others Ex parte George Wang'ang'a [2018] eKLR** where the Court held that –

Therefore by introducing totally new and substantial amendments to the *Pharmacy and Poisons Act* at the Committee Stage of the whole house, which was neither consequential amendment nor amendment within statute law

(Miscellaneous) Bill, but concerned drugs-control of manufacture of medicines, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution.

**(d) Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties) [2019] eKLR** where the Court held that –

It is therefore important to note that any amendments effected at the committee stage should be within the parameters of what was submitted to the public for their input. Otherwise allowing the legislature to pass legislation touching on new matters on the floor of the House will result in the negation of the constitutional principle that requires public participation in the enactment of laws.

**(e) In Kenya Bankers Association v Attorney General & another; Central Bank of Kenya (Interested Party) [2019] eKLR** the Court nullified section 63 of the Finance Act which was not included in the Finance Bill, 2018 at the time of publication and first reading. The amendment sought to amend the Banking Act by introducing a new requirement (as section 31A) for banks to collect next-of-kin details from their customers, whereas the purpose of the bill was to formulate the proposals announced in the budget for 2018/2019 relating to liability and collection of taxes and matters incidental thereto and sought to amend various laws including the Banking Act in line with that object. The Court held that –

The question then that needs to be answered is whether the amendment to the Bill at the committee stage completely altered the purpose for which the public input had been sought through public participation.

...

In the case at hand an entirely new provision not contemplated in the Memorandum and Objects of the proposed Bill was introduced at the Committee

Stage. The DNA of the impugned amendment is, as submitted by the petitioners, therefore defective for want of compliance with the constitutional requirement for public participation.

...

The alleged amendment was not a minor amendment but a major or substantive amendment which was against the purpose of the Bill and which required public participation.

17. From the above decisions it is clear that the Senate has the power to amend a Bill before it is enacted into law. However, such an amendment should be within the parameters of the Standing Orders, and should not be so substantive as to introduce new matters altogether that were not contemplated at the time the Bill was published and taken through public participation.

### **Observations**

18. From the foregoing, we observe as follows:

- a. that any proposed amendments to a Bill under consideration ought to not only comply with Standing Order 152(5) of the Senate Standing Orders, but should also deal with matters within the objects and purposes of the Bill at the time of public participation.
- b. that the Senator's proposed amendment to the IEBC (Amendment) Bill, 2022, which seeks to amend a section of the principal Act not contained in the Bill by increasing the number of members of the selection panel does not comply with Standing Order 152(5) of the Senate Standing Orders as well as with various court decisions as discussed in the preceding paragraphs. The proposed amendment departs from the original intention of the sponsor of the Bill which was to reduce the number of persons nominated to the selection panel by the Parliamentary Service Commission in compliance with the High Court decision.
- c. that the proposed amendment would therefore be an overstretch of the intention of the sponsor of the Bill as it introduces new matters not contemplated in the Bill as at the

time of public participation, and which matter various stakeholders and the public did not have an opportunity to give their views on.

- d. That if the proposed amendment is carried, the resulting legislation may be challenged in court.

**Way forward**

19. The Committee is requested to consider and note the contents of this paper.

A handwritten signature in black ink, appearing to be 'J. G. A.', with a long, sweeping underline that extends to the right.

**DIRECTORATE OF LEGAL SERVICES**

*Appendix 9:*

Text of amendments proposed by the Committee to the Bill

18<sup>th</sup> January, 2023

The Clerk of the Senate  
Parliament Buildings  
**NAIROBI**

**RE: COMMITTEE STAGE AMENDMENTS TO THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022 (NATIONAL ASSEMBLY BILLS NO. 49 OF 2022)**

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**NOTICE** is given that Sen. Wakili Hillary Kiprotich Sigei, Chairperson of the Standing Committee on Justice, Legal Affairs and Human Rights, intends to move the following amendments to the Independent Electoral and Boundaries Commission (Amendment) Bill, 2022, at the Committee Stage —

**CLAUSE 2**

**THAT** the Bill be amended by deleting clause 2 and substituting therefor the following new clause —

Amendment of the  
First Schedule to No.  
9 of 2011.

**2.** The First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 is amended in paragraph (1) by —

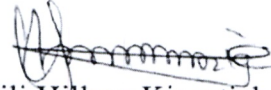
(a) deleting sub-paragraph (2) and substituting therefor the following new sub-paragraph —

(2) The Selection Panel shall consist of —

- (a) one person nominated by the Parliamentary Service Commission;
- (b) one person nominated by the Public Service Commission;
- (c) one man and one woman nominated by the majority and minority political parties represented in the Political Parties Liaison Committee at the national level;
- (d) one person nominated by the Law Society of Kenya; and
- (e) one man and one woman nominated by the Inter-Religious Council of Kenya.

(b) deleting the expression “(2)(b) and (c)” appearing immediately after the words “bodies under sub-paragraphs” in subparagraph (3) and substituting therefor the expression “(2)(b), (c), (d) and (e).”

Dated .....18<sup>th</sup> January....., 2023.



Wakili Hillary Kiprotich Sigei,  
*Chairperson,*  
*Standing Committee on Justice, Legal Affairs and Human Rights.*

