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THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – THIRD SESSION – 2024

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON THE CONSIDERATION OF THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024
(NATIONAL ASSEMBLY BILL NO. 10 OF 2024)

	
THE NATIONAL ASSEMBLY PAPERS L.A.D	
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TABLED BY:	Hon. Gitonga Murugara, MP Chairperson, S.C on Justice and Legal Affairs
THE TABLE:	Anne Shibuko

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LIST OF ABBREVIATIONS AND ACRONYMS

ELGIA	-	Electoral Law Governance Institute for Africa
ELOG	-	Elections Observation Group
FORD	-	Forum of the Restoration of Democracy
IEBC	-	Independent Electoral and Boundaries Commission
IRCK	-	Inter-Religious Council of Kenya
KLRC	-	Kenya Law Reform Commission
MCCP	-	Maendeleo Chap Chap Party
OAG	-	Office of the Attorney-General
ODM	-	Orange Democratic Movement
ORPP	-	Office of the Registrar of Political Parties
PPLC	-	Political Parties Liaison Committee
UDA	-	United Democratic Alliance
WDM	-	Wiper Democratic Movement

ANNEXURES

- Annexure 1: Adoption Schedule
- Annexure 2: Minutes
- Annexure 3: The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024
- Annexure 4: Advertisement inviting the public to submit memoranda on the Bill
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CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on its consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 10 of 2024*) which was published on 4th April 2024.

The Bill seeks to give effect to some of the recommendations and views of the public as submitted to the **National Dialogue Committee (NADCO)** on the Issues of *Electoral Justice and Related Matters; Outstanding Constitutional Matters; Fidelity to Political Parties/Coalitions and the law on multiparty democracy; Entrenchment of the National Government Constituencies Development Fund; the Senate Oversight Fund and the National Government Affirmative Action Fund and Establishment and Entrenchment of State Offices*. The Bill aims to amend the IEBC Act (Cap 7C) to delete obsolete provisions and make consequential amendments to align the Act to the judgement of the High Court in ***Katiba Institute and 3 Others v the Attorney General and 2 Others [2018] eKLR*** where it was held that certain provisions of the Act are unconstitutional.

In compliance with Article 118(b) of the Constitution and Standing Order 127(3), the Committee placed an advertisement in the print media on Friday 8th March 2024 inviting the public to submit memoranda by way of written statements on the Bill.

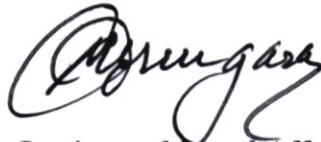
In addition, the Committee vide letter Ref. No. *NA/DDC/JLAC/2024/60* dated 11th April 2024 invited key stakeholders to submit views on the Bill and attend a public participation forum on Thursday 18th April 2024. The memoranda were to be received on or before Thursday 21st March 2024 at 5.00 pm (East African Time). By the close of the submission deadline, the Committee had received nine memoranda.

The OAG, IEBC, IEBC Selection Panel, IRCK, Judiciary, KLRC, ORPP, PPLC and the ELGIA gave their views on the Bill which the Committee considered in the preparation of this report.

While considering the Bill, the Committee observed that the Bill seeks to give effect to some of the recommendations and views of the public that were submitted to the NADCO which was established to facilitate dialogue and consensus building thereafter recommend appropriate constitutional, legal and policy reforms on issues of concern to the people of Kenya framed by NADCO. One of the recommendations on the issue of electoral justice was the proposed amendments to the IEBC Act (Cap. 7C) as provided in the Bill.

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its consideration of the Bill. The Committee further wishes to thank the OAG, IEBC, IEBC Selection Panel, IRCK, Judiciary, KLRC, ORPP, PPLC and the ELGIA for submitting views on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 10 of 2024*) and have the honour to report back to the National Assembly with the recommendation that the House approves the Bill with amendments.



Hon. Murugara George Gitonga, MP
Chairperson, Departmental Committee on Justice and Legal Affairs

CHAPTER ONE

1 PREFACE

1.1 Establishment of the Committee

1. The Departmental Committee on Justice and Legal Affairs is one of twenty departmental committees of the National Assembly established under **Standing Order 216** whose mandate pursuant to the **Standing Order 216 (5)** is as follows:

- i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
- iii. *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
- iv. *To study and review all legislation referred to it;*
- v. *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
- vi. *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- vii. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
- viii. *To examine treaties, agreements and conventions;*
- ix. *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
- x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
- xi. *To examine any questions raised by Members on a matter within its mandate.*

1.2 Mandate of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider¹:-

¹ National Assembly Standing Orders, 6th Edition.

- a) The Judiciary;
- b) Tribunals;
- c) Access to Justice;
- d) Public prosecutions;
- e) Ethics, Integrity and Anti-corruption;
- f) Correctional services;
- g) Community service orders and witness protection;
- h) Constitutional Affairs;
- i) Sovereign immunity;
- j) Elections including referenda;
- k) Human rights;
- l) Political parties; and
- m) The State Law Office' including insolvency, law reform, public trusteeship, marriages and legal education.

3. In executing its mandate, the Committee oversights the following Ministries, Departments and Agencies:

- a) State Department of Correctional Services;
- b) State Law Office and Department of Justice;
- c) The Judiciary;
- d) Judicial Service Commission;
- e) Office of the Director of Public Prosecutions;
- f) Ethics and Anti-Corruption Commission;
- g) Independent Electoral and Boundaries Commission;
- h) Commission on Administrative Justice;
- i) Office of the Registrar of Political Parties;
- j) Witness Protection Agency;
- k) Kenya National Commission on Human Rights;
- l) Kenya Law Reform Commission; and
- m) Council of Legal Education.

1.3 Committee Membership

4. The Committee was constituted by the House on 27th October 2022 and comprises the following Members:

Chairperson

Hon. Murugara George Gitonga, MP
Tharaka Constituency

UDA Party

Vice-Chairperson

Hon. Mutuse Eckomas Mwengi, OGW, MP
Kibwezi West Constituency

MCCP Party

Members

Hon. Maalim Farah, MP
Dadaab Constituency

WDM-Kenya

Hon. Francis Kajwang' Tom Joseph, MP
Ruaraka Constituency

ODM Party

Hon. Junet Mohamed, CBS, MP
Suna East Constituency

ODM Party

Hon. (Dr.) Otiende Amollo, SC, MP
Rarieda Constituency

ODM Party

Hon. Onyiego Silvanus Osoro, CBS, MP
South Mugirango Constituency

UDA Party

Hon. Muchira Michael Mwangi, MP
Ol Jorok Constituency

UDA Party

Hon. Makali John Okwisia, MP
Kanduyi Constituency

FORD-Kenya

Hon. Muriu Wakili Edward, MP
Gatanga Constituency

UDA Party

Hon. Maina Jane Njeri, MP
Kirinyaga (CWR)

UDA Party

Hon. Gichohi Kaguchia John Philip, MP
Mukurweini Constituency

UDA Party

Hon. Mogaka Stephen M, MP
West Mugirango Constituency

Jubilee Party

Hon. Aden Daud, EBS, MP
Wajir East Constituency

Jubilee Party

Hon. Siyad Amina Udgoon, MP
Garissa Township (CWR)

Jubilee Party

1.4 Committee Secretariat

5. The Committee is well-resourced and facilitated by the following staff:

Mr. Ahmed Salim Abdalla
Clerk Assistant I /Head of Secretariat

Mr. Ronald Walala
Senior Legal Counsel

Ms. Vivienne Ogega
Research Officer III

Ms. Jael Ayiego
Clerk Assistant III

Ms. Mary Kamande
Public Communications Officer III

Mr. Abdikafar Abdi
Clerk Assistant III

Mr. John Nduaci
Serjeant-At-Arms

Mr. Omar Abdirahim
Fiscal Analyst II

Mr. Calvin Karung'o
Media Relations Officer III

Mr. Isaac Nabiswa
Legal Counsel II

Mr. Peter Mutethia
Audio Officer III

Mr. Silas Opanga
Hansard Reporter III

CHAPTER TWO

2 OVERVIEW OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (*NATIONAL ASSEMBLY BILL NO. 10 OF 2024*)

2.1 Background

6. The Bill is co-sponsored by the Leader of the Majority Party and the Leader of the Minority Party. The Bill seeks to give effect to some of the recommendations and views of the public that were submitted to the **National Dialogue Committee (NADCO)** on the Issues of *Electoral Justice and Related Matters; Outstanding Constitutional Matters; Fidelity to Political Parties/Coalitions and the law on multiparty democracy; Entrenchment of the National Government Constituencies Development Fund; the Senate Oversight Fund and the National Government Affirmative Action Fund and Establishment and Entrenchment of State Offices.*
7. The Bill was published on 4th April 2024 and read a First Time in the House on 5th March 2024. It was thereafter committed to the Committee in line with the provision of Standing Order 127 (3).

2.2 Summary of Legal Provisions

8. The Bill seeks to amend the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 to clean up the Act by deleting obsolete provisions. The Bill further seeks to make consequential amendments intended to align the Act to the Judgment of the High Court in *Katiba Institute & 3 Others v Attorney-General & 2 Others* [2018] eKLR where the High Court held that certain provisions of the Act were unconstitutional.
9. The Bill further seeks to amend section 6 of the Act and include experience in accounting or information and communication technology as additional professional qualifications for appointment as a member of the Independent Electoral and Boundaries Commission.
10. Additionally, the Bill seeks to amend the First Schedule to the Independent Electoral and Boundaries Commission No. 9 of 2011 to increase the number of members of the selection panel from seven to nine in order to accommodate a wide spectrum of stakeholders and interest groups. The Bill also proposes to replace the current Fifth Schedule of the Act with a new and updated Schedule.
11. In particular, —

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- (a) **Clause 1 of the Bill** sets out the short title of the Bill and provides for its commencement upon publication in the *Gazette*;
- (b) **Clause 2 of the Bill** amends section 2 of the Bill by aligning the definition of the chairperson of the Commission to the Judgment of the High Court and by deleting obsolete provisions in the section;
- (c) **Clause 3 of the Bill** amends section 6(2)(c) of the Act to include information and communications technology and accounting as some of the relevant professional qualifications to be taken into account when nominating persons to be appointed as members of the Commission;
- (d) **Clause 4 of the Bill** amends section 7A of the Act and delete subsections (4), (5), and (6), which the High Court held unconstitutional;
- (e) **Clause 5 of the Bill** amends section 10 of the principal Act to reduce the term of the secretary to the Commission to three years, renewable once;
- (f) **Clause 6 of the Bill** amends section 12 of the principal Act to provide that the Commission shall, after every general election, review its operations and make the necessary changes required to make its operations more efficient, effective, transparent, and accountable;
- (g) **Clause 7 of the Bill** amends section 36 of the Act to anchor the Fifth Schedule to the Act which relates to the procedure for delimitation of electoral units;
- (h) **Clause 8 of the Bill** amends the First Schedule to the Act to increase the number of members of the selection panel from seven to nine to accommodate a wide spectrum of stakeholders and interest groups;
- (i) **Clause 9 of the Bill** amends the Second Schedule to the Act to provide for the quorum of the Commission as five (5) members;
- (j) **Clause 10 of the Bill** deletes and substitutes the Fifth Schedule to the Act which relates to the procedure for delimitation of electoral units;
- (k) **Clause 11 of the Bill** sets out the transitional provisions relating to the selection panel for the appointment of members of the Commission. Under the provision, the current selection panel shall cease to exist after the Bill is passed, but a person who served as a member of that selection panel may be nominated to serve as a member of a selection panel appointed after the provisions of the Bill commence.

CHAPTER THREE

3 PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE BILL

3.1 Legal Framework on Public Participation

1. Article 118 (1)(b) of the Constitution provides that:

“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.”

2. The National Assembly Standing Order 127 (3) and (3A) stipulates that:

*“(3) The Departmental Committee to which a Bill is committed shall **facilitate public participation on the Bill** through an appropriate mechanism including-*

(a) inviting submission of memoranda;

(b) holding public hearings;

(c) consulting relevant stakeholders in a sector; and

(d) consulting experts on technical subjects.

(3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.”

3.2 Memoranda Received on the Bill

3. Pursuant to the aforementioned provisions of law, the Committee placed an advertisement in the print media on Friday, 8th March 2024 inviting the public to submit memoranda by way of written statements on the Bill. Further, the Committee vide letter Ref. No. NA/DDC/JLAC2024/60 dated 11th April 2024 invited key stakeholders to submit views on the Bill and attend a public participation forum on Thursday 18th April 2024.
4. To this end, the Committee received nine (9) memoranda. The memoranda are annexed to this report as **Annexure 7**.
5. The memoranda from the OAG, IEBC, IEBC Selection Panel, IRCK, Judiciary, KLRC, ORPP, PPLC, ELOG and the ELGIA which were largely in agreement with the Bill save for a few reservations which they submitted to the Committee as follows:

Clause 2

6. The **OAG** and the **IEBC** noted that in line with the proposed deletion of obsolete provisions and harmonisation of the Bill with the Act, sections 32, 33 and 34 of the Act be deleted.

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7. The **ORPP** noted the need for clarity on the meaning of a parliamentary party since the Standing Orders cannot be used to interpret statutory terms. Hence, it proposed the introduction of a definition of ‘parliamentary party’ used in clause 8 with respect to the selection panel. It also proposed the inclusion of the definition of ‘electoral unit’ used in clause 10 of the Bill.
8. The **KLRC** submitted that while the proposed amendments are in line with the ruling in *Katiba Institute & 3 Others v AG & 2 Others*, they raise two fundamental issues. One, how IEBC should conduct its business in circumstances where the Chairperson is unable to attend proceedings of the Commission. Two, that when read together with Section 7A and paragraphs 5 and 7 of the Second Schedule of the Act, the amendments shall have the implication that the Chairperson cannot designate a member as a temporary Chairperson. In addition, that in the event that the membership of the Commission drops to below five, no business can be transacted by the Commission.
9. The IRCK proposed amending the clause to provide that the Vice Chairperson can act as the Chairperson in the latter’s absence to avoid a lacuna in the event of a vacancy in the office of the Chairperson.

Committee Observation

10. The Committee observed that section 32, 33 and 34 are part of the savings and transitional provisions of the Act. Transitional provisions make rules to ensure transition from the prior law to the new law which may include provisions to retain an existing right or authority that would otherwise be affected by the new law. Therefore, a blind deletion of sections 32, 33 and 34 would result in losing material information, including the legislative history of the Act.
11. The Committee noted that the term “parliamentary party” is substantively used in the Bill but is not defined. It is therefore important to define the words to accord with their definition in the National Assembly. Standing Orders. However, the Committee was of the view that the term “electoral unit” is clear enough and does not warrant a definition.

Clause 3

12. The **IEBC** proposed merging “accounting and finance” under Section 6(2)(iii) of the IEBC Act as the two disciplines deal with matters relating to financial management. Moreover, it **Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Independent Electoral and Boundaries Commission Bill (National Assembly Bill No. 10 of 2024)**

submitted that the nature of election matters is legal and quasi-judicial, and therefore, it proposed that the Bill be amended to provide that one member, besides the Chairperson, be an Advocate of the High Court of Kenya.

13. The IEBC also proposed amending the clause to provide for the appointment of the Commission to consider the two-thirds gender principle.
14. The IRCK noted that the proposed additional qualifications are not essential for the Commission to execute its mandate and should not be a preserve of certain professional cadres but represent a broad spectrum. It added that the qualifications proposed to be added should only be an added advantage and not the core requirements for the role of a Commissioner.
15. The PPLC submitted that additional qualifications can be acquired through training and support from the Secretariat, which is composed of technical personnel. Consequently, it proposed an amendment to only provide for degrees from a recognised university.

Committee Observation

16. The Committee noted that section 6 of the Act specifies that for a person to qualify for appointment as a member of the Commission, the person needs to prove relevant experience in certain fields which are necessary considering the nature of the function of the committee. Therefore, the proposed additional experience in information and communication technology and accounting accords with the various functions of the Commission that include the use of technology in elections and the prudent procurement of goods and services related to the conduct of an election.

Clause 5

17. The IEBC and the ORPP were of the view that the term of the Commission Secretary should be increased to five years or in the alternative, reviewed to a single term of six years. They noted that on account of the complexity of the functions of the Commission, including elections, boundary delimitation, and referendum, it takes one or two years for any Secretary to be conversant with electoral processes. Consequently, their proposal would enhance the security of tenure and independence of the Secretary.

18. It was **ELOG**'s submission that the term of the Secretary be aligned with that of the Commissioners to prevent an overlap with a new Commission and provide a smooth transition and operational continuity.

Committee Observation

19. The Committee observed that a reduction in the term of office of the Secretary from the current five years to three years would jeopardize the performance of the functions of the office as any person appointed as Secretary would require at least one to two years to be well conversant with the electoral processes. In this regard, the Committee noted that it may be necessary to increase the term of the Secretary to a non-renewable term of six years to ensure that the Secretary understands all that is expected in the performance of his or her functions and enhance their competence and independence in the role. It was their further view that the amendments in the Bill ought to provide that the current Secretary of the Commission serve for the remainder of their unexpired term.

Clause 6

20. The **IEBC** proposed the increase of the period in which the Commission is required to review its operations after every general election from one year to eighteen months. This will enable the Commission to have more time to conduct the review and identify areas for reform taking into account the time it takes for settlement of disputes after an election. It was their contention that the decisions of the courts, which may take longer than a year to be rendered, usually inform any legal and operational reforms to the conduct of elections.
21. Furthermore, **IEBC** recommended that the proposal be a new stand-alone Section instead of being subsumed under section 12 as there is not link between the proposal and the current content of section 12.
22. The **ELGIA** submitted that the role of Parliament ought to be clearly stated since some changes may require statutory reforms. Consequently, it proposed amending the Bill to clearly state the role of Parliament in the review process and the timelines for the review process by both Houses of Parliament.
23. The **PPLC** proposed that the proposal be amended to provide that the audit be carried out by a reputable entity appointed by the Commission.

Committee Observation

24. The Committee observed that a review of the conduct of a general election is a sensitive evaluation process. Such a process points out what worked and what did not work and draws lessons learned for improvement of the conduct of future general elections. The Committee also noted that the resolution of disputes is part of the process of a general election. Therefore, there is need to increase the time required for the completion of the review process. Further, the Committee agreed with the view that the proposal under clause 6 should be provided for in a separate stand-alone for purposes of legislative clarity. It was of the further view that the Commission should not be unduly restricted in terms of the manner of carrying out the review. As an independent constitutional body, the Commission ought to be left at liberty to choose between either an external or internal review.

Clause 7

25. The **IEBC** and the **KLRC** noted that the proposed contents of the Fifth Schedule on the procedure of delimitation of electoral units should not be contained in the saving and transition part but should be a substantive stand-alone part. Thus, it proposed the deletion of the proposal to amend Section 36 which provides that the electoral units shall be set out in the Fifth Schedule and incorporation of the procedure immediately after Section 16 as a new Part III.
26. The **KLRC** further noted that the Fifth Schedule lapsed upon publication of the final report of the first delimitation of electoral boundaries.
27. **ELGIA** submitted that the proposal be deleted and amended to repeal Section 36 of the Act because the section was originally intended for the first boundaries review. Additionally, it stated that Part V of the Act is no longer operational since the transitional provisions in the statute became spent upon its enactment.

Committee Observation

28. The Committee noted that the provisions under section 36 of the Act on the procedure for delimitation of electoral boundaries are wrongly placed in the Act under the savings and transition. It was therefore of the view that section 36 of the Act together with the proposed amendments to the section be moved to a new and distinct part of the Act for purposes of legislative coherence and logical flow of the Act. The Committee noted that the Fifth Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Independent Electoral and Boundaries Commission Bill (*National Assembly Bill No. 10 of 2024*)

Schedule should be retained as proposed in the Bill and anchored in the relocated provisions on delimitation.

Clause 8

29. The **IEBC** submitted that the Selection Panel needs to be inclusive of all key stakeholders who will give additional value to the process. According to them, the proposal as drafted gives priority to political parties.
30. The **ORPP** proposed redrafting the proposed sub-paragraph (2)(a) and (2)(e) to provide that the respective nominating bodies should nominate one man and one woman to achieve gender equity contemplated by the proposed paragraph 2C.
31. In addition, the ORPP recommended redrafting the proposed sub-paragraph (2)(b) to clarify that the persons nominated shall be political parties within the PPLC which is comprised of the ORPP, IEBC and political parties.
32. **ELOG** recommended the reconsideration of the composition of the Selection Panel since the representation of parliamentary parties and coalitions may introduce biases, conflict of interest, deadlock and potentially undermine the integrity and independence of the selection process. Consequently, submitted that the provision should prioritise merit-based selection.

Committee Observation

33. The Committee observed that the revision of the membership of the selection panel to give the Political Parties Liaison Committee extra slots for the persons they should nominate is due to the fact that a general election is a political process.
34. Further, the Committee noted that the current subparagraph 1(2C) of the First Schedule ensures that the bodies nominating more than one person to the selection panel must ensure that gender equity is achieved.
35. In line with the proposed increase in the panel's membership from 7 to 9 members, the Committee noted that it is necessary to amend paragraph 1(1) of the First Schedule to amend the reference to seven members.

Clause 9

36. The **IEBC** noted the need to ensure conformity with the High Court decision in *Isaiah Biwott Kangwony v IEBC & Another [2018] eKLR* which provided that the quorum of the Commission be dependent on the number of Commissioners in office. To this end, the IEBC proposed amending the proposal to include a provision that the quorum for conduct of business at a meeting of the Commission shall, where the membership is not less than five, not be less than fifty percent of the number of members in office.
37. The **PPLC** also proposed amending the proposal to provide that the members of the Commission shall endeavour to be guided by the principles of transparency and accountability in the conduct of their business.

Committee Observation

38. The Committee did not agree with the views on quorum. It noted that for decision-making purposes, the quorum ought to be an odd number and that three members would be too low of a requirement. The proposed quorum of five members was therefore ideal.

Clause 10

39. The **IEBC** and **ELGIA** were of the opinion that the procedure for delimitation of electoral units should not be contained in the saving and transition part but should be a substantive stand-alone part. Consequently, the IEBC and ELGIA recommended the deletion of the clause and instead, place the provisions as a separate Part in the Bill. The IEBC specified that the new Part be introduced after Section 16 by amending Section 36 as follows:

“Procedure for delimitation of electoral boundaries

- (1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act any other law.*
- (2) The procedure for delimitation of electoral units shall be set out under the Fifth Schedule.”*

40. The **OAG** noted that the Act or any other existing legislation does not provide for the establishment, membership, mandate, and relationship between the County Boundary Review Panels and the Commission and thus recommended that this be clarified in the Bill.
41. The **ORPP** proposed the amendment of paragraph 7 of the proposed Fifth Schedule to make provisions for persons with disabilities with a focus on sign language and access to the Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Independent Electoral and Boundaries Commission Bill (*National Assembly Bill No. 10 of 2024*)

members. To this end, the IRCK proposed amending the proposal to either allow the existing Selection Panel to finalize and hand-over its work to a subsequent panel or to retain the current members of the Panel and appoint the additional two members of the Panel proposed in the Bill.

Committee Observation

48. The Committee observed that clause 11 is a transitional clause and does not form part of the proposed Fifth Schedule. The provision shall be retained in the Bill upon enactment as it does not propose any amendment to the Act.
49. The Committee noted that the clause only deals with the dissolution of the current selection panel. It noted a need for expanding the Clause to provide the manner of activating the appointment of a new selection panel after passage of the Bill in light of already existing vacancies in the membership of the Commission.

General

12. The **Judiciary** noted that the Bill does not address the separate policy and administrative remit of the electoral Commission, nor does it make any proposals on the clarity of the roles of the Chairperson, Commissioners, CEO and staff of the Commission as recommended by the Supreme Court. It therefore, recommended that Parliament develop further legislative reform proposals in line with the observations and recommendations of the Supreme Court in the case of *Katiba Institute & 3 Others v Attorney General & 2 Others [2018] eKLR* which noted that the evidence before the court pointed to a serious malaise in the governance of the IEBC, an institution entrusted with one of the monumental tasks of midwifing our democracy.

Committee Observation

50. The Committee noted that the submissions by the Judiciary were general in nature and did not touch on any specific clause of the Bill or the Act. It further noted that a number of proposals in the Bill and the recommendations made by the Committee in relation to the composition of the selection panel, the additional qualifications for appointment as commissioners, and the term of the Secretary address some of the issues highlighted by the Supreme Court.

venues of public hearings. In addition, it also proposed amending paragraph 8(2) of the proposed Fifth Schedule be amended to provide for the requirement of the Commission to illustrate how the views of the public have been considered in the revised report. Another proposal was to amend paragraph 10(1) of the proposed Fifth Schedule to limit any challenge of the delimitation exercise to interested parties that were consulted under paragraph 1(b) of the proposed Fifth Schedule.

Committee Observation

42. The Committee observed that a Schedule is a substantive provision in an Act of Parliament, and therefore, the proposals to shift the proposed Fifth Schedule into the main body of the Act were misconceived.
43. The Committee further noted that paragraph 3(2)(a) and paragraph 3(3) of the proposed Fifth Schedule make reference to County Boundary Review Panels which are entities not recognised in any law. Therefore, there is a need to anchor the County Boundary Review Panels in the Act. However, the Committee noted that matters of composition of the panels may be left to the Commission to decide.

Clause 11

44. The **IEBC** submitted that the clause is misplaced and proposed its deletion and relocation to the First Schedule which makes provisions on the Selection Panel.
 45. The **ORPP** noted that the Bill seeks to revise the secretary's term from five to three years, and therefore, it is important to clarify what will happen to the current Secretary. They proposed amending the proposal to include a saving or transition provision for the current Secretary.
 46. The **IEBC Selection Panel** proposed to amend the provision to provide that all members of the Selection Panel existing immediately after the commencement of the Act shall be compensated fully for the work, they performed from the commencement of the Selection Panel to the dissolution of the Selection Panel by way of enactment of this Act in respect to recruiting members of the Commission.
 47. The **IRCK** also submitted that the work done by the current Selection Panel should not be discarded and, in the spirit of prudent use of public funds, the Selection Panel should be allowed to execute its mandate or, if need be, have its mandate renewed with additional panel
- Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Independent Electoral and Boundaries Commission Bill (National Assembly Bill No. 10 of 2024)**

CHAPTER FOUR

4 COMMITTEE OBSERVATIONS

51. Upon reviewing the Bill and the submissions received, the Committee made the following observations:

- a) The Bill seeks to give effect to some of the recommendations and views of the public that were submitted to the National Dialogue Committee (NADCO) which was established to facilitate dialogue and consensus building, and thereafter recommend appropriate constitutional, legal and policy reforms on issues of concern to the people of Kenya framed by NADCO. One of the recommendations on the issue of electoral justice was the proposed amendments to the IEBC Act (Cap. 7C) as provided in the Bill;
- b) Despite the fact that the Bill is a politically negotiated document, pursuant to the mandate of the Committee and the requirements of Article 118 of the Constitution and Standing Order 127(3), the Committee is at liberty to propose necessary amendments to the Bill in its report to the House. This is informed by the Communication from the Chair (No. 006 of 2024) which directed the respective committees to ensure strict adherence to the due process in the enactment of legislation; and
- c) To the extent that the Bill only seeks to effect change to the IEBC Act to remedy issues identified by NADCO, it constitutes a piecemeal approach to the review of the Act and other legislation relating to elections. Parliament should consider a comprehensive review of electoral laws to address political, operational and institutional challenges affecting the electoral process in a wholistic manner. At present, there is a high likelihood that the legislative coherence of electoral laws shall be affected through the piecemeal amendments proposed in the Bill.

CHAPTER FIVE

5 COMMITTEE RECOMMENDATIONS

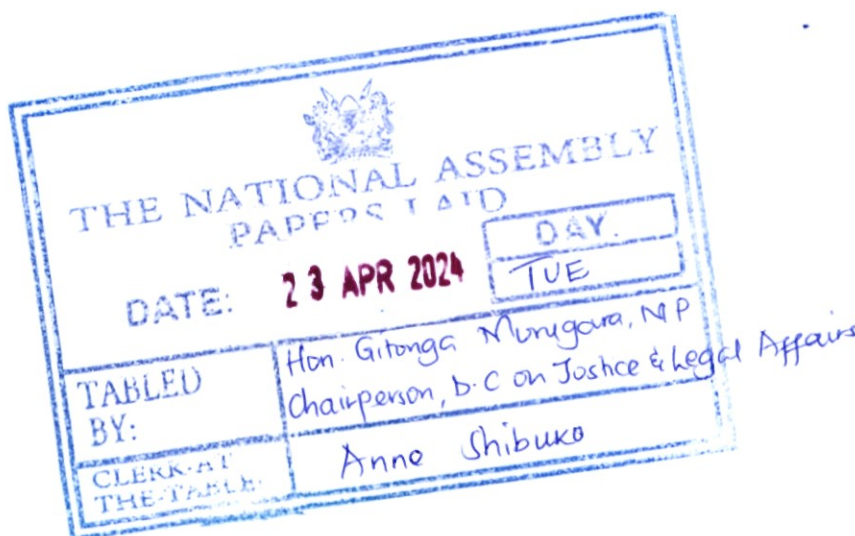
52. The Committee, having considered the Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly No. 10 of 2024*) recommends that the House approves the Bill with the amendments contained in the SCHEDULE OF AMENDMENTS forming CHAPTER SIX of this report.

SIGNED.......... DATE..... 23-04-2024

HON. GEORGE GITONGA MURUGARA, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS



CHAPTER SIX

6 SCHEDULE OF AMENDMENTS

53. In view of the observations made, the Committee proposed the following amendments to the Bill—

54. CLAUSE 2

THAT, Clause 2 of the Bill be amended by inserting the following new paragraph immediately after paragraph (e)—

“(f) by inserting the following new definition in proper alphabetical sequence—

“parliamentary party” means a party or coalition of parties consisting of not less than five percent of the membership of the National Assembly;

Rationale: To define the term “parliamentary party”.

55. CLAUSE 5

THAT, Clause 5 of the Bill be amended by deleting the proposed new subsection (4) and substituting therefor the following subsection—

“(4) The secretary shall hold office for a single term of six years and shall not be eligible for re-appointment.”

Rationale: To revise the term of office of the Secretary to single 6 year term.

56. CLAUSE 6

THAT, the Bill be amended by deleting Clause 6 and substituting therefor the following new Clause—

Insertion of a new s. 24A in Cap. 7C.	6. The principal Act is amended by inserting the following new section immediately after section 24—	
	Review of conduct of general election.	24A.(1) The Commission shall, after every general election, review its operations and make the necessary changes required to make its operations more efficient, effective, transparent and accountable.
		(2) The review shall be completed within eighteen months after every general election and the Commission shall publish the report in the Gazette and submit the report to Parliament.

Rationale: To provide for the review of the conduct of a general election under a separate substantive provision.

57. CLAUSE 7

THAT, the Bill be amended by deleting Clause 7 and substituting therefor the following new Clause—

Insertion of a new PART IIIA in Cap. 7C.	8. The principal Act is amended by inserting the following new Part immediately after section 24—	
	PART IIIA—DELIMITATION OF ELECTORAL UNITS	
	Procedure for delimitation of electoral boundaries.	24B. (1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.
		(2) Subject to the Constitution, matters to be addressed in the delimitation of electoral boundaries are—
		(a) review of the names and boundaries of constituencies;
		(b) review of the number, names and boundaries of wards;
		(c) re-distribution of wards affected by any changes in the boundaries of constituencies; and
		(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota as provided for by Article 89(5) of the Constitution and that such a process—
		(i) allows for variation of margin of not more than the limits provided under Article 89(6) of the Constitution in relation to cities, sparsely populated areas and other areas;
		(ii) takes into account the provisions of Article 89(7)(b) of the Constitution that provides for the progressive realization of the requirement that the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the

		population quota for the purposes of the each review;
		(iii) is subject to the use of enumerated national census figures.
		(3) The Commission shall prepare and publish a preliminary report outlining—
		(a) the proposed delimitation of boundaries for constituencies and wards; and
		(b) the specific geographical; and
		(c) demographical details relating to such delimitation.
		(4) The Commission shall ensure that the preliminary report is made available to the public for a period of thirty days and invite representations from the public on the proposals contained in the report during that period.
		(5) Upon the expiry of the period provided in subsection (4), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received and submit the revised preliminary report to the Parliamentary Committee.
		(6) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report, table the report in the National Assembly together with its recommendations.
		(7) The National Assembly shall, within fourteen days of the tabling of the revised preliminary report, consider the report and forward its recommendations to the Commission.
		(8) Within fourteen days of the expiry of the period provided for in subsection (7), the Commission shall upon receipt and considerations of the National Assembly and representations from the public, prepare the final report for publication in the Gazette.
		(9) Where the National Assembly fails to make recommendations within the period specified in subsection (7), the Commission shall publish its report in accordance with subsection (8).
		(10) A person who, being responsible for the publication in the Gazette of the final report submitted under this subsection fails to publish the report within the time required by the Commission after the report has been submitted to that person, commits an offence and is liable to imprisonment for a term of one year.

		(11) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subsection (9) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the Gazette.
		(12) Subject to this section, the provisions set out in the Fifth Schedule shall apply during the process of delimitation of electoral units.

Rationale: To include all provisions on delimitation of electoral units under a substantive Part of the Act.

58. CLAUSE 8

THAT, Clause 8 of the Bill be amended by—

- (a) deleting paragraph (a) and substituting therefor the following new paragraph—
“(a) in paragraph 1—

- (i) by deleting the word “seven” appearing immediately after the words “consisting of” appearing in sub-paragraph (1) and substituting therefor the word “nine”;

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

“(2) The selection panel shall consist of—

- (a) two persons nominated by the Parliamentary Service Commission, representing the majority party or coalition of parties and the minority party or coalition of parties;
- (b) three persons nominated by the Political Parties Liaison Committee of whom—
 - (i) one shall be from a party other than a parliamentary party or coalition of parties;
 - (ii) one shall be from a parliamentary party or coalition of parties forming the national government;
 - (iii) one shall be from a parliamentary party or coalition of parties not forming the national government;
- (c) one person nominated by the Law Society of Kenya;
- (d) one person nominated by the Institute of Certified Public Accountants of Kenya; and
- (e) two persons nominated by the Inter-religious Council of Kenya.

- (iii) by inserting the following new sub-paragraphs immediately after sub-paragraph (2A)—

“(2B) The respective nominating bodies shall select the nominees for appointment through a competitive and transparent process.

(2C) In nominating, the persons under subparagraph (2)(a), (b) and (e), the respective nominating bodies shall ensure that not more than two-thirds of the nominees are of the same gender.”

- (iv) in sub-paragraph (3), by deleting the words “sub-paragraphs (2)(b) and (c)” and substituting therefor the words “sub-paragraphs (2)(b), (c), (d) and (e)”;

- (v) by inserting the following new subparagraph immediately after subparagraph (6)—

“(7) The Parliamentary Service Commission shall provide for and meet the expenditure of the selection panel.”

Rationale: (1) To align the number of members of the Selection Panel in paragraph 1(1) with the the nine proposed under paragraph 1(2);

(2) To provide that the expenses of the selection Panel are a charge on the budget of the Parliamentary Service Commission.

59. CLAUSE 11

THAT, the Bill be amended by deleting Clause 11 and substituting therefor the following new Clause—

Saving and transition.	11. Upon the commencement of this Act—
Cap. 7C.	(a) The respective nominating bodies under paragraph 1(2)(b), (c), (d) and (e) of the First Schedule to the Independent Electoral and Boundaries Commission Act shall submit the names of their nominees to the Parliamentary Service Commission for transmission to the President for appointment to the selection panel under the Act;
	(b) the selection panel existing immediately before the commencement of this Act shall stand dissolved but the members of the panel may be nominated to serve in any subsequent panel panel;
Cap. 7C.	(c) the President shall, within seven days of receipt of the names of the nominees under paragraph 1(2) of the First Schedule to the Independent Electoral and Boundaries Commission Act from the Parliamentary Service Commission, appoint a selection panel for the purpose of appointment of the chairperson and members of the Commission; and

Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Independent Electoral and Boundaries Commission Bill (National Assembly Bill No. 10 of 2024)

	(d) a person holding the office of the secretary of the Independent Electoral and Boundaries Commission shall continue in office for the remainder of the unexpired period of their term.
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Rationale: (1) To provide a mechanism that activates the appointment of a selection panel in light of already existing vacancies in the Commission. Nominating bodies under the Act shall be required to submit names of their nominees within fourteen days of the commencement of the Act and the President is required to appoint a selection panel within seven days of receipt of the names.

(2) To save the unexpired term of office of the Secretary of the Commission define the term “parliamentary party”.

ANNEXURES

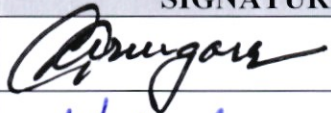
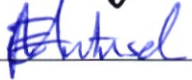
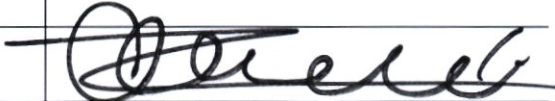
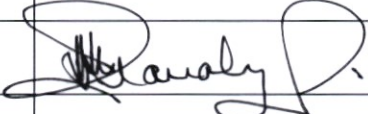
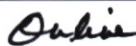
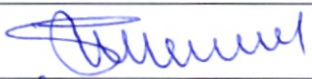
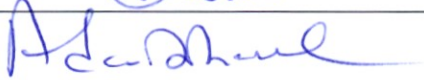
Annexure 1: Adoption Schedule



THE NATIONAL ASSEMBLY
13TH PARLIAMENT – THIRD SESSION - 2024
JUSTICE AND LEGAL AFFAIRS COMMITTEE

ADOPTION SCHEDULE

AGENDA: Adoption of the Report of the Independent Electoral Boundaries Commission (Amendment) Bill, 2024 co-sponsored by Hon. Kimani Ichung'wah, EGH, MP and Hon. Opiyo Wandayi, MGH, CBS, MP

No.	HON MEMBER	SIGNATURE
1.	HON. MURUGARA GEORGE GITONGA, CBS, MP – <i>Chairperson</i>	
2.	HON. MUTUSE ECKOMAS MWENGI, OGW, MP – <i>Vice Chairperson</i>	
3.	HON. MAALIM FARAH, MP	
4.	HON. FRANCIS KAJWANG' TOM JOSEPH, MP	
5.	HON. JUNET MOHAMED, CBS, MP	
6.	HON. ONYIEGO SILVANUS OSORO, CBS, MP	
7.	HON. (DR.) OTIENDE AMOLLO, SC, MP	
8.	HON. MUCHIRA MICHAEL MWANGI, MP	
9.	HON. MAKALI JOHN OKWISIA, MP	
10.	HON. MURIU WAKILI EDWARD, MP	
11.	HON. MAINA JANE NJERI, MP	
12.	HON. GICHOHI KAGUCHIA JOHN PHILIP, MP	
13.	HON. MOGAKA STEPHEN M, MP	
14.	HON. ADEN DAUD, EBS, MP	
15.	HON. SIYAD AMINA UDGOON, MP	

Annexure 2: Minutes

MINUTES OF THE 36TH SITTING FOR THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY 23RD APRIL, 2024 AT 10:00 AM IN ROOM 24, 5TH FLOOR, BUNGE TOWER, PARLIAMENT BUILDINGS

PRESENT

- | | | |
|--|---|--------------------------|
| 1. Hon. Murugara George Gitonga, CBS, MP | - | Chairperson |
| 2. Hon. Mutuse Eckomas Mwengi, OGW, MP | - | Vice- Chairperson |
| 3. Hon. (Dr.) Otiende Amollo, SC, MP | | |
| 4. Hon. Gichohi Kaguchia John Philip, MP | | |
| 5. Hon. Mogaka Stephen M, MP | | |
| 6. Hon. Aden Daud, EBS, MP | | |
| 7. Hon. Makali John Okwisia, MP | | |
| 8. Hon. Maina Jane Njeri, MP | | <i>Virtually</i> |

ABSENT WITH APOLOGIES

1. Hon. Maalim Farah, MP
2. Hon. Francis Kajwang' Tom Joseph, MP
3. Hon. Onyiego Silavvus Osoro, CBS, MP
4. Hon. Junet Mohamed, CBS, MP
5. Hon. Muriu Wakili Edward, MP
6. Hon. Muchira Michael Mwangi, MP
7. Hon. Siyad Amina Udgoon, MP

SECRETARIAT

- | | | |
|---------------------------|---|---------------------------------|
| 1. Mr. Ahmed Salim | - | Clerk Assistant I |
| 2. Mr. Walala Ronald | - | Deputy Director, Legal Services |
| 3. Ms. Jael Ayiego Kilaka | - | Clerk Assistant III |
| 4. Mr. Abdikafar Abdi | - | Clerk Assistant III |
| 5. Mr. Isaac Nabiswa | - | Legal Counsel II |
| 6. Mr. Omar Abdirahim | - | Fiscal Analyst II |
| 7. Ms. Vivienne Ogega | - | Research Officer III |
| 8. Mr. Calvin Karungo | - | Media Relations Officer |
| 9. Mr. Peter Muteithia | - | Audio Officer |
| 10. Mr. John Nduaci | - | Serjeant-at-Arms |

AGENDA

1. Prayers
2. Preliminaries
3. Confirmation of the previous minutes
4. **Consideration and Adoption of the Report of the Independent Electoral Boundaries Commission (Amendment) Bill, 2024 Co-sponsored by the Hon. Kimani Ichung'wah, EGH, MP and Hon. Opiyo J. Wandayi, MGH, MP**
5. Any Other Business
6. Adjournment/ Date of the Next Meeting

MIN. NO/DDC/JLAC/2024/178: PRELIMINARIES

The meeting was called to order at fifteen minutes past ten o'clock by the Chairperson followed by a word of prayer from the Chairperson and thereafter Members of the Committee introduced themselves.

MIN.NO/DDC/JLAC/2024/179: CONFIRMATION OF MINUTES

The agenda was deferred

MIN.NO/DDC/JLAC/2024/180: ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Hon. Mutuse Eckomas Mwengi, OGW, MP and seconded by Hon. Aden Daud, EBS, MP

MIN.NO/DDC/JLAC/2024/181: CONSIDERATION AND ADOPTION OF THE REPORT OF THE INDEPENDENT ELECTORAL BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024 CO-SPONSORED BY THE HON. KIMANI ICHUNG'WAH, EGH, MP AND HON. OPIYO J. WANDAYI, MGH, MP

Committee Observations

Upon reviewing the Bill and the submissions received, the Committee made the following observations:

- a) The Bill sought to give effect to some of the recommendations and views of the public that were submitted to the National Dialogue Committee (NADCO) which was established to facilitate dialogue and consensus building thereafter recommend appropriate constitutional, legal and policy reforms on issues of concern to the people of Kenya framed by NADCO. One of the recommendations on the issue of electoral justice was the proposed amendments to the IEBC Act (Cap. 7C) as provided in the Bill;
- b) Despite the fact that the Bill was a politically negotiated document, pursuant to the mandate of the Committee and the requirements of Article 118 of the Constitution and Standing Order 127(3), the Committee is at liberty to propose necessary amendments to the Bill in its report to the House. This was informed by the Communication from the Chair (No. 006 of 2024) which directed the respective committees to ensure strict adherence to the due process in the enactment of legislation; and
- c) To the extent that the Bill only sought to effect change the IEBC Act to remedy issues identified by NADCO, it constituted a piecemeal approach to the review of the Act and other legislation relating to elections. Parliament should consider a comprehensive review of electoral laws to address political, operational and institutional challenges affecting the electoral process in a wholistic manner. At present, there was a high likelihood that the legislative coherence of electoral laws shall be affected through the piecemeal amendments proposed in the Bill.

Committee Recommendations

The Committee, having considered the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly No. 10 of 2024) recommended that the House approves the Bill with amendments as contained in the Schedule of Amendments attached to the Report.

Adoption of the Report

The report was therefore adopted, having been proposed by Hon. Mogaka Stephen M, MP and seconded by Hon. Makali John Okwisia, MP.

MIN.NO/DDC/JLAC/2024/182: ADJOURNMENT

There being no other business, the meeting was adjourned at forty five minutes past eleven o'clock. The next meeting shall be held on notice.

SIGNED:  DATE: 23-04-2024
(CHAIRPERSON: HON. MURUGARA GEORGE GITONGA, CBS, MP)

MINUTES OF THE 31ST SITTING FOR THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY 18TH APRIL, 2024 AT 2:00 PM AT THE MINI CHAMBER, 1ST FLOOR, COUNTY HALL, NAIROBI COUNTY

PRESENT

Members

- | | | |
|--|---|--------------------------|
| 1. Hon. Murugara George Gitonga, CBS, MP | - | Chairperson |
| 2. Hon. Mutuse Eckomas Mwengi, OGW, MP | - | Vice- Chairperson |
| 3. Hon. Maalim Farah, MP | | |
| 4. Hon. Francis Kajwang' Tom Joseph, MP | | |
| 5. Hon. Gichohi Kaguchia John Philip, MP | | |
| 6. Hon. Mogaka Stephen M, MP | | |
| 7. Hon. Aden Daud, EBS, MP | | |
| 8. Hon. Muriu Wakili Edward, MP | | |
| 9. Hon. Makali John Okwisia, MP | | |

ABSENT

Members

1. Hon. Onyiego Silavvus Osoro, CBS, MP
2. Hon. Junet Mohamed, CBS, MP
3. Hon. (Dr.) Otiende Amollo, SC, MP
4. Hon. Muchira Michael Mwangi, MP
5. Hon. Maina Jane Njeri, MP
6. Hon. Siyad Amina Udgoon, MP

IN ATTENDANCE

Senate Standing Committee on Justice Legal Affairs and Human Rights

- | | | |
|--|---|--------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - | Chairperson |
| 2. Sen. Adan Dullo Fatuma, MP | | |
| 3. Sen. Catherine Muyeka Mumma, MP | | |
| 4. Sen. Veronica Waheti Nduati, MP | | |
| 5. Sen. Karen Njeri Nyamu, MP | | |

Judiciary

- | | | |
|------------------------|---|-------------------------------|
| 6. Hon. Fridah Mokaya | - | Chief Registrar/Secretary JSC |
| 7. Hon. Paul N. Maina | - | Dep. Chief Registrar |
| 8. Hon. Sharon Mwayuli | - | Principal Magistrate |
| 9. Mr. Ken Ogutu | - | Legal Counsel |
| 10. Ms. Diana Munyingi | - | Legal Counsel |

Independent Electoral Boundaries Commission

- | | | |
|-------------------------------|---|---|
| 11. Mr. Marjan Hussein Marjan | - | Chief Executive Officer |
| 12. Mr. Obadiah Keitany | - | Deputy Chief Executive Officer |
| 13. Ms. Purity Njeru | - | Manager, Communications and Public Affairs |
| 14. Ms. Ruth Makuthu | - | Ag. Manager Legal Reform, Political Parties Liaison |

15. Mr. Tioko C. Nkieny - Manager/PA to the CEO

Office of the Registrar of Political Parties

16. Ms. Anne Nderitu - Registrar of Political Parties
17. Mr. Wafula Wakoko - Ag. Head of Legal Unit

Political Parties Liaison Committee

18. Mr. Evans Misati - National Chairman
19. Mr. Mike Oliewo - Legal and Disputes RSLN

Office of the Attorney-General

20. Mr. Samson Davies Maundu

Kenya Law Reform Commission

21. Mr. Peter Musyimi - Director Legislation

Inter-Religious Council of Kenya (IRCK)

22. Mr. Abdirahman Ismail - Executive Director/Secretary General
23. Bishop. John Warari W.

Electoral Laws and Governance Institute for Africa (ELGIA)

24. Mr. Bon Makolwel

SECRETARIAT

1. Mr. Ahmed Salim - Clerk Assistant I
2. Mr. Walala Ronald - Deputy Director, Legal Services
3. Ms. Jael Ayiego Kilaka - Clerk Assistant III
4. Mr. Abdikafar Abdi - Clerk Assistant III
5. Mr. Isaac Nabiswa - Legal Counsel II
6. Mr. Omar Abdirahim - Fiscal Analyst II
7. Ms. Vivienne Ogega - Research Officer III
8. Ms. Mary Kamande - Public Communications Officer
9. Mr. Calvin Karungo - Media Relations Officer
10. Mr. Peter Muteithia - Audio Officer
11. Mr. John Nduaci - Serjeant-at-Arms

AGENDA

1. Prayers
2. Preliminaries
3. Confirmation of the previous minutes
4. **Public Hearing of the Independent Electoral Boundaries Commission (Amendment) Bill, 2024 Co-sponsored by the Hon. Kimani Ichung'wah, EGH, MP and Hon. Opiyo J. Wadayi, MGH, MP**
5. Any Other Business
6. Adjournment/ Date of the Next Meeting

MIN. NO/DDC/JLAC/2024/154: PRELIMINARIES

The meeting was called to order at ten o'clock by the Chairperson followed by a word of prayer from the Chairperson and thereafter Members of the Committee introduced themselves.

MIN.NO/DDC/JLAC/2024/155: CONFIRMATION OF MINUTES

The agenda was deferred

MIN.NO/DDC/JLAC/2024/156: ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Hon. Mutuse Eckomas Mwengi, OGW, MP and seconded by Hon. Aden Daud, EBS, MP

MIN.NO/DDC/JLAC/2024/157: PUBLIC HEARING OF THE INDEPENDENT ELECTORAL BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024 CO-SPONSORED BY THE HON. KIMANI ICHUNG'WAH, EGH, MP AND HON. OPIYO J. WANDAYI, MGH, MP

1. INDEPENDENT ELECTORAL BOUNDARIES COMMISSION

The Chief Executive Officer/ Commission Secretary of the Independent Electoral Boundaries Commission appeared before the Committee and submitted as follows;

On Clause 2 of the Bill, the Commission noted that in line with the proposed deletion of obsolete provisions and harmonisation of the Bill with the Act, sections 32, 33 and 34 of the Act be deleted.

On Clause 3 of the Bill, the Commission proposed merging "accounting and finance" under Section 6(2)(iii) of the IEBC Act as the two disciplines deal with matters relating to financial management. Moreover, it submitted that the nature of election matters is legal and quasi-judicial, and therefore, it proposed that the Bill be amended to provide that one member, besides the Chairperson, be an Advocate of the High Court of Kenya. The IEBC also proposed amending the clause to provide for the appointment of the Commission to consider the two-thirds gender principle.

On Clause 5 of the Bill, the Commission was of the view that the term of the Commission Secretary should be increased to five years or in the alternative, reviewed to a single term of six years. They noted that on account of the complexity of the functions of the Commission, including elections, boundary delimitation, and referendum, it takes one or two years for any Secretary to be conversant with electoral processes. Consequently, their proposal would enhance the security of tenure and independence of the Secretary.

On Clause 6 of the Bill, the Commission proposed the increase of the period in which the Commission is required to review its operations after every general election from one year to

eighteen months. This will enable the Commission to have more time to conduct the review and identify areas for reform taking into account the time it takes for settlement of disputes after an election. It was their contention that the decisions of the courts, which may take longer than a year to be rendered, usually inform any legal and operational reforms to the conduct of elections. Furthermore, recommended that the proposal be a new stand-alone Section instead of being subsumed under section 12 as there is not link between the proposal and the current content of section 12.

On Clause 7 of the Bill, the Commission noted that the proposed contents of the Fifth Schedule on the procedure of delimitation of electoral units should not be contained in the saving and transition part but should be a substantive stand-alone part. Thus, it proposed the deletion of the proposal to amend Section 36 which provides that the electoral units shall be set out in the Fifth Schedule and incorporation of the procedure immediately after Section 16 as a new Part III.

On Clause 8 of the Bill, the Commission submitted that the Selection Panel needs to be inclusive of all key stakeholders who will give additional value to the process. According to them, the proposal as drafted gives priority to political parties.

On Clause 9 of the Bill, the Commission noted the need to ensure conformity with the High Court decision in *Isaiah Biwott Kangwony v IEBC & Another [2018] eKLR* which provided that the quorum of the Commission be dependent on the number of Commissioners in office. To this end, the IEBC proposed amending the proposal to include a provision that the quorum for conduct of business at a meeting of the Commission shall, where the membership is not less than five, not be less than fifty percent of the number of members in office.

Clause 10 of the Bill, the Commission was of the opinion that the procedure for delimitation of electoral units should not be contained in the saving and transition part but should be a substantive stand-alone part. Consequently, the IEBC and ELGIA recommended the deletion of the clause and instead, place the provisions as a separate Part in the Bill. The IEBC specified that the new Part be introduced after Section 16 by amending Section 36 as follows:

“Procedure for delimitation of electoral boundaries

(1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act any other law.

(2) The procedure for delimitation of electoral units shall be set out under the Fifth Schedule.”

On Clause 11 of the Bill, the Commission submitted that the clause is misplaced and proposed its deletion and relocation to the First Schedule which makes provisions on the Selection Panel.

2. JUDICIARY

The Chief Registrar of the Judiciary appeared before the Committee and submitted as follows;

That the Judiciary noted that the Bill does not address the separate policy and administrative remit of the electoral Commission, nor does it make any proposals on the clarity of the roles of the Chairperson, Commissioners, CEO and staff of the Commission as recommended by the Supreme Court. It therefore, recommended that Parliament develops further legislative reform proposals in line with the observations and recommendations of the Supreme Court in the case of *Katiba Institute & 3 Others v Attorney General & 2 Others [2018] eKLR* which noted that the evidence before the court pointed to a serious malaise in the governance of the IEBC, an institution entrusted with one of the monumental tasks of midwifing our democracy.

3. ATTORNEY GENERAL

A representative from the Office of the Attorney-General appeared before the Committee and submitted that:

On Clause 2 of the Bill, the OAG noted that in line with the proposed deletion of obsolete provisions and harmonisation of the Bill with the Act, sections 32, 33 and 34 of the Act be deleted.

On Clause 10 of the Bill, the OAG noted that the Act or any other existing legislation does not provide for the establishment, membership, mandate, and relationship between the County Boundary Review Panels and the Commission and thus recommended that this be clarified in the Bill.

4. OFFICE OF THE REGISTRAR OF POLITICAL PARTIES (ORPP)

The Registrar of Political Parties appeared before the Committee and submitted that:

On Clause 2 of the Bill, ORPP proposed the clause be amended to introduce a definition of 'parliamentary party' used in clause 8 with respect to the selection panel, for clarity on the meaning of a parliamentary party and because the Standing Orders cannot be used to interpret statutory terms. The clause be amended further to include definition of the phrase 'electoral unit' used in clause 10 of the Bill.

On Clause 5 of the Bill, ORPP proposed the clause be amended to increase the term of the Commission Secretary to five years. This is to enhance job security of the CEO and independence in performing his/her duties. The mandate of the IEBC on elections, boundary delimitation and referendum require a lot of preparatory work of about two years.

ORPP proposed that Clause 8 of the Bill, subparagraph (2)(a) and (2)(e) be redrafted to provide that the respective nominating bodies shall nominate one man and one woman. This is to achieve the gender equity contemplated by the proposed paragraph 2C.

ORPP proposed that Clause 8 of the Bill, subparagraph (2)(b) be redrafted to show that the persons nominated shall be political parties within the Political Parties Liaison Committee. This is to specify that the persons nominated by PPLC shall be done by political parties since PPLC is comprised the ORPP, IEBC and political parties.

5. POLITICAL PARTIES LIASON COMMITTEE (PPLC)

A representative from the Political Parties Liaison Committee appeared before the Committee and submitted that:

Clause 3 of the Bill be amended to review of qualifications for appointment as Chairperson and member of IEBC to only provide for degrees from a recognized university. The Committee stated that additional qualifications can be acquired through training and support from the Secretariat that is composed of technical personal.

Clause 6 of the Bill be amended to provide that the audit should be carried out by a reputable entity appointed by the Commission.

6. INTER-RELIGIOUS COUNCIL OF KENYA (IRCK)

The Executive Director/Secretary General of the Inter-Religious Council of Kenya (IRCK) appeared before the Committee and made the following submissions on behalf of the Council:

That Clause 2 of the Bill be amended to provide that the Vice Chairperson can act as Chairperson in the absence of the Chairperson. This is to ensure competency and capacity of the Vice Chairperson and avoid a lacuna in the event of a vacancy in the office of the Chairperson

That Clause 3 of the Bill be deleted. The proposed qualifications are not essential for the Commissioners to execute mandate. Further, the role of Commissioners should not be a preserve of certain professional cadres but represent a broad spectrum of professionals. The additional requirements should only be an added advantage and not core requirements for the role.

7. ELECTORAL LAW AND GOVERNANCE INSTITUTE OF AFRICA (ELGIA)

A representative from the Electoral Law and Governance Institute of Africa (ELGIA) appeared before the Committee and made the following submissions on behalf of the Institute:

That Clause 6 of the Bill, be amended for the proposal to clearly state the role of Parliament in the review process and to provide timelines for the review process by both houses of Parliament. This is because the role of Parliament needs to be clearly stated since some changes may require statutory reforms.

That Clause 7 of the Bill be deleted. Section 36 was originally intended for the first boundaries review. Part V of the Act is no longer existing in law since the transitional provisions in the statute end upon enactment of the statute.

8. KENYA LAW REFORM COMMISSION

A representative from the Kenya Law Reform Commission (KLRC) appeared before the Committee and made the following submissions:

On Clause 2 of the Bill, KLRC stated that when read together with Section 7A and paragraphs 5 and 7 of the Second Schedule, the amendments have the implication that the Chairperson cannot designate a member as a temporary Chairperson: amending the quorum of the Commission from half the number of Commissioners to five. He further retaliated that while the amendments are in line with the ruling in *Katiba Institute and 3 Others v AG & 2 Others*, they raise two issues for deliberation;

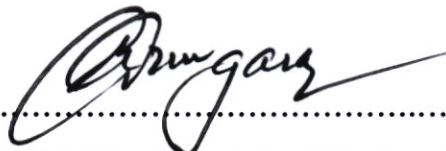
- i. How would the Commission conduct its business in circumstances where the Chairperson is unable to attend proceedings of the Commission; and
- ii. In the event, which the Commission drops to below five, no business can be transacted by the Commission.

That Clause 7 of the Bill, to amend section 36 be deleted and substitute the provisions with a new Part. The proposed contents of the Fifth Schedule should form the substantive provisions. The provisions of the Fifth Schedule lapsed upon publication of the final report of the delimitation of electoral boundaries.

MIN.NO/DDC/JLAC/2024/158: ADJOURNMENT

There being no other business, the meeting was adjourned at five o'clock. The next meeting shall be held on notice.

SIGNED:



DATE:

23-04-2024

(CHAIRPERSON: HON. MURUGARA GEORGE GITONGA, CBS, MP)

MINUTES OF THE 30TH SITTING FOR THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY 16TH APRIL, 2024 AT 10:00 AM AT THE MINI CHAMBER, COUNTY HALL, PARLIAMENT BUILDINGS

PRESENT

Members

- | | |
|--|---------------------|
| 1. Hon. Murugara George Gitonga, CBS, MP | - Chairperson |
| 2. Hon. Mutuse Eckomas Mwengi, OGW, MP | - Vice- Chairperson |
| 3. Hon. Francis Kajwang' Tom Joseph, MP | |
| 4. Hon. Aden Daud, EBS, MP | |
| 5. Hon. Muchira Michael Mwangi, MP | |
| 6. Hon. Mogaka Stephen M, MP | |

ABSENT

Members

1. Hon. Maalim Farah, MP
2. Hon. Onyiego Silavvus Osoro, CBS, MP
3. Hon. Junet Mohamed, CBS, MP
4. Hon. (Dr.) Otiende Amollo, SC, MP
5. Hon. Muriu Wakili Edward, MP
6. Hon. Makali John Okwisia, MP
7. Hon. Gichohi Kaguchia John Philip, MP
8. Hon. Maina Jane Njeri, MP
9. Hon. Siyad Amina Udgoon, MP

IN ATTENDANCE

Standing Committee on Justice Legal Affairs and Human Rights

1. Sen. Wakili Hillary Kiprotich Sigei
2. Sen. Adan Dullo Fatuma
3. Sen. Catherine Muyeka Mumma
4. Sen. Veronica Waheti Nduati

Secretariat

- | | | |
|---------------------------|---|-------------------------------|
| 1. Mr. Ahmed Salim | - | Lead Clerk |
| 2. Mr. Ronald Walala | - | Senior Legal Counsel |
| 3. Mr. Abdirahim Omar | - | Fiscal Analyst |
| 4. Mr. Abdikafar Abdi | - | Clerk Assistant |
| 5. Ms. Jael Kilaka Ayiego | - | Clerk Assistant |
| 6. Ms. Vivienne Ogega | - | Research Officer |
| 7. Mr. Isaac Nabiswa | - | Legal Counsel |
| 8. Mr. Calvin Karono | - | Media Relations Officer |
| 9. Ms. Mary Kamande | - | Public Communications Officer |
| 10. Mr. Peter Mutethia | - | Audio Officer |
| 11. Mr. John Nduaci | - | Serjeant-at-Arms |

AGENDA

1. Prayers
2. Preliminaries
3. Confirmation of the previous minutes
4. **Legal Brief on the Independent Electoral and Boundaries Commission Bill, 2024 co-sponsored by the Leader of the Majority Party Hon. Kimani Ichung'wah, MP and Leader of the Minority Party Hon. Opiyo Wandayi, MP.**
5. Any Other Business
6. Adjournment/ Date of the Next Meeting

MIN. NO/DDC/JLAC/2024/148: PRELIMINARIES

The meeting was called to order at ten o'clock by the Chairperson followed by a word of prayer from the Chairperson and thereafter Members of the Committee introduced themselves.

MIN.NO/DDC/JLAC/2024/149: CONFIRMATION OF MINUTES

The agenda was deferred

MIN.NO/DDC/JLAC/2024/150: ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Hon. Muchira Michael Mwangi, MP and seconded by Hon. Mutuse Eckomas Mwengi, OGW, MP

MIN.NO/DDC/JLAC/2024/151: LEGAL BRIEF ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION BILL, 2024 CO-SPONSORED BY THE LEADER OF THE MAJORITY PARTY HON. KIMANI ICHUNG'WAH, MP AND LEADER OF THE MINORITY PARTY HON. OPIYO WANDAYI, MP.

Members were taken through the meeting brief and were informed as follows: - THAT

1. The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024 is Co-sponsored by the Leader of the Majority Party and the Leader of the Minority Party. The Bill seeks to give effect to some of the recommendations and views of the public that were submitted to the **National Dialogue Committee (NADCO)** on the Issues of *Electoral Justice and Related Matters; Outstanding Constitutional Matters; Fidelity to Political Parties/Coalitions and the law on multiparty democracy; Entrenchment of the National Government Constituencies Development Fund; the Senate Oversight Fund and the National Government Affirmative Action Fund and Establishment and Entrenchment of State Offices.*
2. The Bill seeks to amend the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 to clean up the Act by deleting obsolete provisions. The Bill further seeks to make consequential amendments intended to align the Act to the Judgment of the High Court in ***Katiba Institute & 3 Others v Attorney-General & 2 Others [2018] eKLR*** where the High Court held that certain provisions of the Act were unconstitutional.

3. The Bill further seeks to amend section 6 of the Act and include experience in accounting or information and communication technology as additional professional qualifications for appointment as a member of the Independent Electoral and Boundaries Commission.
4. Additionally, the Bill seeks to amend the First Schedule to the Independent Electoral and Boundaries Commission No. 9 of 2011 to increase the number of members of the selection panel from seven to nine in order to accommodate a wide spectrum of stakeholders and interest groups. The Bill also proposes to replace the current Fifth Schedule of the Act with a new and updated Schedule.
5. In particular, —
 - (a) **Clause 1 of the Bill** sets out the short title of the Bill and provides for its commencement upon publication in the *Gazette*;
 - (b) **Clause 2 of the Bill** amends section 2 of the Bill by aligning the definition of the chairperson of the Commission to the Judgment of the High Court and by deleting obsolete provisions in the section;
 - (c) **Clause 3 of the Bill** amends section 6(2)(c) of the Act to include information and communications technology and accounting as some of the relevant professional qualifications to be taken into account when nominating persons to be appointed as members of the Commission;
 - (d) **Clause 4 of the Bill** amends section 7A of the Act and delete subsections (4), (5), and (6), which the High Court held unconstitutional;
 - (e) **Clause 5 of the Bill** amends section 10 of the principal Act to reduce the term of the secretary to the Commission to three years, renewable once;
 - (f) **Clause 6 of the Bill** amends section 12 of the principal Act to provide that the Commission shall, after every general election, review its operations and make the necessary changes required to make its operations more efficient, effective, transparent, and accountable;
 - (g) **Clause 7 of the Bill** amends section 36 of the Act to anchor the Fifth Schedule to the Act which relates to the procedure for delimitation of electoral units;
 - (h) **Clause 8 of the Bill** amends the First Schedule to the Act to increase the number of members of the selection panel from seven to nine to accommodate a wide spectrum of stakeholders and interest groups;
 - (i) **Clause 9 of the Bill** amends the Second Schedule to the Act to provide for the quorum of the Commission as five (5) members;
 - (j) **Clause 10 of the Bill** deletes and substitutes the Fifth Schedule to the Act which relates to the procedure for delimitation of electoral units;

(k) **Clause 11 of the Bill** sets out the transitional provisions relating to the selection panel for the appointment of members of the Commission. Under the provision, the current selection panel shall cease to exist after the Bill is passed, but a person who served as a member of that selection panel may be nominated to serve as a member of a selection panel appointed after the provisions of the Bill commence.

6. A side-by-side comparison of the current provisions of the Act and the provisions as amended is set out in the attached Schedule.

MIN.NO/DDC/JLAC/2024/152: ANY OTHER BUSINESS

The Committee made the following observation: -

- i) Members noted that it was important to conduct public hearing of the IEBC Bill, 2024 jointly together with the Senate Standing Committee on Justice, Legal Affairs and Human Rights to avoid duplication of efforts and wastage of government resources.
- ii) Members resolved to process all the Bills jointly with the Senate Standing Committee on Justice, Legal Affairs and Human Rights so as to enhance team work and provide administrative coordination between the National Assembly and the Senate.

MIN.NO/DDC/JLAC/2024/153: ADJOURNMENT

There being no other business, the meeting was adjourned at thirty minutes past twelve o'clock. The next meeting shall be held on notice.

SIGNED: DATE: 23-04-2024

(CHAIRPERSON: HON. MURUGARA GEORGE GITONGA, MP)

**Annexure 3: The Independent Electoral and
Boundaries Commission
(Amendment) Bill, 2024**

SPECIAL ISSUE

Kenya Gazette Supplement No. 46 (National Assembly Bills No. 10)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2024

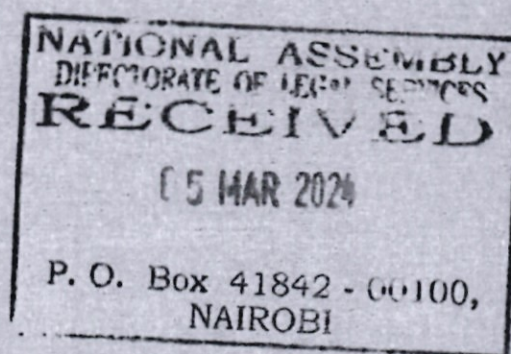
NAIROBI, 4th March, 2024

CONTENT

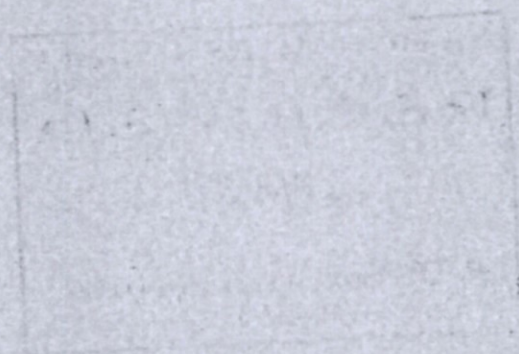
Bill for Introduction into the National Assembly—

PAGE

The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024	303
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PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI



**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION (AMENDMENT) BILL, 2024**

A Bill for

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, 2024 and shall come into force upon publication in the Gazette.

Short title and commencement.

2. Section 2 of the Independent Electoral and Boundaries Commission Act, 2011 (hereinafter referred to as “the principal Act”) is amended-

Amendment of section 2 of No.9 of 2011.

- (a) in the definition of the word “chairperson” by deleting the words “or the vice-chairperson or a member of the Commission when discharging the functions of the chairperson” appearing immediately after the word “Constitution;
- (b) by deleting the definition of the expression “first review”;
- (c) by deleting the definition of the expression “former Boundaries Commission”;
- (d) by deleting the definition of the expression “former Constitution”;
- (e) by deleting the definition of the expression “issues arising”.

3. Section 6 of the principal Act is amended in subsection (2)(c) by inserting the following new sub-paragraphs immediately after sub-paragraph (vi) —

Amendment of section 6 of No. 9 of 2011.

- (vii) information and communication technology;
- (viii) accounting.

4. Section 7A of the principal Act is amended-

Amendment of section 7A of No. 9 of 2011.

- (a) by deleting sub-section (4);
- (b) by deleting sub-section (5);

(c) by deleting sub-section (6).

5. Section 10 of the principal Act is amended by deleting sub-section (4) and substituting therefor the following new sub-section-

Amendment of
section 10 of No.
9 of 2011.

(4) The secretary shall hold office for a term of three years and may be eligible for re-appointment for one further term of three years.

6. Section 12 of the principal Act is amended by inserting the following new sub-sections immediately after sub-section (2)-

Amendment of
section 12 of No.
9 of 2011.

(3) The Commission shall, after every general election, review its operations and make the necessary changes required to make its operations more efficient, effective, transparent and accountable.

(4) The review shall be completed within one year after every general election and the Commission shall publish the report in the *Gazette* and submit the report to Parliament.

7. Section 36 of the principal Act is amended by inserting the following new sub-section immediately after sub-section (11)-

Amendment of
section 36 of No.
9 of 2011.

(12) Subject to this section, the provisions set out in the Fifth Schedule shall apply during the process of delimitation of electoral units.

8. The First Schedule to the principal Act is amended—

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

(a) in paragraph 1 —

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

(2) The selection panel shall consist of—

(a) two persons nominated by the Parliamentary Service Commission, representing the majority party or coalition of parties and the minority party or coalition of parties;

(b) three persons nominated by the Political Parties Liaison Committee of whom-

- (i) one shall be from a party other than a parliamentary party or coalition of parties;
- (ii) one shall be from a parliamentary party or coalition of parties forming the national government;
- (iii) one shall be from a parliamentary party or coalition of parties not forming the national government;
- (c) one person nominated by the Law Society of Kenya;
- (d) one person nominated by the Institute of Certified Public Accountants of Kenya; and
- (e) two persons nominated by the Inter-religious Council of Kenya.
- (ii) by inserting the following new sub-paragraphs immediately after sub-paragraph (2A)—
 - (2B) The respective nominating bodies shall select the nominees for appointment through a competitive and transparent process.
 - (2C) In nominating, the persons under subparagraph (2)(a), (b) and (e), the respective nominating bodies shall ensure that not more than two-thirds of the nominees are of the same gender.
- (iii) in sub-paragraph (3), by deleting the words “sub-paragraphs (2)(b) and (c)” and substituting therefor the words “sub-paragraphs (2)(b), (c), (d) and (e)”;
- (b) by deleting paragraph 6 and substituting therefor the following new paragraph-

Dissolution of Selection Panel

6. (1) The selection panel shall finalize the recruitment exercise within ninety days of its appointment and forward the names of the nominees to the President and shall thereafter stand dissolved.

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

(2) Despite sub-paragraph (1), Parliament may, by resolution passed in both the National Assembly and the Senate, extend the tenure of the selection panel for a specified period.

9. The Second Schedule to the principal Act is amended-

(a) by deleting paragraph 5 and substituting therefore the following new paragraph-

“5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission.”

(b) by deleting paragraph 7 and substituting therefor the following new paragraph-

“(7) Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by the concurrence of a majority of all the members of the Commission.”

10. The principal Act is amended by deleting the Fifth Schedule and substituting therefor the following new Schedule-

FIFTH SCHEDULE (s.36)

PROCEDURES FOR THE DELIMITATION OF ELECTORAL UNITS

1. Notice of delimitation of electoral units

(1) Whenever it is necessary to review the names and boundaries of electoral units in accordance with Article 89(2) and (3) of the Constitution, the Commission shall notify the public of—

- (a) the intended review;
- (b) invite representations from interested parties; and
- (c) specify the period within which the Commission shall publish the preliminary report.

(2) A notice under sub-paragraph (1) shall be accompanied by a preliminary report containing the particulars set out under paragraph 2.

2. Preliminary report

The preliminary report shall contain the following particulars—

- (a) the proposed delimitation of boundaries for constituencies and wards including the actual proposed names of every constituency and ward; and
- (b) description of the proposed boundaries showing the specific geographical and demographical details relating to such delimitation including—
 - (i) the population quota for constituencies and wards;
 - (ii) the number of inhabitants in every constituency and ward;
 - (iii) a classification in relation to each electoral area indicating whether it is a city, a sparsely populated area or other area; and
 - (iv) an indication of the proposed margin of change from the population quota.

3. Reference materials

(1) The Commission shall, use as its primary reference material—

- (a) the final report of the last Electoral and Boundaries Commission on the review of electoral units; and
- (b) the latest official population census report.

(2) The Commission may use as its secondary reference material—

- (a) the reports of County Boundary Review Panels; or
- (b) other relevant data.

(3) The County Boundary Review Panels shall conduct their business as the Commission may, by guidelines determine.

4. Ascertainment of the inhabitants of Kenya

(1) For purposes of determining the population quota, the Commission shall ascertain the number of the inhabitants of Kenya from the figures contained in the latest official national population census report.

(2) Despite sub-paragraph (1), the Commission shall, subject to the timelines set out under Article 89(2) of the Constitution, conduct the delimitation exercise after the national population census.

(3) The Kenya National Bureau of Statistics, shall, as soon as possible after the completion of every national census, submit a copy of the report in the prescribed format to the Commission.

5. Publicization of the preliminary report

(1) The Commission shall—

- (a) publicize the preliminary report in its website and in at least two newspapers of nationwide circulation;
- (b) invite the public to make representations on the proposals contained in the report; and
- (c) put in place administrative mechanisms for receiving representations from the public.

(2) The period set aside for receiving representations from the public on the proposals contained in the report under this paragraph shall be as determined by the Commission.

6. Public sensitization

(1) The Commission shall, upon notification of the public of the intended delimitation of boundaries under paragraph 1 of this Schedule, provide the framework for sensitization and participation of the public.

(2) The Commission may engage the media, avail equipment and prepare materials for effective public education and engagement.

7. Public hearings

(1) The Commission shall conduct boundaries review hearings in every county and may constitute constituencies and wards boundaries review panels in each county for the purposes of facilitating public hearings.

(2) Before engaging in the county boundaries review hearings, the Commission shall notify the public of date, time and place of such hearings.

(3) Representations to the Commission may be made orally or in writing.

(4) The proceedings of all boundary review public hearings shall be recorded, translated and transcribed.

8. Preparation of revised report

(1) Upon completion of the public hearings, the Commission shall review the proposed delimitation of boundaries and submit the report to Parliament.

(2) The revised report shall be based on the feedback received during the public consultative process, subject to the relevant provisions of the law.

9. Preparation and dissemination of maps

(1) The Commission shall prepare and publish maps in its website—

- (a) for all the electoral units in accordance with the final boundary dissemination delimitation report;
- (b) for the respective constituencies in every county; and
- (c) for wards in every constituency.

(2) Despite sub-paragraph (1), the Commission shall provide physical copies of the maps to Parliament.

10. Review of the decisions of the Commission

(1) Pursuant to Article 89(10) of the Constitution, a person may apply to the High Court for review of a decision of the Commission on the delimitation of electoral boundaries.

(2) An application for the review under this paragraph shall be made within thirty days of the publication of the decision in the Gazette as required under Article 89(9) of the Constitution and shall be heard and determined within three months of the date on which it is filed.

11. Maintenance of records

The Commission shall ensure that all documents, materials, publications, reports and recommendations arising from the delimitation process are maintained in a form that is accessible and usable by members of the public.

12. Duty of certain officers to co-operate with the Commission

It shall be the duty of every state officer or public officer serving in the relevant government ministry, department or agency including the ministry for the time being responsible for Interior and National Administration, Director of Surveys, Director-General of the Kenya National Bureau of Statistics and every other public officer whose services are required by the Commission for purposes of the delimitation of electoral units to provide the necessary information and technical support.

11. The selection panel existing immediately at the commencement date of this Act ceases to exist but a person who served as a member of that selection panel may be nominated to serve as a member of a selection panel appointed under this Act.

Transitional
provision.

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons

The Bill seeks to give effect to some of the recommendations and views of the public that were submitted during the national dialogue discourse on the Issues of Electoral Justice and Related Matters; Outstanding Constitutional Matters; Fidelity to Political Parties/Coalitions and the law on multiparty democracy; Entrenchment of the National Government Constituencies Development Fund; the Senate Oversight Fund and the National Government Affirmative Action Fund and Establishment and Entrenchment of State Offices.

The Bill seeks to amend the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 to clean up the Act by deleting obsolete provisions. The Bill further seeks to make some consequential amendments intended to align the Act to the Judgment of the High Court in *Katiba Institute & 3 Others v Attorney-General & 2 Others* [2018]eKLR wherein the High Court held that certain provisions of the Act were unconstitutional.

The Bill also seeks to amend section 6 of the Act and include experience in accounting or information and communication technology as additional professional qualifications for appointment as a member of the Independent Electoral and Boundaries Commission.

The Bill further seeks to amend the First Schedule to the Independent Electoral and Boundaries Commission No. 9 of 2011 to increase the number of members of the selection panel from seven to nine in order to accommodate a wide spectrum of stakeholders and interest groups.

The Bill further seeks to replace the current Fifth Schedule with a new and updated Schedule.

Clause 1 of the Bill sets out the short title of the Bill and provides for its commencement date.

Clause 2 of the Bill seeks to amend section 2 of the Bill by aligning the definition of the chairperson of the Commission to the Judgment of the High Court and by deleting obsolete provisions in the section.

Clause 3 of the Bill seeks to amend section 6(2)(c) of the Act to include information and communications technology and accounting as some of the relevant professional qualifications to be taken into account when nominating persons to be appointed as members of the Commission.

Clause 4 of the Bill seeks to amend section 7A of the Act and delete subsections (4), (5) and (6) that were held to be unconstitutional by the High Court.

Clause 5 of the Bill seeks to amend section 10 of the principal Act to provide that the term of the secretary to the Commission shall be three years, renewable once.

Clause 6 of the Bill seeks to amend section 12 of the principal Act and provide that the Commission shall, after every general election, review its operations and make the necessary changes required to make its operations more efficient, effective, transparent and accountable.

Clause 7 of the Bill provides for the amendment of section 36 of the Act to anchor the Fifth Schedule to the Act which relates to the procedure for delimitation of electoral units.

Clause 8 of the Bill seeks to amend the First Schedule to the Act to increase the number of members of the selection panel from seven to nine in order to accommodate a wide spectrum of stakeholders and interest groups.

Clause 9 of the Bill seeks to amend the Second Schedule to the Act and provide for the quorum of the Commission.

Clause 10 of the Bill provides for the deletion and substitution of the Fifth Schedule to the Act which relates to the procedure for delimitation of electoral units.

Clause 11 of the Bill sets out the transitional provisions relating to the selection panel for the appointment of members of the Commission.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not delegate legislative powers and it does not also contain provisions limiting fundamental rights and freedoms.

Statement on whether the Bill concerns county governments

The Bill concerns county governments in terms of Article 110(1) of the Constitution as it contains provisions relating to the election of a county assembly and a county executive.

Statement on the financial implications of the Bill

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 29th February, 2024.

KIMANI ICHUNG'WAH,
Leader of the Majority Party.

OPIYO WANDAYI,
Leader of the Minority Party.

Section 2 of No. 9 of 2011 which it is proposed to amend—

Interpretation

(1) In this Act, unless the context otherwise requires—

"Cabinet Secretary" means the Cabinet Secretary appointed under Article 152 of the Constitution;

"**chairperson**" means the chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the vice-chairperson or a member of the Commission when discharging the functions of the chairperson;

"Commission" means the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution;

"**first review**" means the review conducted by the former Boundaries Commission taking into account any outstanding work of that Commission and issues arising from that review;

"former Boundaries Commission" means the Interim Independent Boundaries Review Commission established under section 41 B of the former Constitution;

"former Constitution" means the Constitution in force immediately before the 27th of August, 2010;

"Fund" means the Independent Electoral and Boundaries Commission Fund established by section 18;

"issues arising" means the issues specified in paragraph 1 of the Fifth Schedule;

"member" means a member of the Commission and includes the chairperson;

"Parliamentary Committee" means the relevant Departmental Committee of the National Assembly responsible for matters relating to the Commission;

"principal office" means the headquarters of the Commission;

"Registrar of Persons" means the office in charge of identification, registration and issuance of identity cards to all Kenyan citizens;

"Salaries and Remuneration Commission" means the Salaries and Remuneration Commission established under Article 230(1) of the Constitution;

"secretary" means the secretary to the Commission appointed under Article 250(12) of the Constitution;

"vice-chairperson" means the vice-chairperson of the Commission elected under Article 250(10) of the Constitution.

(2) Despite subsection (1), until after the first election under the Constitution, references in this Act to the expression "Cabinet Secretary" shall be construed to mean "Minister".

Section 6 of No. 9 of 2011 which it is proposed to amend—

Qualification for appointments as chairperson or member of the Commission

6. (1) The chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court under the Constitution.

(2) A person is qualified for appointment as a member of the Commission if such person—

- (a) deleted by Act No. 36 of 2016, s. 32;
- (b) holds a degree from a recognized university;
- (c) has proven relevant experience in any the following fields—
 - (i) electoral matters;
 - (ii) management;
 - (iii) finance;
 - (iv) governance;
 - (v) public administration;
 - (vi) law; and
- (d) meets the requirements or Chapter Six of the Constitution.

Section 7A of No. 9 of 2011 which it is proposed to amend—

7A. Vacancy in the office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

- (a) dies;
- (b) resigns from office by notice in writing addressed to the President; or
- (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

[Act No. 36 of 2016, s. 33, Act No. 34 of 2017, s. 3.]

Section 10 of No. 9 of 2011 which it is proposed to amend—

Secretary to the Commission

(1) The Commission shall, through an open, transparent and competitive recruitment process, appoint a suitably qualified person to be the secretary to the Commission.

(2) A person shall be qualified for appointment as the secretary if the person-

- (a) is a citizen of Kenya;
- (b) possesses a degree from a recognized university;
- (c) has had at least five years' proven experience at management level;
- (d) has proven relevant experience in either-
 - (i) electoral matters;
 - (ii) management;
 - (iii) finance;
 - (iv) governance;
 - (v) public administration;

- (vi) law; or
- (vii) political science, and
- (e) meets the requirements of Chapter Six of the Constitution.
- (3) The secretary shall, before assuming office, take and subscribe to the oath or affirmation of office prescribed in the Third Schedule.
- (4) The secretary shall hold office for a term of five years but shall be eligible for re-appointment for one further term of five years.
- (5) Where the Commission does not intend to reappoint the secretary, the Commission shall notify the secretary and shall cause the vacancy to be advertised at least three months before the expiry of the incumbent's term.
- (6) The secretary shall, in the performance of the functions and duties of office, be responsible, answerable and report to the Commission.
- (7) The secretary shall be-
 - (a) the chief executive officer of the Commission;
 - (b) head of the secretariat;
 - (c) the accounting officer of the Commission;
 - (d) custodian of all Commission's records;
 - (e) responsible for-
 - (i) executing decisions of the Commission;
 - (ii) assignment of duties and supervision of all employees of the Commission;
 - (iii) facilitating, co-ordinating and ensuring execution or Commission's mandate;
 - (iv) ensuring staff compliance with public ethics and values; and
 - (v) the performance or such other duties as may be assigned by the law and Commission.
- (8) The secretary may only be removed from office by the Commission on grounds of-
 - (a) inability to perform functions of the office arising out of physical or mental incapacity;
 - (b) gross misconduct;
 - (c) bankruptcy; or

(d) incompetence.

(9) Before removal under subsection (8), the secretary shall be -

(a) informed in writing of the reasons for the intended removal;

(b) given an opportunity to put in a defence against any such allegations, either in person or through an advocate.

Section 36 of No. 9 of 2011 which it is proposed to amend—

Procedure for delimitation of electoral boundaries

(1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.

(2) Subject to the Constitution, matters to be addressed in the delimitation of electoral boundaries are —

(a) review of the names and boundaries of constituencies;

(b) review of the number, names and boundaries of wards;

(c) re-distribution of wards affected by any changes in the boundaries of constituencies; and

(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota as provided for by Article 89(5) of the Constitution and that such a process —

(i) allows for variation of margin of not more than the limits provided under Article 89 (6) of the Constitution in relation to cities, sparsely populated areas and other areas;

(ii) takes into account the provisions of Article 89 (7) (b) of the Constitution that provides for the progressive realization of the requirement that the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the population quota for the purposes of the each review;

(iii) is subject to the use of enumerated national census figures.

(3) The Commission shall prepare and publish a preliminary report outlining —

(a) the proposed delimitation of boundaries for constituencies and wards; and

(b) the specific geographical; and

(c) demographical details relating to such delimitation.

(4) The Commission shall ensure that the preliminary report is made available to the public for a period of thirty days and invite representations from the public on the proposals contained in the report during that period.

(5) Upon the expiry of the period provided in subsection (4), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received and submit the revised preliminary report to the Parliamentary Committee.

(6) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report, table the report in the National Assembly together with its recommendations.

(7) The National Assembly shall, within fourteen days of the tabling of the revised preliminary report, consider the report and forward its recommendations to the Commission.

(8) Within fourteen days of the expiry of the period provided for in subsection (7), the Commission shall upon receipt and considerations of the National Assembly and representations from the public, prepare the final report for publication in the Gazette.

(9) Where the National Assembly fails to make recommendations within the period specified in subsection (7), the Commission shall publish its report in accordance with subsection (8).

(10) A person who, being responsible for the publication in the Gazette of the final report submitted under this subsection fails to publish the report within the time required by the Commission after the report has been submitted to that person, commits an offence and is liable to imprisonment for a term of one year.

(11) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subsection (9) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the Gazette. [Act No. 1 of 2017, s. 30]

The First Schedule to No. 9 of 2011 which it is proposed to amend—

FIRST SCHEDULE

PROCEDURE FOR APPOINTMENT OF CHAIRPERSON AND MEMBERS OF THE COMMISSION

1. (1) At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the Constitution or this Act, the President shall appoint a selection panel consisting of seven persons for the purposes of appointment of the chairperson or member of the Commission.

(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.

(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.

(3) The respective nominating bodies under sub-paragraphs (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.

(4) The selection panel shall, at its first sitting, elect a chairperson and vice-chairperson from amongst its number.

(5) Subject to the provisions of this Schedule, the selection panel shall determine its own procedure.

(6) The Parliamentary Service Commission shall provide the secretariat services and facilities required by the selection panel in the performance of its functions.

2. Oath or affirmation of office

The chairperson and members of the selection panel shall, before assuming office, make and subscribe the oath or affirmation of office prescribed in the Third Schedule.

3. Selection of nominees

(1) The selection panel shall, within seven days of its appointment, invite applications from qualified persons and publish the names of all applicants and their qualifications in the *Gazette*, two newspapers of national circulation and on the website of the Parliamentary Service Commission.

(2) The selection panel shall consider the applications, shortlist and interview the applicants.

(3) The interviews under subparagraph (2) shall be conducted in public.

(4) After conducting interviews under subparagraph (2), the selection panel shall select two persons qualified to be appointed as chairperson and nine persons qualified to be appointed as members of the Commission and shall forward the names to the President for nomination of one person for appointment as the chairperson and six persons for appointment as members.

(5) The President shall, within seven days of receipt of the names under sub-paragraph (4), forward the list of nominees to the National Assembly for approval in accordance with the Public Appointments (Parliamentary Approval) Act (Cap. 7F).

4. Appointment by the President

The President shall, within seven days of receipt of the names approved by the National Assembly, by notice in the *Gazette*, appoint the Chairperson and the members of the Commission.

5. Gender equity and regional balance

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.

6. Dissolution of Selection Panel

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

The Second Schedule to No. 9 of 2011 which it is proposed to amend—

SECOND SCHEDULE[s. 8]

PROVISIONS AS TO THE CONDUCT OF THE BUSINESS AND AFFAIRS OF THE COMMISSION

1. The Commission shall meet as often as may be necessary for the carrying out of its business but it shall meet at least once every calendar month.

2. A meeting of the Commission shall be held on such date and at such time as the chairperson shall decide.

3. The chairperson shall, on the written application of one-third of the members, convene a special meeting of the Commission.

4. Unless the majority of the total membership or the Commission otherwise agree, at least fourteen days' written notice of every meeting of the Commission shall be given to every member of the Commission.

5. The quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members;

6. The chairperson shall preside at every meeting of the Commission at which he is present and in the absence of the chairperson at a meeting, the vice-chairperson, shall preside and in the absence of both the chairperson and the vice-chairperson, the members present shall elect one of their number who shall, with respect to the meeting and the business transacted thereat have all the powers of the chairperson.

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting.

8. Subject to paragraph 5, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof.

9. (1) The secretary shall be the secretary at all meetings of the Commission.

(2) The Commission shall, subject to subparagraph (3), establish a committee for liaison with political parties and may establish committees of its members for any other purpose.

10. The Commission shall cause minutes of all proceedings of meetings of the Commission to be entered in books for that purpose.

11. Except as provided by this Schedule, the Commission may regulate its own procedure.

12. (1) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and in which matter that person or that directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure or interest made under subsection (1) shall be recorded in the minutes or the meeting at which it is made.

(3) A person who contravenes subsection (1) commits an offence and upon conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment.

(4) A member or employee of the Commission shall not transact any business or trade with the Commission.

The Fifth Schedule to No. 9 of 2011 which it is proposed to replace—

FIFTH SCHEDULE

[s. 2]

PROVISIONS RELATING TO THE FIRST REVIEW

[Act No. 12 of 2012, Sch.]

1. Resolution of issues arising from the first review

The Commission shall resolve all issues arising from the first review relating to the delimitation of boundaries or constituencies and wards and publish its final report within a period of four months or the date of its appointment under this Act.

2. Reference materials

(1) The Commission shall, in addressing the issues arising out of the first review—

(a) use as its primary material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and

(b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review.

(2) The issues arising out of the first review are -

(a) re-distribution of such wards or administrative units in the affected constituencies as may be appropriate;

(b) subject to the Constitution, addressing issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the Constitution but at the same time ensuring that such a process shall -

(i) take into account the provisions of Article 89(7)(b) of the Constitution that requires progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for the purposes of the first review;

(ii) not be subject to new definitions of cities, urban areas and sparsely populated areas or to new population figures;

(iii) be subject to the use of enumerated national census figures and not projected figures.

- (c) addressing the issue of progressively advancing towards the population quota in protected constituencies in relation to neighbouring constituencies where appropriate.

3. Delimitation of electoral units

(1) The Commission shall prepare and publish a preliminary report outlining -

- (a) the proposed delimitation of boundaries for constituencies and wards; and
- (b) the specific geographical and demographical details relating to such delimitation.

(2) The Commission shall ensure that the preliminary report is made available to the public for a period of twenty-one days and invite representations from the public on the proposals contained in the report during that period.

(3) Upon the expiry of the period provided in sub-paragraph (2), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received under that sub-paragraph and submit the revised preliminary report of proposed boundaries to the Parliamentary Committee.

(4) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report under sub-paragraph (3), table the revised preliminary report to the National Assembly together with its recommendations.

(5) The National Assembly shall, within seven days of the tabling of the revised preliminary report, consider the revised report and forward its resolutions to the Commission.

(6) Within fourteen days of the expiry of the period provided for in sub-paragraph (5), the Commission shall, taking into account the resolutions of the National Assembly under subparagraph (5), prepare and submit its final report outlining the matters set out in subparagraph (1)(a) for publication in the *Gazette*.

(7) Where the National Assembly fails to make a resolution within the period specified in subparagraph (5), the Commission shall proceed to publish its report in accordance with subparagraph (6).

(8) Any person who, being responsible for the publication in the *Gazette* of the final report submitted under this paragraph fails to publish the report within the time required by the Commission after

the report has been submitted to that person, commits an offence and is liable to imprisonment for a term of one year.

(9) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subparagraph (6) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the *Gazette*.

4. Review of decision of Commission

A person may apply to the High Court for review of a decision of the Commission made under the Constitution and this Act.

5. Application for review

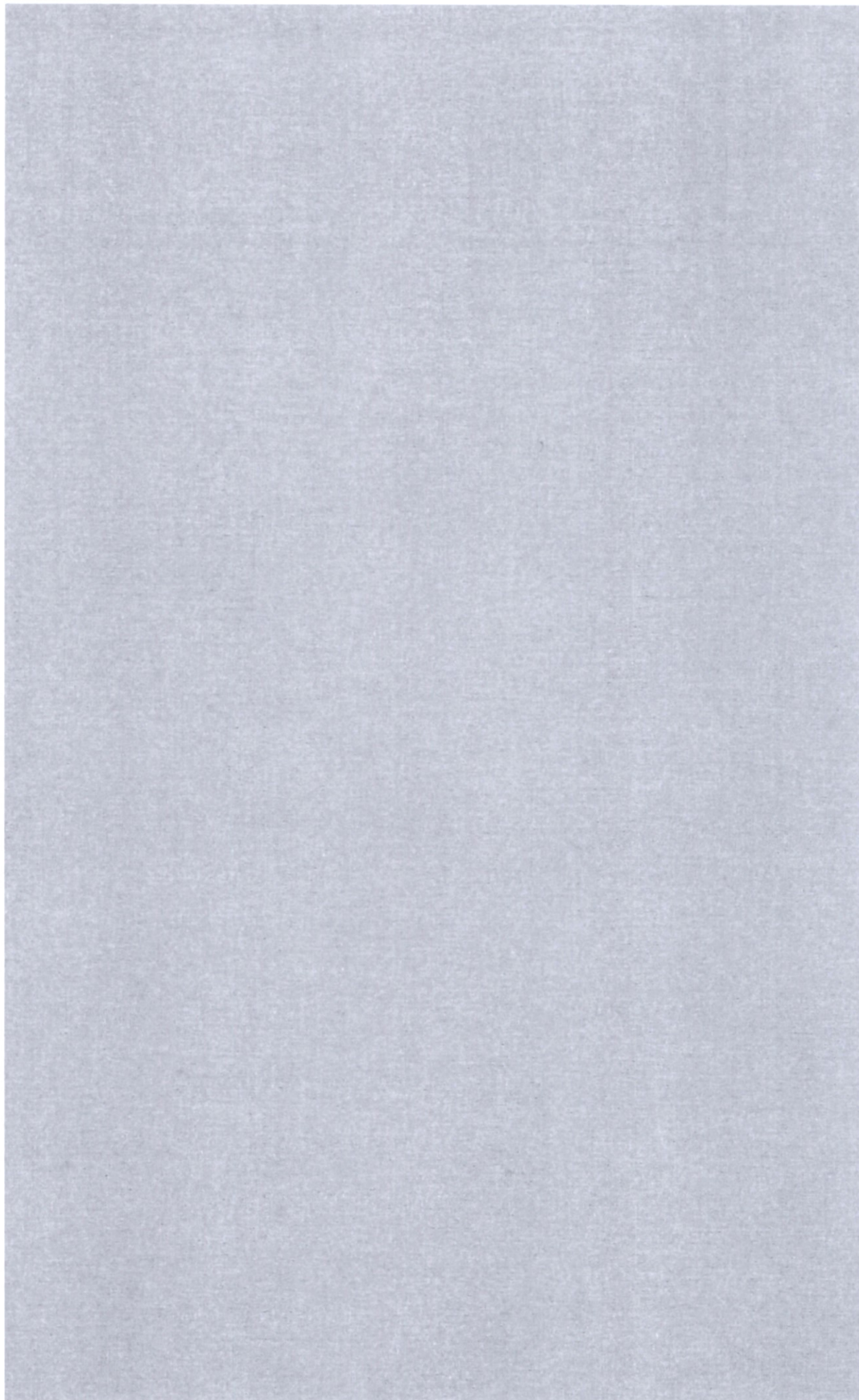
An application for the review of the decision made under paragraph 4 shall be made within thirty days of the publication of the decision in the *Gazette* and shall be heard and determined within three months of the date on which it is filed.

6. Sensitization on the proposed boundaries

The Commission shall, upon publication of the boundaries referred to in paragraph 3 facilitate sensitization of the public on the boundaries for a period of thirty days.

7. Maintenance of records

The Commission shall ensure that all documents, materials, publications, reports and recommendations arising from the delimitation process are maintained in a form that is accessible and usable by members of the public.



**Annexure 4: Advertisement inviting the public
to submit memoranda on the Bill**



REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT- THIRD SESSION (2024)
THE NATIONAL ASSEMBLY

IN THE MATTER OF ARTICLE 118(1) (b) OF THE CONSTITUTION
AND
IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY OF-

1. **THE UNIVERSITIES (AMENDMENT) (NO. 5) BILL (NATIONAL ASSEMBLY BILL NO. 79 OF 2023);**
2. **THE PUBLIC AUDIT (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 3 OF 2024);**
3. **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 10 OF 2024);**
4. **THE AGRICULTURAL AND LIVESTOCK EXTENSION SERVICES BILL (SENATE BILL NO. 12 OF 2022);**
5. **THE MUNG BEANS BILL (SENATE BILL NO. 13 OF 2022);**
6. **THE START-UP BILL (SENATE BILL NO. 14 OF 2022);**
7. **THE LEARNERS WITH DISABILITIES BILL (SENATE BILL NO. 4 OF 2023);**
8. **THE PERSONS WITH DISABILITIES BILL (SENATE BILL NO. 7 OF 2023); AND**
9. **THE KENYAN SIGN LANGUAGE BILL (SENATE BILL NO. 9 OF 2023);**

INVITATION TO SUBMIT MEMORANDA

WHEREAS, Article 118(1) (b) of the Constitution requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees and Standing Order 127(3) of the National Assembly Standing Orders requires House Committees considering Bills to facilitate public participation;

AND WHEREAS the Universities (Amendment) (No. 5) Bill (National Assembly Bill No. 79 of 2023); the Public Audit (Amendment) Bill (National Assembly Bill No. 3 of 2024); the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 10 of 2024); the Agricultural and Livestock Extension Services Bill (Senate Bill No. 12 of 2022); the Mung Beans Bill (Senate Bill No. 13 of 2022); the Start-up Bill (Senate Bill No. 14 of 2022); the Learners with Disabilities Bill (Senate Bill No. 4 of 2023); the Persons with Disabilities Bill (Senate Bill No. 7 of 2023); and the Kenyan Sign Language Bill (Senate Bill No. 9 of 2023) have been read a First Time and referred to the relevant Departmental Committees for consideration and reporting to the House;

IT IS NOTIFIED THAT:

1. **The Universities (Amendment) (No. 5) Bill (National Assembly Bill No. 79 of 2023)** is a Bill sponsored by **Hon. Benjamin Gathiru, MP**, that seeks to amend the Universities Act, 2012 to limit universities from offering certificate and diploma courses.
2. **The Public Audit (Amendment) Bill (National Assembly Bill No. 3 of 2024)** is a Bill sponsored by the **Leader of the Majority Party, Hon. Kimani Ichung'wah, EGH, MP**. The purpose of the Bill is to amend the Public Audit Act, 2015 to align it with the Constitution as per the decision rendered in **Transparency International (TI Kenya) v Attorney General & 2 others [2018] eKLR** declaring sections 4(2), 8, 12, 17(1), 18, 27, 40, 42, and 70 of the Public Audit Act 2015 unconstitutional. The Bill further seeks to update the provisions of the Public Audit Act, 2015 to enhance efficiency in the performance of the Auditor's duties.
3. **The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 10 of 2024)** is a Bill co-sponsored by the **Leader of the Majority Party, Hon. Kimani Ichung'wah, EGH, MP**, and the **Leader of the Minority Party, the Hon. Opiyo Wandayi, EGH, MP** that seeks to give effect to some of the recommendations and views of the public that were submitted during the recent national dialogue discourse facilitated by the **National Dialogue Committee (NADCO)**. The Bill seeks to—
 - (a) amend the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 to increase the membership of the selection panel from seven to nine to accommodate a wide spectrum of stakeholders and interest groups;
 - (b) amend section 6 of the Act to include additional professional qualifications for appointment as a member of the Independent Electoral and Boundaries Commission;
 - (c) amend section 10 of the Act to provide that the secretary of the IEBC shall hold office for a term of three years that is renewable once;
 - (d) replace the current Fifth Schedule to the Act to provide for the procedure for delimitation of boundaries in an updated Schedule; and
 - (e) delete obsolete provisions and make consequential amendments intended to align the Act to the decision of the court in **Katiba Institute & 3 Others v Attorney-General & 2 Others [2018] eKLR**.
4. **The Agricultural and Livestock Extension Services Bill (Senate Bill No. 12 of 2022)** is a Bill sponsored by **Sen. Maureen Tabitha Mutinda, MP** that seeks to provide for agricultural and livestock extension services; and to establish the Agricultural and Livestock Extension Service.
5. **The Mung Beans Bill (Senate Bill No. 13 of 2022)** is a Bill sponsored by **Sen. Enoch Kiio Wambua, MP** that seeks to provide for the development, regulation and promotion of the mung beans sector.
6. **The Start-up Bill (Senate Bill No. 14 of 2022)** is a Bill sponsored by **Sen. Crystal Asige, MP**. The Bill seeks to establish a framework to encourage growth and sustainable technological development, entrepreneurship, employment; create a favourable environment for innovation; and attract Kenyan talent and capital.
7. **The Learners with Disabilities Bill (Senate Bill No. 4 of 2023)** is a Bill co-sponsored by **Sen. Margaret Kamar, MP** and **Sen. Crystal Asige, MP** that seeks to provide a legal framework for the actualization of the right to education for learners with disabilities at all levels of education.
8. **The Persons with Disabilities Bill (Senate Bill No. 7 of 2023)** is a Bill sponsored by **Sen. Crystal Asige, MP** that seeks to provide the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities and to provide incentives and reliefs that give effect to Article 54 of the Constitution.
9. **The Kenyan Sign Language Bill (Senate Bill No. 9 of 2023)** is a Bill sponsored by **Sen. Crystal Asige, MP** that seeks to give effect to Article 7 (3)(b) of the Constitution on the promotion and development of the use of Kenyan Sign Language. The Bill provides for the inclusion of sign language in the education curriculum and the use of sign language in legal proceedings.

NOW THEREFORE, in compliance with Article 118(1) (b) of the Constitution and Standing Order 127(3) the Clerk of the National Assembly hereby invites the public and stakeholders to submit memoranda on the Bills to the respective Departmental Committees listed below—

NO.	BILL	COMMITTEE
1.	The Universities (Amendment) (No. 5) Bill (National Assembly Bill No. 79 of 2023)	Education
2.	The Public Audit (Amendment) Bill (National Assembly Bill No. 3 of 2024)	Finance and National Planning
3.	The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 10 of 2024)	Justice and Legal Affairs
4.	The Agricultural and Livestock Extension Services Bill (Senate Bill No. 12 of 2022)	Agriculture and Livestock
5.	The Mung Beans Bill (Senate Bill No. 13 of 2022)	Agriculture and Livestock
6.	The Start-up Bill (Senate Bill No. 14 of 2022)	Trade, Industry and Co-operatives
7.	The Learners with Disabilities Bill (Senate Bill No. 4 of 2023)	Education
8.	The Persons with Disabilities Bill (Senate Bill No. 7 of 2023)	Social Protection
9.	The Kenyan Sign Language Bill (Senate Bill No. 9 of 2023)	Sports and Culture

The memoranda may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842- 00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to **cna@parliament.go.ke** to be received on or before **Thursday, 21st March 2024 at 5.00 p.m.**

Copies of the Bills are available at the National Assembly Table Office, Main Parliament Buildings and on:
www.parliament.go.ke/the-national-assembly/house-business/bills

S. NJOROGE, CBS
CLERK OF THE NATIONAL ASSEMBLY

8th March 2024

Annexure 5: Letter from the Clerk of the
National Assembly inviting
stakeholders to attend the public
participation forum



THE NATIONAL ASSEMBLY
OFFICE OF THE CLERK

P. O. Box 41842-00100
Nairobi, Kenya
Main Parliament Buildings

Telephone: +254202848000 ext. 3300
Email: cnac@parliament.go.ke
www.parliament.go.ke/the-national-assembly

When replying, please quote

Ref: NA/DDC/JLAC/2024/60

11th April, 2024

Hon. Winfridah Boyani Mokaya

Chief Registrar of the Judiciary of Kenya / Secretary
Judicial Service Commission
Supreme Court Building

NAIROBI

Mr. Marjan Hussein Marjan

Secretary/ Chief Executive Officer
Independent Electoral and Boundaries Commission
Anniversary Towers, 6th floor, University Way,

NAIROBI

Ms. Anne Njeri Nderitu, CBS

Registrar of Political Parties
Office of the Registrar of Political Parties
Lions Place, 1st Floor
Karuna Close, Waiyaki Way Westlands

NAIROBI

Mr. Joash Dache, MBS

Chief Executive Officer/Commission Secretary
Kenya Law Reform Commission,
Reinsurance Plaza, 3rd Floor, Taifa Road,

NAIROBI

Hon. Shadrack Mose

Solicitor-General
The State Law Office and Department of Justice
Sheria House, Harambee Avenue

NAIROBI

Mr. Felix Owuor

Executive Director

Electoral Law and Governance Institute for Africa (ELGIA)

Landmark Plaza, 13th floor Argwings Kodhek Rd

NAIROBI

Mr. Nyang'ori Ohenjo

Chief Executive Officer

Centre for Minority Rights Development

Kisamis Town, Magadi Road, Ongata Rongai

NAIROBI

Mr. Frankline Mukwanja

Executive Director

Centre for Multiparty Democracy

6th Floor, International House

NAIROBI

Mr. Joshua Changwony

Executive Director

Constitution and Reform Education Consortium

Matumbato 45, Off Upper Hill Road

NAIROBI

Mr. Mulle Musau

National Coordinator

Elections Observation Group

Jumuia Place, Lenana Road

NAIROBI

Mr Isaack Otieno

Country Director

International Foundation of Electoral System

Embankment Plaza, Longonot Rd

NAIROBI

Ms. Christine Gakii Nkonge,

Executive Director

Katiba Institute,

House No. 5, the Crescent-Off Parklands Road

NAIROBI

Dr. Mshai Mwangola
Chairperson,
Uraia Trust
Jacaranda Avenue, off Gitanga Road
NAIROBI

Ms. Caroline Gaita
Executive Director
Mzalendo Trust
ACK Garden House, 2nd Floor, Wing A,
1st Ngong Avenue
NAIROBI

Dr. Annette Mbogoh
Executive Director
Kituo cha Sheria
Ole Odume Rd, Off Argwings Kodhek Rd
NAIROBI

Mr. Evans Misati James
Chairman
Political Parties Liaison Committee
Lions Place, 1st Floor, Karuna Close
Waiyaki Way Westlands
NAIROBI

Mr. Abdirahim Ismail, OGW
Executive Director
Inter-religious Council of Kenya
NAIROBI

Dear

**RE: INVITATION TO SUBMIT VIEWS ON THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024 (NATIONAL
ASSEMBLY BILL NO. 10 OF 2024) CO-SPONSORED BY HON. KIMANI
ICHUNG'WAH, EGH, MP AND HON. OPIYO WANDAYI, MP**

The Departmental Committee on Justice and Legal Affairs is established pursuant to National Assembly Standing Order 216, which mandates it to, *inter alia*, 'study and review all legislation referred to it.'

The Independent Electoral and Boundaries (Amendment) Bill, 2024 (*National Assembly Bill No. 10 of 2024*) co-sponsored by Leader of the Majority Party, Hon. Kimani Ichung'wah, EGH, MP

and Leader of the Minority Party. Hon, Opiyo Wandayi, MP is before the Committee for consideration and reporting back to the House.

The Bill seeks to give effect to some of the recommendations and views of the public that were submitted during the national dialogue discourse on the issues of electoral justice and related matters, outstanding constitutional matters, fidelity to political parties/coalitions and the law on multiparty democracy, entrenchment of the National Government Constituencies Development Fund; the Senate Oversight Fund and the National Government Affirmative Action Fund and establishment and entrenchment of state offices.

Article 118(1)(b) of the Constitution of Kenya and National Assembly Standing Order 127(3) require Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees. Due to the great public interest in the Bill, the Committee has resolved to meet critical stakeholders to make submissions on the Bill.

This is therefore to invite you to the meeting scheduled for **Thursday, 18th April 2024 at 10.30 a.m.** at a venue to be communicated in due course.

We request you to prepare your written submissions in a matrix format that indicates the section of the Act, specific clause, proposed amendment and justification. Twenty (20) hard copies of the submissions should be sent to the **Office of the Clerk of the National Assembly, Main Parliament Building**, by **Tuesday, 16th April 2024** and a soft copy emailed to the Office through: cna@parliament.go.ke.

Our Liaison Officers on this matter are **Mr. Ahmed Salim Abdalla** who may be contacted on tel. no. **0710204056** or email: ahmed.salim@parliament.go.ke or **Ms. Jael Ayiego Kilaka** on tel. no. **0725385945** or email: jael.kilaka@parliament.go.ke and **Mr. Abdikafar Abdi Sheikh** on tel. no. **0715456503** or email: abdikafar.sheikh@parliament.go.ke

Yours

JEREMIAH M. NDOMBI

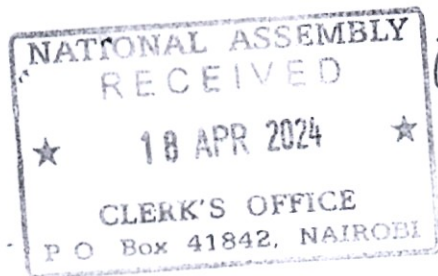
For: CLERK OF THE NATIONAL ASSEMBLY

Copy to:-

Hon. Justin B. N. Muturi, EGH
Attorney-General of the Republic of Kenya
The State Law Office and the Department of Justice
Sheria House, Harambee Avenue
NAIROBI



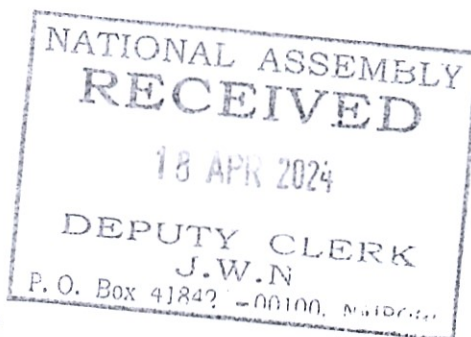
Annexure 6: Memoranda by Stakeholders



① DDC
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OFFICE OF THE ATTORNEY GENERAL
&
DEPARTMENT OF JUSTICE



Our Ref: AG/LDD/6/1/12

Mr. Samuel Njoroge, CBS

The Clerk of the National Assembly
Clerk's Chambers, Parliament Buildings
P. O. Box 41842-00100

NAIROBI

17th April, 2024

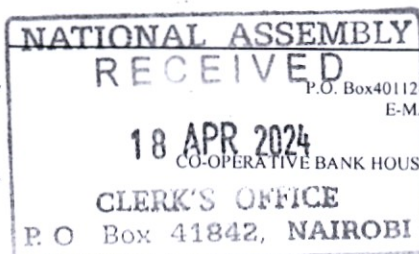
② Ahmed Salim
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18/4/24

**RE: INVITATION TO SUBMIT VIEWS ON THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024**

Reference is made to your letter dated the 11th April, 2024 and referenced NA/DDC/JLAC/2024/60 requesting this Office for submissions on the proposed Independent Electoral and Boundaries Commission (Amendment) Bill, 2024, co-sponsored by Hon. Kimani Ichungwa, MP and Hon. Opiyo Wandayi, MP.

We have scrutinized the constitutionality of the proposed Bill and whether it contravenes existing legislation. We note that the Bill does not offend the Constitution, however the proposed amendments need to extend to all related provisions in the Act.

Clause	Comments
2	The proposed amendment seeks to delete the definition of the expressions former boundaries commission and former Constitution as they are obsolete. It is important to note that Part V of the Independent Electoral and Boundaries Commission Act, (Cap. 7C) provides for savings and transitional provisions. Section 32 provides for the interpretation of <i>inter alia</i>, the terms "former boundaries commission" and "former Constitution", section 33 provides for the transition of staff from the former boundaries commission to the Independent Electoral and Boundaries Commission and section 34 provides for the transfer of assets from the former boundaries commission to the Independent Electoral and Boundaries Commission. The proposed amendment is only restricted to section 2 of the Act without taking into consideration sections 32, 33 and 34. We propose the repeal of Section 32, 33 and 34 as they are spent, in order to harmonize the proposed amendments with the Act.
10	Paragraph 3 of the Fifth Schedule provides for reference materials to be used by the Commission as its primary reference materials and they include reports of County Boundary Review Panels. However, we note that there is no provision in the Act or any other existing legislation that provides for the establishment, constitution, mandate and the relationship of the Panels to the Commission. Therefore, there is need for clarity in the establishment, constitution, mandate, tenure and the relationship between the Panels and the Commission taking into



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	consideration the provisions of Article 89 of the Constitution on delimitation of electoral units.
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HON. SHADRACK I. MOSE
SOLICITOR-GENERAL

Copy to: **Hon. J. B.N. Muturi, EGH**
Attorney-General



THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AMENDMENT BILL, 2024

ADDENDUM

Dated 18th APRIL, 2024

Independent Electoral & Boundaries Commission (IEBC)

Anniversary Towers, 6th Floor, Off University Way

P.O. Box 45371 – 00100, Nairobi – Kenya

Telephone: + 254 (0) 20 29925

A. Introduction

1. The Independent Electoral and Boundaries Commission (hereinafter referred to as “the Commission/IEBC”) is a Constitutional Commission established under Article 88 of the Constitution of Kenya.
2. Article 88 (4) outlines its mandate to conduct or supervise referenda and elections to any elective body or office established by the Constitution and any other election as prescribed by an Act of Parliament.
3. The Independent Electoral and Boundaries Commissions Act (hereinafter referred to as “the Act”) was enacted in 2011 to give life to the provisions of Article 88 and ensure effective operation of the Commission.
4. It provides for the mandate of the Commission, membership of the Commission, the relationship between the Commission and the Secretariat, qualifications of and appointment of the Chairperson, Commissioners and Commission Secretary/CEO, recruitment of staff and functions of the Secretariat, rec code of conduct for members and employees of the Commission, delimitation of boundaries among others.
5. Since its enactment, the Act has been amended several times but there remains certain gaps and deficiencies in the Act that need to be revisited.
6. As part of its legal reform agenda, the Commission has made proposals for reform on all electoral laws including the Independent Electoral and Boundaries Commission Act, which it presented before the Justice and Legal Affairs Committee and Parliament.
7. The Commission makes the following additional comments on the Independent Electoral and Boundaries Commission (Amendment) Bill, 2024.

Table: Matrix of IEBC's comments on the IEBC Amendment Bill, 2024

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
1.	Clause 2	Section 2 – Interpretation Delete: i. the phrase including Vice Chairperson or a member of the Commission acting as a Chairperson in the Chairperson's place. ii. definition of first review; iii. delete definition of former Boundaries Commission; iv. delete definition of issues arising;	The proposal is sound as long as it does not affect the provisions of paragraph 6 of the Second Schedule allowing the Vice Chairperson or other Members of the Commission to act in place of the Chairperson.	The Commission concurs with the proposal to delete the obsolete terms contained in this section. Parliament may consider deletion of the terms as they appear under Sections 32 and 33. Further, we submit that there is need to delete the definition of the "former Constitution" as well.
2.	Clause 3	Section 6 – Qualifications for appointment as Chairperson or member of the Commission Amend by adding 2(c) (vii) information and communication technology (viii) accounting	The Commission supports the proposal to add ICT as one of the professional areas that one can be trained in because technology is a key component of the electoral process.	However, we propose a merge of accounting and finance under Section 6(2)(c)(iii) as they deal with matters relating to financial management. Further, we reiterate that at least one (1) Member of the Commission besides the Chairperson to be an Advocate of the High Court of Kenya because of the legal and quasi-judicial nature of election matters.

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
				We also propose that the appointments of the Chairperson, and Commissioners considers the not more than two thirds gender principle.
3.	Clause 4	Section 7 B – Absence of Chairperson Delete Sub-Sections 4, 5 and 6	Removes the provisions allowing the Vice Chairperson or Members of the Commission to act in place of the Chairperson or the Vice Chairperson when their seats fall vacant.	The appointment of the Chairperson is conducted and published separately and therefore a Member may not take up the seat in case of a vacancy.
4.	Clause 5	Section 10 – Secretary to the Commission Amend sub-section 4 by revising the term of office from five years renewable once to three (3) years renewable once	It is the Commission's view that revising the term of Office of the Commission Secretary from the current five years to three years may pose challenges in Commission operations. Shortening the term of service denies IEBC full benefits of Human Capital invested in the position and suffer experience drain due to shortened period.	Our proposal is that, the current term of the Commission Secretary be maintained and identify areas for improvement and undertake continuous reviews to enhance governance structure and operation framework. In the alternative, should there be need to review the term, it is proposed that the same be reviewed to a single term of six (6) years renewable. This will go a long way in ensuring that the Commission Secretary understands what is expected, plans and implements the Commission's policy directives by putting in place the necessary mechanisms in

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
				preparation for elections and other processes. It will also go a long way in ensuring accountability by the Commission Secretary. In addition, an election is a complex process with legal underpinnings that will take one at least one or two years to be conversant with electoral processes depending on one's election expertise.
5.	Clause 6	Section 12 – Units of the Commission Introduce sub sections 3 and 4 to require the Commission to review its operations and make necessary changes required to make its operations efficient, effective, transparent, and accountable within a year after the General Election, publish a report in the <i>Gazette</i> and submit it to Parliament.	It is the Commission's view that an evaluation of an election seeks to make a critical assessment of the conduct of an election. It seeks to establish what worked and what did not work as expected, draws lessons-learned for improvement of conduct of future elections. It should be noted that after every election after engagement with key elections stakeholders, the Commission prepares and publishes a post-election evaluation report pursuant to Article 88 (4)(h) of the Constitution and Section 4(h) of the IEBC Act. In most circumstances, the Commission has published its	Following a General Election aggrieved parties file disputes in Courts. This process takes six (6) months. The decisions of the Courts inform legal and operational reform. It is our view, that this be considered in computing time for evaluation and increase it to 18 months. This will enable the Commission to have more time to conduct the evaluation and identify areas for reform to make the necessary changes required to make election processes more efficient and effective. Consider placement of this proposal after Section 24 for good order. Section 12 is about

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
			report within 18 months after the General Election.	administrative units of the Commission Create a new section 24A “ Title Evaluation of Elections. <i>That the Commission shall review its operations and make necessary changes required to make its operations efficient, effective, transparent, and accountable.</i> <i>The review shall be completed within 18 months after every general election and the Commission shall publish the report in the Gazette and submit the report to Parliament.”</i>
6.	Clause 7	Section 36 – Procedure for delimitation of electoral boundaries Introduce sub-section 12 to make reference to the revised Fifth Schedule for procedure of delimitation of electoral units.	The Commission proposes a repeal of Section 36 and the Fifth schedule and incorporate the procedure for delimitation of electoral boundaries immediately after Section 16 as the new PART III of the Act.	It is the Commission’s view that the procedure for delimitation should not be contained in the savings and transitional part of the Act but should be a substantive stand-alone part. (refer to s/No 9)
7.	Fifth Schedule	First Schedule – Procedure for appointment of chairperson and members of the Commission Amend the composition of the selection panel from 7 to 9	The proposal does not sufficiently include all key stakeholders as it gives most priority to political parties by increasing nominees from PPLC from 1 to 3. Further, the two nominees from the Parliamentary Service	The selection panel needs to be inclusive of all key stakeholders who will give additional value to the process e.g. Special Interest Groups (persons with disabilities), Public Service Commission, other professional entities, among others.

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
			Commission are still from the political parties.	Include National Council or persons with Disabilities (NCPWD)
8.	Second Schedule	Second Schedule – Provisions as to the conduct of business and affairs of the Commission Revise quorum for members of the Commission to 5 and decision to be made by a majority of all members of the Commission.	<i>In line with the decision of the High Court Decision in Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another [2018] eKLR at par 44</i> <i>“Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event</i>	We submit that quorum of Commissioners should be dependent on the number of the members in post. Consider the following provision “Notwithstanding the provisions of paragraph 5, where a vacancy has occurred and the Commission membership is less than five, the quorum shall not be less than fifty percent (50%) of the number of commissioners in post.”

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
			<i>that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. <u>My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed.</u></i>"	
9.	Second Schedule	Fifth Schedule – Provisions relating to the first review Amend the schedule with a new title: Procedures for	The Commission supports the proposal to have a detailed step by step procedure for boundary delimitation under the Fifth Schedule.	The Commission's proposals are; 1. A new part be created after Section 16 of the Act to provide for the Boundary

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
		the delimitation of electoral units and provide a detailed procedure for the steps to be undertaken in boundary delimitation.		delimitation as a whole and delete section 36. 2. In the alternative have the guiding provision immediately after Section 16 and move all procedures for delimitation to the fifth schedule and delete the current fifth schedule. Section 36 to read as follows; (1) The Commission shall discharge its mandate of delimitation of boundaries of constituencies and wards in accordance with the constitution, this act and any other law; (2) The procedure for delimitation of electoral units shall be as set out under the Fifth Schedule; Then delete sections 1-11 and replace. This will avoid duplication.
10.	Fifth schedule	Clause 11 That the selection panel existing immediately at the commencement date of this Act shall cease to exist but a person who served as a member of that selection panel maybe nominated to serve as a member of the selection	The provision is misplaced.	Delete clause 11 on transitional clause on selection panel. The provision needs to be moved to the First Schedule from the Fifth Schedule.

S/ No.	Clause of the Bill	Section of the Act proposed for amendment	IEBC Comments on implications	Justifications and Proposals for review
		panel appointed under this Act.		

B. CONCLUSION

8. The Commission submits that the intention of the Bill's is appreciated. However, we have some reservations on the issues identified in the matrix and urge this Honourable House to consider the initial proposals and the addendum herein.



Marjan Hussein Marjan, MBS
Commission Secretary/CEO



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 548 OF 2017

KATIBA INSTITUTE.....1ST PETITIONER

AFRICA CENTER FOR OPEN GOVERNANCE.....2ND PETITIONER

OKIYA OMTATAH OKOITI.....3RD PETITIONER

DAVID OUMA OCHIENG.....4TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

GOVERNMENT PRINTER.....2ND RESPONDENT

NATIONAL ASSEMBLY.....3RD RESPONDENT

JUDGMENT

Introduction

1. On 8th August 2017 the country held elections for various elective posts including that of the president of Kenya in which ***Uhuru Kenyatta*** was declared the winner. His closest challenger, ***Raila Odinga*** challenged that win in the Supreme Court in accordance with the Constitution. On 1st of September 2017, the Supreme Court delivered its verdict annulling the presidential election for failing to meet constitutional and legal threshold of a free and fair election and ordered a fresh election to be held under Article 140(3) of the Constitution.

2. That annulment triggered the introduction of ***Election Laws Amendment Bill*** 2017 in Parliament to amend the ***Elections Act, 2011, The Independent Electoral and Boundaries Commission Act 2011*** and ***The Election offences Act, 2016***. The Bill was published on 27th September 2017 and despite strong opposition from a section of Kenyans, it had been passed by 11th October 2017 it was then placed before the Senate and passed and was finally transmitted to the President for Assent. The President neither assented to the Bill nor returned it to parliament as required by ***Article 115(2)*** of the ***Constitution***. After 14 days the Bill became law by virtue of ***Article 116*** of the ***Constitution***. It was published in the Kenya Gazette on 2nd November 2017 thus become effective as the ***Election Laws Amendment Act No. 34 of 2017***. It introduced significant changes in the management of election results, declaration of results and annulment of election results.

The petition

3. **Katiba Institute**, a Constitutional research, Policy and Litigation Institute and **Africa Centre for Open Governance (Africorg)** a Non-profit Organization who were joined by **Okiya Omtatah Okiiti** and **David Ouma Ochieng'**, public interest litigants, instituted this petition against the **Attorney General**, the Chief legal advisor to the national government, and who represents the national government in civil proceedings, with the duty to promote, protect and defend public interest, (the 1st respondent), and the **Government Printer**, responsible for publication of Official government information and documents, (the 2nd respondent). Also joined in these proceedings as the 3rd respondent, is the **National Assembly** which is responsible for enacting laws of the Republic.

4. In their petition dated 1st November 2017 the petitioners challenged the **ELAA, 2017** which was enacted by the 3rd respondent to amend various provisions of the Elections Act, 2011, The IEBC Act, and the Election Offences Act contending that the amendments are unconstitutional. The amendments under challenge include amendment to **section 2** of the IEBC Act which introduced a new definition for the **Chairperson** to include the vice chairperson and a member elected by Commissioners, **section 3** of the **ELAA Act** which amended **section 7A of IEBC Act** by introducing new **subsections 4, 5 and 6** relating to a vacancy in the office of the Chairperson and Vice of Chairperson of IEBC. Subsection (4) provides that in the event a vacancy occurs in the office of the Chairperson the Vice Chairperson will perform the functions of the chairperson until a new one is appointed. Subsection (5) provides that where the positions of the chairperson and vice chairperson are vacant, a member elected by Commissioners shall act as Chairperson. Subsection (6) provides that in the case of the Vice Chairperson or a Commissioner acting as Chairperson, section 6(1) of the IEBC Act relating to qualifications of the Chairperson shall not apply. The petitioners contended that these amendments are unconstitutional.

5. The petitioners further challenged the constitutionality of the amendments introduced by Section 3A of the impugned Act which introduced section 7B to the IEBC Act to the effect that whenever the chairperson and vice chairperson are absent members of the Commission shall elect a member from among themselves to act as the chairperson and in that case, section 6(1) of the IEBC Act shall not apply; and Section 4 which amended paragraphs 5 and 7 of the **Second Schedule** to the IEBC Act on the quorum of the Commission for purposes of meetings making the quorum of the Commissioners to be half the members but not less than three members and further that that unless a unanimous decision is reached, a decision on a matter shall be decided by majority of those commissioners present and voting.

6. Further challenge was against section 5 which deleted Section 29 of the Elections Act and section 6 which amended section 39 by deleting subsection (1C), and introduced a new subsection (1C) and new subsections (1D), (1E), (1F), and (1G) to the Elections Act on the transmission of Presidential election results. Also amended was section 39(2) of the Elections Act so that Presidential Elections results may be declared before receipt of results from all constituencies if the remaining results will not affect the election results and section 39(3) of the Election Act by deleting the word

“provisional” to provide that final results will be announced in the order in which tallying of the results is completed, section 7 deleted and substituted sections 44(5) and deleted sub sections 6, 7 and 8 of section 44 of the Elections Act.

7. Section 8 of the impugned Act deleted section 44A of Election Act and substituted it with a new section 44A on introduction of a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent for purposes of complying with Article 38 of the Constitution; section 9 deleted sections 83 of the Elections Act and introduced a new section 83 so that an election cannot be voided except for failure to comply with constitutional principles and the law **and** the non-compliance substantially affected the results of the election. The section also saved forms that may deviate from the requirements of the Act or regulations.

8. Section 10 was also impugned for introducing a new section 86A to the Elections Act on the holding of fresh Presidential Election under Article 140(3) of the Constitution in case of invalidation by the Court; section 11 which amended section 6 of the Election Offences Act by enhancing the fine from two million shillings to five million shillings and imprisonment from three years to five years. While section 12 deleted section 14(2) of the Election Offences Act.

9. The petitioners averred that these amendments violate a number of Articles of the Constitution and negate national values and principles in the Constitution. They contended that the amendments were meant to compromise the values and principles of electoral process in the country and should be invalidated. They sought the following reliefs:

i. A declaration be and is hereby issued that the election Laws (Amendment) Act as passed through national Assembly Bill No 39 of 2017 on October 12, 2017 in its entirety is unconstitutional.

ii. An order be and is hereby issued that the election Laws (amendment) Act as passed through National Assembly Bill No 39 of 2017 on October 12, 2017 is invalid.

iii. An order permanently restraining the 2nd respondent from Gazetting or publishing passed The Election Laws (Amendment) Act as passed through National Assembly Bill No. 39 of 2017.

iv. Any other just or expedient order the court may deem fit to make.

v. Costs of and incidental to this petition.

3rd Respondent's response

10. The 3rd respondent filed a replying affidavit by **Michael Sialai**, Clerk to the National Assembly, sworn on 16th November and filed in Court on 20th November 2017. It was deposed that following the decision of the **Supreme Court** in the case of **Raila Odinga & Another v Uhuru Kenyatta & Others [2017]eKLR** which successfully challenged the 2017 presidential election, the **Supreme Court** pointed out a number of issues that

required legislative reform to avoid future challenges with regard to the conduct of presidential elections.

11. **Mr. Sialai** deposed that the 8th August 2017 General election exposed lacuna in the Electoral Laws that needed urgent amendments to align them with the Constitution and the principles governing free and fair elections. He deposed that the purpose of the ELAA, 2017 was to provide for the proper conduct of affairs and business of the IEBC and to address the concerns raised following the August 8th 2017 general elections and therefore the amendments were intended to address those aspects.

12. It was his deposition that the amendments introduced to the **IEBC Act**, the **Elections Act**, and the **Election Offences Act** were neither unconstitutional nor were they intended to interfere with the handling of General Elections including that of transmitting results. **Mr. Sialai** further stated that for the Court to determine the constitutionality of a statute or statutory provisions, it must look of the object and purpose of the impugned statute or statutory provision, and that the petitioner's contention that the amendments introduced by the impugned legislation are unconstitutional is unfounded.

13. According to **Mr. Sialai**, the impugned statute, sought to give effect to the opinion of both the majority and minority decisions of the **Supreme Court** in the **Raila Odinga & Another v Uhuru Kenyatta & Others (supra)**. It was **Mr. Sialai's** further deposition that there was public participation, that Parliament invited and received both oral representations and written memoranda in accordance with **Article 118** of the Constitution and the National Assembly Standing Orders. He deposed that the 1st petitioner though invited failed to present its views hence this petition was presented in bad faith. He therefore contended that the Parliamentary Committee of the National Assembly considered the views, prepared and tabled a report before the National Assembly following which the Bill was eventually passed by both the National Assembly and the Senate.

Petitioners' submissions

14. **Mr. Waikwa**, learned counsel for the petitioners, submitted highlighting their written submission dated 14th December 2017 and filed in Court on the same date, that the petition challenges the constitutionality of the Election Laws Amendment Act, No. 34 of 2017 published on 2nd November 2017 with a commencement date of 28th December 2017. Counsel abandoned rightly so, prayer (c) in their petition which had in any case been overtaken by events.

15. Learned Counsel submitted that the object of the amendments as is clear from the objects of the Bill, was to respond to the **Supreme Court's** judgment in the case of **Raila Odinga and another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** on how IEBC should conduct presidential elections. According to learned counsel, the **Supreme Court** never indicated that there was any inadequacy in the electoral laws but only stated that IEBC should conduct elections in accordance with the Constitution and election laws.

16. **Mr. Waikwa** contended that in enacting the impugned legislation, the 3rd respondent was trying to give effect to the minority **Supreme Court** judgment instead of that of the majority. Learned counsel pointed out to the 3rd respondent's replying affidavit more so the memorandum submitted by Jubilee Party in which Raphael Tuju explained that the amendments were in line with the opinion expressed by **Her Ladyship Justice Njoki Ndungu** in her dissenting opinion. According to learned counsel, this made it clear why Jubilee Party wanted the laws amended. Counsel argued that the memorandum by Mr. Tuju was important when read together with the Memorandum of objects and reasons in the Bill. According to the Bill, principal object of the Bill **was to amend the IEBC Act, the Elections Act and The Election offences Act to provide for the proper conduct of the affairs and business of the IEBC and for effective management of elections.**

17. Counsel went on to refer to the Judgment of the Supreme Court at paragraph 392 to contend that the **Supreme Court** never suggested that there was inadequacy in the existing election laws and pointed out at page 175 (paragraph 24) of the 3rd respondent's response to show that the Supreme Court never suggested that there was lack of a complementary mechanism. He contended that the affidavit by **Michael Sialai** never pointed out where the **Supreme Court** recommended amendments to the election laws. In counsel's view, the amendments were intended to down play the importance of the Supreme Court majority judgment in the **Raila Odinga's** case.

18. **Mr. Waikwa** went on to submitted that the Court's comments on sections 39, 44 and 83 of the Elections Act pointed out the applicable election laws and therefore, could not be the basis of amendments to give a minority judgment prominence that goes to against the majority reading of the Constitution. He submitted that Parliament can amend the law in order to align it with the Constitution but not otherwise. Learned counsel contended that the Constitution has set a very high threshold of what constitutes a free and fair election in terms of Articles 81 and 86 of the Constitution and the Supreme Court emphasized the need for elections to meet that standard. He referred to paragraphs 231, 236 and 237 of the Supreme Court judgment in **Raila Odinga & another v Independent Electoral Commission & others (supra)** to reinforce his submissions.

19. Learned counsel went on to contend that the amendments do not meet the constitutional requirements; that some provisions are vague and over board, and that the amendments go against transparency and accountability as contemplated in **Articles 10, 81 and 86** of the Constitution. According to counsel, the amendments on the Elections Act are intended to defeat and infringe on the electoral transparency, accountability and verifiability thus minimize the credibility demanded by Articles 81 and 86 of the Constitution.

20. Regarding **sections 39, 44 and 44A** of the Elections Act, learned counsel submitted that the Supreme Court had considered and given its interpretation on them, and therefore the amendments were intended to take away that verifiability aspect of the elections. According to counsel, amendments introduced in **sections 39 (1C)** was disingenuous round-about way of rendering useless and of no effect electronically transmitted results. In counsel's view, subsections (1D), (1E), (1F), and (1G) further

diluted the element of verifiability of election results and as a result, upgraded manual transmission of results above electronic transmission yet they should rank in *peripassu*. He argued that the amendment rendered electronically transmitted results useless and elections manual transmission of results more important. According to counsel, electronic transmission of results was made central in elections and referred to the case of Independent Electoral and Boundaries Commissions v Maina Kiai & Others [2017] eKLR to support the submission on the centrality of electronic transmission of election results.

21. **Mr. Waikwa** further submitted that **sections 2 and 3** of the impugned Act are vague hence unconstitutional. He contended that a vague law is over board and misses certainty, cannot be implemented and is therefore a ground for declaring it unconstitutional. He contended that **section 2** expanded the definition of Chairperson and argued that **section 3** which amended section 7A of the IEBC Act by introducing subsections 4, 5 and 6 on the filling the position of Chairperson in case of a vacancy is also unconstitutional. He contended that the qualifications of Chairperson are supported by the Constitution thus the provision is too broad and unconstitutional. He relied on the case of Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] KLR 240 for the submission that certainty of law is one of the ingredients of the rule of law, Coalition for Reforms and Democracy & others v Attorney General & others petition No. 628 of 2014 for the submission that a law should not be so vague as to leave the persons required to abide by it in doubt as to what was intended to be prohibited and Dawood v Minister of Home Affairs; Shalabi & another v Minister of Home Affairs ; Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at par 47 for the proposition that it is an important principle of law that rules be stated in a clear and accessible manner.

22. Regarding section 9 which amended section 83 of the Elections Act, counsel submitted that section 83 provided the standard which Courts use to decide whether or not to annul elections. He argued that the section had been interpreted to be disjunctive and, in his view, the amendment seeking to make the test conjunctive makes it much more onerous, and in effect amends the Constitution. This, counsel argued, interferes with **Article 81** of the Constitution. Learned counsel further contended that the **Supreme Court** had properly interpreted section 83 and rendered its opinion (at paragraph 194 and 212) after testing that section against the Constitution and found it in harmony hence there was no need for the amendment. He relied on other decisions and urged that the petition be allowed.

3rd Respondents Submissions

23. The respondents agreed that counsel for the 3rd respondent's takes the floor first and therefore **Mr. Mwendwa**, learned counsel for the 3rd respondent took the floor and submitted, highlighting their written submissions, that the National Assembly exercised its legislature authority under the Constitution, that it exercises that authority through committees or directly through members in accordance with **Articles 118 and 124** of the Constitution.

24. Learned counsel contended that the impugned laws were introduced through a member's Bill, was not a Jubilee Party Bill and argued that the purpose of the Bill is clear in the memorandum of objects and reasons. **Mr. Mwendwa** submitted that the Affidavit by **Mr. Sialai**, the Clerk to the National Assembly, satisfactorily explained the process leading to the enactment of the impugned Act. according to learned counsel, the jurisdiction of the Court under Article 165(3) (d) is limited when it comes to considering legislation to checking whether the law is in conformity with the Constitution or not. **Mr. Mwendwa** submitted that the law was published as required, went through public participation where various people and groups presented views to the Committee of the National Assembly and therefore, the amendments were done in compliance with the Constitution.

25. Learned counsel went on to contend that even the 1st petitioner was invited to present views to the committee but did not do so and for that reason, it is estopped from complaining otherwise it will be acting in bad faith. Counsel argued that it is not true that the President did not support the Bill because he did not assent to it. In **Mr. Mwendwa's** view, if the President had any reservations, he would have expressed them in a memorandum by returning the Bill to the National Assembly. He contended that the fact that the President did not assent to the Bill did not mean he was opposed to it. Counsel argued that having failed to send reservations to the National Assembly, Article 116 of the Constitution activated the finalization of the law making process.

25. **Mr. Mwendwa** further submitted that the power and authority of the Court is to interrogate the constitutionality of the impugned legislation but cannot do a legislative audit as contended by the petitioners. Learned Counsel relied on the decision in the case of **The Commission for Implementation of the Constitution v Parliament of Kenya & 5 Others** [2013] eKLR to contend that the petition before Court does not meet the threshold for challenging the legislative enactment and submitted that amendments are constitutional.

27. **Mr. Mbaraka**, who appeared together with **Mr. Mwendwa**, took over and submitted that the burden of proof that a law is unconstitutional is on the petitioners. He relied on the case of **Council of governors v Inspector General, National Police Service & 3 others** [2015] for that submission. Counsel contended that the role of the Court is to consider whether the law which has been enacted is unconstitutional. He submitted that there is a presumption that the law is constitutional until the contrary is proved. He also submitted that the Court must look at both the purpose and effect of the legislation before declaring the law unconstitutional. He relied on the case of **Institute of Social Accountability & another v National Assembly & 4 others** [2015] eKLR for the proposition that in determining whether a statute is unconstitutional, the Court must determine its object and purpose.

28. Learned counsel went on to contend that section 6 of the impugned legislation is aimed at creating an additional accountability layer of transparency by establishing an obligation on the IEBC for live-streaming results announced at polling stations which must then be transmitted to the constituency tallying centre as well as the national tallying centre the aim being to cure failure of technology. He submitted that in case of failure of technology, verified manual results *visa vice* the electronic results, the one

verified shall prevail. He contended that sections 2 and 3, of ELAA which amend sections 2 and 7A of the IEBC are constitutional since their purpose is to avoid a vacuum in the office of the Chairperson by providing for an acting Chairperson to exercise powers of the Chairperson should a vacancy arise.

29. Counsel submitted that section 4 of the impugned legislation amended paragraphs 5 and 7 of the Second schedule to the IEBC Act by lowering the quorum necessary for the Commission's meetings. He contended that the purpose, object and effect of the amendment is to allow the Commission carry out its functions whenever there is deficiency in its numbers. He submitted with regard to section 5 of ELAA which deleted section 29 of the Election Act that the amendment did not undermine the Constitution and in particular Article 137 (1) (c) on the qualification for nomination as a presidential candidate. Article 137 (1) (c) provides that **(1) A person qualifies for nomination as a presidential candidate if the person (c) is nominated by a political party, or is an independent candidate;** That amended, counsel contended, serves to enrich democracy within political parties and enhances political participation by independent candidates..

30. On section 8 which amended section 44A of the Elections Act, on the complimentary mechanism for identification of voters, counsel saw no unconstitutional effect thereof. Regarding the amended section 83 of the Elections Act, **Mr. Mbaraka** submitted that Parliament amended the section to remove the word **"or"** and introduce the word **"and"** in place thereof arguing that the law was not amended to override the Supreme Court decision. He also contended that the introduction of the word **"and"** in place of **"or"** in section 83 was not intended to water down the provisions of the Constitution. In learned counsel's view, in doing so, Parliament exercised its legislative mandate.

31. Learned counsel referred to the position in the USA where Congress had amended the Voting Rights Act of 1985 to overrule a narrow majority in the **case of Mobile v Bolden**. He also referred to an article which of their submissions on comparative jurisdiction in an article **"The case for Legislative Override"** by **Nicholas Stephanopoulos** to submit that the legislature can overturn a Court's judgment which is the essence of democracy. He submitted that there is no violation of the Constitution. In counsel's view there is also no vagueness in the legislation as enacted. Counsel contended with regard to Section 10 that it amended introduced section 86A (1) and (2) in the Elections Act to provide procedure for conducting fresh presidential election in case of annulment a procedure that did not exist thus remove uncertainty and therefore it did not amount to contrary interpretation of Article 140 from that of the Supreme Court in the **Raila Odinga** case. Counsel relied on several authorities in support of their position.

1st and 2nd Respondents' submissions

32. **Mr. Kuria**, learned counsel to the 1st and 2nd respondents, agreed with the submissions made on behalf of the 3rd respondent and added that Parliament can amend the law in reaction to a Court's judgment. Learned Counsel further contended that there was no vagueness in the amended laws and in particular **section 2** thereof

especially when the law is read in terms of **Article 259(3)** of the Constitution on what happens when a seat falls vacant. Article 259 (3) states that every Article of the Constitution should be construed according to the doctrine that the law is always speaking and that (a) a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. He contended that the amendment to section 2 of the IEBC Act gives effect to that Article. Learned Counsel argued that a Court should not entertain arguments that raise political questions since the Court does not, in exercising its jurisdiction deal with political questions. In counsel's view, the amendments did not amount to an amendment to the Constitution through the back door. He relied on a number of decisions to support his position.

Mr. Waikwa in Reply

33. In a short rejoinder, **Mr. Waikwa** submitted that in terms of **Article 250(2)** of the Constitution, a Chairperson should be identified and nominated as provided for by an Act of Parliament. He submitted that **section 2** as amended, allows any member of the Commission to act as Chairperson which is not in tandem with **section 6** on the qualifications of the Chairperson. He also argued that what is raised in the petition is not a political question and that even under **Article 165** the Court has to decide whether what Parliament had done, had been done in accordance with the Constitution.

34. Learned Counsel went on to contend that the values and principles of good governance under Article 10 require that a majority party acts responsibly but not in breach of or to undermine the Constitution. He submitted that under **Article 73** members of the National Assembly are state officer, who should act in accordance with the constitution.

35. Regard the submission by the respondents that there is presumption of constitutionality of Acts of Parliament **Mr. Waikwa** contended that where a law is challenged for being unconstitutional, the challenge is subject to proof hence the principle of legality cannot be sustained. On the submission that Parliament can amend the law in reaction to a Court's judgment, **Mr. Waikwa's** take was that the amendment can only be in accordance with the majority decision and not that of minority. He urged the Court to weigh carefully the authorities relied on by the 1st and 2nd respondents since they were foreign, arguing that **Mr. Kuria** did not show that the situation addressed by the foreign decisions was similar to ours

36. Learned counsel submitted that it was up to the respondents to show that the amendments were in tandem with the Constitution given that ours is a constitutional supremacy and not parliamentary supremacy. On public participation and views presented, learned counsel argued that most of those who presented views opposed the enactment of the impugned legislation and as an example, pointed at the submissions by the **Catholic Justice and Peace Commission Parliamentary Liaison Desk** attached in **Mr. Sialai's** affidavit to support his submission that majority of those who presented views opposed the amendments.

37. Regarding **section 6** of the impugned legislation, learned counsel submitted that sections 39 (1E) and (1F) significantly altered the value of electronic transmission of election results in that according to section 39(1F) live transmitted electronic results are merely for public information and does not affect the final result. He referred to the Supreme Court arguing that there is need for electronic transmission of results.

Analysis and Determination

38. I have carefully considered the pleadings herein, submissions by counsel for the parties and authorities relied on. The petition invokes the jurisdiction of this Court under Article 165 (3) (d) (i) of the Constitution to determine whether a law is inconsistent with the constitution. The question that has been raised in this petition is on the constitutional validity of the Election Laws (Amendment) Act, No. 34 of 2017. The petitioners have contended that the amendments introduced after the annulled 2017 Presidential election violate national values and principles in Articles 10, 81 and 86 of the Constitution in that they tend to inhibit rather than enhance transparency and accountability of the electoral process. They argued that these amendments are unconstitutional and violate not only Articles 10, 81 and 86 of the Constitution, but also were intended to circumvent the majority Judgment of the **Supreme Court in Raila Odinga and another v Independent Electoral and Boundaries Commission & 2 others (supra)**

39. The respondents on their part took the position that the amendments are constitutional and that Parliament exercised its mandate in enacting those amendments. In principle, the respondents saw nothing unconstitutional in the amendments either in purpose or effect. It was their contention that the amendments were necessary in aligning election laws with the Constitution. They in particular denied the petitioners' contention that the amendments were intended to circumvent the majority opinion of the **Supreme Court** in favour of that of the minority.

40. In my view, the proper approach in dealing with the issue raised herein is to consider each amendment and determine its constitutional validity. This is so because the amendments having become law and taken effect, the views expressed by either side support or oppose the constitutionality of these provisions. This therefore calls for interpretation of the Constitution *visa Vis* each of the impugned provisions in order to determine whether they pass the constitutionality test. In doing so, it behooves the Court lays each of the impugned provisions alongside the Articles of the Constitution alleged to be offended and determine their constitutional validity. It is important however that that we briefly consider the Principles applicable in constitutional interpretation

41. When it comes to the interpretation of the constitution, the starting point should be Article 259 (1) of the Constitution itself which lays down the principles that Courts must bear in mind when interpreting it. Article 259(1) provides that **(1) This Constitution shall be interpreted in a manner that - (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.** The values and principles of the Constitution that is; the rule of law,

human rights and fundamental freedoms development of the law and good governance must permeate the process of constitutional interpretation.

42. Courts have also over the years developed principles of constitutional interpretation through judicial pronouncements which are useful aids in the exercise of constitutional interpretation. First; as was stated in State v Acheson 1991 20 SA SOS;

"The Constitution of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the 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"

43. Second, the Constitution should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people. In the case of The Government of Republic of Namibia v Cultura 2000, 1994 (1) SA 407 at 418 the Court stated that;

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism; and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation."

44. This principle was emaciated in the case of Njoya & 6 Others v Attorney General & another [2004]eKLR where the Court stated;

"Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."

45. Third, a Constitution has various provisions which should be given a holistic interpretation. It should be read as one document and not as several and or separate provisions. Each provision should be read as supporting the other and not one provision destroying the other. They should be given a harmonious reading as one document. In the case of Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC the Constitutional Court put it thus;

"The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness."

46. The Court of Appeal of Tanzania while agreeing with this view in the case of Attorney General of Tanzania v Rev. Christopher Mtikila [2010] EA 13 observed that the principle of harmony requires that the entire Constitution be read as one entity. The Supreme Court also advocated a holistic interpretation of the Constitution In the

Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012) stating;

“But what is meant by a holistic interpretation of the Constitution” It must mean interpreting the Constitution in context. It is 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 in each other, so as to arrive at a desired result.”

47. Fourth, there is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved. This view is based on the fact that as peoples’ representative, parliament usually enacts laws to serve people and therefore, Parliament understands why such laws are enacted and the problems they are intended to solve. Advancing this view in the case of **Hambardda Dawakhana v Union of India Air (1960) AIR 554**, the **Supreme Court** of India stated;

“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.”

48. It was stated in **Ndyanabo v Attorney General of Tanzania [2001] EA 495**, that it is the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that invalidity.

49. Fifth, the Court must also consider the cause- effect in interpreting the Constitution. The purpose of enacting a statute and the effect of implementing the statute will also determine the constitutionality of a statute. In the case of **R v Big M Drug Mart Ltd [1985]1 SCR 295**, the **Supreme Court** of Canada observed;

*“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.” (See Olum **and another v Attorney General [2002] 2 EA 508**).*

50. And In Ng Ka Ling & Another v The Director of Immigration (1999) 1 HKLRD 315. the Court stated;

“It is generally accepted that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”

51. Guided by the above principles, we now turn to consider whether the impugned provisions go against Articles of the Constitution as contended by the petitioners. In doing so the Court should bear in mind the principle stated in US v Butler 297 US 1 [1936] that;

“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 besides the statute which is challenged and 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.”

1. The IEBC Act

52. The amendments concern three statutes. The first is the **IEBC Act 2011** whose **sections 2, 7A (4), 7A (5) 7A (6) 7B** and **paragraphs 5** and **7** of the **Second Schedule** to the Act are in issue. Section 2 was amended with regard to the definition of **Chairperson**. “Chairperson” is now defined to mean “the Chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the Vice chairperson or a member of the Commission when discharging the functions of the chairperson”. Prior to the impugned amendment, “Chairperson” was defined as *“the chairperson of the Commission appointed in accordance with Article 250(2) of the constitution”*.

53. The petitioners have argued that this amendment is overboard and violates the Constitution on who is the Chairperson of the Commission. According to the petitioners, there is only one chairperson who is appointed in accordance with the Constitution and therefore, the definition to include any other person as chairperson is erroneous and unconstitutional.

54. The Constitution, in **Article 250(2)**, provides that there should be a chairperson identified and appointed in accordance with a national legislation. In the case of IEBC, the chairperson must have been identified in accordance with the IEBC Act and appointed in accordance with the Constitution. Once appointed, the chairperson performs constitutional functions that only the person appointed in accordance with the Constitution should perform.

55. In that regard therefore, there can be only one chairperson who is appointed in the manner provided for by the Constitution and the IEBC Act. The Vice Chairperson or any other member, however appointed, cannot be defined as **“Chairperson”**. In determining such an issue one has to look at the object, purpose and effect of defining any other person as chairperson of the Commission when such a definition gives an unintended effect.

56. In my considered view, the definition in the amended section 2 is too broad and overboard. It confers a title and status on a person who is not intended by the Constitution. This is because section 6 (1) of the Act provides for qualifications one must have be appointed chairperson of the Commission. He must be qualified to hold the office of **Judge of Supreme Court**. Article 166(3) of the Constitution provides for qualifications for appointment as Judge of Supreme Court, namely; at least 15 years’ experience as judge of a Superior Court; or at least 15 years’ experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field or has held the qualifications as judge of Supreme Court or distinguished academic, judicial officer legal practitioner or experience in other relevant legal field.

57. Only a person, who possesses these qualifications, should qualify to be appointed chairperson of the Commission. And only a person appointed as required by the Constitution should fall in the definition of chairperson. In that case therefore, the definition of chairperson should be limited to the person who meets the qualifications and has been appointed in accordance with the Constitution. Anyone else, whether in acting capacity, or not cannot be defined as chairperson. I have for comparison purposes, perused the definition of “chairperson” in the legislations for other Commissions but none has a definition similar to that in the impugned section 2. There would be no justification to have a different definition assigned to the chairperson of IEBC. The former definition was in line with the Constitution as opposed to new one.

58. The petitioners next challenged amendments introduced in Section 7A; that is introduction of subsections (4), (5) and (6) which deal with filling of a vacancy in the office of chairperson. Section 7A (4), 7A(5) and 7A(6) provide:-

“(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson

and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section."

59. The import of the amendment introduced by section 7A (4) is that the vice chairperson will act as chairperson and discharge the full constitutional responsibilities of the chairperson should a vacancy occur in that office. Although this may on the face appear a simple issue, one has to bear in mind that the chairperson appointed in accordance with the Constitution, performs some critical constitutional functions only reserved for the chairperson. The role and authority of the chairperson emanates from the Constitution. In a nutshell, he is the head and spokesperson, provides leadership and direction to the Commission. On being appointed, he/she takes the oath of office to execute his mandate as such. The question that arises is whether a person who does not meet the qualifications required should assume and perform such constitutional functions.

60. In my respectful view, and from the reading of the Constitution, this is not possible. Ordinarily, the vice chairperson would perform certain minimal administrative functions in the absence of the chairperson. That would not however entitle him/her to assume the full duties and perform critical functions including constitutional mandate of the Chairperson when he does not meet the qualifications to be chairperson, and has not been appointed in accordance with the Constitution. When the Constitution provides that chairperson be appointed in a particular manner, there can be no shortcut but to stick to the constitutional dictates. An appointment done in any other manner would be unconstitutional.

61. There is an even more fundamental problem with regard to section 7A (5) which provides that in the event ***"the positions of both the chairperson and vice chairperson fall vacant, a member elected by Commissioners shall act as the chairperson and exercise the powers and responsibilities of the chairpersons until such time as the chairperson is appointed"***. Section 7A (6) goes further to provide that section 6(1) of the Act (on qualifications of chairperson) shall not apply to the vice chairperson or member acting as chairperson under section 7A (4) or 7A (5).

62. The petitioners contended that these amendments are unconstitutional since they give constitutional mandate of the chairperson to a person appointed in a manner otherwise than as provided by the Constitution and most likely without qualifications. These amendments present a number of constitutional and legal problems. The chairperson is supposed to be identified as provided by the IEBC Act and appointed as contemplated by the Constitution. Article 250(2) of the Constitution provides that ***(2) The chairperson and each member of a commission, and the holder of an independent office, shall be— (a) identified and recommended for appointment in a manner prescribed by national legislation; (b) approved by the National Assembly; and (c) appointed by the President.*** It is even more important that Article 250(3) emphasizes that ***(3) to be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.***

63. In that regard, the qualifications for the chairperson set out in section 6(1) are anchored in the Constitution and are mandatory. A person without these qualifications cannot by any means be chairperson whether in acting capacity or not, since the Constitution leaves no option. Some of the chairperson's mandate are clearly spelt out in the Constitution (Article 138 (10))-to **declare Presidential result**. This is a responsibility that only the chairperson identified, recommended and appointed as required by the Constitution should perform.

64. The purpose and effect of the sections 7A (4) and 7A (5) is to allow a person who is not the chairperson, has no qualifications required by section 6(1) and not appointed in accordance with the Constitution to take over leadership of the Commission and perform constitutional functions of the chairperson. This is a clear violation of the Constitution and in particular Articles 138(10) and 250(2) and (3).

65. It is of more intriguing that section 7A (6) suspends section 6 (1) of the Act with regard to qualifications of the chairperson at that time section 7A (4) and 7A (5) become applicable notwithstanding that the person will perform and exercise full responsibilities of the chairperson. In essence, section 7A (6) read purposively, has the singular effect of suspending Article 250 (3) of the Constitution regarding the qualifications of the chairperson. When the framers of our Constitution included sub Article 3 in Article 250, they had no illusion that it would be followed. Their wish must be respected.

66. Where the Constitution provides the manner of appointment and goes further to state in a plain and unambiguous language that the qualification contained in the national legislation that one must meet to be appointed to a particular position, must be strictly followed. Parliament, as the legislative organ of state, has only one option- to obey and observe that constitutional decree. It cannot, and must not, in the exercise of its legislative authority, enact a law whose effect is to circumvent that constitutional command. Short of this, such a law would fall to be declared unconstitutional as demanded by Article 2(4) of the Constitution.

67. It was contended by the respondents that these amendments are in line with Article 259(3) (a) which provides that a function or power conferred by the constitution on an office may be performed or exercised as occasion requires, by the person holding the office. This Article must be read purposively and in harmony with Article 250 of the Constitution. In the case of IEBC the person holding the office must have been placed in that position as required by the Constitution and the law. Article 259(3) cannot be the motivation for enacting a legislation that overrides the Constitution. Moreover, the chairperson's appointment should be differentiated from that of the vice chairperson who is elected by Commissioners under Article 250 (10) and a vacancy in that office filled in accordance with Article 250(11). If the Constitution provides how a vacancy in the vice chairperson's position should be filled, that of the Chair person must, in the same vein, be filled in accordance with the Constitution as read with the Section 6(1) of the Act to give the Constitution a harmonious reading. In that regard therefore, section 7A (6) is unconstitutional.

68. The petitioners further took issue with the introduction of section 7B to the effect that“(1) ***Whenever the chairperson is absent, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson;*** (2) ***Whenever the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson;*** (3) ***The provisions of section 6(1) shall not apply to the vice chairperson or a member acting as chairperson under this section***”.

69. A reading of section 7B has a similar effect as section 7A (4), (5), and (6). Even though a duly appointed chairperson may be in office, the section empowers the vice chairperson to exercise the chairperson's functions for reasons other than inability to discharge his functions under the Constitution and the law. The same applies to a situation where both the chairperson and vice chairperson are “***absent***” which would allow members of the Commission to elect an unqualified member of the Commission to act as chairperson and exercise responsibilities of the chairperson. The Act does not define the word “***absent***.” However, taken in its ordinary meaning and context; that “***absent***” means not being present in a place, at an occasion or as part of the meeting, the section creates mischief. Section 7B (3) also suspends section 6(1) of the Act in such an eventuality.

70. Section 7B does not only flies in the face of Article 250(2) and (3) of the Constitution just like section 7A (4) (5) and (6) but also generally makes nonsense of the Constitution and the Act on the importance of the office of chairperson of the Commission. IEBC is an independent Commission that discharges critical mandate under Article 88(4). The framers of the Constitution were clear when they stated in Article 88 (5) that **the Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation**. They also tasked Parliament with the responsibility of enacting legislation to operationalize Article 88. They said in plain language in Article 250 (3), that the qualifications for the chairperson should be strictly followed. Parliament was therefore alive to this when it enacted section 6(1) providing the qualifications one would have to meet to be appointed to the position of chairperson. It is inconceivable that the same Parliament would suspend operations of the same provision at some convenient time.

71. One of the principles of statutory interpretation is that a statute should be read as a whole and given a holistic interpretation to avoid distortion. (See **The Engineers Board of Kenya v Jesse Waweru Wahome & others** Civil Appeal No 240 of 2013). Weighing section 7B as read with section 6 of the Act against the Articles of the Constitution, it emerges clearly that it is not only unconstitutional but will also have unintended negative consequences. It will engineer divisions, fights, disharmony and cause disorientation within the Commission in the discharge of its constitutional mandate. The provision will also weaken the position of the Chairperson and cause unnecessary tension. Members of the Commission may take advantage of the chairperson's absence to make fundamental decisions with serious ramifications to the Commission and the country, taking into account the divisive nature of politics in the country ***visa viz*** the important role the Commission plays in the management of elections. It cannot be in

the best interest of Commission to allow commissioners to choose one of their own, albeit unconstitutionally, to exercise constitutional mandate of the chairperson who is lawfully in office.

72. The law must be certain and support the functioning of an independent constitutional Commission given that the tenure of the chairperson once appointed, is guaranteed by the Constitution. Allowing Commissioners to choose one of them to act a chairperson, is to allow them to oust the chairperson and or his vice from office should an opportunity present itself despite the fact that chairperson's tenure and independence is constitutionally protected. A provision such as section 7B weakens the Commission. It will most certainly affect its institutional independence guaranteed by the Constitution and emphasized under section 26 of the Act. It also exposes the Commission to external pressure or direction in violation of the Constitution.

73. Lastly, there is the question of quorum for meetings of the Commission which has been introduced by paragraph 5 of the Second Schedule to the Act. Prior to the impugned amendment, paragraph 5 of the Second Schedule to the Act provided that the quorum was five, stating; ***"the quorum for the conduct of business at a meeting of the commission shall be at least five members of the commission."*** After the amendment, the paragraph now provides that ***"the quorum for the conduct of business at a meeting of the commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members."*** Paragraph 7 was also deleted and a new one inserted. The deleted paragraph provided that unless a unanimous decision was reached, a decision on any matter before the Commission was to be by concurrence of a majority of all the members. This was however deleted and the following new paragraph inserted to the effect that ***"Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting."***

74. The Commission is currently composed of 7 members including the chairperson. The quorum for purposes of conducting business is half of the members but not less than three. This means the Commission can comfortably conduct business with three out of seven members, a minority of the Commissioners. Taking into account the new paragraph 7 which requires that if there is no unanimous decision, a decision of the majority of the Commissioners present and voting shall prevail, has one fundamental flaw. With a quorum of three Commissioners, there is a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. This would not auger well for an independent constitutional Commission that discharges very important constitutional mandate for the proper functioning of democracy in the country. Such a provision, in my respectful view, encourages divisions within the Commission given that the Commission's decisions have far reaching consequences on democratic elections as the foundation of democracy and the rule of law.

75. Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With

membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional.

76. The respondents, in supporting the amendments, submitted that they were meant to address a lacuna in the event there was a vacancy in the Commission with respect to the chairperson. Even though that may be so, one of the rules of interpretation of statutes requires that a statute be holistically interpreted. In the case of **The Engineers Board of Kenya v Jesse Waweru Wahome & others** (supra) the Court of Appeal observed;

“One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as ‘stand -alone’ An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.” (Emphasis)

77. Looking at the amendments and reading the Act as a whole, from the definition of chairperson, election of a member to exercise powers and functions of the chairperson, to the quorum of the Commission for purposes of meetings, it is obvious that these amendments have a negative and unconstitutional effect to the functioning of the Commission. As the Supreme Court of Canada stated in **R v Big M Drug Mart Ltd** (supra), an unconstitutional purpose or an unconstitutional effect is enough to invalidate legislation. This was emphasized in **Olum and another v Attorney General** (supra), that if the effect of implementing a statute or provision infringes a right, the impugned statute or section should be declared unconstitutional. With the above in mind, and considering the effect of implementing these amendments, I find and hold that the amendments to the IEBC Act are unconstitutional.

The Elections Act

78. The next challenge was directed at the amendments made to the Elections Act 2011. The amendments relate Sections 39, 44, 44A, 83 and 86A of the Act They deal with transmission of election results, voter identification, declaration of election results, annulment of election results and holding of fresh presidential elections under Article 140(3). Section 39 was amended by deleting section 39 (1C) and introducing a new subsections (1C), (1D), (1E), (1F) and (1G).The previous subsection (1D) was renumbered subsection (1H).

79. The impugned section 39(1C) now provides;

“For purposes of a presidential election, the Commission shall-

(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and

(c) publish the polling result forms online public portal maintained by Commission."

80. Prior to the amendments the subsection, introduced in September 2016, required the Commission to *electronically transmit, in the prescribed form*, the tabulated results of an election for the president from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the national tallying centre; and (c) publish the polling result forms on an online public portal maintained by the Commission.

81. The difference between the old subsection (1C) and the new subsection is, first; that whereas the results were to be transmitted only electronically, the new subsection requires that election results be not only transmitted electronically but also delivered physically from the polling stations to the constituency tallying centres and the national tallying centre. Another notable difference is that whereas the results were to be transmitted in the prescribed form, there is no requirement for any particular form for purposes of transmission of results.

82. The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C) (a). First, there is no requirement for the results to be transmitted in any prescribed form which was an essential requirement in the deleted subsection. This was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.

83. Speaking about the gains brought about by the former section 39(1C) before its amendment, the *Court of Appeal* observed in the case of *Independent Electoral and Boundaries Commission & another v Maina Kiai & 5 others* [2017] eKLR;

Pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability under the present legal regime, in the presidential election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. The results announced at each polling station shall be transmitted to the constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From

the constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying centre....From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced results."

84. The Supreme Court, commenting about the same reforms in *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (supra) observed;

"...these changes, in our view, were meant to re-align several pieces of election-related legislation, with the principles of the Constitution and the electoral jurisprudence that had been developed by the Courts. The cumulative effect of these changes was the establishment of what is now referred to as the Kenya Integrated Election Management System (KIEMS). Henceforth, technology would be deployed to the process of voter registration, voter identification and the transmission of results to the Constituency and National Tallying Centres"

85. The above decisions confirmed that the changes had been introduced in line with the dictates of the Constitution. For that reason, a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms, is to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. This amendment is clearly against the spirit of Articles 10, 81 and 86 of the Constitution and cannot pass the constitutionality test of validity.

86. The petitioners also took issue with Subsection (1D) which provides that ***the Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.*** The subsection merely states that the Commission should verify that the results transmitted under Section 39 (1C) (a) are an accurate record of the results tallied, verified and declared at the Polling Stations. This, on the face of it, would appear to be in line with Article 138 (3) (c) of the Constitution which requires that after counting the votes at the polling stations, the Commission should, tally, verify the count and declares result..

87. However, section 39(1D) presents a problem when read together with section 39(1E) which provides that ***"where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the***

results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.” A reading of the two Sub-sections creates a potential tension between physically transmitted results and those transmitted electronically. First, the results are supposed to be from the same process, they should have been counted, tallied and verified before being transmitted. They therefore ought to be the same. To my mind, the way these sub-sections are crafted is not only vague and ambiguous but also creates a conflict between the two modes of transmission of results thus opens a window for tinkering with election results.

88. Ambiguity or vagueness in a statutory provision makes that provision void. A provision is said to be vague and or ambiguous when the average citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality. In the case of Aids Law Project v Attorney General & 3 others [2015] eKLR the Court stated that overboard legislations are to be deprecated and the spirit of the Constitution and its principles frowns upon such overboard enactments.

89. The Supreme Court of Canada observed in Osborne v Canada (Treasury Board) [1991] 2 SCR 69, 1991 that;

“Vagueness can have constitutional significance; one such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. That uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.”

90. Lord Diplock, on his part commented in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG [1975] AC 591, 638 that: ***“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”***

91. The constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the Act.

92. Section 39 (1F) is also contentious. It provides that; “ **Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.**” The petitioners contended that this Sub-section negates the whole purpose of electronic transmission of results. The Sub-section absolves presiding or returning Officers who, though without justification, fail to transmit or publish election results in an electronic format. The country’s experience over tinkered results is well known and would not like to go back there. It adopted electronic transmission of election results as a way of guaranteeing free, fair, accurate, transparent and accountable elections as required by the Constitution. The Election laws were enacted to ensure that counting was done at polling stations and presiding and returning officers electronically transmitted verified elections results in conformity with the spirit of the Constitution.

93. The enactment of section 39(1F) is clearly a drawback on the very principle of accuracy, transparency and accountability of election results enshrined in the Constitution. Free and fair election is the process towards electoral democracy and the highway to a democratic state. Rather than a move forward, section 39(1 F) is a backward step in so far as the requirements for free and fair elections are concerned. Juxtaposed against **Articles 10, 81 and 86** of the Constitution, it is obvious that section 39(1F) strikes at the heart the principles of our electoral system in the Constitution, for saving results that have not been transmitted as required by law. This violates constitutional principles and is invalid.

94. The amendments further introduced subsection (1G) whose Constitutional validity has also been questioned. The sub Section provides that “**the Commission shall, to facilitate Public information, establish mechanisms for the live streaming of results as announced at Polling Stations, and the results so streamed shall be for purposes of public information only, and shall not be the basis for a declaration by the Commission.**” Learned counsel for the Petitioners took issue with this provision submitting that it renders live streaming of election results insignificant. It was submitted that the amendment would make live transmission useless and in a way circumvent the Court of Appeal decision in **The Independent Electoral and Boundaries Commission & Others v Maina Kiai & others** (supra) and that of the Supreme Court majority in **Raila Odinga & another V Uhuru Kenyatta & Others** (Supra).

95. Live transmission of election results announced at the polling stations to the Constituency and national tallying centres is critical when it comes to openness, transparency and accountability of the electoral process. Live transmission of election results was adopted after reforms were introduced in election laws as a means of avoiding situations where election results announced at the polling station would later significantly differ from those declared at the constituency and national tallying centres. The results announced at the polling stations form the basis of any other results declared either at the constituency or national tallying centres.

96. The import of the new subsection is to make live streaming of results from polling stations of no value when it comes to the finality of the declared results. If the intention of the legislature was that results streamed live from the primary source should not

matter when it comes to the final tally, why should the country invest heavily in technology as provided for in section 44 of the Act, have results streamed live from polling stations for public information only" Live streaming of election results is one way of conforming to the constitutional principles of transparency and accountability. Citizens should be able to compare the live transmitted results with the final declared results to confirm the accuracy of the election results.

97. When Parliament enacts a law that significantly erodes the element of transparency and accountability in the electoral process, such a law overrides the constitutional principles of the electoral systems contemplated in Articles 10, 81 and 86 of the Constitution. You cannot have results that are streamed live from polling stations but which are of no value when it comes to declaration of final results. The results streamed live from polling stations are the primary source of those finally declared. Final results are a product of the same process. One process cannot have two different results. Live streamed results play a significant role in determining the final results. Those results should be as much correct as those finally declared. I am persuaded that sub-section (1G) is a mockery of the requirements for free, fair and credible elections. It violates the principles of electoral systems in the Constitution. In that regard therefore, this amendment cannot hold in our transformative constitutional dispensation.

98. Looking at the effects of the amendments introduced by section 39 (1C) (a), 39(1D), 39(1E), 39(1F) and 39(1G), I am persuaded that they have the effect of weakening rather than strengthening our electoral process. Any amendments that would have the effect of circumventing constitutional principles are unconstitutional.

99. There was also an amendment to section 39(2) to the effect that the chairperson of the Commission may declare a candidate elected president before all constituencies have transmitted their results if satisfied that the remaining results will not affect the result of the election. Prior to the amendment section 39(2) provided that before determining and declaring the final results of an election, under subsection (1), the Commission could announce "**provisional**" results of an election. Section 39(3) was also amended by deleting the word "**provisional**" so that now the Commission should announce final results in the order in which the tallying of results is completed. It was contended on behalf of the petitioners that this amendment disfranchises voters given that the Commission is required to hold elections in the 290 constituencies.

100. The Constitution requires that the Commission holds elections in all the 290 Constituencies in the case of Presidential Elections. It must therefore, discharge its mandate by holding elections in each constituency and ensure that voters in the constituency have had an opportunity to vote. In that regard, the reading of section 39(2) is not that elections have not been held, but that the Commission has held elections, received election results and is satisfied that results from the Constituencies that are yet to transmit, will not change the election results. The Chairperson may in such circumstances declare a person elected president. The mandate of the IEBC is to declare the winner of the presidential contest after tallying the results received and determining that those remaining are such that they would change the position regarding the winner.

101. A plain reading of the two subsections, in my view, does not disclose any unconstitutionality. Section 39(2),(3) has removed provisional results so that the Commission is only to announce final results and made it clear that the chairperson can declare a person elected president if results from the yet to transmit constituencies will not affect the final tally. There is really nothing unconstitutional if final results are announced when it is clear that those from the remaining constituencies will not change the election result as to who the winner is. There is no constitutional invalidity in these provisions. However, it is desirable that all results be received and tallied before a declaration of the winner is made.

102. Section 44(5) of the Act was deleted and a new subsection introduced to the effect that ***the Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section.*** The petitioners attacked this amendment arguing, generally, that the amendments are unconstitutional. Section 44 deals with ***use of technology*** and establishes an ***integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.*** Subsection 44(5) only requires the Commission, in consultation with stakeholders, comes up with regulations on the implementation of the Integrated Biometric Voter Registration, Electronic Voter Identification and Electronic Transmission of results (***KIEMS***). The petitioners have not demonstrated how, if at all, this provision violates the Constitution to require that it be declared unconstitutional. I find neither unconstitutional purpose nor effect in the implementation of this provision.

103. The impugned Act deleted section 44A and inserted a new section 44A which provides that notwithstanding the provisions of section 44, the Commission shall put in place a complimentary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution. The petitioners contended that this was in a way doing away with the electronic system.

104. The complimentary mechanism contemplated in this section is, as the name suggests, only complimentary. It does not replace the electronic voter identification system. The word ***“complimentary”***, in the context in which it is used in this section, can only mean to assist or aid. It can only be resorted to in the event the principle voter identification system has failed. That is; it is to be used only when there is technology failure. To that extent, therefore, I do not see how this provision violates Articles 10, 38, 81 and 86 on the values and principles transparency and accountability of the electoral system. Rather, it is intended to aid and or complement the main voter identification system in the event there is failure and ensure that the electoral process continues.

105. Finally, there was a submission that the amendments introduced to Sections 83 and 86A of the Act have an unconstitutional effect. Prior to the impugned amendments, Section 83 provided that ***“no election shall be declared to be void by reasons of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the noncompliance did not affect the***

results of the election. The Section had a disjunctive word “or” that gave two test for purposes of annulling an election.

106. The amended section 83 now provides;

“(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and

(b) the non-compliance did not substantially affect the result of the election.

(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.”

107. This amendment was introduced after the **Supreme Court** by Majority, annulled the 2017 Presidential election on 1st September 2017 holding that the election failed to comply with the Constitution and Election laws. The petitioners contended that by amending the law from a disjunctive test to a conjunctive one, it would be difficult to challenge an election even when there was violation of the constitutional principles. The petitioners further contended that the amendment was intended to circumvent the Constitution and the **Supreme Court’s** judgment on how elections should be conducted, thus make it impossible to annul a faulty election.

108. The Supreme Court while dealing with Section 83 in ***Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** (Supra, observed at paragraph 194 that the provision (the then section 83) was different from provisions in other jurisdictions in that the Act did not have the word ***“Substantially”***, which was in many of the other countries’ legislations. It also observed that our Elections Act, 2011 including Section 83 of the Act, had been harmonized with the Constitution. It was the Majority’s opinion that for elections to be valid, they had to be conducted in strict compliance with the principles laid down in the Constitution, given that the retired Constitution did not contain any constitutional principles relating to elections. The majority emphasized that in interpreting Section 83, it had to pay due regard to the meaning and import of the envisaged constitutional principles.

109. The Supreme Court therefore gave section 83 an interpretation that was in line with the principles in our transformative Constitution and the electoral laws. While interpreting section 83, the Supreme Court made reference to several comparative jurisprudence including the opinion expressed by **Prof. Justice Tibatemwa Ekirikubinza** in the case of ***Col. Dr. Kizza Besigye v Attorney General*** (Constitutional Petition No. 13 of 2009) where the learned Judge observed that a Court can annul Presidential election results if the evidence adduced before it showed substantial departure from the Constitutional imperatives.

110. With this holding the Supreme Court underlined one fact; that Section 83 was in harmony with the 2010 Constitution and that it was different from the previous election laws. The amendment to section 83 which removed the disjunctive word '**or**' and introduced the conjunctive word '**and**' together with the word "**substantially**", is a departure from the constitutional requirements for free, fair and transparent election and a draw back in the electoral reforms.

111. When interpreting the import of this amendment visa viz the Constitution, the court must remain alive to the general principles that the Constitution is a living instrument with a soul and consciousness of its own reflected in the preamble and fundamental objectives and its directive principles. The Court must therefore endeavour to avoid crippling the Constitution by construing it technically or in a narrow sense. It must be construed in tune with the purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. (See **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another** (Nairobi High Court Misc. Appl. No. 890 of 2004).

112. It is true as submitted by the respondents' counsel that Parliament exercises its mandate under the Constitution when enacting legislation. However, Parliament has a constitutional obligation to enact laws that are in tandem with the Constitution. Article 81 of the Constitution contains principles of our electoral systems which elections must comply with including **free and fair elections that are by secret ballot, free from violence, intimidation, improper influence or corruption; that are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.** Article 82 further provides that Parliament should enact laws that **will facilitate conduct of free and fair elections and referenda and ensure that the voting is simple and transparent also taking into account the needs of persons with disabilities and special needs.** Article 86 also demands that (a) **whatever method of voting is used, it should be simple, accurate, verifiable, secure, accountable and transparent;** (b) **the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;** (c) **the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and that (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.**

113. Taking these constitutional imperatives into account and juxtaposing them with the amended section 83 of the Elections Act, it is clear that even though the Constitution values the quality of elections, and the amendment has the effect disregarding these principles when it comes to considering whether or not to annul an election. In my considered view, that must not have been the intention of the framers of our Constitution when they included these principles of electoral system in the Constitution. These principles are part and parcel of the Constitution and are important in holding free, fair, open, transparent, impartial and accountable elections. We must appreciate that these are constitutional and not statutory requirements. Parliament could not enact a legislation that had the effect of whittling down constitutional principles that had been harmonized and embodied in section 83 prior to its

amendment by demanding that failures in complying with the Constitution or the law must be **“substantial”** as to affect the result for an election to be annulled.

114. The Supreme Court observed at paragraphs 23 and 237 of the Judgment that all the legislative enactments had one objective; to ensure that in conformity with the Constitution, the elections are free, fair, transparent and credible and that the terms *“simple, accurate, verifiable, secure, accountable and transparent”* engrafted into the provisions of those enactments, are the self- same constitutional principles in Articles 10, 38, 81 and 86 that the (presidential) election had to be conducted in accordance with the principles laid down in the Constitution and the law. An election could be annulled if it failed to comply with constitutional principles and the election laws **or** the non-compliance substantially affected the results.

115. The amendment now means that for an election to be annulled there must not only be failure to comply with the Constitutional principles and election laws but also the failures must substantially affect the result of the election. The essence of this amendment is to allow violation of constitutional principles and election laws as long as they do not substantially affect the result. Any amendments must be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiate an electoral process. It is my holding that there was no constitutional compulsion or rational in amending section 83 of the Act to remove the disjunctive word **‘or’** and introduce the conjunctive word **‘and’** so that only where there are failures in complying with the constitution and election laws and they **substantially** affected the results should an election be annulled. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in our transformative Constitution that there should be free, fair, transparent and accountable elections.

116. I take guidance from the holding in *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), that:

“When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And in so far as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.... ‘the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the

fact that it gives effect to the provisions of our Constitution.’ In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; ‘[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid’. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the ‘Constitution is supreme...; law or conduct inconsistent with it is invalid’. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid...”

117. I so find with regard to the amended section 83 of the Elections Act. Parliament has a duty to defend and protect the Constitution and enact laws that are in conformity with its values and principles. Section 83(2) cannot invite the aid of the Statutory Interpretations Act to shield violations of the Elections Act and Regulations enacted to enforce the Constitutional principles.

118. The respondents submitted that the Supreme Court had decided on the constitutionality of section 83 as amended hence this Court has no jurisdiction to deal with the issue. I have perused the judgment of the Supreme Court in John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others [2017]. What is clear is that the Supreme Court declined to take up jurisdiction and decide that issue because it was pending before this Court stating; “...**we leave the issue of the unconstitutionality or invalidity, or otherwise, of Section 83 of the amended law to the determination of the High Court, where the matter is currently under consideration.**” However, **Lady Justice Njoki Ndungu** was of the opinion that Parliament had not invaded the judicial realm in amending section 83.

119. All this Court can say is that **Lady Justice Njoki Ndungu’s** opinion on the amendment to section 83 was **obiter dictum**. The Supreme Court having decided to leave the issue for this Court’s determination, it was not an issue falling for determination by the Supreme Court and therefore, there was no decision by the Supreme Court on the matter that is binding on this Court. This was one of those situations where the Supreme Court was faced with the question of co- shared jurisdiction on the interpretation of the Constitution. It declined jurisdiction and left the matter for this court’s decision. (see In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, [2012]eKLR)

120. The impugned Act also introduced Section 86A to the effect that where the Supreme Court annuls presidential elections under Article 140(3) of the Constitution, the Commission has to publish a gazette notice within seven days indicating that no candidate had been elected following the nullification, announce the date of the fresh election, and names of candidates and political parties to take part in the fresh election. The section further provides that the Commission will not hold fresh nominations pursuant to Article 140(3); that an eligible candidate under Article 140(3) may

withdraw from the election by giving a notice to the Commission, and that where there remain more than two candidates, election will proceed but where only one candidate remains after such withdrawal, no elections shall take place, but the remaining candidate shall be declared president-elect.

121. The introduction of this section was in response to the challenges the Commission faced after annulment of the 2017 presidential election and the subsequent disputes that followed, more so on who was eligible to participate in the fresh election. In my view, section 86A clears a lacuna that made the holding of the 2017 fresh presidential election a challenge to the Commission. The section clarifies what should happen and the timelines. It also makes it clear what should happen when only one candidate remains after withdrawal of the other candidates which is in tandem with Article 138(1) of the Constitution. The section is for necessary clarity and efficiency. I see no constitutional invalidity.

122. The other amendments involved the sections 6 and 14(2) of the Election offences Act. The fine and sentence in section 6 was enhanced while section 14(2) was deleted. There is not much the Court can say on this. There was also no submission that there was no public participation.

Conclusion

123. In conclusion therefore, having considered the petition, the responses and submissions by counsel for the parties, the authorities relied on by parties and those by the Court, and also having considered the applicable law, I am persuaded that certain amendments introduced through the **Election Laws (Amendment) Act No. 34 of 2017** failed the constitutional test of validity. All the amendments made to the Independent Electoral and Boundaries Commission, namely; section 2, on definition of the word **"chairperson"**, section 7A(4), 7A(5), and 7A(6), the entire section 7B and paragraphs 5 and 7 of the Second Schedule to the Act on the quorum for purposes of meetings of the Commission are unconstitutional.

124. With regard to the Elections Act, 2011, the petitioners have succeeded to persuade the court that amendments introduced to section 39(1) (C) (a), 39(1D), 39(1E), 39(1F), 39(1G) and the entire section 83 have failed the constitutionality test. I however find no fault in the amended sections, 39(2), 39(3), 44(5), and 44A of the Elections Act, 2011.

125. In the premise therefore, this petition partially succeeds and I make the following orders which I find appropriate;

i. A declaration be and is hereby issued that sections 2, 7A (4), 7A (5), 7A (6) of the IEBC ACT, 2011, and Paragraphs 5 and 7 of the Second Schedule to the Act are constitutionally invalid.

ii. A declaration be and is hereby issued that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the Elections Act, 2011 are constitutionally invalid.

iii. As this was a public interest litigation, I order that each party do bear own costs.

Dated, Signed and Delivered at Nairobi this 6th Day of April 2018

E C MWITA

JUDGE



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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 212 OF 2018

ISAIAH BIWOTT
KANGWONY.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT

THE ATTORNEY GENERAL.....2ND
RESPONDENT

JUDGMENT

Introduction

1. The petitioner herein, who describes himself as a male adult of sound mind filed this Petition against the 1st respondent (hereinafter “the commission”), a constitutional body established pursuant to Article 88 of the constitution, and the 2nd respondent, the Honourable Attorney General, challenging the legality of the Commission, as presently constituted, following the resignation of four of its commissioners.

The petitioner seeks the following orders;

1. **A DECLARATION** does issue to the effect that the current composition of the Independent Electoral and Boundaries Commission is illegal and unconstitutional as a result of the resignation of four commissioners and hence the Commission lacks the requisite quorum to conduct and/or carry out its business.
2. **A DECLARATION** does issue to the effect that the current composition of the Commission is illegal and unconstitutional as a result of the resignation of four Commissioners and hence, the Commission as constituted cannot hold and/or supervise any such elections moreover, the By-elections for Baringo South Bobasi Chache Ward; and for Member of County Assembly North Kadem Ward scheduled for 17th August, 2018.

3. A DECLARATION does issue to the effect that the current composition of the Commission is illegal and unconstitutional as a result, any purported By-elections to be held by the Commission, shall be null and void.

4. AN ORDER does issue to the effect that all such administrative action taken by the Commission in regard to the preparations of the intended By-elections for Baringo South Constituency; Bobasi Chache Ward are illegal, unlawful and null and void and contrary to the provisions of Article 47 of the Constitution.

5. AN ORDER awarding costs of the Petition to the Petitioner.

6. Any other orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners' fundamental rights and freedoms.

The Petitioner's Case

2. The petitioner's case, which is supported by his affidavit sworn on 6th June 2018 and further affidavit dated 21st June 2018, is that vide a **Gazette Notice .Vol. CXX-No. 62** dated 28th May 2018 attached as annexure **IBK-1** to the said affidavit, the Commission initiated the process of conducting by-elections in various elective positions that had fallen vacant due to the death of a Member of Parliament and the nullification of elections by various courts. He highlighted the affected electoral areas as Baringo South Constituency, North Kadem Ward and Bobasi Chache Ward.

3. The gist of the petitioner's case is that following the resignation of four (4) commissioners namely; **Ms. Roselyne Akombe, Ms. Consolata Maina, Mr. Paul Kurgat, and Ms. Margret Mwachanya** the current composition of the Commission does not comply with the provisions of the Constitution and Sections (4), (5) and (7) of the Second Schedule of the Independent Electoral and Boundaries Commission Act (hereinafter "**the Act**") and that the Commission therefore lacks the requisite quorum to conduct any business and/or to undertake its constitutional mandate.

4. The petitioner states that he is apprehensive that the people of Baringo South Constituency, North Kadem Ward and Bobasi Chache Ward shall be subjected to a sham electoral process not sanctioned by a properly constituted commission thereby compromising the integrity and validity of the intended by-elections.

Petitioner's submissions

5. **Mr. Ochieng' Oginga**, learned counsel for the petitioner, who appeared together with **Dr. Khaminwa S.C.** submitted that the current composition of the commission contravenes the provisions of Article 27(8) of the constitution, also known as the two-thirds gender rule, which provides that "**.....the State shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be of the same gender**".

6. Counsel urged the Court to adopt a progressive approach to the interpretation of the Constitution which gives effect to the constitutional values and principles which the

framers of the Constitution envisaged when they drafted the Constitution. In this regard counsel proposed a three-pronged approach in the interpretation as follows;

- i. Interpret the provisions in a manner that avoids constricting the Constitution.
- ii. Interpretation ought to give effect to the will and aspirations of the people.
- iii. Interpretation that gives effect to the intention of the framers of the Constitution and legislators.

7. Counsel referred to several authorities on the interpretation of the Constitution and submitted that the IEBC Act, which was enacted in 2011 and revised in 2016, was in tandem with Article 250 of the Constitution regarding the composition of constitutional commissions. He added that Section 3 of the Act outlines the objects and purpose of the Act, and that among the aspirations of Kenyan people was the principle of inclusion and equality. According to the petitioner, a reading of Article 250(1) and 27 of the Constitution shows that it was not the intention of Parliament that members of a constitutional body shall be of the same gender. Stating that Article 250(1) prescribes the minimum number of commissioners to be three members, **Mr. Oginga** submitted that the Court ought to breathe life into that provision so that even in the case of 3 members, they must not be of the same gender as this would contravene the constitutional values and aspirations of the people of Kenya.

8. In **Dr. Khaminwa's** submissions on behalf of the petitioner, he referred to the provisions of Article 259 of the Constitution and urged the court to interpret the Constitution in a manner that promotes its function and purpose. He submitted that Article 250 of the Constitution is a general provision applicable to all commissions while the IEBC Act is a constitutional statute which must be interpreted in conformity with Article 259. He further submitted that the IEBC Act is clear, at schedule 5, that the minimum quorum of the Commission shall be 5 commissioners and that under Article 88(4) of the Constitution, the functions of the Commission are so vast that they cannot be performed by the 3 remaining commissioners which justifies the statutory provision that decisions be made by a minimum of five commissioners.

9. He also submitted that since 4 commissioners had resigned, the remaining 3 cannot conduct the business of the Commission and emphasized that there is no way the Commission, as presently constituted, can continue to render valid decisions. He suggested that the Commission must therefore be disbanded as the remaining 3 commissioners, who are all of the male gender cannot continue to function legally and constitutionally in the face of the glaring breach of the two third gender rule. He maintained that allowing the Commission, as currently constituted, to function would amount to an infringement of the constitutional rights of the contestants and the electorate in the upcoming By-elections as shown in the impugned Gazette Notice.

The Respondents' case

10. In response to the petition, the Respondents filed the Replying Affidavit of the 1st respondent's chairman, **Wanyonyi Wafula Chebukati**, dated 19th June 2018 and written

submissions dated 12th July 2018. The Respondents' case was highlighted in oral submissions by **Ms. Awuor**, learned counsel for the 1st Respondent, who submitted that the Speaker of the National Assembly wrote to the Commission notifying it of vacancies in the elective seats that in accordance with the law, the 1st respondent published the vacancies in the Kenya Gazette. It was submitted that the vacancies were therefore not occasioned by a decision of the Commission so as to warrant the filing of the instant petition.

11. **Ms. Awuor** also submitted that the instant petition offends the *sub judice* rule and that this court therefore lacks the jurisdiction to entertain it in view of the fact that it raises similar issues as the issues raised in an earlier case of **Okiya Omtatah Okiiti vs. the Independent Electoral and Boundaries Commission & Others Petition Number 165 of 2018** (hereinafter "the **Okiya Omtatah** case") which is still pending before Mwita, J., wherein the main issue for determination is the is of the legality of the composition of the Commission following the resignation of some of its members. Counsel submitted that by-elections are administrative issues that do not involve the Commissioners directly as under Sections 10 and 11 of the IEBC Act, it is the Commission's secretariat that is charged with the function of executing the elections while the commissioners merely play the oversight role. Counsel added that under Section 19 of the Election Act the Commission is required to transmit vacancy notices to the affected constituencies after which the Returning Officers take over the execution of the conduct of the by-elections in line with the provisions of the Elections Act and the Elections (General) Regulations 2012.

12. She further submitted that since Article 250 of the Constitution stipulates that the minimum number of commissioners in the constitutional commissions is 3, the validity of that article of the constitution cannot be subject to challenge in view of the supremacy of the Constitution. In this regard, **Ms. Awuor** submitted that Paragraph 5 of the 2nd Schedule of the IEBC Act is unconstitutional as it offends Articles 250(1) and 248(2) (c) of the Constitution. Counsel cited several authorities in support of the submission on the supremacy of the Constitution.

13. She further submitted that by dint of the provisions of Section 7(3) of the Act the Commission remains properly constituted notwithstanding the vacancies that were occasioned by the resignation of some of its members.

Analysis and Determination

14. I have carefully considered the pleadings herein, submissions by counsel for the parties and the authorities that they relied on. The petition challenges the legality of the constitution of the Commission, which currently has only 3 male commissioners, following the resignation of four (4) of its members. The first issue that presents itself determination is that of the jurisdiction of this court to entertain the petition in the face of the allegations by the respondent that the suit is *sub judice* on the basis that it raises similar issues as those raised in the **Okiya Omtatah** case which is currently pending before Mwita, J. It is only after settling the issue of jurisdiction that this court will, depending on the outcome thereof, venture into the merits and other issue raised in the petition. The other issues for determination are:

- a) Whether the commission, as currently constituted, is illegal and unconstitutional and therefore incapable of overseeing the upcoming by-elections.
- b) Whether the petitioner is entitled to the orders sought in the petition.

Jurisdiction

15. It is trite law that jurisdiction, in any matter coming up before a court, is a fundamental issue that must be resolved at the beginning because it is the fountain from which the flow of the judicial process originates. As was aptly stated by Nyarangi, J.A. in the celebrated case of ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd.*** [1989] KLR 1

"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

On *res sub judice*, Section 6 of the Civil Procedure Act, Cap. 21 (CPA) provides that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

The term '*sub-judice*' is defined in ***BLACK'S LAW DICTIONARY 9TH EDITION*** as:

"Before the Court or Judge for determination"

16. The purpose of the *sub judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party who seeks to invoke the doctrine of *res sub judice* must establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

17. Where the test of *res sub judice* is established or met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined. The practice in our courts has however been to consolidate such suits for hearing and determination.

18. In the present case, the 1st respondents drew the attention of this court to the case of **Okiya Omtatah** case that is pending before Mwita J. A copy of the pleadings in the said case was attached to the 1st respondent's replying affidavit and marked as annexure **"WWC1"**. I have perused the pleadings in the said case and I note that it raises the issue of the legality of composition of the Commission following the resignation of four of its commissioners. Indeed at paragraph 5 of the petition it is stated:

"5. At the point of filing this petition, the respondent is composed of only three commissioners, following the voluntary resignation of four commissioners."

19. I further note that one the prayers sought in the Okiya Omtatah case is for a declaration that: **"That the current three-member Commission is lawfully and properly constituted pursuant to Article 250 (1) of the Constitution; its operations are not to be hampered by the resignation of the four commissioners; and any business it conducts in the discharge of its lawful mandate under the constitution and statute is legitimate and valid in law."**

20. When the instant petition is considered side by side with the Okiya Omtatah case, the glaring and undeniable fact is that both cases were precipitated by the resignation of the four commissioners of the 1st respondent and while the instant petition seeks the declaration that the Commission is, following the said resignation, unlawfully constituted, the earlier petition seeks a declaration the Commission is properly constituted despite the resignations. I however note that the two petitions have been filed by different petitioners and in the instant case, there is the new twist of the upcoming by-elections which are slated, according to the impugned Gazette Notice, for 17th August 2018, exactly one week from the date of the delivery of this judgment, in which case I find that the subject matter in the petitions is not entirely the same and neither are the parties. It is therefore my finding that this Court has jurisdiction to entertain the petition.

Composition of the Commission

21. The petitioner challenged the current composition of the Commission on account of the number of the commissioners and the two third gender rule. The respondents' contention, on the other hand, was that the gender issue does not arise as the composition of the IEBC was occasioned by voluntary resignations of four commissioners, among them women. The respondents argued that it cannot therefore be said that the appointing body did not comply with the two-third gender principle during the recruitment and maintained that the remaining commissioners should not be victimized on account of the resignations. The respondents maintained that under Section 7(3) of the IEBC Act, the Commission remains properly constituted notwithstanding a vacancy in its membership.

Article 27 of the Constitution provides that;

27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

27(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

27(8) 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 appointed bodies shall be of the same gender.

22. The Supreme Court of Kenya considered the two-third gender principle in the context of the composition of the membership of the Judicial Service Commission (JSC) in **Advisory Opinion No. 2 of 2012 In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate [2012]eKLR** wherein the learned justices, upon noting that the said commission had both elected and appointed commissioners, pointed out that the two-third gender rule was immediately realizable in the context of the JSC because of the appointive slots, such that the JSC would always have three women members out of eleven which falls short of the two-third rule. The Judges however noted that Article 27(8) of the Constitution bestows upon the State the responsibility to take *further action* to enable the attainment of the two-third gender rule so that the number of women would rise from three to at least four, which meets the two-third threshold. This being the case, the learned Justices termed the realization of the three female members of the JSC is immediate but the attainment of the four members is progressive. The Court emphasized that whether a right is to be realized progressively or immediately is not a self-evident question but is dependent on factors such as language used in the normative safeguard, or in the expression of principle, the mechanisms provided for attainment of gender equity, the nature of the right in question, the mode of constitution of the public body in question among other factors.

23. In the present case, it is not disputed that the composition of the Commission, before the resignation of the four commissioners, had complied with the two-third gender principle; hence the appointing body cannot be faulted in that regard. The issue of the two-third gender rule has been raised by the petitioner following the resignation of the four commissioners and my finding is that the wording of the Constitution at Article 27(8) is that the two third gender principle needs to be observed during the election or appointment process, in which case, I find that the petitioner ought to hold his horses and raise the gender issue during the recruitment of the new commissioners to fill in the vacant positions created by the resignations. It is therefore my finding that raising of the issue of the two- third gender rule, in the circumstances of this case, is misplaced. My finding that the two-third gender principle is only applicable during the recruitment process is bolstered by the provisions of Paragraph 5 of the 1st Schedule of the IEBC Act which stipulates that:

“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.”

Vacancy in the Commission

24. The petitioner stated that the Commission is currently not properly constituted on account of the vacancies created by the resignation of the four commissioners which has reduced its numbers to three contrary to the requirement, under Paragraph 5 of the Second Schedule of the Act that the quorum for the conducting of the business of the Commission be a total of 5 commissioners. The 1st respondent's case, on the other hand, was that the Commission cannot be said to be improperly constituted by the mere fact that there are vacancies.

25. Even though the issue of whether or not there are vacancies in the Commission was not contested by the parties, this court is still minded to consider the provisions of the law on how a vacancy may occur in the Commission and determine whether, on the facts presented before this court, it can be said that indeed vacancies were created following the alleged resignation of some of the commissioners. In support of his claim on the alleged resignations, the petitioner attached a signed copy of Ms. Roselyn Akombe's press statement (marked "IBK-2") and a copy of an unsigned joint statement of resignation by the other three Commissioners (marked "IBK-3").

Section 7A of the IEBC Act provides as follows on vacancy in the Commission;

7A. Vacancy in the office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

(a) Dies;

(b) Resigns from office by notice in writing addressed to the President; or

(c) Is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

26. A reading of Section 7A (1) (b) of the Act clearly shows that ***resignation is by notice in writing to the President***. Other than a copy of the press statement released by Ms. Roselyn Akombe and a copy of an unsigned joint resignation statement by her three colleagues, there was no other tangible evidence placed before this Court to demonstrate that there were vacancies created, through resignation, as is envisaged under Section 7A (1) (b) so as to enable me arrive at the conclusion that there are indeed, vacancies in the commission as alleged by the petitioner. My take is that the commissioners who issued the press statements regarding their alleged resignations were fully aware of the provisions of Section 7A (2) and (3) which provides for the steps that follow their resignation regarding the publishing of the occurrence of a vacancy and the immediate recruitment of the new commissioners.

Section 7A (2) provides;

(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.

Section 7A (3) provides;

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

27. In the instant case, no evidence been presented before this Court to show that the President has published a notice of vacancy as dictated by **Section 7A (2)**. Section 7A (3) clearly states that the recruitment of a new chairperson or member can only commence after the declaration of vacancy by the President under subsection (2). From the above provision, one can say that the Act contemplated that vacancies could occur due to resignations and gave clear provisions on what action was to be taken by the appointing authority to facilitate the recruitment of new commissioners. Clearly therefore, the mere fact that there are vacancies in the commission does not mean that the Commission becomes unconstitutional and by extension, the mere fact that the appointing authority has not initiated the process of recruiting new commissioners does not mean that the commission as presently constituted, is not constitutional. Considering that the Commission still meets the minimum threshold of three members as envisaged under Article 250(1) of the Constitution.

28. From a legal standpoint therefore, and in light of the clear provisions on how a vacancy may be created in the commission, this court is unable hold that there is any vacancy in the Commission following the alleged resignations communicated through the press statements. My finding is that if indeed, the lawmakers intended that a vacancy, through resignation, may be communicated through any other means other than a letter addressed to the President, then the Act would have explicitly stated as much. Perhaps this case will serve as a wake-up call to lawmakers to reconsider the provisions relating to the resignations by commissioners with a view to plugging the gaps therein so as deal with the stalemate that is currently existing at the commission as a result of the commissioners opting to tender their resignations through the press instead of a letter addressed to the President as is required by the law.

29. Be that as it may, this court takes judicial notice of the fact that the issue of the resignation of the four commissioners, albeit without complying with the law on resignations, is an issue that has been in the public domain for some time now and is a matter that the court cannot ignore in determining the merits of this petition. The lingering question is whether the commission can be said to be improperly constituted purely on account of resignation of some of its commissioners. Section 7(3) of the Act provides that the Commission shall be properly constituted notwithstanding a vacancy. This position is confirmed by the provisions of Section 7A (4), (5) and (6) which stipulate as follows:

Section 7A

(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

30. My finding is that the occurrence of a vacancy in the commission does not invalidate the composition of the commission and it is for this reason that the lawmakers enacted clear provisions regarding the prompt replacement of commissioners upon the resignation of any one of them.

Paragraph 5 of the 2nd Schedule of the IEBC Act

31. Is Paragraph 5 of the 2nd Schedule of the IEBC Act unconstitutional for offending Article 250(1) and Article 248(2) (c) of the Constitution" The said paragraph provides that;

"The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission."

Article 250 (1), on the other hand, provides that; *"each commission shall consist of at least three but not more than nine members."*

Article 248 (2) (c) lists the IEBC as one of the said commissions.

32. In determining the constitutionality of the impugned provisions, the rules of constitutional interpretation come into focus by providing guidelines on the manner of interpretation.

33. On the interpretation of the Constitution, the Constitution itself at Article 259 (1) lays down the principles that Courts must bear in mind and that must permeate the process of constitutional interpretation. Article 259(1) provides that **(1) This Constitution shall be interpreted in a manner that - (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.**

34. Under Article 159 (2) (e) of the Constitution this court is mandated to protect and promote the purposes and principles of the constitution. Through numerous judicial pronouncements, various courts have over the years developed principles of constitutional interpretation some of which I will highlight as follows:

In **Paul Ssemogerere and Others vs. The Attorney General Constitutional Appeal no. 1 of 2002) [2004] UGSC10** it was held that:

“it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole.”

In the case of Smith Dakota vs. North Carolina 192 US 268(1940) the Supreme Court of the United States pronounced itself thus:

“It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.”

The above decision also held sway in the case of Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC the Constitutional Court put it thus;

“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”

35. The Court of Appeal of Tanzania concurred with this view in the case of Attorney General of Tanzania v Rev. Christopher Mtikila [2010] EA 13 where it observed that the principle of harmony requires that the entire Constitution be read as one entity.

36. The Supreme Court also advocated a holistic interpretation of the Constitution In the Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012) where it stated;

(a) *“But what is meant by a holistic interpretation of the Constitution” It must mean interpreting the Constitution in context. It is 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 in each other, so as to arrive at a desired result.”*

In State v Acheson 1991 20 SA SOS it was stated that:

(b) *“The Constitution of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the 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”

In the case of Njoya & 6 Others v Attorney General & another [2004] eKLR the Court stated;

(c) “Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”

37. Courts have also held that there is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved. This assumption is based on the fact that as peoples’ representative, parliament usually enacts laws to serve people and therefore understands the problems that the laws are intended to solve. This was the view enunciated in the case of Hambardda Dawakhana v Union of India Air (1960) AIR 554, where the Supreme Court of India stated;

(1) “In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.”

38. It was stated in the case of Ndyanabo v Attorney General of Tanzania [2001] EA 495, the burden is on the person alleging that a statute is unconstitutional to prove the unconstitutionality or invalidity.

In Ng Ka Ling & Another v The Director of Immigration (1999) 1 HKLRD 315, the Court stated;

(a) “It is generally accepted that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text

in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”

39. Applying the above principles to the instant case, I will now consider whether the impugned provisions of the IEBC Act go against Articles of the Constitution as the petitioner had contended. In doing so, I am alive to the fact that the duty of the court is only to juxtapose the article of the constitution with the statute challenged and declare whether the legislation is in accordance with or in contravention of the Constitution as the Court should neither approve nor condemn a legislation. (See **US v Butler 297 US 1[1936]**).

40. As a starting point, I note that the IEBC Act is a creature of the Constitution. Article 88 of the Constitution establishes the IEBC and provides under Clause 5 that the Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation, in which case the legislation in question is the IEBC Act among other laws governing elections. In my humble opinion the provision under Article 250(1) for a minimum of three members of the commission and a maximum of nine members shows that the framers of the Constitution gave the appointing authority the latitude to appoint number of commissioners as long as they did not exceed nine or go below three members.

41. In this case, the number of the commissioners was reduced following resignations and as I have already found in this judgment, the mere fact that some commissioners have resigned does not invalidate the composition of the commission. All that the reduction of the numbers does is to limit the operations of the commission especially in respect to raising the quorum required for the meetings.

42. Turning to the issue of the quorum of the commission as stated in Paragraph 5 of the second schedule of the IEBC Act, it is noteworthy that the issue of the quorum of the commission only arises during the conduct of the business of the commission. My humble view is that the issue of the quorum of the commission, even though tied to the commission's membership, is not per se an issue that should lead to a declaration that the commission is improperly constituted as quorum will only be the subject of a challenge if the policy decisions of the commission are made without the requisite quorum.

43. In the instant case, the petitioner prays, inter alia, for a declaration that the commission is illegal and unconstitutional for lack of quorum as a result of the resignations. As I have already found in this judgment, the issue of the alleged resignation of the four commissioner was an issue that was neither here nor there and was not proved by any tangible evidence.

Black's Law Dictionary (10th Edition) defines quorum as ***“the smallest number of people who must be present at a meeting so that official decisions can be made”***

In the case of **Katiba Institute & 4 Others vs. The Attorney General & 2 Others [2018] eKLR**, Mwita J. pronounced himself on the issue of the quorum of the commission as follows:

a. "Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five" The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed.

45. It is worth noting that in the instant case, the lack of quorum has been occasioned by vacancies in the commission which vacancies cannot be attributed to the fault of the remaining commissioners or the Commission so as to warrant the issuance of a declaration that the Commission is not properly constituted. In any event, the vacancies ought to have been addressed through the immediate recruitment of new commissioners as I have already found in this judgment.

46. In the present case, the petitioner argued that the current composition of the commission is unlawful and it cannot supervise the by-elections that are slated for 17th August 2018. My finding is that the conduct of elections or by-elections is not a matter that arises out of the resolutions or decisions made by the commissioners at a meeting of the commission but are dictated by the operation of the law following the

declaration of vacancies by the speakers in the elective positions that are the subject of the elections or by-elections. Section 16 of the Elections Act stipulates as follows:

Parliamentary elections

16. (1) Whenever a parliamentary election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of the general election; or

(b) in any other case, upon the office of a Member of Parliament becoming vacant and on receipt of a notice issued by the respective Speaker under subsection (2).

(2) The notice referred to under subsection (1) shall be in the prescribed form and shall specify—

a. the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;

b. the day for the nomination of candidates for the parliamentary election; and

c. the day or days on which the poll shall be taken for the day specified for nomination under paragraph (b)

(3) Whenever a vacancy occurs in the National Assembly or the Senate, the respective Speaker shall issue a notice in accordance with Article 101 of the Constitution.

(4) The Commission shall within twenty one days of receipt of the notice issued under subsection (2), transmit the notice to the relevant returning officer.

A similar provision to the above section is contained in Section 19 of the Election Act in respect to vacancies in the office of the Member of County Assembly (MCA).

47. From the above provisions, it is clear that the Commission does not act on its own motion through board room decision in determining that an election is to be conducted or that a vacancy has occurred in the National Assembly, but acts only act upon receiving a notice, of such a vacancy, from the Speaker.

48. Having considered the petition, the Constitution and the law and having regard to my findings and observations in this judgment, I find that the instant petition lacks merit and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 10th day of August 2018.

W. A. OKWANY

JUDGE

In the presence of

Mr Hussein for Awuor for the 1st respondent

Miss Chibole for the 2nd respondent

Mr Ochieng Oginga for the petitioner

Court Assistant -Kombo



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INTER-RELIGIOUS COUNCIL *of* KENYA

P.O Box 6352, 00200 Nairobi, Kenya Tel: 3877791, 3872070 Fax : 3861397
Email: info@interreligiouscouncil.or.ke, www.interreligiouscouncil.or.ke

**MEMORANDUM PRESENTED TO THE CLERK OF THE
NATIONAL ASSEMBLY ON ISSUES OF INTEREST IN THE IEBC
(AMENDMENT) BILL 2024 CURRENTLY IN THE NATIONAL
ASSEMBLY**

16th APRIL 2024

**SUBMITTED
BY**

**INTER-RELIGIOUS COUNCIL OF
KENYA**

16TH APRIL 2024

To
The Clerk
The National Assembly
Parliament Buildings
Nairobi, Kenya.

Dear Mr. Samuel Njoroge,

RE: Memorandum on the Independent Electoral and Boundaries Commission (Amendment) Bill, 2024.

The Inter-Religious Council of Kenya (IRCK), on the basis of the sanctity of public participation as a cardinal value of governance in Kenya, submits this memorandum for consideration by parliament. IRCK was established as a society in 2005. It is a national coalition of all major faith communities (Christian, Hindu, and Muslim) in Kenya that works together to deepen interfaith dialogue and collaboration among members for a common endeavour to mobilize the unique moral and social resources of religious people and address shared concerns.

Being a membership organization, the IRCK works through umbrella bodies known as Religious Coordinating Bodies (RCBs) which have a presence in all the 47 counties in Kenya. The Council has facilitated the formation of Interfaith Networks in all 47 counties that comprise members of the clergy as well as youth and women leaders for local-level advocacy and implementation of programmatic interventions.

The Council endeavours to fulfill the ***Vision “Faith communities living in peace; united in social economic action in Kenya”***, being guided by the ***Mission: “To promote a just society in Kenya through social economic transformation”***.

Since the advent of multiparty democracy in Kenya, electoral reforms have perpetually attracted critical interest, enticed intense multisector debates, and unavoidably viewed through lenses of mistrust in contemporary Kenya. Presidential elections in Kenya, since 2013 under the Constitution of Kenya (2010) have remained hotly contested, and the role of IEBC as a crucial constitutional commission with the sole mandate of

managing elections from the front has been highly scrutinized, some approaches challenged, and most recently, the conduct of some commissioners being questioned.

Technological imperatives, recruitment of commissioners, and the dynamics in electoral malpractices have kept issues around election management a matter of critical public interest.

No doubt, IRCK unequivocally holds that its quest to promote the Rule of Law and Democracy in Kenya necessitates advocating for reforms that will ensure the conduct of free, fair, and credible elections by the Elections Management Body (EMB) known as IEBC, and that such is central to the survival of progressive democracy in Kenya.

Central to this is public confidence in IEBC, and the need for political non-interference in how IEBC carries out its work. This non-interference must be seen before, during, and after elections.

Particularly of note is that elections and their management are a public interest matter, and must be an inclusive process, not consigned to political players.

It is in this breadth that IRCK and its membership proffer this memorandum to the National Assembly for consideration, as hereunder;

Whereas via the Gazette Notice No. 2641 Dated 27th February 2023, whereby the President and Commander-in-Chief of the Kenya Defense Forces H.E. Dr. William Samoei Ruto, PhD, C.G.H., appointed the members of the Selection Panel for the Recruitment of Nominees for Appointment as the Chairperson and Members of the Independent Electoral and Boundaries Commission (IEBC), and further on 2nd March 2023, took an Oath of Office at the Supreme Court, before the Chief Justice of Kenya Hon. Lady Justice Martha Karambu Koome.

Whereas noting that dutifully the panel has discharged its role up and including the advertising of vacancies for the position of the chairperson and six members of the IEBC: receiving of applications and processing to the same to an advanced level.

Appreciating the political processes to resolve some of the electoral processes arising from the contestations around elections including the bi-partisan parliamentary committee and also the formation of the National Dialogue Committee (NADCO) by parliamentary resolution of National Assembly on 16th, August 2023 and passed in the Senate on 29th, August 2023.

And further **cognizant** of the attendant reports arising from the NADCO team including its adoption by the Senate on the 21st of February 2024 and the National Assembly on the 22nd of February 2024.

Recognising the legislative proposals arising from these reports including the IEBC (Amendment) Bill 2024 that was published on 4th March 2024 and received in the

National Assembly on 5th March for the purpose of debate and due process for law making.

Underscores that the said Bill, IEBC (Amendment) Bill 2024, has substantive implications for the established IEBC Selection Panel.

Thus, hereby in response, would wish to present the memorandum in keeping with the advertisement in the national dailies on the 8th of March requesting proposals in the form of memoranda.

The memorandum is presented in good faith and in recognition of the need to safeguard the interests and constitutional rights of the panel members and preserve the institutional integrity of the nominating bodies as well as enhancing accountability and the fidelity of processes for posterity.

Outline of key Concerns:

Bill	Descriptions of Amends	Concerns/ Issues	Remarks
The Independent Electoral and Boundaries Commission (Amendment) Bill, 2024	Some of the proposals in this Bill include: Proposal to amend the Independent Electoral and Boundaries Commission Act No. 9 of 2011 by deleting provisions deemed obsolete such as section 7A subsections 4,5 and 6 that were held to be unconstitutional by the High Court. Proposal to amend section 6 of the Act and include experience in accounting or ICT as additional professional qualifications for appointment as a member of the IEBC. Proposal to replace the current Fifth Schedule with a	We are in support of the proposals for amendment of Section 2 of No. 9 of 2011 except to avoid a lacuna in the event of a vacancy in the office of the Chairman, the Vice Chair has to have the same qualifications as the chair. This is to ensure competence and capacity in the vice chair just as much as it is expected of the chair.	

	new and updated schedule. Proposal to amend section 10 of the principal act to provide that the term of the secretary to the commission shall be three years, renewable once. Proposal to amend section 12 of the principal act and provide that the commission shall, after every general election, review its operations and make necessary changes required to make its operations more efficient. Proposal to amend the First Schedule to the Act to increase the number of members of the selection panel from 7 to 9 to accommodate a wide spectrum of stakeholders and interest groups. Proposal to amend the Second Schedule to the Act and provide for the quorum of the commission.	Additional qualifications are not mandatory, other than the fact that it would be necessary for the vice chair of IEBC to hold such qualifications not at variance with those of the chair, for the reasons stated above. (NB: The chair is to hold such qualifications as a judge of the Supreme Court).	
IEBC AMENDMENT BILL 2024 (Transitional Clause)	The selection panel existing immediately at the commencement of this Act ceases to exist, but a person who served as a member of that selection panel may be nominated to serve as a member of the selection panel	Kenyans through submissions wanted an expanded selection panel as reflected in the proposed Amendment of the First	We welcome the proposal to expand the selection panel through the Amendment of the First Schedule to No.

	appointed under this Act.	Schedule to No. 9 of 2011. In our considered opinion, it is prudent not to discard the work already done by the current selection panel. In the spirit of prudent use of public finances, the panel should be allowed to execute its mandate, or if need be, have its mandate renewed, with additional panel members added. Further, the capacity of the members of the current selection panel is not at issue, neither has any citizen petitioned parliament to depict any as unmerited.	9 of 2011. Consider the current panel finishing its work and let the new law take effect for the successive panels. We propose that the transitional clause be amended or deleted for the reasons stated above. The selection panel existing immediately at the commencement of this Act ceases to exist but a person who served as a member of that selection panel may be nominated to serve as a member of the selection panel appointed under this ACT... be deleted and the be stated as
--	----------------------------------	---	---

			follows. The existing Selection Panel at the commencement of this act shall finalise their work and subsequent panels shall be established in accordance with this act.
--	--	--	---

Signed and submitted on behalf of the Inter-Religious Council of Kenya on 16th April 2024.

Signed:

Abdirahman Ismail

Abdirahman Ismail, OGW
Executive Director
Inter-Religious Council of Kenya



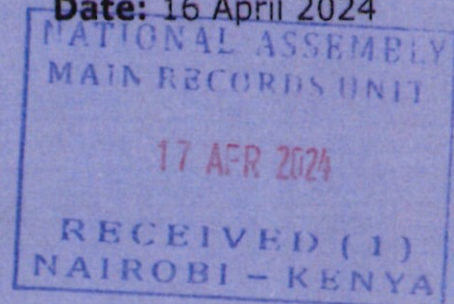
Our Ref: JUD/CRJ/23.2

Your Ref: NA/DDC/JLAC/2024/60

Samuel Njoroge, CBS
Clerk of the National Assembly
Clerk's Chambers
Parliament Buildings
P. O. Box 41842- 00100

NAIROBI

Date: 16 April 2024



**RE: INVITATION BY JLAC TO GIVE VIEWS ON THE INDEPENDENT
ELECTORAL & BOUNDARIES COMMISSION (AMENDMENT) BILL,
2024 (NATIONAL ASSEMBLY BILLS NO. 10 OF 2024)**

We acknowledge receipt of your letter Ref: NA/DDC/JLAC/2024/60 dated 11th April 2024 on the above subject.

We have reviewed the contents of the Independent Electoral & Boundaries Commission (Amendment) Bill, 2024 whose objective is to give effect to some of the recommendations and views submitted by the public during the national dialogue discourse, and to make amendments necessitated by the decision of the High Court in *Katiba Institute & 3 Others v Attorney General & 2 Others [2018] eKLR*.

We laud Parliament's efforts to amend the law to incorporate proposals that came out of the national dialogue process and the decision of the High Court in *Katiba Institute & 3 Others v Attorney General & 2 Others [2018] eKLR* and write to draw the attention of the Justice & Legal Affairs Committee to additional legislative reforms proposed by the Supreme Court in its determination of the petitions lodged in the aftermath of the 2022 presidential election.

Upon consideration of the evidence adduced in the consolidated petitions, the Supreme Court concluded that there were institutional dysfunctionalities undermining the optimal functioning of IEBC and called for urgent legal, policy and institutional reforms to address the glaring shortcomings within the Commission.

More specifically, the Supreme Court recommended that:

- a. Parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of IEBC.
- b. IEBC ought to effect formal internal guidelines that clearly delineate the policy, strategy, and oversight responsibility of the Chairperson and the Commissioners; and develop institutionalized guidelines on how to manage the separation of administrative and policy domains.





- c. The roles of the Chairperson, Commissioners, and the Chief Executive Officer, other staff and third parties should be clearly set out in both the legislative and administrative edicts as stipulated above.

In its decision aforesaid, the Supreme also declared that "to the extent that Regulation 87 (3) of the Elections (General) Regulations, 2012 purports to vest the power of verifying and tallying Presidential Election results, as received at the NTC, solely on the Chairperson to the exclusion of other members of the Commission, the same is contrary to and inconsistent with the provisions of the Constitution."

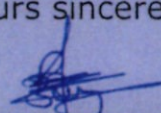
We have noted that the Independent Electoral & Boundaries Commission (Amendment) Bill, 2024 does not seem to address the separate policy and administrative remit of the electoral Commission, nor does it make any proposals on the clarity of the roles of the Chairperson, Commissioners, CEO and staff of the Commission as recommended by the Supreme Court.

We therefore call on Parliament to develop further legislative reform proposals in line with the observations and recommendations of the Supreme Court which noted that the evidence before the Court "point[ed] to a serious malaise in the governance of an institution entrusted with one of the monumental tasks of midwifing our democracy."

The decision of the Supreme Court is attached herewith for ease of reference.

We thank you for the opportunity to submit these comments on the Bill and hope that the Justice & Legal Affairs Committee will find them useful in its deliberations.

Yours sincerely,


WINFRIDAH B. MOKAYA
CHIEF REGISTRAR OF THE JUDICIARY

wmb/ko

Copy To: Chief Justice & President,
Supreme Court of Kenya
Supreme Court Building
Nairobi

Deputy Chief Justice & Vice President,
Supreme Court of Kenya
Supreme Court Building

Chairperson,
Judiciary Committee on Elections
Supreme Court Building



Article stipulates the requisite procedures and processes as well as the proper fora for adjudication of such matters.

[306] In the same vein, a prayer to declare the Chairperson in breach of Article 73 of the Constitution as sought by the 2nd and 3rd petitioners cannot be made in a Presidential Election Petition.

[307] The Attorney General's plea to us to dismiss the Chairperson's allegation that the National Security Advisory Council (NSAC) attempted to subvert the will of the people must meet the same fate as the prayers by the 2nd and 3rd petitioners. The Court is exercising in this consolidated Petition its exclusive original jurisdiction under Article 163 (3) (a) of the Constitution. Consequently, the Court is unable to make any definitive findings or issue any Orders on the matters raised.

[308] The Court can however make recommendations or observations, or structural interdicts besides giving advisory opinion under Article 163(6) of the Constitution. Indeed, since 2013, this Court has issued many recommendations arising from the determination of the past three Presidential Petitions. From this cause, we recommend and observe as follows:

D. RECOMMENDATIONS

(i) IEBC

[309] On the basis of the pleadings and submissions in this consolidated Petition, the Court retains a constitutional obligation to point out the institutional dysfunctionality undermining the optimal functioning of IEBC. It is clear to us that there are legal, policy and institutional reforms that are urgently required to address the glaring shortcomings within IEBC. We therefore recommend as follows:

(a) On corporate governance issues

1. Parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of IEBC.
2. IEBC ought to effect formal internal guidelines that clearly delineate the policy, strategy, and oversight responsibility of the Chairperson and the Commissioners; and develop institutionalized guidelines on how to manage the separation of administrative and policy domains.
3. The roles of the Chairperson, Commissioners, and the Chief Executive Officer, other staff and third parties should be clearly set out in both the legislative and administrative edicts as stipulated above.

(b) On election technology

4. To avoid suspicion from stakeholders, unless where and when it is absolutely necessary, access to the servers supporting the transmission and storage of Forms 34A, 34B and 34C should be restricted to IEBC staff during the election period.
5. IEBC should ensure that the servers supporting the elections and those serving their internal administrative work are distinct and separate. This would then allow the Court, should the need arise, to carry out forensic imaging of the same

without compromising and/or infringing any third-party agreements.

(c) On statutory Forms

6. IEBC may consider simplifying and restructuring the Form 34A and include a column that accounts for stray ballots. In addition, it may consider having only one section for total valid votes. The independent body may also find it prudent to thoroughly train its Returning Officers as to what constitutes valid votes per this Court's decision.
7. IEBC ought to put in place specific mechanisms to allow for special voting as contemplated under Regulation 90 of the Elections (General) Regulations 2012.

(ii) Constitutional Reforms

[310] We are constrained to revisit the recommendation we made in ***Raila Amolo Odinga & Another v. IEBC & 2 Others***, SC Petition Presidential Petition No. 1 of 2017; [2017] eKLR regarding the need to extend the constitutional timeline, within which to hear and determine a Presidential Election Petition. At paragraph 403 of the Judgment, this Court underscored the need to extend the fourteen-day limit, for purposes of efficient case management by the Court, and also, to afford the parties sufficient time to ventilate their cases. We hereby make a similar recommendation.

(iii) Conduct of the Proceedings Before the Supreme Court

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and Date



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NAIROBI, KENYA

17th April, 2024

The Clerk of National Assembly
Clerk's Chambers
National Assembly
Parliament Building
P.O. Box 41842 -00100
NAIROBI

(Attn: Mr. Jeremiah W. Ndombi, MBS)

Dear *Jerem*,

RE: INVITATION TO SUBMIT VIEWS ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024 (NATIONAL ASSEMBLY BILL NO. 10 OF 2024) CO-SPONSORED BY HON. KIMANI ICHUNG'WAH, EGH, MP AND HON. OPIYO WANDANYI, MP

Your letter Ref. NA/DDC/JLAC/2024/60 dated 11th APRIL, 2024 refers.

The Kenya Law Reform Commission has analyzed the proposals and makes the following comments:

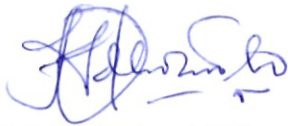
	CLAUSE	KLRC PROPOSAL	RATIONALE
1.	Clause 1: Short title	None	Standard provision
2.	Clause 2: Amendm	a) Definition "chairperson"	of by The amendments are in line with the ruling of the Constitutional Petition

	ent of section 2	deleting the words “or the vice-chairperson or a member of the Commission when discharging the functions of the chairperson” b) Read together with the proposed amendments to Section 7A and paragraphs (5) and (7) of the Second Schedule, the implication is that the chairperson cannot designate a member as a temporary chairperson: Amending the quorum of the Commission from half the number of commissioners to “five”	No. 548 of 2017: <i>Katiba Institute and 3 Others V. Attorney General and 2 Others</i> which declared the definition of the term “chairperson” and the provisions on quorum of IEBC to be unconstitutional. The amendments however raise the following issues for deliberation: a) How would the Commission conduct its business, in circumstances where the chairperson is unable by any reason to attend proceedings of the Commission? (Note section 7 provides that the Commission shall be properly constituted notwithstanding a vacancy. Section 7B which provided that in the absence of the chairperson the vice chairperson was to act as the chairperson was declared unconstitutional. A vacancy may occur by reason of death, resignation or removal). b) In the event that the membership of the Commission drops to below five, no business can be transacted by the Commission.
3.	Clauses 7 and 10	It is proposed that section 36 of the Act be deleted and substituted with a new Part to be titled: “Part III- Delimitation of Boundaries and Electoral Units” The proposed contents of the Fifth Schedule should form the substantive provisions of this new Part.	By virtue of section 36 of Act No. 9 of 2011, the Fifth Schedule lapsed upon the publication of the final report of the delimitation of electoral boundaries. The Schedule is therefore The Fifth Schedule only dealt with delimitation of boundaries during first review. Subsection (2) of the Section 36 provided that “<i>This section shall lapse upon the gazettelement of the final report in accordance with the Fifth Schedule</i>” The report was gazetted in 2012 and therefore section 36 and the

			Fifth Schedule lapsed ceased to have any effect. The Election Laws Amendment Act, (No 1 of 2017) introduced a new section 36 which contained some procedures for delimitation of electoral units. The procedures however are not detailed enough and contain many gaps and are not deemed sufficient hence the need to pride a more detailed procedure for the delimitation of electoral boundaries in Kenya. The Section did not re-introduce the Fifth Schedule. The Schedule was neither re-introduced by any of the successive amendments to the IEBC Act. This Bill therefore cannot purport to amend what does nor exist. KLRC therefore recommends that what is proposed as the contents of the Fifth Schedule be converted into a new Part of the IEBC Act to be titled: "Part III- Delimitation of Boundaries and Electoral Units"
4.	Other clauses	Deletion of obsolete provisions. Expansion of relevant professional qualifications for the chairperson to include information and communication technology. Term of office of the Secretary/CEO IEBC Selection panel for the IEBC	It is proper to delete obsolete provisions of the Act. Consider using a more inclusive term e.g. "any other relevant field" Similar offices in other Constitutional Commissions provide for a term of five years. Increasing the spectrum of the selection panel for IEBC from 7 to 9 is a policy issue and promotes wider participation.

We thank you for your continued support and cooperation.

Yours *Sincerely,*



Joash Dache, MBS

SECRETARY/CEO

Copy to:

Hon. Winfridah Boyani Mokaya
Chief Registrar of the Judiciary of Kenya/Secretary
Judicial Service Commission
Supreme Court Building
NAIROBI

Mr. Marjan Hussein Marjan
Secretary/Chief Executive Officer
Independent Electoral and Boundaries Commission
Anniversary Towers, 6th Floor, University Way,
NAIROBI

Ms. Anne Njeri Nderitu, CBS
Registrar of Political Parties
Office of the Registrar of Political Parties
Lions Place, 1st Floor
Karuna Close, Waiyaki Way Westlands,
NAIROBI

Hon. Shadrack Mose
Solicitor-General
The State Law Office and Department of Justice
Sheria House, Harambee Avenue
NAIROBI



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② DD C
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18/4/24



Lion Place, 1st & 4th Floor
Off Waiyaki Way
P.O. Box 1131-00606
Sarit Centre, Nairobi.

Ref: RPP/FRP/34 Vol. VII (63)

Date: 16th April, 2024

Clerk of the National Assembly
Clerk's Chambers
National Assembly, Parliament Buildings
P.O. Box 41842-00100
NAIROBI

Dear Sir,

RE: MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024

Reference is made to the above subject matter.

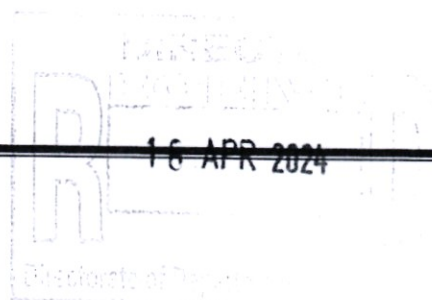
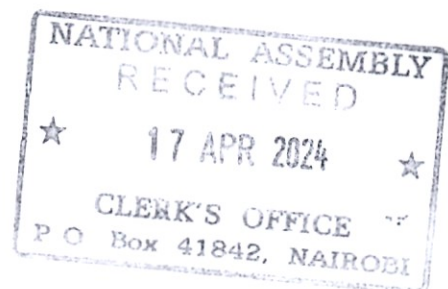
This Office acknowledges receipt of your letter dated 11th April 2024 and the attachment thereto calling for submission of views on the Independent Electoral and Boundaries Commission (Amendment) Bill, 2024 (IEBC Bill).

Annexed herewith is a signed memorandum of the Office of the Registrar of Political Parties on the IEBC Bill.

Yours faithfully,

Ann N. Nderitu, CBS
Registrar of Political Parties/CEO

Copy to: Office of the Attorney General
State Law Office and Department of Justice
Sheria House, Harambee Avenue
P.O. Box 40112 – 00100
NAIROBI





ORPP MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024

1. Pursuant to Article 118(1) (b) of the Constitution, the National Assembly called for submission of memoranda on the Independent Electoral and Boundaries Commission (Amendment) Bill, 2024 by April 16th, 2024.
2. The Office of the Registrar of Political Parties (ORPP) is established under Section 33 of the Political Parties Act, 2011 as an independent State Office within the meaning of Article 260 of the Constitution. Its mandate includes registration and regulation of political parties as well as administration of the Political Parties Fund.
3. The elements of the ORPP views are as captured herein below:

No.	CLAUSE	REMARKS/RECOMMENDATIONS
1.	Clause 2 of the Bill provides for the interpretation of terms/phrases.	Parliament should consider defining the term parliamentary party which has been used under clause 8 with respect to the selection panel; there is need for clarity as to what a parliamentary party means. It is worth noting that while the National Assembly Standing Orders under Paragraph 20A provide, <i>inter alia</i>, that a parliamentary party is a party or a coalition of parties that consist of not less than five percent of the membership of the National Assembly, the Standing Orders cannot be used to interpret Statutory terms. Further, in common parlance, a parliamentary party would mean a party which has representation in parliament. Parliament should consider defining the term/phrase electoral unit(s) which is used under clause 10 of the IEBC Bill.

2.	Clause 5 of the Bill provides for the term of office of the IECB CEO as 3 years on an optional renewable basis.	Parliament should consider enlarging the term of the CEO to 5 years as this would enhance the job security of the CEO and thereby independence of mind when performing functions. Further, considering the mandate of IECB on elections, boundary delimitation, and referenda, there is a lot of preparatory work that the CEO is required to undertake.
3.	Clause 8 of the IECB Bill covers the selection panel.	Parliament should consider recrafting clause 8 (e) (2C) with respect to the Parliamentary Service Commission and the Inter-Religious Council of Kenya in plain terms that where a nominating body is required to nominate two persons, the two persons shall be one man and one woman. This is not synonymous to, as it currently is in the bill, that the nominating bodies should ensure that not more than two-thirds of the nominees are of the same gender. Clause 8 (b) stipulates the criteria of appointment of representatives by the Political Parties Liaison Committee. It is to be noted that, under Section 38 of the Political Parties Act, 2011, PPLC comprises IECB, ORPP, and all political parties. Parliament should consider recrafting the provision to illustrate that the nominating body are political parties within PPLC.
4.	Clause 10 provides for the proposed Fifth Schedule which contains procedures for the delimitation of electoral units.	Parliament should consider:- Paragraph 7 of the proposed Fifth Schedule on public hearings should contain a provision for Persons with Disabilities with a focus on sign language and access to the venue of public hearings. Paragraph 8(2) of the proposed Fifth Schedule on preparation of a revised report should have a requirement for the Commission to illustrate how the views from the public have been considered/included with reasons thereof. Paragraph 10(1) of the proposed Fifth Schedule provides that a person may apply to the High Court for review of a decision of the Commission on the delimitation of electoral boundaries; the legal standing is relatively pronounced. Parliament may consider qualifying the legal standing, with necessary modifications, to the interested parties under Paragraph 1(b) of the proposed Fifth Schedule.

5	Clause 11 provides for transitional provisions.	There is no transition and or savings clauses for the current Secretary to the IEBC given that term of office has been revised from five years to three years. It is noted that in line with clause 1 of the IEBC Bill, the IEBC Act, 2024 is supposed to come into force upon publication in the Gazette. While the Interpretation and General Provisions Act under Section 25 provides that where one written law amends another written law, the amending written law shall, so far as it is consistent with the tenor thereof, and unless a contrary intention appears, be construed as one with the amended written law, it is key for clarity purposes for the Bill to contain transition clauses or clarity with regard to computing the term of the Secretary to the Commission.
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ANN N. NDERITU, CBS
 REGISTRAR OF POLITICAL PARTIES
OFFICE OF THE REGISTRAR OF POLITICAL PARTIES



REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT- THIRD SESSION (2024)
THE NATIONAL ASSEMBLY

IN THE MATTER OF ARTICLE 118(1) (b) OF THE CONSTITUTION
AND
IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY OF-

1. THE UNIVERSITIES (AMENDMENT) (NO. 5) BILL (NATIONAL ASSEMBLY BILL NO. 79 OF 2023);
2. THE PUBLIC AUDIT (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 3 OF 2024);
3. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 10 OF 2024);
4. THE AGRICULTURAL AND LIVESTOCK EXTENSION SERVICES BILL (SENATE BILL NO. 12 OF 2022);
5. THE MUNG BEANS BILL (SENATE BILL NO. 13 OF 2022);
6. THE START-UP BILL (SENATE BILL NO. 14 OF 2022);
7. THE LEARNERS WITH DISABILITIES BILL (SENATE BILL NO. 4 OF 2023);
8. THE PERSONS WITH DISABILITIES BILL (SENATE BILL NO. 7 OF 2023); AND
9. THE KENYAN SIGN LANGUAGE BILL (SENATE BILL NO. 9 OF 2023);

INVITATION TO SUBMIT MEMORANDA

WHEREAS, Article 118(1) (b) of the Constitution requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees and Standing Order 127(3) of the National Assembly Standing Orders requires House Committees considering Bills to facilitate public participation;

AND WHEREAS the Universities (Amendment) (No. 5) Bill (National Assembly Bill No. 79 of 2023); the Public Audit (Amendment) Bill (National Assembly Bill No. 3 of 2024); the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 10 of 2024); the Agricultural and Livestock Extension Services Bill (Senate Bill No. 12 of 2022); the Mung Beans Bill (Senate Bill No. 13 of 2022); the Start-up Bill (Senate Bill No. 14 of 2022); the Learners with Disabilities Bill (Senate Bill No. 4 of 2023); the Persons with Disabilities Bill (Senate Bill No. 7 of 2023); and the Kenyan Sign Language Bill (Senate Bill No. 9 of 2023) have been read a First Time and referred to the relevant Departmental Committees for consideration and reporting to the House;

IT IS NOTIFIED THAT:

1. The Universities (Amendment) (No. 5) Bill (National Assembly Bill No. 79 of 2023) is a Bill sponsored by Hon. Benjamin Gathiru, MP, that seeks to amend the Universities Act, 2012 to limit universities from offering certificate and diploma courses.
2. The Public Audit (Amendment) Bill (National Assembly Bill No. 3 of 2024) is a Bill sponsored by the Leader of the Majority Party, Hon. Kimani Ichung'wah, EGH, MP. The purpose of the Bill is to amend the Public Audit Act, 2015 to align it with the Constitution as per the decision rendered in *Transparency International (TI Kenya) v Attorney General & 2 others* [2018] eKLR declaring sections 4(2), 8, 12, 17(1), 18, 27, 40, 42, and 70 of the Public Audit Act 2015 unconstitutional. The Bill further seeks to update the provisions of the Public Audit Act, 2015 to enhance efficiency in the performance of the Auditor's duties.
3. The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 10 of 2024) is a Bill co-sponsored by the Leader of the Majority Party, Hon. Kimani Ichung'wah, EGH, MP, and the Leader of the Minority Party, the Hon. Opiyo Wandayi, EGH, MP that seeks to give effect to some of the recommendations and views of the public that were submitted during the recent national dialogue discourse facilitated by the National Dialogue Committee (NADCO). The Bill seeks to—
 - (a) amend the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 to increase the membership of the selection panel from seven to nine to accommodate a wide spectrum of stakeholders and interest groups;
 - (b) amend section 6 of the Act to include additional professional qualifications for appointment as a member of the Independent Electoral and Boundaries Commission;
 - (c) amend section 10 of the Act to provide that the secretary of the IEBC shall hold office for a term of three years that is renewable once;
 - (d) replace the current Fifth Schedule to the Act to provide for the procedure for delimitation of boundaries in an updated Schedule; and
 - (e) delete obsolete provisions and make consequential amendments intended to align the Act to the decision of the court in *Katiba Institute & 3 Others v Attorney-General & 2 Others* (2018) eKLR.
4. The Agricultural and Livestock Extension Services Bill (Senate Bill No. 12 of 2022) is a Bill sponsored by Sen. Maureen Tabitha Mutinda, MP that seeks to provide for agricultural and livestock extension services; and to establish the Agricultural and Livestock Extension Service.
5. The Mung Beans Bill (Senate Bill No. 13 of 2022) is a Bill sponsored by Sen. Enoch Kiio Wambua, MP that seeks to provide for the development, regulation and promotion of the mung beans sector.
6. The Start-up Bill (Senate Bill No. 14 of 2022) is a Bill sponsored by Sen. Crystal Asige, MP. The Bill seeks to establish a framework to encourage growth and sustainable technological development, entrepreneurship, employment; create a favourable environment for innovation; and attract Kenyan talent and capital.
7. The Learners with Disabilities Bill (Senate Bill No. 4 of 2023) is a Bill co-sponsored by Sen. Margaret Kamar, MP and Sen. Crystal Asige, MP that seeks to provide a legal framework for the actualization of the right to education for learners with disabilities at all levels of education.
8. The Persons with Disabilities Bill (Senate Bill No. 7 of 2023) is a Bill sponsored by Sen. Crystal Asige, MP that seeks to provide the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities and to provide incentives and reliefs that give effect to Article 54 of the Constitution.
9. The Kenyan Sign Language Bill (Senate Bill No. 9 of 2023) is a Bill sponsored by Sen. Crystal Asige, MP that seeks to give effect to Article 7 (3)(b) of the Constitution on the promotion and development of the use of Kenyan Sign Language. The Bill provides for the inclusion of sign language in the education curriculum and the use of sign language in legal proceedings.

NOW THEREFORE, in compliance with Article 118(1) (b) of the Constitution and Standing Order 127(3) the Clerk of the National Assembly hereby invites the public and stakeholders to submit memoranda on the Bills to the respective Departmental Committees listed below—

NO.	BILL	COMMITTEE
1.	The Universities (Amendment) (No. 5) Bill (National Assembly Bill No. 79 of 2023)	Education
2.	The Public Audit (Amendment) Bill (National Assembly Bill No. 3 of 2024)	Finance and National Planning
3.	The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 10 of 2024)	Justice and Legal Affairs
4.	The Agricultural and Livestock Extension Services Bill (Senate Bill No. 12 of 2022)	Agriculture and Livestock
5.	The Mung Beans Bill (Senate Bill No. 13 of 2022)	Agriculture and Livestock
6.	The Start-up Bill (Senate Bill No. 14 of 2022)	Trade, Industry and Co-operatives
7.	The Learners with Disabilities Bill (Senate Bill No. 4 of 2023)	Education
8.	The Persons with Disabilities Bill (Senate Bill No. 7 of 2023)	Social Protection
9.	The Kenyan Sign Language Bill (Senate Bill No. 9 of 2023)	Sports and Culture

The memoranda may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to cna@parliament.go.ke to be received on or before Thursday, 21st March 2024 at 5.00 p.m.

Copies of the Bills are available at the National Assembly Table Office, Main Parliament Buildings and on: www.parliament.go.ke/the-national-assembly/house-business/bills.

S. NJOROGE, CBS
CLERK OF THE NATIONAL ASSEMBLY

8th March 2024



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21/03/24



POLITICAL PARTIES LIAISON COMMITTEE (PPLC)

C/o Office of the Registrar of Political Parties, Lions Place, 1st Floor
Karuna Close, Waiyaki Way, Westlands
P.O Box 1131-00606, Sarit Centre, Nairobi, Kenya.
Email: pplcparties@gmail.com

Ref; fin.com 20th/03/24

20th March 2024

Clerk of the National Assembly
Main Parliament Building,
Nairobi, Kenya.

*Salim Ahmed
to facilitate
we 21/3/24*

Attn: Justice and Legal Affairs Committee

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024 PROPOSALS

Background of PPLC

The Political Parties Liaison Committee is a tripartite dialogue platform that comprises of all the fully registered political parties in Kenya, the Office of the Registrar of Political Parties and the Independent Electoral and Boundaries Commission.

Introduction

The National Assembly introduces the Independent Electoral & Boundaries Commission (Amendment) Bill, 2024 that seeks to among others:

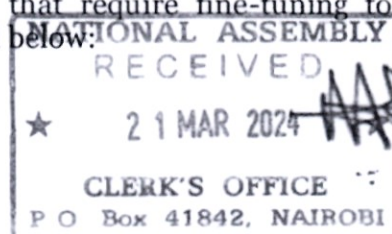
- i) Review the framework of selecting for appointment, members of the Commission;
- ii) Review the term of office for the CEO to the Commission;
- iii) Review the quorum of the meeting of the Commissioners
- iv) Set out the procedure to be followed in the delimitation of electoral units;

These amendments stem from the presentations made by various stakeholders before the National Dialogue Committee on the thematic area concerning Electoral Justice and Related Matters.

We believe that these amendments emerging immediately after the 2022 general elections, aim to streamline the conduct and operations of the Commission to enhance the realisation of its core mandate.

The Bill contains some progressive provisions that, if adopted by Parliament and enacted into law, will help address the inherent problems faced by the Commission.

However, the Bill also includes provisions that require fine-tuning to enable a seamless functional institution, as highlighted below:



Clause	Issue / What the Bill Provides	Proposal/Recommendations
1 (Interpretation)	The Bill seeks to amend section 2 of the Act by aligning the definition of the chairperson of the Commission with the judgement of the High Court in the matter of Katiba Institute & 3 Others –vs- AG & 2 Others (2018)	The amendments seek to align the definition of the Chairperson as provided for in Article 250(2) of the Constitution hence giving prominence to the Constitution as the supreme law of the land.
	Deleting the definition of “first review”	In agreement
	Deleting the definition of “former boundaries commission”	In agreement
	Deleting the definition of “issues arising”	In agreement
2 Qualifications	The Bill seeks to amend S.6 of the Act on Qualifications for appointment as chairperson or member of the Commission by proposing additional qualifications of ICT & Accounting	There is need to review the qualifications. It is our considered view that members of the Commission only need to hold degrees from recognized institutions of learning. Additional qualifications can be acquired through training & support from the Secretariat that is composed of technical personnel.



3 Vacancy in the Office of Chairperson & Members	The Bill seeks to amend Section 7 by deleting subsections (4), (5) & (6) that were declared unconstitutional by the High Court in the matter of Katiba Institute & 3 Others -vs- AG & 2 Others (2018)	Where the constitution provides the manner of appointment and further states plainly and unambiguously the qualifications outlined in national legislation that one must meet to be appointed to a particular position, these requirements must be strictly followed.
4 (Secretary to the Commission)	The Bill seeks to amend S. 10 of the Act by deleting subsection (4) that provides that the CEO will serve a term of five years but shall be eligible for re-appointment for one further term of five years and substituting it with a term of three years and may be eligible for a reappointment for one further term of three years.	We support this proposal as it will enhance diligence and accountability. The Secretary will only be able to oversee a single general election. If the Commissioners are satisfied with the conduct of the office holder, then they will be eligible for another additional single term.
5 Audit of Elections	The Bill seeks to amend S.12 of the Act by creating an additional subsection that requires the Commission to after every general election to review its operations & make the necessary changes required to make its operations more efficient, effective, transparent & accountable.	It is good management practice to conduct a review of the Commission's operations after every general election. This review aims to verify whether the process, systems & operations were executed according to the law and the elections plan, and to identify areas for improvement. To achieve this objective, the Commission should in consultation with other relevant stakeholders such as PPLC, appoint a reputable firm to carry out the audit.
6 Procedure delimitation electoral boundaries for of	The Bill seeks to amend s. 36 of the Act by adding a new sub-section to anchor provisions of the Fifth Schedule of the Act that provides the procedure for delimitation of electoral units	Given that the Fifth Schedule pertained to the initial review of electoral units under the Constitution of Kenya 2010, it is crucial that the procedure be integrated with the provisions of section 36 of the Act to guide future exercises. Public participation being one of the key principles of governance in our Constitution and to realise this objective, we propose the following: - There is need for clear timelines for conducting

		public participation during the delimitation exercise - On public sensitization, the Commission shall engage the media, avail equipment and prepare materials for effective public education and engagement
7 Procedure for appointment of Chairperson & Members of the Commission	The Bill seeks to amend the First Schedule of the Act to increase the number of members of the selection panel from seven to nine so as to accommodate more stakeholders and interest groups.	Increasing the membership of the selection panel addresses the deficiency of inclusivity in the selection process. The addition of two extra slots designated for the PPLC will significantly enhance the political parties' participation in shaping the future of the Commission.
8 Conduct of the Business & Affairs of the Commission	The Bill seeks to amend the Second Schedule to the Act to provide quorum of the Commission to be at least five members of the Commission. A further amendment to the effect that unless there is a unanimous decision, any matter before the Commission shall be by the concurrence of a majority of all the members of the Commission.	In conducting the affairs of the Commission, there is need for unanimity in arriving at its decisions. The members of the Commission shall endeavour to be guided by the principles of transparency and accountability in the conduct of their business.
9 The Fifth Schedule	The Bill amends the Act by deleting the Fifth Schedule, which has provisions that relates to the procedure for delimitation of electoral units in the first review.	The period under review has already been extinguished and hence the Schedule is rendered obsolete.

Yours Sincerely,



Evans Misati James
Chairman - PPLC Steering Committee



MEMORANDUM

From : Electoral Law and Governance Institute for Africa

To : The Clerk of the National Assembly

Date : 16th April, 2024

RE : The Independent Electoral and Boundaries Commission (Amendment) Bill, 2023

Background

- The Departmental Committee on Justice and Legal Affairs (JLAC) in the National Assembly is established pursuant to the National Assembly Standing Order 216. In line with its mandate under Article 118(1)(b) of the Constitution and the National Assemblies Standing Order number 127(3), which requires the Committee to study and review all legislations referred to it and further facilitate public participation and other critical stakeholders' involvement in the legislative and other business of Parliament, the committee has invited the Electoral Law and Governance Institute for Africa (ELGIA) to submit representations/comments on the Independent Electoral and Boundaries Commission (Amendment) Bill, 2023.
- Electoral Law and Governance Institute for Africa (ELGIA) is a Continental organization headquartered in Nairobi, Kenya, working to strengthen and consolidate constitutional democracy, good governance, and electoral processes in African dialogue, electoral reforms, and advocacy. It collaborates with continental and sub-regional organizations, including the African Union, East African Community (EAC), Southern Africa Development Community (SADC), and ECOWAS, to enhance good governance and strengthen political institutions through technical assistance, capacity building, advocacy, and research.

Context

- The Bill seeks to amend the Independent Electoral and Boundaries Commission Act No. 9 of 2011, to give effect to some of the recommendations and views of the public that were submitted during the National Dialogue Discourse on the issues of Electoral Justices and Related Matters; Outstanding Constitutional Matters; Fidelity to Political Parties/ Coalitions and the law on Multiparty Democracy among others. One of the objectives of the amendment is to streamline the Act by removing outdated provisions and making consequential amendments to align with Court Judgments.
- It is important to note that ELGIA provided technical support to the NADCO process and agrees with most of the proposals and recommendations contained in the Report and the enabling Bills. This Memorandum elaborates on ELGIA's considerations to inform the Committee about the proposed amendments.

Remarks, comments and recommendations on the Bill to amend the Independent Electoral and Boundaries Commission Act and for connected purposes.

Proposed Amendment Clauses	Observation	Remarks and Comments
Clause 6 of the Bill	● The Bill proposes the amendment of Section 12 of the Act to empower the Commission to review its operations and implement necessary changes to enhance efficiency, effectiveness, transparency, and accountability. ● The Bill proposes the Commission shall publish the report and gazette it, then	● The role of Parliament in the review process needs to be clearly stated, especially since some changes may require not just institutional but also statutory reforms. ● The amendment should provide timelines for the review process by both

	submit it to parliament.	houses of parliament.
Clause 7 of the Bill	The Bill proposes to amend Section 36 of the Principal Act.	The Section which is within the Savings and Transitional part of the Act and was originally intended for the first boundaries review.
Clause 10 of the Bill		The proposals under the Fifth Schedule are substantive provisions and therefore cannot be in as a Schedule within an Act. This is because they make reference to the Constitution and not the enabling provisions in the Act. Recommendation on Clause 7 And 10 of the Bill; ELGIA urges the Committee to adopt the provisions under the harmonized Independent Electoral and Boundaries (Amendment) Bill, 2023. Regarding boundaries units (Annexed herewith). The Bill was submitted by IEBC to the Justice and Legal affairs Committee (JLAC).

		The harmonization of the Bills will ensure there is no duplication over the same subject matter. The Bill proposes; Repealing the entire Section 36 of the principal Act. For the following reasons; a. Part V of the Act, the Savings and Transitional Provisions under IEBC Act is no longer existing in law. The general principle is that transitional provisions in a statute end upon enactment of the Primary statute. b. Insert the Proposals in the Bill by creating a part with the title <u>'Delimitation of Electoral Boundaries'</u> within the substantive part of the Act. In effect, all that is proposed in the Fifth Schedule will form part of the sections within the primary Act.
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		c. The Bill is more elaborate on the role of Parliament and provides operation timelines of the process. d. In the First Past the Post electoral system, boundaries delimitation is a critical issue for representation. The proposals contained in the Fifth Schedule are very substantive and should not be included in a schedule within an Act. For this reason, the Bill proposes an amendment to create Part III of the Act titled <u>Delimitation of Boundaries of Electoral Units</u>. This part provides a comprehensive legal framework, procedures for delimitation, scope of procedures including public participation, and detailed operation timelines from commencement
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		to gazette of the final boundaries. These timelines are aligned with the Boundaries Review Operation Plan (BROP) developed by the Commission.
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Conclusion

ELGIA played a critical role in providing technical, administrative and material support that ensured NADCO successfully completed its work in line with the Notice of Motion and Dialogue Agreement framework that was passed by Parliament. It is against this backdrop, that ELGIA still reaffirms its commitment during this crucial implementation phase of the legal reforms process that ushers the country into the 2027 electoral cycle. This will be key to the consolidation of democratic governance in Kenya.



Felix Odhiambo Owuor
Executive Director,

[Electoral Law and Governance Institute for Africa \(ELGIA\)](#)

THE INDEPENDENT ELECTORAL AND BOUNDARIES (AMENDMENT) BILL, 2023

A Bill for

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

ENACTED by the Parliament of Kenya, as follows—

Short title

1. This Act may be cited as the Independent Electoral and Boundaries Commission (Amendment) Act, 2023.

2. Section 2 of the Independent Electoral and Boundaries Commission Act, 2011, (hereinafter referred to as "the principal Act") is amended by—

(a) inserting the following definitions in their proper alphabetical order—

“city” has the meaning assigned to it under the Urban Areas and Cities Act, 2011 and includes capital city, city county and urban areas;

“densely populated area” means an area whose population density is above the national average;

“population quota” has the meaning assigned to it Article Article 89(12) of the Constitution;

“sparsely populated area” means an area whose population density is below the national average;

“urban area” has the meaning assigned to it under the Urban Areas and Cities Act, 2011 and includes capital city, city county and urban areas; and

(b) deleting the definition of the term “issues arising”.

Amendment of No. 9 of 2011.

3. The principal Act is amended by inserting the following new Part immediately after section 16—

PART III—DELIMITATION OF BOUNDARIES OF ELECTORAL UNITS

Procedure for delimitation of

16A. (1) The Commission shall discharge its

electoral boundaries mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.

(2) The procedure for delimitation of electoral units shall be as set out under this Part

Scope of procedures 16B. The procedure for delimitation of boundaries of electoral units include—

- (a) publication of a notice and initiation of the delimitation of process;
- (b) preparation of the preliminary report;
- (c) ascertainment of the number of inhabitants of Kenya;
- (d) Determination of timeframes;
- (e) particulars of the report;
- (f) public sensitization and participation process;
- (g) preparation of the revised report;
- (h) adoption of the report;
- (i) consideration by Parliament;
- (j) preparation and publication of the final report;
- (k) judicial review of a decision of the Commission; and
- (l) preparation and dissemination of maps.

Matters to be addressed in delimitation of electoral boundaries 16C. Subject to the provisions of Article 89 of the Constitution, the matters to be addressed in delimitation of electoral boundaries are—

- (a) review of the names and boundaries of constituencies;
- (b) review of the number, names and boundaries of wards;
- (c) re-distribution of wards affected by any changes in the boundaries

of constituencies; and

(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota as provided for by Article 89(5) of the Constitution and that such a process—

(i) allows for variation of margin of not more than the limits provided under Article 89 (6) of the Constitution in relation to cities, sparsely populated areas and other areas;

(ii) takes into account the provisions of Article 89 (7) (b) of the Constitution that provides for the progressive realization of the requirement that the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the population quota;

(iii) takes into account the the most recent enumerated figures of the national census .

Notice of delimitation
of electoral units

16D. (1) Whenever it is necessary to review the names and boundaries of electoral units in accordance with Article 89 (2) and (3) of the Constitution, the Commission shall notify the public of—

(a) the intended review;

(b) invite representations from

interested parties; and

- (c) specify the period within which the Commission shall publish the preliminary report.

(2) A notice under sub section (1) shall be accompanied by a preliminary report containing the particulars set out under section 16G.

Notice of delimitation of electoral units

16E. (1) Whenever it is necessary to review the names and boundaries of electoral units in accordance with Article 89 (2) and (3) of the Constitution, the Commission shall notify the public of—

- (a) the intended review;
- (b) invite representations from interested parties; and
- (c) specify the period within which the Commission shall publish the preliminary report.

(2) A notice under sub section (1) shall be accompanied by a preliminary report containing the particulars set out under section 16G.

Preliminary report

16G. (1) The preliminary report shall contain the following particulars—

- (a) the proposed delimitation of boundaries for constituencies and wards including—
 - (i) the actual proposed names of every constituency and ward; and
 - (ii) description of the proposed boundaries.
- (b) the specific geographical and demographical details relating to such delimitation including—
 - (i) the population quota for constituencies and wards;

- (ii) the number of inhabitants in every constituency and ward;
- (iii) a classification in relation to each electoral area indicating whether it is a city, a sparsely populated area or other area; and
- (iv) an indication of the proposed margin of change from the population quota.

(2) Where the Commission makes a determination to vary the population quota as provided under Article 89 (6) of the Constitution, the Commission shall, provide reasons for each variation and ensure such determination is in line with the principles of fair representation and equality of vote.

Reference materials

16H. (1) The Commission shall, use as its primary reference material—

- (a) the final report of the latest review of electoral units;
- (b) the latest official population census report; and
- (c) Gazette Notices on cities and urban areas issued under the Cities and Urban Areas Act, 2011.

(2) The Commission may use as its secondary reference material

- (a) the reports of County Boundary Review Panels; or
- (b) other relevant data.

(3) The County Boundary Review Panels

shall conduct their business as the Commission may, by guidelines determine.

Ascertainment of the inhabitants of Kenya

16I. (1) For purposes of determining the population quota, the Commission shall ascertain the number of inhabitants of Kenya, from—

- (a) figures contained the latest official national population census report, if such report was prepared not more than three years before the delimitation exercise; or
- (b) official population estimates certified by the National Bureau of Statistics, if the census report was prepared more than three years before the delimitation exercise.

(2) Despite sub section (1), the Commission shall, subject to the timelines set out under Article 89 (2) of the Constitution, conduct the delimitation exercise after the conduct of the national population census.

(3) The National Bureau of Statistics shall, as soon as possible after the completion of every national census, submit a copy of the report to the Commission.

Preliminary report to be publicized

16J (1) The Commission shall—

- (a) publicize the preliminary report in its website and in at least two newspapers of nationwide circulation;
- (b) invite the public to make

representations on the proposals contained in the report; and

- (c) put in place administrative mechanism for receiving representations from the public.

(2) The period set aside for receiving representations from the public on the proposals contained in the report under this section shall not be less than thirty days.

Public sensitization

16K. (1) The Commission shall, upon notification of the public of the intended delimitation of boundaries under section 16D, provide the framework for sensitization and participation of the public.

(2) The Commission may engage the media, avail equipment and prepare materials for effective public education and engagement.

Public hearings

16L. (1) The Commission shall conduct boundaries review hearings in every county and may constitute County Boundary Review Panels for purposes of facilitating public hearings.

(2) Before engaging in the county boundaries review hearings, the Commission shall notify the public of date, time and place of such hearings;

(3) Representations to the Commission may be made orally or in writing.

(4) The proceedings of all boundary review public hearings shall be recorded,

translated and transcribed.

Preparation of the
revised report

16M. (1) Upon completion of the public hearings the Commission shall review the proposed delimitation of boundaries and submit the report to the National Assembly.

(2) The revised report shall be based on the feedback received during the public consultative process, subject to the relevant provisions of the law.

(3) Where the Commission makes a determination to vary the population quota as provided under Article 89 (6) of the Constitution, the Commission shall, provide reasons for each variation and ensure such determination is in line with the principles of fair representation and equality of vote.

Consideration by
Parliament and
preparation of final
report

16N. (1) The revised report shall be submitted to Parliamentary Committee which shall, within thirty days, consider the report and forward its recommendations to the Commission.

(2) Within fourteen days of the expiry of the period provided for in subsection (1), the Commission shall upon receipt and considerations of Parliament and representations from the public, prepare the final report for publication in the *Gazette*.

(3) If Parliament fails to make recommendations within the period specified in subsection (1), the Commission shall publish its report in

accordance with sub section (2).

(4) Notwithstanding any other law, where the final report is not published in accordance with the provisions of sub section (3) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the *Gazette*.

Preparation
dissemination
maps

and
of

16O. (1) The Commission shall prepare and publish maps—

- (a) for all the new electoral units in accordance with the final report;
- (b) for the respective constituencies in every county; and
- (c) for wards in every constituency.

(2) The Commission shall provide copies the maps to Parliament and publish all the maps in its website.

Review of decisions
of the Commission

16P. (1) A person may apply to the High Court for review of a decision of the Commission on the delimitation of electoral boundaries.

(2) A decision of the High Court in an application brought pursuant to sub section (1) shall be final.

(3) An application for the review under this section shall be made within thirty days of the publication of the decision in the *Gazette* and shall be heard and determined within three months of the date on which it is filed.

Maintenance of records

16Q. The Commission shall ensure that all documents, materials, publications, reports and recommendations arising from the delimitation process are maintained in a form that is accessible and usable by members of the public.

Duty of certain offices to cooperate with the Commission

16R. It shall be the duty of the Director of Survey and Director-General of the Kenya National Bureau of Statistics and every public officer whose services are required by the Commission for purposes of the delimitation of electoral boundaries to provide the necessary technical support.

4. The principal Act is amended by re-naming—
 - (a) Part III as Part IV immediately before section 17; and
 - (b) Part IV as Part V immediately before section section 25; and
 - (c) Partt V as Part VI immediately before section 32.

Repeal of section 36 of No. 9 of 2011.

5. Section 36 the of the the principal Act is repealed.

Deletion of Fifth Schedule to No. 9 of 2011.

6. The principal Act is amended by deleting the the Fifth Schedule.

MEMORANDUM OF OBJECTS AND REASONS

Statement of Objects and Reasons of the Bill

The principle object of this Bill is to amend the Independent Electoral and Boundaries Commission Act to remove provisions which became spent after the first review of electoral boundaries.

By virtue of section 36 of Act No. 9 of 2011, the Fifth Schedule lapsed upon the publication of the final report of the delimitation of electoral boundaries. The Election Laws Amendment Act,

2017 introduced a new section 36 which contained some procedures for delimitation of electoral units. The procedures however are not detailed enough and contain many gaps.

This Bill seeks to repeal section 36 and the Fifth Schedule and replace the same with substantive provisions on the delimitation of boundaries of electoral units under the proposed new Part III.

The purpose of the proposed amendment is to provide for a complete procedure for the delimitation of electoral boundaries and to address identified gaps.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does delegate legislative powers to the Commission but does not limit fundamental rights and freedoms.

Statement as to whether the Bill concerns county governments

The Bill affects the functions of the county governments and is therefore a Bill concerning counties for purposes of the Standing Orders.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The Bill is a money Bill for the purposes of Article 114 of the Constitution as the enactment of this Bill will occasion additional expenditure of public funds.

Dated 2023.

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Chairperson
Justice and Legal Affairs Committee
National Assembly

**SUBMISSIONS AND
RECOMMENDATIONS ON THE IEBC
(AMENDMENT) BILL 2024 CURRENTLY
IN THE NATIONAL ASSEMBLY**

By the Chairman of the IEBC Selection Panel,
Dr Nelson Makanda

20TH MARCH 2024

~~MAC.~~
EVANS MISATI.

I. Background

Further to the conclusion of the 2022 general election, the resignation of three Commissioners, the removal of another through a tribunal and the retirement of the chairman and two commissioners upon their tenure at the independent electoral and Boundaries Commission (IEBC) coming to an end; H.E. President William Samoei Ruto assented to law the Independent Electoral and Boundaries Commission (Amendment) Bill 2022 on 23rd January 2023, making it a newly amended Act of Parliament guiding the operations of the Independent and Electoral Boundaries Commission (IEBC).

The Bill sponsored by the National Assembly Majority Leader, Hon. Kimani Ichung'wa proposed expansion of the IEBC selection panel to include; two slots for the Parliamentary Service Commission, the Inter-Religious Council of Kenya to have two slots, one slot for the Public Service Commission and another slot each for the Political Parties Liaison Committee and the Law Society of Kenya.

The composition of a complete IEBC selection panel was intended to pave the way for the recruitment of new IEBC commissioners to spearhead elections at the electoral body. However, the Azimio la Umoja One Kenya Alliance remained opposed to the formation of the IEBC selection panel demanding a political parties-led and a more inclusive process for reconstituting the IEBC. The opposition further organized a series of demonstrations in various parts of the country to protest among others the high cost of living and an audit of the 2022 Presidential Election.

To resolve the stand-off between the Government and the opposition over the destructive and fatal protests, the National Assembly and the Senate established the National Dialogue Committee on Wednesday, 16th August 2023, and Tuesday, 29th August 2023 respectively. The mandate of the Committee was to facilitate dialogue and consensus building and recommend appropriate constitutional, legal, and policy reforms on issues of concern to the people of Kenya, as framed by the National Dialogue Committee, in line with the Constitution and the laws of the Republic of Kenya and respecting the functional and institutional integrity of state organs.

II. National Dialogue Committee (NADCO)

In accordance with its mandate, the NADCO invited members of the public and stakeholders to make representations on any or all of the five (5) issues as framed by the National Dialogue Committee. One of the five issues was Electoral Justice and Related Matters. To address this, the NADCO introduced amendments to the IEBC Act vide the IEBC (Amendment) Bill 2024.

IEBC (Amendment) Bill 2024

As a result of the NADCO process, the IEBC (Amendment) Bill 2024 has been presented to the National Assembly.

Having reviewed the Bill, I have the following concerns:

PROPOSED AMENDMENTS TO THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2024

- a) Proposal to amend the Independent Electoral and Boundaries Commission Act No. 9 of 2011 by deleting provisions deemed obsolete such as section 7A subsections 4,5 and 6 that were held to be unconstitutional by the High Court.
- b) Proposal to amend section 6 of the Act and include experience in accounting or ICT as additional professional qualifications for appointment as a member of the IEBC.
- c) Proposal to replace the current Fifth Schedule with a new and updated schedule.
- d) Proposal to amend section 10 of the principal act to provide that the term of the secretary to the commission shall be three years, renewable once.
- e) Proposal to amend section 12 of the principal Act and provide that the commission shall, after every general election, review its operations and make necessary changes required to make its operations more efficient.
- f) Proposal to amend the First Schedule to the Act to increase the number of members of the selection panel from 7 to 9 to accommodate a wide spectrum of stakeholders and interest groups.
- g) Proposal to amend the Second Schedule to the Act and provide for the quorum of the commission. In agreement and in support of the proposals for amendments except to avoid a lacuna in the event of a vacancy in the office of the Chairman, the Vice Chair has to have the same qualifications as the chair. This amendment goes contrary to the general spirit among Christians and religious leaders in Kenya who hold the view that the IEBC Chairman does not necessarily have to be an advocate of the High Court. This requirement of the Vice Chairman having qualifications such as those of the Chairman now makes the leadership of the IEBC a lawyers preserve.

Our concern:

- a) We agree and are in support of the proposals for amendments except on the provision that “to avoid a lacuna in the event of a vacancy in the office of the Chairman, the Vice Chair has to have the same qualifications as the chair”.
- b) Additional qualifications are not mandatory, other than the fact that it would be necessary for the vice chair of IEBC to hold such qualifications not at variance with those of the chair, for the reasons stated above.

PROPOSED AMENDMENT TO THE IEBC AMENDMENT BILL 2024 (TRANSITIONAL CLAUSE)

- a) The selection panel existing immediately at the commencement of this Act ceases to exist, but a person who served as a member of that selection panel may be nominated to serve as a member of the selection panel appointed under this Act.

Handwritten signature/initials

The concerns of the Members of the Selection Panel chaired by Dr Nelson Makanda

- a. What happens to the work already done by the current panel? In the spirit of prudent use of public finances, public money must not be used imprudently. The panel should have its mandate renewed with additional members added.
- b. What happens to the applicants who had already submitted a complete set of documents to the Selection Panel in accordance with the law? Don't we risk litigation and the further encumbrance on the Selection Panel work?
- c. Kenyans through their submissions wanted an expanded selection panel and not the disbandment of the existing panel.
- d. The current Panel was duly constituted under current law and in keeping with the nominating bodies process, where is the fairness in its arbitrary dissolution or dismissal?
- e. Why should the panel be punished for no defined crime under the law?

Recommendations:

- a. While upholding the provision that *"The selection panel existing immediately at the commencement of this Act ceases to Exist but a person who served as a member of that selection panel may be nominated to serve as a member of the selection panel appointed under this Act"...* Provide that:
- b. All the members of the selection Panel existing immediately at the commencement of this Act shall be compensated fully for the work they performed from the commencement of the Selection Panel's swearing in to the dissolution of the Selection Panel by way of the enactment of this Act.
- c. The work done by the existing Selection Panel at the commencement of this Act including the applicants' bio data and credentials as processed by the Selection Panel shall be preserved as a record of the work done by that Selection Panel.

AAE

END

