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Clerk of the Senate/Secretary, PSC  
Date: 15/05/24

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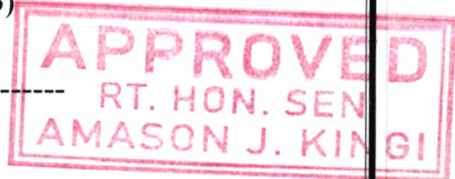
REPUBLIC OF KENYA  
THIRTEENTH PARLIAMENT | THIRD SESSION

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS



REPORT ON THE CONSTITUTION (AMENDMENT) (NO. 2) BILL,  
2023 (SENATE BILLS NO. 52 OF 2023)



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## LIST OF ABBREVIATIONS/ACRONYMS

AG	- Office of the Attorney-General
CoG	- The Council of County Governors
EACC	- The Ethics and Anti-Corruption Commission
IEBC	- Independent Electoral and Boundaries Commission
KLRC	- Kenya Law Reform Commission
KNCHR	- Kenya National Commission on Human Rights
ODPP	- Office of the Director of Public Prosecutions
CAF	- The County Assemblies Forum
ELGIA	- Electoral Law and Governance Institute of Africa

## PRELIMINARIES

### Establishment and Mandate of the Committee

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

### Membership of the Committee

The Committee is comprised of –

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

Minutes of the Committee in considering the Constitution (Amendment) Bill, 2023 (National Assembly Bills No. 52 of 2023) are attached to this Report as ***Annex 1***.

## FOREWORD BY THE CHAIRPERSON

**Hon. Speaker,**

1. Honourable Senators, the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023) sponsored by Sen. Raphael Chimera Mwinzagu, MP was published on and was introduced in the Senate by way of First Reading on Wednesday, 14<sup>th</sup> February, 2024. The Bill was referred to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration as an Ordinary Bill.

**Hon. Speaker,**

2. The Bill seeks to amend Articles 99(2) and 193(2) of the Constitution as well as section 24(2) and 25(2) of the Elections Act, No. 24 of 2011, to provide that a person who has served as a county governor shall not be eligible to be elected as a senator or a member of a county assembly within the first five years immediately after the end of their term of service. This is to give a cooling off period and allow for any ongoing accountability processes conducted by the Senate related to administration and financial management affairs of the county to be completed, as these would have a bearing on the suitability of the former county governor to hold any other elective position.

**Hon. Speaker**

3. Pursuant to Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, the Committee undertook public participation on the Bill. In that regard, the Committee published an advertisement in the *Daily Nation* and *Standard* newspapers on, Friday, 16<sup>th</sup> February, 2024, inviting members of the public to submit written memoranda to the Committee on the Bill. Additionally, the Committee sent invitations to key stakeholders inviting them to submit their comments on the Bill.
4. The Committee received written memoranda from the following invited stakeholders on the Bill which the Committee considered in the preparation of this report—
  - (i) Office of the Attorney General and Department of Justice;
  - (ii) Council of Governors;
  - (iii) Ethics and Anti-Corruption Commission;
  - (iv) Independent Electoral and Boundaries Commission;
  - (v) Kenya Law Reform Commission;

- (vi) Kenya National Commission on Human Rights;
- (vii) Office of the Director of Public Prosecutions;
- (viii) County Assemblies Forum; and
- (ix) Electoral Law and Governance Institute of East Africa.

**Hon. Speaker,**

The Committee considered the Bill at length and held extensive deliberations thereon. Consequently, the Committee has proposed amendments to the Bill with a view to ensure that we have a good law in place that will stand test of time.

**Hon. Speaker,**

I wish to thank the Offices of the Speaker and the Clerk of the Senate for the logistical and technical support accorded to the Committee during the extensive consideration of the Bill. The Committee wishes to thank the Stakeholders for their extensive submissions and comments that greatly enriched our consideration on the Bill.

Finally, I wish to express my sincere gratitude and appreciation to the Honourable Senators of the Committee and the members of the Secretariat who made useful contributions towards the preparation and production of this report.

**Hon. Speaker,**




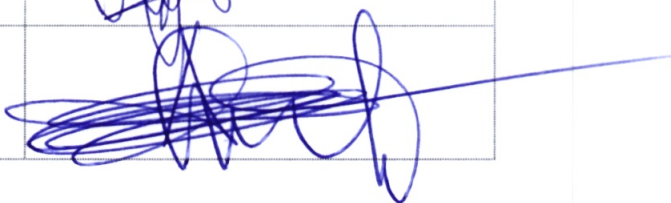
It is now my pleasant duty, pursuant to Standing Order 148 (1) of the Senate Standing Orders, to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023).

Signed .....  ..... Date..... 14/05/2024 .....

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

**ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2023 (SENATE BILLS NO. 52 OF 2023).**

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

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

## CHAPTER ONE: INTRODUCTION

### 1.1 Introduction

1. The Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023) was sponsored by Sen. Raphael Chimera Mwinzagu, MP and published on 24<sup>th</sup> November, 2023.
2. Pursuant to Article 110(4) of the Constitution, the Bill by Sen. Raphael Chimera Mwinzagu, MP, was published on 24<sup>th</sup> November, 2023 and was introduced in the Senate by way of First Reading on Wednesday, 14<sup>th</sup> February, 2024. The Bill was referred to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration as a special Bill. A copy of the Bill is annexed to this Report as *Annex 2*.

### 1.2 Object of the Bill

3. The object of the Bill is to amend Articles 99(2) and 193(2) of the Constitution as well as section 24(2) and 25(2) of the Elections Act, No. 24 of 2011, to provide that a person who has served as a county governor shall not be eligible to be elected as a senator or a member of a county assembly within the first five years immediately after the end of their term of service. This is to give a cooling off period and allow for any ongoing accountability processes conducted by the Senate related to administration and financial management affairs of the county to be completed, as these would have a bearing on the suitability of the former county governor to hold any other elective position.
4. The enactment of the Bill does not occasion additional expenditure or charge of the public funds.

### 1.3. Overview of the Bill

5. The Bill proposes the following amendments –

**Clause 2** of the Bill amends Article 99(2) of the Constitution to bar a person currently serving as governor, or one who has served as governor within the last five years preceding an election from being eligible for election to the Senate.

**Clause 3** of the Bill seeks to amend Article 193(2) to bar a person who has served as governor within the last five years preceding an election from being eligible for election as a Member of a County Assembly.

**Clause 4** of the Bill seeks to amend section 24(2) of the Elections Act (Cap 7) to bar a person currently serving as governor, or one who has served as governor

within the last five years preceding an election from being eligible for election to the Senate.

**Clause 5** of the Bill seeks to amend section 25(2) of the Elections Act to bar a person who has served as governor within the last five years preceding an election from being eligible for election as a Member of a County Assembly.

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

6. The Bill seeks to bar former county governors from vying for election as Senator or Member of County Assembly for a subsequent period of five years to allow for any ongoing accountability processes related to administration and financial management affairs of the county to be completed, as these would have a bearing on the suitability of the former county governor to hold any other elective position, as well as eliminate any potential conflict of interest arising from their presence in the Senate or County Assembly.
7. The effect of this would be that—
  - (a) oversight bodies would have adequate time to inquire into any matters arising from the tenure of a previous holder of the office of county governor without interference by the former county governor, which is highly likely particularly if the person is elected as member of county assembly or to the Senate;
  - (b) voters would have a reference point in making an informed choice on the candidate's suitability for another elective office since all accountability processes would have been completed; and
  - (c) any real or perceived conflict of interest would be eliminated due to the five-year cooling off period.

## CHAPTER TWO: PUBLIC PARTICIPATION ON THE BILL

### 2.0 Introduction

8. The Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023) was read a First Time on 14<sup>th</sup> February, 2024, and thereafter the Bill stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.
9. The Committee, pursuant to the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, proceeded to undertake public participation on the Bill.
10. In this regard, the Committee published an advertisement in the *Daily Nation* and *Standard* newspapers on Friday, 16<sup>th</sup> February, 2024, inviting members of the public to submit written memoranda on the Bill. A copy of the advertisement is annexed to this Report as **Annex 3**.
11. Additionally, the Committee sent invitations to key stakeholders inviting them to submit their comments on the Bill.
12. In response to the advertisement and invitation, the Committee received written submissions from nine Stakeholders which are –
  - (i) Office of the Attorney General and Department of Justice
  - (ii) Council of Governors
  - (iii) Ethics and Anti-Corruption Commission
  - (iv) Independent Electoral and Boundaries Commission
  - (v) Kenya Law Reform Commission
  - (vi) Kenya National Commission on Human Rights
  - (vii) Office of the Director of Public Prosecutions
  - (viii) County Assemblies Forum
  - (ix) Electoral Law and Governance Institute of East Africa
13. Copies of the said submissions are attached as **Annex 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g), 4(h) and 4(i)** with a summary thereon in the form of a matrix attached as **Annex 5**.
14. The Committee proceeded to consider the Bill, together with the Stakeholder submissions received thereon and at the public participation held at Tononoka Social Hall, Mombasa County,

15. Below is a summary of the stakeholder submissions on the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023) together with consideration by the Committee.

*Clause 2*

16. **The Ethics and Anti Corruption Commission** submitted in favour of the proposed addition of clause 2 (ba) after Article **99(2)(b)** of the Constitution on the ground that the proposed amendment to bar a former Governor from vying for the position of Senator shall prevent any form of conflict of interest (real or perceived); and allow for the completion of any ongoing accountability processes related to administration and financial management affairs of the County.

17. **The Office of Attorney General** opposed the addition of clause 2 (ba) after Article 193(2)(b) of the Constitution on the basis that barring a former Governor from vying for the position of member of County Assembly provides reasonable restriction to avoid situations of conflict of interests, prevent abuse of position or undue influence.

18. **The Kenya Law Reform Commission** observed that the proposed addition of **clause 2 (ba)** after Article **99(2)(b)** of the Constitution is partly repetitive of **clause (2)** for disqualifying State Officers from being members of Parliament. The stakeholder contended that to disqualify a former Governor from vying for a seat in the Senate while ‘allowing’ the person to vie as a member of the National Assembly shall defeat the object of the Bill since the scrutiny and accountability process by the County Assembly and the Senate “would have a bearing on the suitability of the former Governor to hold any other elective position” and conflicts with other provisions of the Constitution.

*Clause 3*

19. **The Ethics and Anti-Corruption Commission** submitted in agreement of the proposed addition of clause 2(ba) after Article 193(2)(b) of the Constitution. The stakeholder contented that barring a former Governor from vying for the position of member of County Assembly provides reasonable restriction to avoid situations of conflict of interests, prevent abuse of position or undue influence.

20. **The Office of the Attorney General** disagreed with proposed amendment that seeks addition of clause 2(ba) after Article 193(2)(b) of the Constitution.

21. **The Kenya Law Reform Commission** disagreed with the addition of Clause 2(ba) after Article 193(2)(b) of the Constitution on the limb that barring a person

who previously held during the position of Governor from being elected member of County Assembly and ‘allowing’ the person to vie as a member of the National Assembly appears to defeat the object of the Bill as stated in paragraph 3 of the Memorandum of Objects and reasons, namely, the scrutiny and accountability process by the County Assembly and the Senate would have a bearing on the suitability of the former Governor to hold any other elective position and thus shall be in conflict with other provisions of the Constitution.

#### **Clause 4**

22. **The Ethics and Anti-Corruption Commission** agreed with the addition of Clause 2(ba) after Section 24(2)(b) of the Elections Act which provision bars a former Governor from vying for the position of Member of Parliament aids in curbing the divergence of personal and public interests.

23. **The Kenya Law Reform Commission** held the view that the proposed amendment to Section 24(2)(b) of the Elections Act would be best captured in a Schedule to the Bill but not as a substantive clause as proposed and thus make the Bill neater.

#### **Clause 5**

24. **The Ethics and Anti Corruption Commission** in its submission agreed to the addition of subsection 2(ba) after Section 25(2)(b) of the Elections Act to the extent that the proposed length period of 5 year election cycle/one term, is **reasonable** and proportionate to the threat posed by the immediate former County Governors to the oversight role of the County Assembly.

25. **The Kenya Law Reform Commission** were in favor of the proposed amendment to **section 25(2)(b)** of the Elections Act. However, it ought to be contained in a Schedule to the Bill as opposed to a substantive clause as proposed.

#### **Clause 2,3,4,5**

26. The **County Assembly Forum** proposed that the phrase “...*immediately preceding the date of election...*” be replaced with “...*within the last five years but not exceeding 12 months before the date of election...*” The term “immediately preceding the date of election” is used in several clauses. While the intention is clear, specifying the exact time frame within the 5 years could reduce ambiguity.

## **General Comments**

### **a) The Office of Director of Public Prosecutions**

27. The Stakeholder is opposed to the Bill in its entirety as the proposed amendments affect a wider array of Constitutional provisions as follows—

- (i) The Stakeholder is of the view that the Senate cannot by way of Parliamentary initiative seek to limit the right of former Governors from contesting for elective seats of the Office of Senator and Members of County Assembly without violating Article 255 of the Constitution. In effect the proposed amendment can only be undertaken through a popular initiative as provided for under Article 257 of the Constitution;
- (ii) The proposed amendments will affect the fundamental rights of Governors as provided for under Article 27(1-3) of the Constitution. Enactment of the proposed Bill as it curtails the political rights of Governors provided for under Article 38(3)(c); and
- (iii) The Stakeholder views that singling out of Governors in intended Constitutional amendments is not in conformity with Articles 10(2)(a & b), 27 and 38 of the Constitution. Stakeholder argues that the objective of the Bill seems discriminative as it targets only 2 seats to the exclusion of Office of the President, Deputy President, Speaker of the National Assembly, Speaker of the Senate, Member of National Assembly, Office of the Deputy Governor, Cabinet Secretary (Treasury, Devolution and Internal Security), offices of great political influence than what the sitting Governors may seek thus defeating the spirit of the Bill.

### **b) The County of Governors**

28. The Stakeholder holds that the proposed amendments might require a referendum under Article 255 of the Constitution as it seeks to amend certain fundamental provisions of the Constitution as enumerated in the following ways—

- (i) The proposed amendment offends Article 38 of the Constitution on political rights;
- (ii) The Stakeholder further observes that the contents of the Bill are in violation to Article 50(2)(a) on presumption of innocence and fair hearing on the basis that the provisions are speculative in the sense that they presume all current and former Governors as presumably guilty of

misconduct which they will be held accountable prior to the exercise of their constitutional right to contest for elective office;

- (iii) The oversight role of the Senate is a collective responsibility, which negates the justification in the Bill's Memorandum of Objects and Reasons;
- (iv) The Bill is incongruent with Article 27 in that it is selective and discriminatory in its exclusion;
- (v) The bill violates Article 73(2)(b) and (c) on exercising leadership objectively and in public interest. Senate in this case appears to be legislating in self-interest in a move to insulate and/or cushion its members from competition in the next general election;
- (vi) The Bill conflicts the decision in **Constitutional Petition No. E005 of 2022; *Carolyn Andzazi Chilango & Another v. The IEBC and Others*** delivered on 17<sup>th</sup> June 2022 which dismissed a Petition seeking to bar former and current Governors from vying for seats as MPs as there will be an affront to the Senate's oversight role on the County Government because the MPs will essentially be over sighting functions they performed; and
- (vii) Governors are not immune to accountability proceedings after the lapse of their term in accordance with Article 226(5) of the Constitution.

**c) *The IEBC***

29. The Stakeholder submitted that—

- (i) The proposals in the Bill limit the rights provided for under Article 38(3) of the Constitution. Such a limitation to the bill of rights needs to be in conformity with Article 24 of the Constitution;
- (ii) The Bill should consider other available mechanisms within the ethics, integrity, and electoral legal framework to achieve the desired purpose to enhance accountability and deal with conflict of interest of an elective leader;

- (iii) Instead of limiting the rights espoused under Article 38(3) of the Constitution, consideration should be made to expand the existing legislative frameworks inherent in the Elections Act, Election Offences Act, Leadership and Integrity Act and the Ethics and Anti-Corruption Act to bar convicted office holders in future elections as anticipated under Chapter six read together with Article 99(2)(h) of the Constitution; and
- (iv) In the event the Bill is enacted, the Commission will be obligated to initiate amendments to the electoral statutory instruments and other guidelines in the electoral operational framework.

**d) ELGIA**

30. The Stakeholder submitted that—

- (i) instead of limiting the rights espoused under Article 38(3) of the Constitution, consideration should be made to expand the existing legislative frameworks inherent in the Elections Act. The Stakeholder held that the proposals in the Bill are a limitation to Article 38(3)(c);
- (ii) The Constitution provides that a provision limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far to derogate from its core or essential content;
- (iii) That Article 24(3) of the Constitution provides that the state or a person seeking to justify a particular limitation shall demonstrate to the court, Tribunal or other authority that the requirements of Article 24 of the Constitution have been satisfied;
- (iv) There are other lesser restrictive means within the electoral law and integrity framework to achieve the purpose of the Memorandum of Objects and Reasons of the Bill which includes enhancing accountability and dealing with conflict of interest of an elective leader; and
- (v) Limitation of political rights in a constitutional text has to be consistent with international obligations like Article 25 of ICCPR on political participation which provides that there should be no unreasonable restrictions on political rights.

***e) Office of the Attorney General***

26 The Stakeholder submitted that:

- (i) Having former Governors in the Senate and the County Assemblies directly exercising oversight over County Governments would lead to conflict of interest and interfere in their decision making process.
- (ii) However, the issue of accountability of those in charge of county affairs is a multi-institutional and a multi-agency affair involving other institutions like the Office of the Auditor-General, the EACC, the Controller of Budget, DCI and the ODPP. These institutions/agencies are independent of the Senate and the County Assemblies.

***f) The County Assembly Forum***

27 The Stakeholder submitted that:

- (i) Restricting former governors from contesting elective positions is a limitation of their political rights under Article 38(3)(c) of the Constitution;
- (ii) The proposed gap of 5yrs proposed may result in delayed representation for communities that are of the view that the former governors as potential leaders in other capacities; and
- (iii) The proposal presumes guilt of the governors before being convicted.

***g) KNCHR***

31. The Commission submitted by welcoming the proposals in the Bill. The Commission was however opposed to subjecting the limitation to former Governors to positions for Members of the National Assembly on the dint that:

- (i) They play a minimal role in over-sighting County chief executives and barring former County Governors from vying for the positions of Members of County Assembly and Senate will allow for better completion of accountability processes related to administration and financial management affairs within the County;

- (ii) Article 38 on political rights can be restricted on legal, reasonable and justifiable grounds;
- (iii) The limitation of Article 38 is within the ambit of Article 24 of the Constitution. This is because Senators and Members of County Assemblies directly oversight Governors. It is possible for Senators or Members of County Assemblies who were Governors to directly or indirectly influence the examination of the audit reports submitted by the Auditor General or conduct of investigations into administration and financial mismanagement during their immediate tenure;
- (iv) Barring former Governors from vying for the oversight positions would prevent actual conflict of interest in line with chapter 6 of the Constitution, Leadership and Integrity Act; Public Officer Ethics Act and other laws;
- (v) The Bill would promote democratic and accountable exercise of power without undue interference;
- (vi) The Bill will enhance the separation of powers and checks and balances;
- (vii) The Bill will promote the national values and principles of the Constitution under Article 10 and promote the values and principles of public service enshrined under Article 232 and the Public Service (Values and Principles) Act, 2015; and
- (viii) The proposals in the Bill present similar restrictions that have been imposed in law. For instance, for the appointment of members of the IEBC, Article 88(2) of the Constitution disqualifies a person from appointment as a member of the IEBC if the person has, **at any time within the preceding five years**, held office, or stood for election as a member of Parliament or of a County Assembly; or a member of the governing body of a political party. The imposition of this requirement for former Governors under the Bill would therefore not be anything new to Kenya's constitutional and legal framework.

### **3.0. Submissions received from the public hearing at the Tononoka Social Hall in Mombasa County**

32. Majority of stakeholders expressed their support for the proposals in the Bill as they will instill transparency, accountability, rule of law, public confidence, good governance and the auspices of devolution.

33. Most respondents at the public hearing supported the Bill with concerns on—
- (i) the constitutionality of the Bill with regards to the limitation on human rights, discrimination, presumption of innocence;
  - (ii) the discrimination of the Bill by selectively targeting former governors who wish to vie for the position of Member of County Assembly and Senatorial seats;
  - (iii) the stakeholders submitted that the Bill should be further reviewed so as to not bar a governor with a good audit report. However, on the same issue, majority of stakeholders were of the view that a governor having served for two terms or found culpable, should not, for whatever reason, be allowed by law to hold any other public office; and
  - (iv) There were submissions that the disqualification period as proposed in the Bill should further be increased from five-year period to ten years.

## CHAPTER THREE: COMMITTEE OBSERVATIONS

### 3.1 Committee Observations

34. Having considered the Bill and the submissions received thereon, the Committee made the following observations –

(a) that Article 38(3)(c) of the Constitution of Kenya provides that every adult citizen has the right, without undue restrictions, to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office;

(b) that the right to be a candidate for public office is not absolute, and there are already certain limitations to the exercise of this right already provided for in the Constitution. These are contained in among others, Articles 99(2) and 193(2) of the Constitution (as replicated in section 24(2) and 25(2) of the Elections Act, no. 24 of 2011) and they provide for the grounds on which a person stands disqualified from being elected as a member of Parliament and of the county assembly respectively, including if the person has held certain state offices such as being an IEBC commissioner;

(c) that the right to vie for political office under article 38(3) is one that can be limited, the limitation has to be reasonable and justifiable, and it needs to be examined against Article 24(1) of the Constitution which provides that—

*A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

*(a) the nature of the right or fundamental freedom;*

*(b) the importance of the purpose of the limitation;*

*(c) the nature and extent of the limitation;*

*(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

*(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

(d) that the proposed limitation is reasonable and justifiable as it is limited to the offices which directly exercise oversight over county governments, through examining their audit reports and holding them accountable for their decisions, i.e the Senate and the county Assemblies. Unlike the Senate or county assemblies, the National Assembly does not directly exercise

oversight over counties, hence the proposed limitation would not be justifiable as regards members of the National Assembly;

- (e) that the Senate and county assemblies, in exercising oversight over county governments, are bound to examine the actions and decisions of governors, whether they are still in office or have left office and that if former governors are elected to sit in the county assembly or the Senate, they may be in a position to influence certain outcomes of the ongoing accountability processes;
- (f) that for the above reasons, although the proposed amendment does affect the right to be a candidate for election to certain public offices, the proposed amendment is already envisioned under article 38(3) and article 24 on limitation of fundamental rights, and it is necessary as it promotes accountability and impartiality by eliminating any real or perceived bias that may result in a conflict of interest upon the candidate being elected;
- (g) that as regards whether the amendment contained in the Bill is one that requires a referendum to be enacted, Article 255 of the Constitution provides that an amendment to the Constitution needs to be approved by a referendum if it relates to the following matters—
  - (a) the supremacy of this Constitution;
  - (b) the territory of Kenya;
  - (c) the sovereignty of the people;
  - (d) the national values and principles of governance referred to in Article 10 (2) (a) to (d);
  - (e) the Bill of Rights;
  - (f) the term of office of the President;
  - (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;
  - (h) the functions of Parliament;
  - (i) the objects, principles and structure of devolved government;
  - or
  - (j) the provisions of this Chapter.

As such, the proposed amendment is not one that requires approval through a referendum, and it can be enacted through parliamentary initiative as provided for under article 256 of the Constitution. This would require the bill to be passed by at least two-thirds of the membership of both Houses.

## CHAPTER FOUR: COMMITTEE RECOMMENDATION

### 4.1 Committee Recommendation

35. Having considered the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023) and the submissions received thereon, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that the Senate **passes the Bill without amendments.**

## LIST OF ANNEXES

- Annex 1:* Minutes of the sittings of the Committee in considering the Bill
- Annex 2:* Copy of the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023)
- Annex 3:* Advertisement published in the *Daily Nation* and *Standard* Newspapers on Friday, 16<sup>th</sup> February, 2024
- Annex 4:* Copy of Stakeholder Submissions on the Bill
- Annex 5:* Matrix on the Committee's consideration of Stakeholder Submissions

***ANNEX 1:*** Minutes of the sittings of the Committee in  
considering the Bill



13<sup>TH</sup> PARLIAMENT | 3<sup>RD</sup> SESSION

**MINUTES OF THE 111<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 18<sup>TH</sup> MARCH, 2024 AT 8.00 A.M ON THE ZOOM ONLINE MEETING PLATFORM**

**PRESENT**

- |    |   |                                   |
|----|---|-----------------------------------|
| 1. | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson ( <i>Chairing</i> ) |
| 2. | Sen. Raphael Chimera Mwinzagu, MP       | - Vice-Chair                      |
| 3. | Sen. Fatuma Adan Dullo, CBS, MP         | - Member                          |
| 4. | Sen. Andrew Omtatah Okoiti, MP          | - Member                          |

**ABSENT WITH APOLOGY**

- |    |   |          |
|----|---|----------|
| 1. | Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 2. | Sen. Hamida Ali Kibwana, MP             | - Member |
| 3. | Sen. Catherine Muyeka Mumma, MP         | - Member |
| 4. | Sen. Veronica W. Maina, MP              | - Member |
| 5. | Sen. Karen Njeri Nyamu, MP              | - Member |

**SECRETARIAT**

- |    |                      |   |
|----|----------------------|---|
| 1. | Mr. Charles Munyua   | - Senior Clerk Assistant                        |
| 2. | Mr. Moses Kenyanchui | - Legal Counsel I                               |
| 3. | Ms. Lilian Waweru    | - Legal Counsel II                              |
| 4. | Ms. Lynn Aseka       | - Clerk Assistant III ( <i>Taking Minutes</i> ) |
| 5. | Mr. Jackson Osore    | - Research Officer III                          |
| 6. | Mr. Josphat Ng'eno   | - Media Relations Officer III                   |
| 7. | Ms. Rosebella Ngesa  | - Protocol Officer III                          |
| 8. | Ms. Judith Aoka      | - Assistant Audio Officer                       |

**MIN. NO. 50/2024**

**PRELIMINARIES**

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

**MIN. NO. 51/2024**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Raphael Chimera Mwinzagu, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.

**MIN. NO. 52/2024**

**REPORT ON THE STATUTORY INSTRUMENTS  
(AMENDMENT) BILL (NATIONAL ASSEMBLY  
BILLS NO. 2 OF 2023)**

The Committee deferred adoption of the Report as there were less than five (5) Members present.

**MIN. NO. 53/2024**

**THE CONSTITUTION OF KENYA (AMENDMENT)  
(NO.2) BILL (SENATE BILLS NO. 52 OF 2023)**

The Committee was taken through a Brief on the Constitution of Kenya (Amendment) (No. 2) Bill (Senate Bills No. 52 of 2023).

Following deliberations, the Committee resolved –

- i) to hold a meeting with the eight (8) stakeholders who have submitted written comments on the Bill, on Monday, 15<sup>th</sup> April, 2024, in Machakos County;
- ii) to hold a public hearing on the Bill on Friday, 3<sup>rd</sup> May, 2024 at a venue in Mombasa County; and
- iii) thereafter, to consider, adopt and table its Report in the Senate before 14<sup>th</sup> May, 2024

**MIN. NO. 54/2024**

**THE CONFLICT OF INTEREST BILL, 2023  
(NATIONAL ASSEMBLY BILLS NO. 12 OF 2023)**

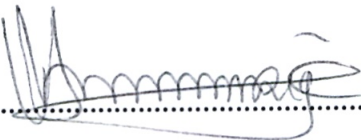
The Committee resumed consideration of the submissions received on the Conflict of Interest Bill (National Assembly Bills No. 12 of 2023).

Due to lapse of time, the Committee resolved to resume consideration of the matrix at a subsequent meeting to be held on Wednesday, 20<sup>th</sup> March, 2024 at 8.00 a.m.

**MIN. NO. 55/2024**

**ADJOURNMENT**

The Chairperson adjourned the meeting at forty-four minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 20<sup>th</sup> March, 2024 at eight O'clock.

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

DATE: ..... 04/05/2024 .....



13<sup>TH</sup> PARLIAMENT | 3<sup>RD</sup> SESSION

**MINUTES OF THE 117<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON MONDAY, 15<sup>TH</sup> APRIL, 2024 AT 9.00 A.M AT THE ARGYLE GRAND HOTEL, MACHAKOS COUNTY**

**PRESENT**

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

**ABSENT WITH APOLOGY**

- |    |   |              |
|----|---|--------------|
| 1. | Sen. Raphael Chimera Mwinzagu, MP       | - Vice-Chair |
| 2. | Sen. William Cheptumo Kipkiror, CBS, MP | - Member     |
| 3. | Sen. Veronica W. Maina, MP              | - Member     |
| 4. | Sen. Karen Njeri Nyamu, MP              | - Member     |

**SECRETARIAT**

- |    |                      |   |
|----|----------------------|---|
| 1. | Mr. Hassan Odhwa     | - PCA II/ HoD, Governance Committees            |
| 2. | Mr. Charles Munyua   | - Senior Clerk Assistant                        |
| 3. | Mr. Moses Kenyanchui | - Legal Counsel I                               |
| 4. | Ms. Lilian Waweru    | - Legal Counsel II                              |
| 5. | Ms. Lynn Aseka       | - Clerk Assistant III ( <i>Taking Minutes</i> ) |
| 6. | Mr. Jackson Osore    | - Research Officer III                          |
| 7. | Mr. Josphat Ng'eno   | - Media Relations Officer III                   |
| 8. | Ms. Judith Aoka      | - Assistant Audio Officer                       |
| 9. | Mr. Abdalla Mbore    | - Sergeant-at-Arms                              |

**IN ATTENDANCE** (*See Annex for Full List*)

1. Office of the Attorney General and Department of Justice
2. Council of Governors
3. Ethics and Anti-Corruption Commission
4. Independent Electoral and Boundaries Commission
5. Kenya Law Reform Commission
6. Kenya National Commission on Human Rights

7. Office of the Director of Public Prosecutions
8. County Assemblies Forum
9. Electoral Law and Governance Institute of East Africa

**MIN. NO. 80/2024**                      **PRELIMINARIES**

The Chairperson called the meeting to order at twenty-nine minutes past nine O'clock and opened with a word of prayer. This was followed by a self-introductory session by Senators, Secretariat, and the invited stakeholders.

**MIN. NO. 81/2024**                      **ADOPTION OF THE AGENDA**

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

**MIN. NO. 82/2024**                      **MEETING WITH STAKEHOLDERS TO RECEIVE  
SUBMISSIONS AND DELIBERATE ON THE  
CONSTITUTION OF KENYA (AMENDMENT) (NO.  
2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)**

The Committee resumed consideration of the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023). Upon invitation by the Chairperson, the Committee received submissions from the following invited stakeholders -

**a) Office of the Attorney-General and Department of Justice**

Appearing on behalf of the Attorney General, the Solicitor General observed that the Bill sought to prevent conflict of Interests that would arise when the immediate former Governors in the Senate and the county assemblies directly exercising oversight over county governments. However, accountability issues of those in charge of county affairs involves institutions like the Office of the Auditor-General, EACC, the Controller of Budget, ODPP, and DCI which are independent bodies of the Senate and the County Assemblies.

Under Article 99(2)(h) of the Constitution, disqualification of persons from being elected to Parliament (Senate) provides that a person is disqualified if found, in accordance with any law to have misused or abused a State office or public office or in any way to have contravened Chapter Six. The same is replicated in Article 193(2)(g) for county assembly.

He further submitted that the Constitution contemplates guilt with finality before barring any person from being elected to parliament or county assembly. However, the proposed Bill seeks to presume the culpability of the said Governors pending the completion of the investigations.

**b) Council of Governors**

The Council of Governors submitted that it opposed the Bill in its entirety, for the reasons –

- i) the Bill offends Article 38 of the Constitution on political rights;
- ii) the proposed Bill violates Article 50(2)(a) on presumption of innocence and fair hearing;
- iii) the Bill is incongruent with Article 27 in that it is selective and discriminatory in its exclusion;
- iv) the Bill violates Article 73(2)(b) and (c) on exercising leadership objectively and in the public interest; and
- v) the Bill conflicts a decision of the Court on the same subject matter. Constitutional Petition No. E005 of 2022; *Carolyn Andzazi Chilango & Anor v. The Independent Electoral and Boundaries Commission & Others* delivered on 17<sup>th</sup> June 2022.

**c) Ethics and Anti-Corruption Commission**

The Commission submitted that it was in support of the Bill noting that the proposed amendments aimed to prevent conflict of interest that would arise when immediate former County Governors who are elected Senators exercise oversight role over the counties they presided over.

The Commission found the proposed length of suspension that is five (5) years was reasonable and proportionate to the threat posed by the immediate former county Governors to the oversight role of Senate and County Assembly. This would enhance the Senate and County Assembly oversight role over County Governments and public funds and ultimately protect devolution.

In addition, they stated that the suspension period is not unique to immediate Governors. The same has been applied to Members of the Independent Electoral and Boundaries Commission under Article 99(2)(b) of the Constitution.

The provision to bar a former Governor from vying for the position of Senator under Article 99(2) and Member of County Assembly under Article 193(2), would allow for completion of any ongoing accountability process related to administration and financial management affairs of the County.

**d) Independent Electoral and Boundaries Commission**

The Commission submitted that the proposed amendments to the Constitution and the Election Act would directly affect the Commission's functions as the proposal seeks to review qualification/disqualification of candidates for election.

The intent and purposes of the Memorandum and objects of the Bill that proposes to limit the provisions of Chapter four (4), should consider other available mechanisms

within the ethics, integrity and electoral legal framework to achieve the desired purpose which includes to enhance accountability and deal with conflict of interest of an elective leader. This would behove the affected person in the respective assembly to rescue themselves from presiding over matters arising from the tenure of their previous office.

The Commission proposed that instead of limiting the rights espoused under Article 38(3)(c) of the Constitution, consideration should be made to expand the existing legislative frameworks inherent in the Elections Act, Election Offences Act, Leadership and Integrity Act and the Ethics and Anti-Corruption Commission Act to bar convicted office holders in future elections as anticipated under Chapter six (6) read together with Article 99(2)(h) of the Constitution.

**e) Kenya Law Reform Commission**

KLRC submitted that –

- i) the proposed amendment of Article 99 of the Constitution barring a sitting governor or person who has held the position of governor was partly repetitive of clause (2) which already disqualified State officers from being Members of Parliament;
- ii) disqualifying a former governor from vying for a seat in the Senate and allowing the person to vie as a Member of the National Assembly appeared to defeat the objects of the Bill; and
- iii) the proposed amendments appear to conflict with Article 27 of the Constitution.

Further, that clauses four (4) and five (5) which sought to amend sections 24 and 25 of the Elections Act, respectively, would best be captured in a Schedule to the Bill but not as substantive clauses as proposed.

**MIN. NO. 83/2024**

**ADJOURNMENT**

The Chairperson adjourned the meeting at five minutes past one O'clock. The next meeting was scheduled to commence the same day at two O'clock.

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

DATE: ..... 04/05/2024 .....



13<sup>TH</sup> PARLIAMENT | 3<sup>RD</sup> SESSION

**MINUTES OF THE 118<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON MONDAY, 15<sup>TH</sup> APRIL, 2024 AT 2.00 P.M AT THE ARGYLE GRAND HOTEL, MACHAKOS COUNTY**

**PRESENT**

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

**ABSENT WITH APOLOGY**

- |    |   |              |
|----|---|--------------|
| 1. | Sen. Raphael Chimera Mwinzagu, MP       | - Vice-Chair |
| 2. | Sen. William Cheptumo Kipkiror, CBS, MP | - Member     |
| 3. | Sen. Veronica W. Maina, MP              | - Member     |
| 4. | Sen. Karen Njeri Nyamu, MP              | - Member     |

**SECRETARIAT**

- |    |                      |   |
|----|----------------------|---|
| 1. | Mr. Hassan Odhwa     | - PCA II/HoD, Governance Committee              |
| 2. | Mr. Charles Munyua   | - Senior Clerk Assistant                        |
| 3. | Mr. Moses Kenyanchui | - Legal Counsel I                               |
| 4. | Ms. Lilian Waweru    | - Legal Counsel II                              |
| 5. | Ms. Lynn Aseka       | - Clerk Assistant III ( <i>Taking Minutes</i> ) |
| 6. | Mr. Jackson Osore    | - Research Officer III                          |
| 7. | Mr. Josphat Ng'eno   | - Media Relations Officer III                   |
| 8. | Ms. Judith Aoka      | - Assistant Audio Officer                       |

**IN ATTENDANCE** (*See Annex for Full List*)

1. Office of the Attorney General and Department of Justice
2. Council of Governors
3. Ethics and Anti-Corruption Commission
4. Independent Electoral and Boundaries Commission
5. Kenya Law Reform Commission
6. Kenya National Commission on Human Rights
7. Office of the Director of Public Prosecutions

8. County Assemblies Forum
9. Electoral Law and Governance Institute of East Africa

**MIN. NO. 84/2024**                      **PRELIMINARIES**

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

**MIN. NO. 85/2024**                      **MEETING WITH STAKEHOLDERS TO RECEIVE  
SUBMISSIONS AND DELIBERATE ON THE  
CONSTITUTION OF KENYA (AMENDMENT) (NO.  
2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)**

The Committee resumed receipt of submissions on the Constitution of Kenya (Amendment) Bill, 2023 (Senate Bills No. 52 of 2023) –

**a) Kenya National Commission on Human Rights**

The Commission observed that limiting former Governors from vying for these positions within the first five years after the end of their terms as Governors was justifiable under the ambit of Article 24 because Senators and Members of the County Assembly directly oversight Governors. It is possible for them to directly or indirectly influence the examination of the Audit reports submitted by the Auditor General or conduct of investigations into administration and financial mismanagement during their immediate tenure.

The Commission further stated that the proposed amendment to the bill promotes other key constitutional provisions including good governance, integrity, transparency and accountability under Article 10; leadership and integrity under Chapter Six; the values and principles of public service under Article 232 and public finance under Chapter Twelve.

The Commission was however opposed to also subjecting the limitations to positions for members of the National Assembly. This is because they play a minimal role in overseeing county chief executives.

The Commission further noted that similar restrictions have been imposed elsewhere in law. For instance, to commissioners of the Independent Electoral and Boundaries Commission.

**b) Office of the Director of Public Prosecutions**

ODPP submitted that the proposed amendments would affect the fundamental rights of Governors as provided for under Article 27 of the Constitution. In addition, if the Senate enacts the bill as proposed, the bill risks to be struck down on grounds of unconstitutionality as it would curtail political rights of Governors as provided for under Article 38(3)(c).

The intended Constitutional Amendments would attract legal challenges in that the law seeks to advocate for class discrimination against Governors which does not conform with the provisions of Article 10, 27 and 38 of the Constitution.

ODPP noted the purpose, Objects and Reasons for the bill are noble but would require to be approached through the popular initiative to avoid a declaration of the constitutional invalidity should any citizen approach the court for the interpretation through public interest litigation.

**c) County Assembles Forum**

CAF enunciated that the proposed amendments would provide a mechanism to enhance accountability by enhancing that former county Governors are held to scrutiny for their administrative actions during their tenure. The further observed that the five-year restriction period for the immediate former Governor to vie for as a senator or Member of County Assembly is aimed to prevent potential conflicts of interest.

They also submitted that while the justification of the bill is sound restricting former county Governors from contesting elections for five years may be perceived as limiting the political rights of individuals who have served in leadership roles. It could be seen as contradicting Article 38(3)(c). This would also be seen as delayed representation for communities that view these individuals as potential leaders.

**d) Electoral Law and Governance Institute for Africa**

ELGIA submitted that the proposed amendments to the Constitution would go against chapter 4 of the Constitution. They further submitted that in amending the proposed constitutional articles, the Bill in its context consequently limits the political rights provided under Article 38. They also noted that Article 24 provides situations and the extent to which the rights and fundamental freedom may be limited justifiably and reasonably in an open and democratic society.

**Deliberations**

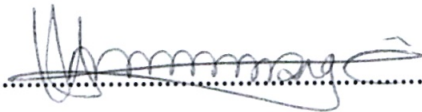
After the Committee received submissions from the invited stakeholders, this was followed by a roundtable discussion on the key issues that arose from the submissions received, including –

- i) whether the proposals contained in the Bill met the threshold under Article 24 of the Constitution for derogation from the Bill of Rights;
- ii) if not, what alternative legislative measures could be taken to address the concerns that informed the drafting of the Bill; and
- iii) whether the Bill fell under the areas set out at Article 255 of the Constitution that would require a referendum to process.

Thereupon, the Committee resolved to resume consideration of the Bill on 3<sup>rd</sup> May, 2024, when it would hold a public hearing on the Bill in Mombasa County, and thereafter retreat to prepare its Report.

**MIN. NO. 86/2024**                      **ADJOURNMENT**

The Chairperson adjourned the meeting at forty minutes past four O'clock. The next meeting was scheduled to be held on Tuesday, 16<sup>th</sup> April, 2024 at eight O'clock.

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

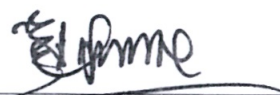
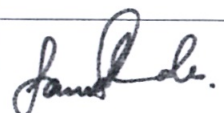
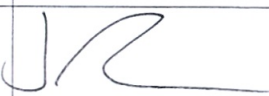
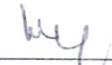

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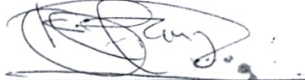


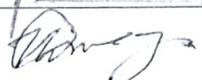



STAKEHOLDERS ATTENDANCE SHEET

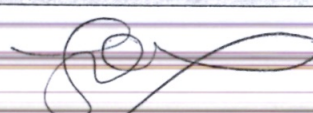
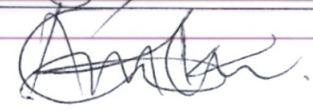
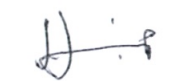





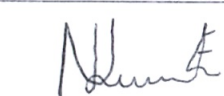
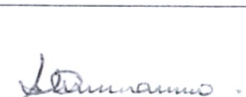

DATE: 15/4/2024 | TIME: 9:00 | VENUE: Argyle Grand Hotel

AGENDA: Deliberate on the Cok (Amendment) (No. 2) Stat. Ord. No. 22 of 2023)

IN ATTENDANCE

NO	NAME	TITLE AND ORGANIZATION	SIGNATURE
1.	Hon Shadrach MOSE	SOLICITOR GENERAL	
2.			
3.	Samson Mawdu	Principal State Counsel, OAG & DOJ	
4.	MUTILIA KILONZO JK	CHAIR, LEGAL AFFAIRS COB	
5.	IRINE M. OAKUMBA	Director Legal Services CoG	
6.	ABDI A. MOHAMUD	Deputy CEO, EACC	

NO	NAME	TITLE AND ORGANIZATION	SIGNATURE
7.	REGINA MURIKI	DEPUTY DIRECTOR, EACC	
8.	Christine Owiye	Director Legal Services, IEBC	
9.	Obadiah Keitany	Deputy CEO, IEBC	
10.	RUTH MAKUTHU	Ag. Manager legal Reforms, political parties and campaign financing, IEBC	
11.	Roselene Odede	KNCHR & Chairperson	
12.	Petronella Mwakindo	KNCHR DEPUTY DIRECTOR	
13.	Zachary Omwega	SADPP, ODPF	
14.	ALEXANDER M MUTETI	Ag. DDPP	
15.	SETH M. KAMAZA	KWAKE SPEAKER (C.A.E)	
16.	ANNE KIUSYA	MACHAKOS COUNTY SPEAKER VICE CHAIR-COUNTY ASSEMBLIES	
17.	Bon Makulwa	ELGIA	

NO	NAME	TITLE AND ORGANIZATION	SIGNATURE
18.	Felix Owuor	ELG/A/Executive Director	
19.	Austin Ngunjiri	CAF	
20.	Jeremy Mutunga	CAF	
21.	Martin Mwangi	CAF	
22.	Elijah Rotto	Senior Human Rights Officer KNCHR	
23.	Alex Mgoroge	KNCHR (SENIOR OFFICER)	
24.	Samuel Stawili	Research Assistant. Sen Sige's office	
25.	Naomi Kefa	Council of Governors	
26.	Lawi Eugene	Council of Governors	
27.	Bochere Ombani	Office of the Attorney General	
28.	BILWA KEKE	Office of the Attorney General	


STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

STAKEHOLDERS ATTENDANCE SHEET

DATE:..... | TIME:..... | VENUE:.....

AGENDA:.....

IN ATTENDANCE

NO	NAME	TITLE AND ORGANIZATION	SIGNATURE
1.	Peter Musyimi	Ag Director Legal-KLRC	
2.			
3.			
4.			
5.			
6.			

NO	NAME	TITLE AND ORGANIZATION	SIGNATURE
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NO	NAME	TITLE AND ORGANIZATION	SIGNATURE
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13<sup>TH</sup> PARLIAMENT | 3<sup>RD</sup> SESSION

MINUTES OF THE 126<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON  
JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON FRIDAY, 4<sup>TH</sup>  
MAY, 2024 AT 09.00 A.M IN TONONOKA SOCIAL HALL, MOMBASA  
COUNTY

PRESENT

1. Sen. Wakili Hillary Kiprotich Sigei, MP - Chairperson (*Chairing*)
2. Sen. Raphael Chimera Mwinzagu, MP - Vice-Chair
3. Sen. Veronica W. Maina, MP - Member

ABSENT WITH APOLOGY

1. Sen. Fatuma Adan Dullo, CBS, MP - Member
2. Sen. William Cheptumo Kipkiror, CBS, MP - Member
3. Sen. Hamida Ali Kibwana, MP - Member
4. Sen. Catherine Muyeka Mumma, MP - Member
5. Sen. Veronica W. Maina, MP - Member
6. Sen. Karen Njeri Nyamu, MP - Member
7. Sen. Andrew Omtatah Okoiti, MP - Member

SECRETARIAT

1. Mr. Njenga Njuguna - Director, Governance & Accountability Committees
2. Mr. Hassan Odhwa - Head of Department, Governance Committees
3. Ms. Lilian Waweru - Legal Counsel II
4. Ms. Lynn Aseka - Clerk Assistant III
5. Ms. Angela Bonaya - Clerk Assistant III (*Taking Minutes*)
6. Mr. Josphat Ng'eno - Media Relations Officer III
7. Ms. Judith Aoka - Assistant Audio Officer
8. Mr. Abadallah Mbore - Serjeant-At-Arms

IN ATTENDANCE

1. Invited stakeholders from the public. (*Annex 1*)

**MIN. NO. 120/2024**

**PRELIMINARIES**

The Chairperson called the meeting to order at thirty-one minutes past nine O'clock and opened with a word of prayer. This was followed by a self-introductory session by the Members, Secretariat and the invited stakeholders.

**MIN. NO. 121/2024**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Veronica W. Maina, MP and seconded by Sen. Raphael Chimera Mwinzagu, MP.

**MIN. NO. 122/2024**

**RECEIPT OF PUBLIC SUBMISSIONS ON THE  
CONSTITUTION OF KENYA (AMENDMENT) (NO.  
2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)**

The Committee conducted a public hearing on the Constitution of Kenya (Amendment) (No. 2) Bill, 2023 (Senate Bills No. 52 of 2023) which was held at Tononoka Social Hall in Mombasa County.

Representatives from various groups such as the County Government of Mombasa, women and youth groups as well as the residents of Mombasa town were present.

Majority of stakeholders expressed their support for the proposals in the Bill as they noted that it would instill the principles of transparency, accountability, rule of law, public confidence and good governance as enshrined in the Constitution.

The Committee thanked the members of the public who availed themselves for the public hearing and committed to take their views into consideration while further considering the Bill.

**MIN. NO. 123/2024**

**ADJOURNMENT**

The Chairperson adjourned the meeting at ten minutes past twelve O'clock. The next meeting was scheduled to be held on the same at two O'clock, at the Serena Hotel, Mombasa County.

SIGNED: ..... 

DATE: ..... 09/05/2024

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS


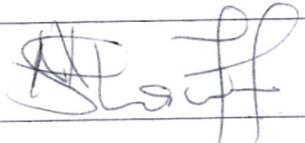




ATTENDANCE SHEET - STAKEHOLDERS










DATE: 3<sup>RD</sup> MAY, 2024

TIME: 9:00AM

VENUE: TONONOKA SOCIAL HALL, MOMBASA

AGENDA: PUBLIC HEARING ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)

NO	NAME	DESIGNATION	SIGNATURE
1.	Khadija Ribwana		
2.	Nasra Shattiff		
3.	HAMIDA GHAZAL		
4.	Barke Mohamed		
5.	ABUBAKAR JUMA		
6.	SHAFI HAMISI		

7.	Timothy Jackson		
8.	Victor Ogas		
9.	RISIKI ATHUMANI		
10.	Murugan Ravuor		
11.	BRIAN DROTH		
12.	Judy Ravuor		
13.	JACQUE NYAMBU		
14.	DOR MANSOLE		
15.	MOMO OMMI		

CONFIRMED BY: .....

SIGNATURE: .....

DATE: .....

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS



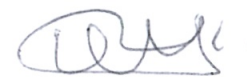



ATTENDANCE SHEET - STAKEHOLDERS









DATE: 3<sup>rd</sup> MAY 2024

TIME: 9.00 AM

VENUE: TONDOKA SOCIAL HALL, MONDASA

AGENDA: PUBLIC HEARING ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)

NO	NAME	DESIGNATION	SIGNATURE
1.	SARUM MORAMU		
2.	George Nyongera		
3.	Manga Douglas		
4.	Phidima Mboni		
5.	MASITA SAMUKA		
6.	ZAB WANGA		

7.	JANE KINIGULL		
8.	JANINA HASSAN		
9.	MARY KADIRI		Mary 
10.	Fatma Seleman	Young Urban women	
11.	Salma Khamis	Y.U.WI	
12.	EVERETT OJENO	Young Urban women	
13.	Yusef Omer	<del>Y.U.WI</del>	
14.	MENDI SARU	SWAHILIPOH HUB	
15.	JOSHUA NYONGESA	AMKENI CBD	

CONFIRMED BY: .....

SIGNATURE: .....

DATE: .....

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS







ATTENDANCE SHEET - STAKEHOLDERS

DATE: 3<sup>rd</sup> MAY, 2024

TIME: 9:00 AM

VENUE: TOBONGORA SOCIAL HALL, MOMBASA

AGENDA: PUBLIC HEARING ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)

NO	NAME	DESIGNATION	SIGNATURE
1.	EVE SEBBY	County Assembly MCA SENIOR CLERK ASSISTANT	
2.	ABDALLAH KHAMIS	County Assembly MCA PRINCIPAL CLERK ASSISTANT	
3.	BABIDA MWINYI/FAKI	MOMBASA COUNTY	
4.	JUMA BACHALI	MEMBER OF COMMITTEE	
5.	HALIMA ADAN	County Assembly of Mombasa Senior Clerk Assistant	
6.	ABDULLA GUEIMAN	PA SEN- FAKI	

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CONFIRMED BY: .....

SIGNATURE: .....

DATE: .....

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

ATTENDANCE SHEET – STAKEHOLDERS

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**CONFIRMED BY:** .....

**SIGNATURE:** .....

**DATE:** .....

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

ATTENDANCE SHEET – STAKEHOLDERS

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CONFIRMED BY: .....

SIGNATURE: .....

DATE: .....

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

ATTENDANCE SHEET – STAKEHOLDERS

DATE: .....

TIME: .....

VENUE: .....

AGENDA: .....

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CONFIRMED BY: .....

SIGNATURE: .....

DATE: .....



13<sup>TH</sup> PARLIAMENT | 3<sup>RD</sup> SESSION

**MINUTES OF THE 127<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON FRIDAY, 4<sup>TH</sup> MAY, 2024 AT 2.00 P.M AT THE SERENA RESORT & SPA HOTEL, MOMBASA COUNTY**

**PRESENT**

1. Sen. Wakili Hillary Kiprotich Sigei, MP - Chairperson (*Chairing*)
2. Sen. Raphael Chimera Mwinzagu, MP - Vice-Chairperson
3. Sen. Veronica W. Maina, MP - Member

**ABSENT WITH APOLOGY**

1. Sen. Fatuma Adan Dullo, CBS, MP - Member
2. Sen. William Cheptumo Kipkiror, CBS, MP - Member
3. Sen. Hamida Ali Kibwana, MP - Member
4. Sen. Catherine Muyeka Mumma, MP - Member
5. Sen. Veronica W. Maina, MP - Member
6. Sen. Karen Njeri Nyamu, MP - Member
7. Sen. Andrew Omtatah Okoiti, MP - Member

**SECRETARIAT**

1. Mr. Njenga Njuguna - Director, Governance & Accountability Committees
2. Mr. Hassan Odhwa - Head of Department, Governance Committees
3. Ms. Lilian Waweru - Legal Counsel II
4. Ms. Lynn Aseka - Clerk Assistant III
5. Ms. Angela Bonaya - Clerk Assistant III (*Taking Minutes*)
6. Mr. Josphat Ng'eno - Media Relations Officer III
7. Ms. Judith Aoka - Assistant Audio Officer
8. Mr. Abadallah Mbore - Serjeant-At-Arms

**MIN. NO. 124/2024**

**PRELIMINARIES**

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

**MIN. NO. 125/2024**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Veronica W. Maina, MP and seconded by Sen. Raphael Chimera Mwinzagu, MP.

**MIN. NO. 126/2024**

**CONSIDERATION OF STAKEHOLDER  
SUBMISSIONS ON THE CONSTITUTION OF  
KENYA (AMENDMENT) (NO. 2) BILL, 2023  
(SENATE BILLS NO. 52 OF 2023)**

Members considered the stakeholder submissions on the Constitution of Kenya (Amendment) (No. 2) Bill, 2023 (Senate Bills No. 52 of 2023) as was received during the public hearing held in Tononoka Social Hall in Mombasa County.

The Committee observed that majority of stakeholders expressed their support for the proposals in the Bill as they noted that it would instill the principles of transparency, accountability, rule of law, public confidence and good governance as enshrined in the Constitution.

However, the Committee further noted that the stakeholders at the public hearing supported the Bill but raised concerns with regard to the following-

- i). the constitutionality of the Bill with regard to the limitation on human rights and the presumption of innocence;
- ii). the discriminatory nature of the Bill in selectively targeting former governors who wish to vie for the position of Member of County Assembly or Senatorial seats;
- iii). in addition, the stakeholders submitted that the Bill should be further reviewed so as to not bar a governor with a good audit report. However, on the same issue, majority of stakeholders were of the view that a governor having served for two terms and found culpable, should not, for whatever reason, be allowed by law to hold any public office.
- iv). further, there were submissions that the proposed five-year ban as proposed in the Bill should be further increased to ten years.

The Committee thereafter extensively deliberated on the comments and resolved to recommend the Bill to the Senate for second reading.

**MIN. NO. 127/2024**

**ADJOURNMENT**

The Chairperson adjourned the meeting at three minutes past four O'clock. The next meeting was scheduled to be held on Saturday, 4<sup>th</sup> May, 2024 at nine O'clock at the Serena Resort & Spa Hotel, in Mombasa County.

SIGNED: .....

*[Handwritten signature]*

DATE: .....

09/05/2024



13<sup>TH</sup> PARLIAMENT | 3<sup>RD</sup> SESSION

**MINUTES OF THE 128<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON SATURDAY, 4<sup>TH</sup> MAY, 2024 AT 9.00 A.M AT THE SERENA RESORT & SPA HOTEL, MOMBASA COUNTY**

**PRESENT**

1. Sen. Wakili Hillary Kiprotich Sigei, MP - Chairperson (*Chairing*)
2. Sen. Raphael Chimera Mwinzagu, MP - Vice-Chairperson
3. Sen. Veronica W. Maina, MP - Member
4. Sen. Karen Njeri Nyamu, MP - Member
5. Sen. Andrew Omtatah Okoiti, MP - Member

**ABSENT WITH APOLOGY**

1. Sen. Fatuma Adan Dullo, CBS, MP - Member
2. Sen. William Cheptumo Kipkiror, CBS, MP - Member
3. Sen. Hamida Ali Kibwana, MP - Member
4. Sen. Catherine Muyeka Mumma, MP - Member

**SECRETARIAT**

1. Mr. Njenga Njuguna - Director, Governance & Accountability Committees
2. Mr. Hassan Odhwa - Head of Department, Governance Committees
3. Ms. Lilian Waweru - Legal Counsel II
4. Ms. Lynn Aseka - Clerk Assistant III
5. Ms. Angela Bonaya - Clerk Assistant III (*Taking Minutes*)
6. Mr. Josphat Ng'eno - Media Relations Officer III
7. Ms. Judith Aoka - Assistant Audio Officer
8. Mr. Abadallah Mbore - Serjeant-At-Arms

**MIN. NO. 133/2024**

**PRELIMINARIES**

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

**MIN. NO. 134/2024**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Veronica W. Maina, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.

**MIN. NO. 135/2024**

**CONSIDERATION OF THE DRAFT COMMITTEE REPORT ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)**

The Committee was taken through the draft Report the Constitution of Kenya (Amendment) (No. 2) Bill, 2023 (Senate Bills No. 52 of 2023) with the proposed amendments incorporated as observations and recommendations at chapters three and four of the Report.

Thereafter, the Committee adopted the Report, having been proposed by Sen. Raphael Chimera Mwinzagu, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.

**MIN. NO. 136/2024**

**CONSIDERATION OF THE DRAFT COMMITTEE REPORT ON THE HOUSES OF PARLIAMENT (BICAMERAL RELATIONS) BILL, 2023 (NATIONAL ASSEMBLY BILLS NO. 44 OF 2023)**

The Committee was taken through the draft Report on the Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023) with the proposed amendments incorporated as observations and recommendations at chapters three and four of the Report.

Thereafter, the Committee adopted the Report, having been proposed by Sen. Raphael Chimera and seconded by Sen. Andrew Omtatah Okoiti, MP.

**MIN. NO. 137/2024**

**ADJOURNMENT**

The Chairperson adjourned the meeting at thirty minutes past twelve O'clock. The next meeting was scheduled to be held on the same day, 4<sup>th</sup> May, 2024 at two O'clock at the Serena Resort & Spa Hotel, in Mombasa County.

SIGNED: ..... 

DATE: ..... 09/05/2024

***ANNEX 2:*** Copy of The Constitution (Amendment) Bill, 2023  
(National Assembly Bills No. 52 of 2023)

**SPECIAL ISSUE**

*Kenya Gazette Supplement No. 226 (Senate Bills No. 52)*



REPUBLIC OF KENYA

***KENYA GAZETTE SUPPLEMENT***

**SENATE BILLS, 2023**

**NAIROBI, 24th November, 2023**

CONTENT

Bill for Introduction into the Senate—	PAGE
The Constitution of Kenya (Amendment) (No. 2) Bill, 2023 .....	1103

**THE CONSTITUTION OF KENYA (AMENDMENT)  
(NO. 2) BILL, 2023**

**A Bill for**

**AN ACT of Parliament to amend the Constitution of Kenya**

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

**1.** This Act may be cited as the Constitution of Kenya (Amendment) (No. 2) Act, 2023. Short title.

**2.** Article 99 of the Constitution is amended in clause (2) by inserting the following new paragraph immediately after paragraph (b)— Amendment of Article 99 of the Constitution.

(ba) in the case of election to the Senate—

- (i) is a county governor; or
- (ii) has, at any time within the five years immediately preceding the date of election, held office as a county governor.

**3.** Article 193 of the Constitution is amended in clause (2) by inserting the following new paragraph immediately after paragraph (b)— Amendment of Article 193 of the Constitution.

(ba) has, at any time within the five years immediately preceding the date of election, held office as a county governor.

**4.** Section 24 of the Elections Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (b)— Amendment of section 24 of No. 24 of 2011.

(ba) in the case of election to the Senate—

- (i) is a county governor; or
- (ii) has, at any time within the five years immediately preceding the date of election, held office as a county governor.

**5.** Section 25 of the Elections Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (b) —

Amendment of  
section 25 of No.  
24 of 2011.

- (ba) has, at any time within the five years immediately preceding the date of election, held office as a county governor.

### **MEMORANDUM OF OBJECTS AND REASONS**

The object of the legislative proposal is to amend Articles 99 (2) and 193 (2) of the Constitution of Kenya to bar persons who have served as county governors from vying for election as Members of Parliament or members of county assembly for the first five years immediately after serving as county governors. The Bill also amends section 24 (2) and 25 (2) of the Elections Act, No. 24 of 2011 which replicate the above provisions of the Constitution.

County governors, in the course of their duties, have to account to the county assemblies and the Senate for any financial and administrative decisions made. Annual audits reports prepared by the Office of the Auditor General are submitted to the Senate and the relevant county assembly pursuant to section 32 of the Public Audit Act, no. 34 of 2015 for scrutiny.

Barring former county governors from vying for elections will allow for any ongoing accountability processes related to administration and financial management affairs of the county to be completed, as these would have a bearing on the suitability of the former county governor to hold any other elective position.

Additionally, since the Senate and the county assemblies directly exercise oversight over county governments, through examining their audit reports and holding governors accountable for their decisions, having former governors sit in the two legislatures would lead to conflict of interest and interfere in their decision-making process.

The effect of this would be —

- (a) oversight bodies would have adequate time to inquire into any matters arising from the tenure of a previous holder of the office of county governor without interference by the former county governor, which is highly likely particularly if the person is elected as member of county assembly or to the Senate; and
- (b) voters would have a reference point in making an informed choice on the candidate's suitability for another elective office since all accountability processes would have been completed.

Article 256 (1) (b) provides that a Bill may not address any other matter apart from consequential amendments to legislation arising from the Bill. This Bill contains amendments to section 24 (2) and 25 (2) of the Elections Act, No. 24 of 2011. The two sections replicate the provisions of

Article 99 (2) and 193 (2) of the Constitutions, hence the necessity of amending them.

Dated the 9th November, 2023.

RAPHAEL CHIMERA,  
*Senator.*

*Article 99 of the Constitution that the Bill proposes to amend—*

**99. Qualifications and disqualifications for election as member of Parliament**

(1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—

- (a) is registered as a voter;
- (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and
- (c) is nominated by a political party, or is an independent candidate who is supported—
  - (i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or
  - (ii) in the case of election to the Senate, by at least two thousand registered voters in the county.

(2) A person is disqualified from being elected a member of Parliament if the person—

- (a) is a State officer or other public officer, other than a member of Parliament;
- (b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
- (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
- (d) is a member of a county assembly;
- (e) is of unsound mind;
- (f) is an undischarged bankrupt;
- (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or
- (h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

*Article 193 of the Constitution that the Bill proposes to amend—*

**193. Qualifications for election as member of county assembly**

(1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—

- (a) is registered as a voter;
- (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and
- (c) is either—
  - (i) nominated by a political party; or
  - (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

(2) A person is disqualified from being elected a member of a county assembly if the person—

- (a) is a State officer or other public officer, other than a member of the county assembly;
- (b) has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
- (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
- (d) is of unsound mind;
- (e) is an undischarged bankrupt;
- (f) is serving a sentence of imprisonment of at least six months; or
- (g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.

(3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

*Section 24 of No.24 of 2011 that the Bill proposes to amend—*

**24. Qualifications and disqualifications for nomination as member of Parliament**

(1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person—

- (a) is registered as a voter;
  - (b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act; and
  - (c) is nominated by a political party, or is an independent candidate who is supported—
    - (i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or
    - (ii) in the case of election to the Senate, by at least two thousand registered voters in the county.
- (2) A person is disqualified from being elected a member of Parliament if the person—
- (a) is a State officer or other public officer, other than a member of Parliament;
  - (b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Commission;
  - (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
  - (d) is a member of a county assembly;
  - (e) is of unsound mind;
  - (f) is an undischarged bankrupt;
  - (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or
  - (h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six of the Constitution.
- (3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

*Section 25 of no.24 of 2011 that the Bill proposes to amend—*

**25. Qualifications for nomination as member of county assembly**

- (1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—
- (a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

(2) A person is disqualified from being elected a member of a county assembly if the person—

(a) is a State officer or other public officer, other than a member of the county assembly;

(b) has, at any time within the five years immediately before the date of election, held office as a member of the Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is of unsound mind;

(e) is an undischarged bankrupt;

(f) is serving a sentence of imprisonment of at least six months; or

(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution.

(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

**ANNEX 3:** Advertisement Published in the *Daily Nation* and  
*Standard Newspapers* on Friday, 16<sup>th</sup> February,  
2024

REPUBLIC OF KENYA



Friday  
Feb 16, 2024

THIRTEENTH PARLIAMENT | THIRD SESSION  
THE SENATE

**INVITATION FOR SUBMISSION OF MEMORANDA**

At the sitting of the Senate held on Wednesday, 14<sup>th</sup> February, 2024, the Bills listed at the second column below were introduced in the Senate by way of First Reading and thereafter stood committed to the respective Standing Committees indicated at the third column.

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

The memoranda may be submitted to the Clerk of the Senate, P. O. Box 41842-00100, Nairobi, hand-delivered to the Office of the Clerk of the Senate, Main Parliament Buildings, Nairobi or emailed to [clerk.senate@parliament.go.ke](mailto:clerk.senate@parliament.go.ke) and copied to the email addresses of the respective Committee indicated at the fourth column below, to be received on or before **Friday, 1<sup>st</sup> March, 2024 at 5.00 p.m.**

Bill	Committee Referred To	Email Address
a) The Conflict of Interest Bill (National Assembly Bills No. 12 of 23)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senatejlahrc@parliament.go.ke">senatejlahrc@parliament.go.ke</a>
b) The Gambling Control Bill (National Assembly Bills No. 70 of 2023)	Standing Committee on Labour and Social Welfare	<a href="mailto:laboursocialwelfarecomm.senate@parliament.go.ke">laboursocialwelfarecomm.senate@parliament.go.ke</a>
c) The Wildlife Conservation and Management (Amendment) Bill (Senate Bills No. 46 of 2023)	Standing Committee on Land, Environment and Natural Resources	<a href="mailto:landenvironcommittee.senate@parliament.go.ke">landenvironcommittee.senate@parliament.go.ke</a>
d) The Nuts and Oil Crops Development Bill (Senate Bills No. 47 of 2023)	Standing Committee on Agriculture, Livestock and Fisheries	<a href="mailto:agriculturelcommittee.senate@parliament.go.ke">agriculturelcommittee.senate@parliament.go.ke</a>
e) The Constitution of Kenya (Amendment) (No. 2) Bill (Senate Bills No. 52 of 2023)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senatejlahrc@parliament.go.ke">senatejlahrc@parliament.go.ke</a>

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

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

*ANNEX 4(a):* Office of the Attorney General



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL  
&  
DEPARTMENT OF JUSTICE



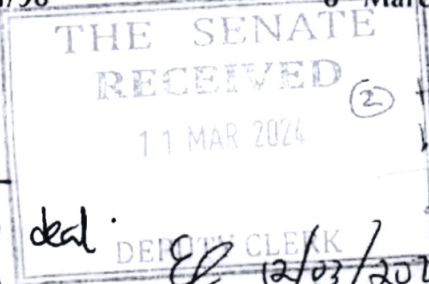
12 March 2024

Our Ref: DOJ/PM/9/7 VOL.I (36); AG/LDD/1101/1/98  
Your Ref: SEN/DGAC/DGC/JLAHRC/2024/11(a)

8<sup>th</sup> March, 2024

Mr. Jeremiah M. Nyegenye, CBS  
Clerk of the Senate  
Clerk's chambers  
P.O Box 41842- 00100  
**NAIROBI**

① DGAC  
DGC



② HOD-Governments  
Head Clerk - JLAS  
Kindly deal  
12/03/24

Kindly deal  
12/03/2024

RE: INVITATION TO SUBMIT COMMENTS ON THE CONSTITUTION OF KENYA  
(AMENDMENT) (NO.2) BILL (SENATE BILLS NO.52 OF 2023)

Reference is made to your letter under reference SEN/DGAC/DGC/JLAHRC/2024/11(a) dated 23<sup>rd</sup> February, 2024 inviting this Office to respond through written submissions on the Constitution of Kenya (Amendment) (No. 2) Bill (Senate Bills No.52 of 2023).

We note that the Bill seeks to amend Articles 99 (2) and 193 (2) of the Constitution to bar persons who have served as Governors from vying for election as Members of Parliament or Members of County Assembly for the first five years immediately after serving as Governor. The Bill further proposes to amend sections 24(2) and 25(2) of the Elections Act, 2011 which replicate the above provisions of the Constitution. It is stated that the intention to bar Governors is to allow accountability processes related to administration and financial management affairs of the county to be completed as these would have a bearing on the suitability of the former Governor to hold any other elective office.

Having analyzed the Bill, we propose that the Standing Committee on Justice, Legal Affairs and Human Rights consider the following observations:

1. The main concern is that having former governors in the Senate and the county assemblies directly exercising oversight over county governments would lead to conflict of interest and interfere in their decision-making process. However, we note that the issue of accountability of those in charge of county affairs is a multi-institutional and a multi-agency affair involving other institutions like the Office of the Auditor-General, the Ethics and Anti-Corruption Commission (EACC), the Controller of Budget, the Director of Criminal Investigations (DCI) and the Office of the Director of Public Prosecutions (ODPP). These institutions/ agencies are independent of the Senate and the County Assemblies.
2. Comparatively, Article 99(2)(h) of the Constitution on disqualification of persons from being elected to Parliament (Senate) provides that a person is disqualified if found, in

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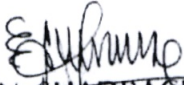
DEPARTMENT OF JUSTICE  
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337  
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accordance with any law to have misused or abused a State office or public office or in any way to have contravened Chapter Six. The same is replicated in Article 193(2)(g) for county assembly. However, Articles 99(3) and 193(3) of the Constitution expressly state that a person is not disqualified *unless all possibility of appeal or review of the relevant sentence or decision has been exhausted*. The Constitution, therefore, contemplates guilt with finality before barring any person from being elected to parliament or county assembly. The proposed Bill seeks to make an exception to this position and presume the culpability of the said Governors pending the completion of the investigations, an issue that the Committee may wish to review further.

We respectfully submit.



**HON. SHADRACK J. MOSE**  
**SOLICITOR GENERAL**

Copy to: **Hon. J.B.N. Muturi, EGH**  
**ATTORNEY GENERAL**

***ANNEX 4(b):*** Council of County Governors (CoG)



12 March 2024

DGAC  
DLG



**COUNCIL OF GOVERNORS**

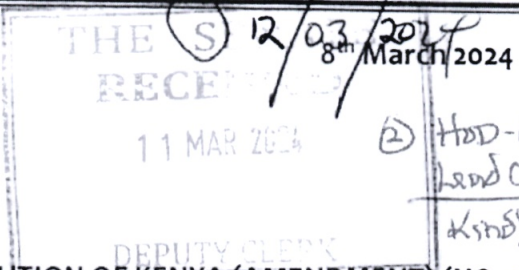
Kindly Deal  
Eg

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

Tel: (020) 2403314, 2403313  
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Our Ref: COG/6/12 Vol.12

The Office of the Clerk of the Senate  
Main Parliament Buildings  
Nairobi.



12/03/2024  
8<sup>th</sup> March 2024

② Hon-Governor  
Lead Clerk-JLH  
Kindly Deal  
12/03/2024

**LEGISLATIVE MEMORANDUM ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL, 2023 (SENATE BILL NO. 52 OF 2023)**

Greetings from the Council of Governors.

We refer to the above matter and your letter dated 23<sup>rd</sup> February 2024 Ref. SEN/DGAC/DGC/JLAHRC/2024/11(i) calling for submission of legislative memoranda on the Constitution of Kenya (Amendment) (No. 2) Bill, 2023 (Senate Bill No. 52 of 2023) (the "Bill").

Having reviewed the same, the Council notes that the object of the Bill is to amend Articles 99 (2) and 193 (2) of the Constitution of Kenya to bar persons who have served as County Governors from vying for election as Members of Parliament (in the Senate) or members of county assembly for the first five years immediately after serving as county governors. The Bill also amends section 24 (2) and 25 (2) of the Elections Act, No. 24 of 2011 which replicate the above provisions of the Constitution.

The Council **OPPOSES** the Bill in its entirety for the reasons outlined hereunder:

**i. The Bill proposes an amendment that requires a referendum under Article 255 of the Constitution**

The Council notes that the Bill falls squarely under Article 255 of the Constitution, which outlines the requirement for a referendum when amending certain fundamental provisions of the Constitution, including matters related to the Bill of Rights. It provides that any proposed constitutional amendment touching on the Bill of Rights shall be approved through a referendum as outlined in clauses (2) thereof.

**ii. The Bill offends Article 38 of the Constitution on political rights**

The Council opposes the Bill as it seeks to bar current and former Governors from exercising their political rights under Article 38 of the Constitution without reasonable justification. The Bill's justification avers that barring former county governors from vying for elections will allow for any ongoing accountability processes related to administration and financial management affairs of the county to be completed, as these would have a bearing on their suitability to hold any other elective position.

This limitation **does not meet the threshold** for limitation of rights under Article 24 of the Constitution, which requires that a limitation of a fundamental right must be by law and to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

**iii. The Bill violates Article 50 (2) (a) on presumption of innocence and fair hearing**  
The Council notes that the Bill speculates that all current and former Governors are guilty of misconduct for which they will be held accountable before they exercise their constitutional right to vie for elective office. This speculation is contrary to Article 50 (2) (a) of the Constitution on presumption of innocence and fair hearing. Additionally, we note that the oversight role of the Senate is **not exercised by individual senators but is a collective responsibility**, which negates the justification in the Bill's Memorandum of Objects and Reasons.

**iv. The Bill is incongruent with Article 27 in that it is selective and discriminatory in its exclusion**  
The Council notes that the Bill infringes Article 27 of the Constitution that stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law. The State is obligated to ensure it does not discriminate directly or indirectly against any person under clause (4). While accountability and oversight over county governance are important considerations, the proposed restrictions do not align with the principles of **fairness and equality**, as contemplated under Article 27 (1) of the Constitution of Kenya. We note that the Bill is selective as it excludes Governors from vying for Senate or County Assemblies yet the Senate oversees other public officers including Cabinet Secretaries and Chief Executive Officers of state corporations. These public officers have not been barred from contesting for these elective seats.

**v. The Bill violates Article 73 (2) (b) and (c) on exercising leadership objectively and in the public interest**  
The Council notes that the spirit of the Bill offends Article 73 (2) (b) and (c) of the Constitution that provides for the guiding principles of leadership which include objectivity in decision making and selfless service based solely on the public interest. We note that the Senate in this case, appears to be legislating in its self-interest in a move to insulate and or cushion its members from competition in the next general election.

**vi. The Bill conflicts a decision of the Court on the same subject matter**  
The Council notes that the Bill is in blatant incongruence with the decision of the Court in *Constitutional Petition No. E005 of 2022; Carolyne Andzazi Chilango & Anor v. The Independent Electoral and Boundaries Commission & Others* delivered on 17<sup>th</sup> June 2022. The Council was a party to the petition where the court dismissed a petition seeking to bar former and current Governors from vying for seats as Members of Parliament as there will be an affront to the Senate's oversight role on County Governments because the MPs will essentially be overseeing functions they themselves performed. The court held:

*"The above averment is speculative and overbroad ... It targets a group of people and dangerously assumes all are guilty. It wants the court to "declare" former and current governors' guilty long before the culpable are identified through a credible process. Its tantamount to applying an arrest warrant and suspend it over a group of people who stand "arrested" before culpability is established ... the orders sought if granted are likely to impinge Article 38 rights of the targeted group of people ... Such a limitation cannot pass an Article 24 analysis test because a limitation of a fundamental right must be reasonable and justifiable in an open and democratic society... (emphasis ours)*

*(Attached hereto is a copy of the court decision for your reference)*

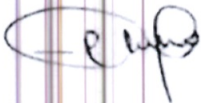
The Council submits that the Senate and County Assemblies ought to exercise their oversight role and complete the same within the Governor's term instead of visiting any delays thereto on the former Governor.

Nevertheless, **Governors are not immune to accountability proceedings** after the lapse of their term. **Article 226 (5)** of the Constitution provides that the holder of a public office who is liable for any loss of public funds pursuant to their instruction shall make good that loss whether they remain the holder of the office or not.

Finally, the Council also notes that the existing Constitutional provisions on qualifications for election as senator and member of county assembly are sufficient and suitability is a continuous process.

In view of these submissions, we urge the Senate to withdraw the Bill as it seeks to infringe the fundamental rights of Governors and undo the gains of democracy enshrined under our Constitution.

Please accept the assurance of our highest esteem and consideration.



**Mary Mwit**  
**Chief Executive Officer**

Copy to:

1. **All Excellency Governors**
2. **All County Attorneys**



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**CONSTITUTIONAL PETITION NO. E005 OF 2022**

**CAROLYNE ANDZAZI CHILANGO .....1<sup>st</sup> PETITIONER**  
**COAST LEGAL AIDS AND RESOURCE FOUNDATION.....2<sup>nd</sup> PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**  
**BOUNDARIES COMMISSION.....1<sup>st</sup> RESPONDENT**  
**THE SPEAKER OF THE NATIONAL ASSEMBLY.....2<sup>nd</sup> RESPONDENT**  
**THE COUNCIL OF GOVERNORS.....3<sup>rd</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....4<sup>th</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners' case as I glean it from the Petition is that there exists a number of County Governors who have expressed intention to vie for the positions of members of Parliament. Their contestation is that Members of Parliament are constitutionally mandated to perform oversight role over County Governments. They contend that in the event a former or current governor is elected to Parliament, it will be tantamount to asking a party to inquire, investigate and sanitize his misdeeds while at the helm of the County Government. To them, this would be an avenue for covering their wrongs and a violation of national values and principles of governance. As a consequence, they pray for: -

*a. A declaration that the former and current governors are not eligible to vie for the position of member of Parliament as it negates Articles 10 and 73 and 95(4) and 96(3) of the Constitution.*

- b. A conservatory order be issued restraining the 1<sup>st</sup> Respondent from clearing and allowing any County Chief Executive Officer (Governors) to contest for the Position of Member(s) of Parliament.*
- c. Any such other and or further order the honourable court may deem fit, just and expedient to grant in the circumstances of this case.*
- d. Costs of the Petition.*

2. In its grounds of opposition dated 31<sup>st</sup> May 2022, the 1<sup>st</sup> defendant states:- that Article 88 of the Constitution mandates the IEBC to supervise referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an act of Parliament; (b) Article 88(4) (d) and (f) mandates the 1<sup>st</sup> Respondent to regulate the nomination of candidates and conduct their registration for elections; (c) the IEBC can only reject the candidature of a candidate if there exists a law that bars the individual from vying; (d) there is no law barring former Governors from vying for the seat of a Member of Parliament; (e) fundamental rights can only be limited by law, including the Right to a candidature for public in elections; (f) the Petition as drawn does not disclose any reasonable and or justifiable reason to limit the right of former Governors to vie as Members of Parliament; that the Petition is based on assumptions which cannot qualify as justifiable and reasonable grounds to limit the rights provided under the Constitution; and (g) that the Petition is an abuse of court process.
3. In its grounds of opposition dated 30<sup>th</sup> May 2022, the 4<sup>th</sup> Respondent stated that the Petition lacks merit; that this court lacks jurisdiction; that the Petition offends Article 38 of the Constitution, and lastly, it's a misapprehension of the functions of the Parliament.
4. The 5<sup>th</sup> Respondent filed a Response to the Petition dated 2<sup>nd</sup> June 2022 stating that the application is scandalous, vexatious and an abuse of court process; that unless disqualified under Article 99(2) of the Constitution, a person is eligible for election as a Member of Parliament if the person registered as a voter satisfies educational, moral and ethical requirements prescribed by the Constitution or Act of Parliament and is nominated by a political party; that no person can be disqualified under Article 99(2) of the Constitution unless all possibility of appeal or review of the relevant sentence or decision has been exhausted; that the qualification and the disqualification for nomination as Member of

Parliament are set out in section 24 of the Election Act and being a governor or former governor is not one of the reasons for disqualification.

5. The Petitioners' counsel's submissions were essentially a replication of the averments in the pleadings. Essentially, he argued that should persons who served as governors be elected as Members of Parliament, there would be a risk of conflict of interests because of the unique oversight role over county government they undertake. He submitted that such a scenario will amount to inviting governors to sanitize themselves which will be an affront to checks and balances. While acknowledging that no law bars former and current governors from vying, he argued that there is a danger of conflict of interest. He invoked Article 165 (3) of the Constitution and argued that this court has jurisdiction to determine this case and cited *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*.<sup>1</sup>
6. Counsel for the IEBC argued that the Petitioner seeks to curtail the rights of former and current governors guaranteed under Article 38 of the Constitution. He submitted that fundamental rights can only be limited as provided under Article 24 of the Constitution. He argued that no law bars former and current governors from vying, and added that the qualifications for Members of Parliament are provided in Article 99 of the Constitution. He relied on *Stephen Wachira Karani v Attorney General and 4 others*.<sup>2</sup> On the question of oversight and conflict of interests, he submitted that the argument is too speculative to curtail a fundamental right. He submitted that the law lays down sufficient safeguards to oversee expenditure at the counties such as the office of the Controller and Auditor General. He added that the Senate sits as a whole and not the individual senators.
7. Counsel for the 4<sup>th</sup> Respondent cited Article 84 (f) of the Constitution and section 4 of the Independent Electoral and Boundaries Commission Act<sup>3</sup> and submitted that this court lacks jurisdiction because this is a matter that ought to have been raised before the IEBC. He relied on *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Shem Odongo Ochuodh*<sup>4</sup> which held that section 74(1) of the Elections Act gives the IEBC responsibility *inter alia*, to settle disputes relating to or arising from nomination.

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<sup>1</sup> [2015] e KLR.

<sup>2</sup> [2017] e KLR.

<sup>3</sup> Act No. 9 of 2011.

<sup>4</sup> [2017] e KLR.

8. Additionally, counsel cited Article 38 of the Constitution which grants every person political rights which cannot be easily derogated. As for the alleged conflict of interest, he noted that the Petitioner admits there is no law barring the former governors from vying for the said seats and added that the Petitioners have said nothing about Articles 94 and 95 of the Constitution. He submitted that the National Assembly does not oversight the County Governments unlike the Senate. He submitted that at the Senate, the oversight is not done by individual senators but it is a collective responsibility. He submitted that the qualifications of Members of Parliament under the Constitution do not bar a sitting governor from vying unless barred by law.
9. Counsel for the Attorney General referred to the qualifications in Article 99 and submitted that it does not refer to specific group of people nor does the Article bar governors from vying, and, that the only specific bar is provided in Article 75(3) of the Constitution.
10. This Petition will stand or fall on three key issues. One is whether it is premised on speculation, conjecture, generalities, possibilities and assumptions. The Petition is directed against former and serving governors who are said to have expressed interest to contest in the forthcoming general elections. The specific persons are not stated. Their identities are not disclosed. The Petition does not name any person who has declared interest or intention to vie. The Petitioners were not patient enough to object to the clearance of the candidates by the IEBC and if unsuccessful escalate the matter to the High Court. The use of the words “if the former and current governors are elected” and “it is likely to cause conflict of interest” have severally deployed in the Petition and the submissions.
11. For starters, I underscore the undeniable fact that access to justice is a cornerstone principle of our democracy. Vital to that principle is our justice system and the ease with which those who have been aggrieved are able to seek relief from the courts. Prior to the advent of the 2010 Constitution, litigants often encountered insurmountable pleading standards characterizing the gate through which claimants had to pass to gain entry into the judicial system. The 2010 Constitution ushered in a new era of open access for Petitioners by casting aside complicated fact-pleading regimes in favor of simplified pleadings including informal documents. The idea was that decisions should be rooted in the merits.

12. Rule 10 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)

*Practice and Procedure Rules, 2013* provides: -

*(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom*

13. The above rule does not open a blanket door for Petitioners to bring to court Petitions based on speculation, conjecture, moot or unripe issues. For an informal pleading to be accepted, it must disclose denial, violation, infringement or threat to a right or fundamental freedom. A pleading should not be prospective, hypothetical or speculative. As Kriegler J<sup>5</sup> succinctly put it: -

*"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."*

14. As Lord Bridge of Harwich put it, courts do not pronounce on abstract questions of law when there is no dispute to be resolved."<sup>6</sup> It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed<sup>7</sup> or shown to be likely to be infringed. Claimants are required to show plausible entitlement to relief by offering enough facts "to raise a right to relief above the speculative level. The 2010 Constitution did not open a flood gate for Petitions based on speculation and conjecture. A party citing violation of Articles of the Constitution or breach of rights must plead with specificity the articles of the constitution alleged to be violated and the facts supporting the alleged violation. A Petitioner's obligation to provide the grounds of his entitlement to

<sup>5</sup> In *Ferreira vs Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) at paragraph [199].

<sup>6</sup> In the case of *Ainsbury vs Millington* (1987) 1 All ER 929 (HL), which concluded at 930g: 13.

<sup>7</sup> See *Transvaal Coal Owners Association v Board of Control* 1921 TPD 447 at 452

relief requires more than labels, conclusions, speculation or assumptions. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are probable (even if doubtful in fact).

15. As stated above the Petitioners seek to bar former and current county governors from contesting in the August 8<sup>th</sup> 2022 general elections. This argument is premised on an averment that “if the former and current governors are elected as Members of Parliament” there will be an affront to the Senates oversight role on county governments because the MPS will essentially be overseeing functions they themselves performed. The above averment is speculative and overbroad. Arguability of a Petition is basically a question of fact based on materials and not on speculative persuasion at the hearing. This Petition suffers from a lack of precision. It is imprecise, vague and speculative. It targets a group of people and dangerously assumes all are guilty. It wants the court to “declare” former and current governors’ guilty long before the culpable are identified through a credible process. Its tantamount to applying an arrest warrant and suspend it over a group of people who stand “arrested” before culpability is established. The Petition stands on assumptions, it is overbroad in its language, and imprecise.
16. Speculative and conjectural allegations are not considered reliable, and they are not allowed as evidence in court cases. While someone can make an educated guess about something and be correct, there is no way to verify that in the court. Courts rely only on factual evidence and not litigants’ guesses about what else occur or may have occurred. This is what I will describe ungrounded assumptions. Courts must avoid speculative reasoning that invokes “common-sense” assumptions that are not grounded in the evidence. This Petition suffers from speculation and conjuncture. On this ground alone, I dismiss it.
17. The second hurdle in front of this Petition is the doctrine of ripeness which prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. Ripeness refers to the readiness of a case for litigation; “a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”<sup>8</sup> The goal of ripeness is to prevent premature adjudication; if a dispute is

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<sup>8</sup> *Texas v United States*, 523, US 296 (1998).

insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.

18. The U.S. Supreme Court fashioned a two-part test for assessing ripeness challenges in *Abbott Laboratories v Gardner*<sup>9</sup> as follows:-

*"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."<sup>10</sup>*

19. The Petitioners approached this court immediately after the IEBC issued a Gazette Notice detailing the electoral calendar prior to the August 8<sup>th</sup> General Elections targeting the former and current governors who had declared interest in the said elections. At this point the nomination process had not been done. The claim was premised on an assumption they will offer their candidature and that they would be cleared to contest. This being the case, it cannot be said there existed a justiciable controversy as at the time this Petition was filed. A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.<sup>11</sup>

20. Like justiciability doctrine, the ripeness doctrine defines the limits of court's jurisdiction to adjudicate disputes. Ripeness concerns the timing of judicial intervention and prevents courts from entangling themselves in abstract disagreements by adjudicating disputes too early. Ripeness is a jurisdictional issue that may be raised at any time. Also, the question of ripeness can be considered on a court's own motion.

21. To determine whether a particular issue is ripe for judicial resolution, courts employ the tests in *Abbott Laboratories v Gardner*<sup>12</sup> which requires courts to evaluate whether a dispute is ripe. These are- (1) the fitness of the issues for judicial decision and (2) the

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<sup>9</sup> 387 U.S. 136 (1967).

<sup>10</sup> *Abbott Laboratories vs. Gardner*, 387 U.S. 136 (1967), pp. 148-49.

<sup>11</sup> *Board of Optometry vs. Colet*, 260 SCRA 88, July 30, 1996; *Gozun vs. Liangco*; citing *Galarosa vs. Valencia*, 227 SCRA 728, 737, November 11, 1993; *Office of the Ombudsman vs. Judge Ibay*, 364 SCRA 281, September 3, 2001.

<sup>12</sup> 387 US 136.

hardship to the parties of withholding court consideration until later time.<sup>13</sup> A claim may be unripe if it is based upon future events that may not occur as predicted at all. If waiting to decide a case would put the court in a better position to resolve the dispute, such as when further factual development would help the court to adjudicate the case, the case may be unripe and therefore nonjusticiable. Ripeness challenges arise in a variety of contexts, including challenges to administrative agencies actions or policies or pre-enforcement challenges against criminal investigation or prosecution.

22. Thus, to determine whether the case is presently justiciable within the meaning of threat of violation of rights contemplated under Article 22, the court must assess whether from the facts presented a real and imminent breach of the rights or violation of the Constitution is disclosed and whether it would be prudent to decide the case at the present time. As stated above. From the material before me, I find there was no real and imminent threat of rights to warrant court intervention at the stage this suit was filed and after candidates presented their nominations to IEBC, no amendment was sought to name the particular individuals, and even if this had been done, the Petitioners will still have to surmount yet another dispositive hurdle, namely the doctrine of exhaustion of remedies discussed below. To conclude the issue at hand, it is manifest that this Petition was filed pre-maturely at appoint it was not ripe for adjudication. On this ground alone this Petition is a non-starter and it must fail. I dismiss it on this ground.

23. I turn to the third issue, namely, the doctrine of exhaustion of remedies. As stated above, the Petitioners were too impatient to wait for the process to take shape and to only approach the IEBC after it had cleared the candidates. At this point they would have been certain whom to object and also the law would have been perfectly on their side since it provides a mechanism for settling such disputes. In fact, during the pendency of this Petition, nothing prevented them from approaching the said forum and then approach the High Court if dissatisfied by the decision.

24. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, moves to court without pursuing available remedies before the agency

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<sup>13</sup> See National Park Hospital Association, 538 US at 808.

itself. This doctrine has assumed esteemed juridical lineage in Kenya,<sup>14</sup> a position upheld by the Court of Appeal<sup>15</sup> in *Speaker of National Assembly v Karume*<sup>16</sup> thus: -

*"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."*

25. The above decision was pronounced prior to the promulgation of the 2010 Constitution. However, many Post-2010 court decisions in Kenya have embraced the reasoning as sound, and have added justification and rationale for the doctrine under the 2010 Constitution.<sup>17</sup> In *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*<sup>18</sup> the Court of Appeal provided the constitutional rationale and basis for the doctrine as follows: -

*"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*

26. The High Court in the *Matter of the Mui Coal Basin Local Community*<sup>19</sup> explained the rationale in the following words: -

*"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the*

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<sup>14</sup> *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR

<sup>15</sup> *Ibid.*

<sup>16</sup> {1992} KLR 21.

<sup>17</sup> *Ibid.*

<sup>18</sup> {2015} eKLR.

<sup>19</sup> {2015} eKLR.

*issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”*

27. Article 88 (4) (e) of the Constitution mandates the IEBC to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. This mandate is replicated in section 74 of the Elections Act which provides for settlement of certain disputes. It reads: -

*(1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.*

*(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.*

*(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.*

28. The Petitioners failed to wait until the candidates are cleared and then utilize the above mechanism and only approach the High court if aggrieved by the decision. Their impatience and disregard of the above provisions means that this suit offends the doctrine of exhaustion of remedies, a doctrine which enjoys recognition under Article 159 (2) (d) which requires courts to embrace alternative dispute resolution mechanisms. On this ground alone, this Petition collapses because this court is divested of jurisdiction by the doctrine of exhaustion of remedies.

29. Even if I were to address the Petition on merits, (which I need not to on account of the above decided three issues), the orders sought if granted are likely to impinge Article 38 rights of the targeted group of people who are not before me or named by name. Such a limitation cannot pass an Article 24 analysis test because a limitation of a fundamental right must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the

nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. There was no attempt to show that the limitation of the rights guaranteed under Article 38 if permitted will pass the tests in Article 24.

30. The Petition having failed to surmount the issues discussed above; it is my finding that this Petition fails. I dismiss it with no orders as to costs.

Orders accordingly.

Signed, dated, delivered virtually at Mombasa this 17<sup>th</sup> day June 2022



Digitally signed by Justice John M. Mativo  
DN: cn=Justice John M. Mativo, o=The  
Judiciary, ou=Judge,  
email=jm\_mativo@yahoo.com, c=KE  
Date: 2022.06.17 13:42:18 +03'00'

**John M. Mativo**  
**Judge**

*ANNEX 4(c):* Ethics and Anti-Corruption Commission (EACC)



**ETHICS AND ANTI-CORRUPTION COMMISSION**

**MEMORANDUM SUBMITTED BY THE ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) TO THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)**

=====  
**Tuesday, 12<sup>th</sup> March 2024**  
**Parliament Buildings**  
**Nairobi**  
=====

**MEMORANDUM SUBMITTED BY THE ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) TO THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)**

---

**1. Introduction**

- The Ethics and Anti-Corruption Commission (EACC) is a statutory body established under **section 3** of the Ethics and Anti-Corruption Commission Act, 2011 pursuant to the requirement under **Article 79** of the Constitution of Kenya, 2010.
- The mandate of the Commission is to combat corruption and economic crime in Kenya through law enforcement, prevention, public education and promotion of standards and practices of integrity and ethics.
- Vide a letter **Ref. No. SEN/DGAC/DGC/JLAHRC/2024/11(d)** dated **23<sup>rd</sup> February, 2024**, the Commission was invited by the Senate Standing Committee on Justice, Legal Affairs and Human Rights to submit views on the Constitution of Kenya (Amendment) (No. 2) Bill, Senate Bills No. 52 of 2023.

**2. Comments/Observations on the Bill**


- The Bill seeks to amend Articles 99(2) and 193(2) of the Constitution to bar persons who have served as County Governors from vying for elections as Members of Parliament or Members of the County Assembly for the first five years immediately after serving as County Governors.
- The Bill further proposes to amend sections 24(2) and 25(2) of the Elections Act (No.24 of 2011) which replicate the provisions of the Constitution.
- The Commission is in support of the Bill for the reason that, the amendment aims to prevent conflict of interest (real or perceived) that will arise when immediate former County Governors who are elected Senators exercise oversight role over the counties they presided over.
- It is noteworthy that the political rights under Article 38 are not among the non-derogable rights set out in Article 25 of the Constitution. Political rights can be limited where the limitation is reasonable and justifiable in an open and democratic society in accordance with Article 24 of the Constitution.
- The suspension of political rights under Article 38(3) (c) for immediate former County Governors particularly from being elected to the Senate or County Assembly, is a reasonable restriction to avoid situations of conflict of interests, prevent abuse of position or undue influence.

- The Bill seeks to suspend for a period of 5 years the right of an immediate former County Governor from vying for position of Senator or Member of County Assembly.
- The proposed length of the suspension, referred to as the cooling off period, the five-year election cycle/one term, is reasonable and proportionate to the threat posed by the immediate former country Governors to the oversight role of Senate and County Assembly. The cooling off period will enhance the Senate and County Assembly oversight role over County Governments and public funds therein and ultimately protect devolution.
- If for instance, majority of the 47 sitting Governors can be elected to the Senate, there would be no oversight of Counties and/or interrogation of audit reports, as they would be seeking to defend their impugned conduct when they were serving as Governors.
- In situations where a Senator recuses himself from the house or a Committee, that alone will not allay the perception of conflict of interest. The impartiality of Senators who are former governors cannot be guaranteed when they are dealing with matters touching on their counties.
- In addition, the effect of a recusal from inquiries or proceedings would amount to negligence of the core duty of oversight, which would also affect the constitutional rights of the constituents on right of representation in the Senate and County Assemblies.
- The restriction/cooling off period is also not unique to immediate former Governors. The same has been applied to Members of the Independent Electoral and Boundaries Commission under Article 99(2)(b) of the Constitution. The Members are disqualified from being elected as members of parliament if at any time within five (5) years, they preceded elections.
- Barring immediate former County Governors from vying for elections to the Senate and County Assembly will allow for the completion of any ongoing accountability processes related to administration and financial management affairs of the County, as these would have a bearing on the suitability of the former County Governor to hold any other elective position.
- It is important that the proposed cooling-off period for the former Governors is introduced to enhance impartiality of the Senate and County Assembly Committees and the entire house. The rationale for introducing the cooling-off period is to assist in containing perceived, potential and actual conflict of interest by former Governors in the Senate or County Assembly.
- The Commission therefore submits as follows:

No.	Specific Law/ Section	Proposed Amendments	Comments/Observations
1.	Articles 99(2) of the Constitution	A person is disqualified from being elected a member of Parliament if the Person-	This provision to bar a former Governor from vying for the position of Senator;

		<p>b(a) in the case of election to the senate-</p> <p>i. is a County Governor; or</p> <p>ii. has, at any time within the five years immediately preceding the date of election, held office as a County Governor</p>	<ul style="list-style-type: none"> <li>• Will allow for the completion of any ongoing accountability processes related to administration and financial management affairs of the County.</li> <li>• Aims to prevent conflict of interest (real or perceived).</li> </ul>
2.	Articles 193(2) of the Constitution	<p>A person is disqualified from being elected a member of a County Assembly if the Person-</p> <p>b(a) has, at any time within the five years immediately preceding the date of election, held office as a County Governor</p>	<p>In this Article, barring a former Governor from vying for the position of member of County Assembly provides reasonable restriction to avoid situations of conflict of interests, prevent abuse of position or undue influence.</p>
3.	Sections 24(2) of the Elections Act	<p>A person is disqualified from being elected a member of Parliament if the Person-</p> <p>b(a) in the case of election to the senate-</p> <p>i. is a County Governor; or</p> <p>ii. has, at any time within the five years immediately preceding the date of election, held office as a County Governor</p>	<p>Barring a former Governor from vying for the position of Member of Parliament aids in curbing the divergence of personal and public interests.</p>
4.	Section 25(2) of the Elections Act	<p>A person is disqualified from being elected a member of a County Assembly if the Person-</p> <p>b(a) has, at any time within the five years immediately preceding the date of election, held office as a County Governor</p>	<p>This section disqualifies a former Governor from vying for the position of member of County Assembly.</p> <p>The proposed length of the suspension, referred to as the cooling off period, the five-year election cycle/one term, is reasonable and proportionate to the threat posed by the immediate former country Governors to the oversight role of the County Assembly.</p>

**Dated this Tuesday, 12<sup>th</sup> Day of March 2024**



=====

**Twalib Mbarak, MGH, CBS  
Secretary/Chief Executive Officer  
Ethics and Anti-Corruption Commission (EACC)**

*ANNEX 4(d):* Independent Electoral and Boundaries  
Commission (IEBC)

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

MEMORANDUM

TO THE SENATE

ON

THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL (SENATE BILLS No. 52  
of 2023)

Dated 6<sup>th</sup> March 2024

Independent Electoral & Boundaries Commission (I.E.B.C)

Anniversary Towers, Off University Way

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

Telephone: +254 (0) 20 29925

## INTRODUCTION

1. The Independent Electoral and Boundaries Commission (IEBC) established under Article 88 of the Constitution is responsible for the conduct or supervision of referenda and elections to any elective body or office established by the Constitution and any other elections prescribed by an Act of Parliament.
2. The IEBC is a Constitutional Commission established under Chapter 15 of the Constitution with particular reference to Article 249 which sets out the objects of Constitutional Commissions.
3. The general functions of the IEBC and other Commissions are set-out under Article 252(1). However, the specific mandate of the Commission is primarily governed by Article 88(4) of the Constitution and Section 4 of the IEBC Act.
4. The IEBC notes the Bill under reference and makes the following submissions:

### Purpose of the Bill

5. The Bill seeks to amend Article 99(2) and 193(2) of the Constitution of Kenya to bar persons who have served as County Governors from vying for election as members of Parliament or members of county assembly for the first five years immediately after serving as county governors.
6. The Bill further proposes to amend Sections 24(2) and 25(2) of the Elections Act which replicate the above provisions of the Constitution.
7. The IEBC makes the following general comments on the laws that directly affect the mandate of the Commission.

### General Comments

8. Whereas the Constitution of Kenya (Amendment) (No. 2) Bill, 2023 makes proposals to amend the Constitution and the Elections Act. These proposals directly affect the Commission's functions as the proposal seeks to review qualifications/disqualifications of candidates for election.

### Specific Comments

9. The IEBC has endeavored to prepare submissions which highlight the relevant legal framework, implication of the proposed Bill and the consequential impact of the Bill. In addition, IEBC has proffered further views including international best practices on the proposed amendments.

10. This Bill intends to review provisions of Section 24(2) and 25(2) of the Elections Act taking into account emerging reforms and to this we make the following specific comments on proposals that have an impact on the said Act.

Legal framework	Current provision	New proposal
Article 99 (2)	Provides for the disqualifications of Members of Parliament	99(2) (ba) (i) and (ii) In the case of election to the senate – i. Is a County Governor or ii. Has, at any time within five years immediately preceding the date of election, held office as a County Governor.
Article 193(2)	Provides for disqualifications for Members of the County Assembly	Article 193(2) (ba) has at any time within five years immediately preceding the date of election, held office as a County Governor.
Section 24 (2)	Provides for disqualifications for Members of the Parliament	Section (24)(2) (ba) In the case of election to the senate – i. Is a County Governor or ii. Has, at any time within five years immediately preceding the date of election, held office as a County Governor
Section 25(2)	Provides for disqualifications for Members of the County Assembly	Section (25)(2) (ba) has at any time within five years immediately preceding the date of election, held office as a County Governor.

#### Assessment of Political Rights in the Kenyan context

11. In its analyses, the IEBC notes that the bills propose to amend the Constitution and the Elections Act with the aim of barring persons who have served as County Governors from contesting as members of Senate and County Assembly, amendments which fall within the category of Articles 24 and 38 of the Constitution.
12. Article 24 of the Constitution provides that “*A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based*

*on human dignity, equality and freedom and taking into account all relevant factors”.*

13. Article 38 (3)(c) of the Constitution provides that every adult citizen has the right, without unreasonable restriction to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. This provision is under the Bill of Rights and its proposed limitations need to be in amity with the provisions of Article 24 which provides the circumstances and the extent under the said rights and fundamental freedoms may be limited.
14. Notably, the applicable exception is that these rights can only be limited by express provisions of the law and to the extent that the said limitation is reasonable and justifiable in an open and democratic society. We submit that the said limitations may not be limited arbitrarily or whimsically.
15. Article 24(3) of the Constitution also provides that the state or a person seeking to justify a particular limitation shall demonstrate to the court, Tribunal, or other authority that the requirements of Article 24 of the Constitution have been satisfied. This, therefore, confers upon parliament the duty to not only promote but also protect the rights and fundamental freedoms espoused in the Bill of Rights.
16. In addition, Article 73 (2) (a) of the Constitution provides that; *“The guiding principles of leadership and integrity include selection on the basis of personal integrity, competence and suitability, or election in free and fair elections.”*
17. It is our considered view that the intents and purposes of the Memorandum of Objects and Reason of the Bill that proposes to limit the provisions of Chapter Four, should in essence consider other available mechanisms within the ethics, integrity, and electoral legal framework to achieve the desired purpose which includes to enhance accountability and deal with conflict of interest of an elective leader. In addition, it behoves the affected person in the respective assembly to recuse himself or herself from presiding over matters arising from the tenure of their previous office.
18. It is our humble proposal that instead of limiting the rights espoused under Article 38(3)(c) of the Constitution, consideration should be made to expand the existing legislative frameworks inherent in the Elections Act, Election Offences Act, Leadership and Integrity Act and the Ethics and Anti- Corruption Commission Act to bar convicted office holders in future elections as anticipated under chapter six read together with Article 99 (2)(h) of the Constitution. It is an anathema to constitutional ethos and principles to meet out a blanket punishment of all persons desirous of contesting election to elective state offices.

### *Consideration of Case law, International Instruments and Best Practices*

19. It is a settled constitutional principle that a provision intended to limit a constitutional right should not derogate the core or essential content of the right. It even goes further to fortify the importance of the proportionality test by including an additional safeguard against excessive limitation. Indeed, it is argued that limiting rights degrades human dignity and has the effect of curtailing freedoms. Therefore, any limitation of rights ought to be reasonable and proportionate.
20. We are guided by the *Canadian Supreme Court Ruling in R V. David Oakes (1986) 1 S.C.R.103* which provides two tests: The Oakes test and the proportionality test. These two tests read together, state that it must be shown that the means chosen to limit a right must be reasonable and demonstrably justified which implies that the means chosen to achieve the objective must be proportional to the burden on the rights of a person.
21. The European Convention on Human Rights (ECHR) provides in all its general limitation clauses, that the measures must be necessary in a democratic society and Article 12 of the ICCPR on freedom of movement emphasizes that limitations must be consistent with the other rights recognized in the present Covenant.
22. Similarly, the African Commission of Human and Peoples Rights contains a general limitation clause in Article 27 paragraph 2 states thus: “*The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*”
23. In this regard, proportionality, necessity, the least restrictive alternatives, and appropriateness are the main criteria for assessing the limitable scope of limitation of the rights, all present in Article 24 of the Kenyan Constitution. This criterion can be found in the *Sirucasa* principles on limitation and derogation provisions of the ICCPR which observed that the limitations imposed ought not to violate any rights at stake. They should not conflict with the minimum core rights and that, limitations ought to respect the principle of proportionality.
24. The Constitution states that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and such limitation shall be reasonable and justifiable in an open and democratic society. All these requirements are a culmination of the various guiding principles behind the international human rights instruments like the *Sirucasa* principles referred to above.
25. Owing to the foregoing, it should be noted that the law is the greatest tool available to ensure the people's rights are protected. Parliament is equally tasked with the

responsibility of ensuring that caution is taken when performing its legislative duties in order to avoid arbitrarily depriving any citizens of their rights and fundamental freedoms.

26. Therefore, it is our humble view that in so far as the limitations aforesaid are concerned, all Acts of Parliament must conform to the international standards during drafting and enactment. This will obviate violations to the applicable limitations espoused under Article 24.

27. That in the event this bill is enacted, the Commission will be obligated to initiate amendments to the electoral statutory instruments and other guidelines in the electoral operational framework.

## CONCLUSION

The Commission submits its comments on the draft Bill and urges this Honourable House to consider the proposals herein.



**Marjan Hussein Marjan, MBS**  
Commission Secretary/CEO

*ANNEX 4(e): Kenya Law Reform Commission (KLRC)*

# KENYA LAW REFORM COMMISSION



"A Vibrant Agency for Responsive Law Reform"

Telegrams: "LAWREFORM" NAIROBI  
 Telephone: Nairobi, +254-20-2241186/2241201  
 Fax: +254-20-2225786  
 www.info@klrc.go.ke

When replying please quote

Ref. No. KLRC8/86(29)  
 and Date



KENYA LAW REFORM COMMISSION  
 REINSURANCE PLAZA  
 3RD FLOOR  
 TAIFA ROAD  
 P.O. Box 34999-00100  
 NAIROBI, KENYA

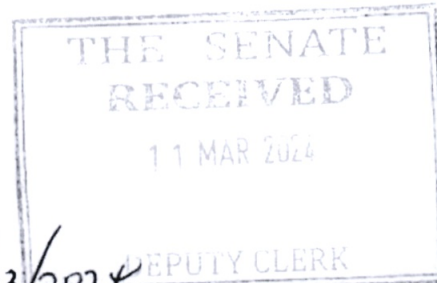
8<sup>th</sup> March, 2024

Mr. J. M. Nyegenye, CBS  
 Clerk of the Senate  
 Clerks Chambers  
 The Senate  
 Parliament Buildings  
 P O Box 41842 - 00100  
 NAIROBI.

① DGAC  
 DLG

Kindly deal.

Eg 12/03/2024



Dear Jerem,

RE: INVITATION TO SUBMIT COMMENTS ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL SENATE BILL NO. 52 OF 2023)

Your letter Ref SEN/DGAC/DGC/JLAHRC/2024/11(F) dated 23<sup>rd</sup> February, 2024 on the above subject refers

The Kenya Law Reform Commission (KLRC) is established under the Kenya Law Reform Commission Act No. 19 of 2013 with the mandate of keeping the law under review and recommending its reform to ensure among other things that the law conforms to the Constitution. is consistent, harmonized, just, simple, accessible, modern and cost-effective in application.

The KLRC has studied the Bill and makes the following comments.

Clause	Comments	Rationale
1-Short title	No comments	Standard clause
2- Amendment of Article 99 of	The proposal to insert a new paragraph (ba) under Clause (2) of	Clause (2)(a) of Article 99 provides that a State officer or

12 March 2024

② HOD-Governance  
 Head Clerk-CLERK

Kindly deal

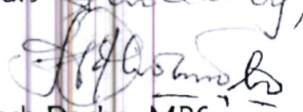
12/03/2024

<p>the Constitution</p>	<p>Article 99 barring a sitting governor or a person who has held the position of governor raises the following concerns:</p> <p>a) It is partly repetitive of clause (2) which already disqualifies State officers from being members of Parliament.</p> <p>b) Disqualifying a former governor from vying for a seat in the Senate and 'allowing' the person to vie as a member of the National Assembly appears to defeat the object of the Bill as stated in paragraph three of the Memorandum of Objects and Reasons, namely, the scrutiny and accountability process by the county assembly and the Senate "would have a bearing on the suitability of the former governor to hold any other elective position."</p> <p>c) The proposed amendment appears to conflict with Articles 27 (Equality and freedom from discrimination) and Article 50 (Fair hearing)</p>	<p>other public officer, other than a member of Parliament, is disqualified from being elected a member of Parliament. Article 260 defines a State office to include that of the governor.</p> <p>The debarment is based on the assumptions that the scrutiny and accountability process by the Senate and county assemblies cannot take place when the former governor is a member of the respective bodies and that the outcome will necessarily be against them.</p> <p>Article 27 of the Constitution provides that every person is equal before the law and has the right to equal protection which includes enjoyment of all rights and fundamental freedoms.</p> <p>Article 50(2)(a) provides for presumption of innocence until the contrary is proved.</p>
<p>3-Amendment of Article 193 of the Constitution</p>	<p>The proposal to insert a new paragraph (ba) under Clause (2) of Article 193 barring a person who has held the position of governor from being elected member of county assembly and 'allowing' the person to vie as a member of the National Assembly appears to defeat the object of the Bill as stated in paragraph three of the Memorandum of Objects and</p>	

	<p>Reasons, namely, the scrutiny and accountability process by the county assembly and the Senate “would have a bearing on the suitability of the former governor to hold any other elective position.”</p> <p>The proposed amendment appears to conflict with Articles 27 (Equality and freedom from discrimination) and Article 50 (Fair hearing)</p>	
4-Amendment of section 24 of Cap 7	<p>Clauses 4 and 5 of the Bill seek to amend sections 24 and 25 of the Elections Act, Cap 7 respectively. Provisions of this nature would best be captured in a Schedule to the Bill but not as substantive clauses as proposed.</p>	<p>This will make the Bill neater.</p>
5- Amendment of section 25 of Cap 7		

As always, we thank you for your continued cooperation.

Yours *sincerely,*

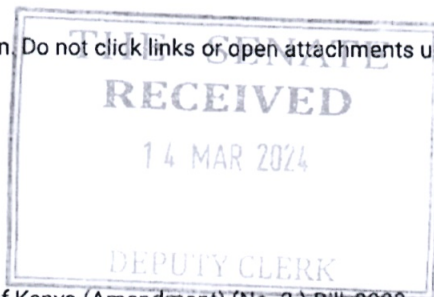


Joash Dache, MBS  
SECRETARY/CEO

*ANNEX 4(f):* Kenya National Commission on Human Rights  
(KNCHR)

Subject KNCHR ADVISORY ON THE CONSTITUTION (AMENDMENT) (No. 2) BILL , 2023  
From Janet Wanjiku <jwanjiku@knchr.org>  
To clerk senate <clerk.senate@parliament.go.ke>  
Cc senatejlahrc <senatejlahrc@parliament.go.ke>, charles munyua <charles.munyua@parliament.go.ke>  
Date Thursday March 14, 2024 1:26:41 PM

CAUTION: This Mail Originated from outside of the Organization. Do not click links or open attachments unless you can confirm the sender and know the content is safe.



Good afternoon,

Find attached the Commission's advisory on the Constitution of Kenya (Amendment) (No. 2) Bill, 2023.



Kind Regards

Janet Kabaya

Senior Human Rights Officer

Kenya National Commission on Human Rights

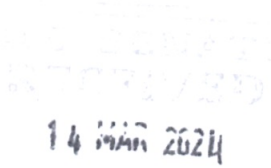
P.O. 74359-00200

Nairobi

Email: [jwanjiku@knchr.org](mailto:jwanjiku@knchr.org)

Mobile: +254723818963

DGKC  
DLG



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14/03/2024

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Attachments

KNCHR Advisory on the Constitution Amendment No. 2023 Bill.pdf (259 kB)

② HOD-Governance  
Lead Clerk-ILHR

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14/03/2024



**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)**

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**ADVISORY ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL NO. 52  
OF 2023**

**SUBMITTED TO**

**THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN  
RIGHTS**

**14<sup>TH</sup> MARCH 2024**

Kenya National Commission on Human Rights  
1st Floor, CVS Plaza, Lenana Road  
P.O. Box 74359-00200  
NAIROBI, KENYA  
Tel: 254-20-2717908 /2717256/2712664  
Fax: 254-20-2716160  
Website: [www.knchr.org](http://www.knchr.org)

## A. INTRODUCTION

1. The Kenya National Commission on Human Rights (the Commission or KNCHR) is a Constitutional Commission established under Article 59(1) and Chapter 15 of the Constitution of Kenya and subsequently operationalized through the Kenya National Commission on Human Rights Act, 2011.<sup>1</sup> The KNCHR is mandated to act as the principal organ of the state in ensuring compliance with obligations under international, and regional treaties and conventions relating to human rights. Section 8 (a) and (b) of the KNCHR Act, 2011 enjoins the KNCHR to promote respect for human rights, develop a culture of human rights in the Republic, and promote the protection and observance of human rights in public and private institutions. Section 8 (j) of the said Act further mandates the KNCHR to perform such other functions as the Commission may consider necessary for the promotion and protection of human rights.
2. In addition to the functions of the Commission outlined in Article 59 (2) Constitution of Kenya 2010 and Section 8 of the Kenya National Commission on Human Rights Act, 2011 the Commission has additional functions to oversight implementation of the Prevention of Torture Act<sup>2</sup> and also under the Convention on the Rights of Persons with Disabilities as the national monitoring agency. Regionally, the KNCHR enjoys an Affiliate Status with the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The Commission is also a member of the Network of African National Human Rights Institutions (NANHRI), the regional umbrella body that brings together National Human Rights Institutions in Africa. The National Commission is accredited with 'A' status by the Global Alliance of National Human Rights Institutions (GANHRI) for compliance with the principles relating to the Status of National Human Rights Institutions ("The Paris Principles").

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<sup>1</sup> Act No.14 of 2011.

<sup>2</sup> Under section 12 of the Prevention of Torture Act, 2017 (Act No. 12 of 2017); available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202017>.

3. In pursuant to the above mandate and upon receipt of a letter dated 23<sup>rd</sup> February 2024, the KNCHR was invited by the office of the Clerk of the Senate to submit comments on the Constitution of Kenya (Amendment) (No. 2) bill (Senate Bills No. 52 of 2023) and makes the following submissions.

#### **B. GENERAL COMMENTS**

4. The Commission welcomes the Constitution of Kenya (Amendment) (No. 2) Bill which, by barring former county Governors from vying for the positions of member of county assemblies and Senate within the first five years after serving as county governors, will allow for any accountability processes related to administration and financial management affairs within the county to be completed.
5. The Constitution at Article 38 entitles every citizen to make political choices. This includes the right of every adult citizen to vote and to vie for public office. This right, however can be restricted on legal, reasonable and justifiable grounds.
6. Article 185(3)(4) of the Constitution as read together with section 8 of the County Governments Act, 2012 vest county assemblies with the oversight role over the county executive committee including the Governor. According to Article 96(3) of the Constitution, the Senate among other things “exercises oversight over national revenue allocated to the county governments”. These oversight and related responsibilities over county governments are further buttressed under the Public Finance Management Act (section 8) and the Senate Standing Orders. Article 229 of the Constitution further stipulates that the Auditor General’s reports may be submitted to Parliament or the relevant county assembly.
7. The Commission opines that limiting the right of former Governors from vying for these positions within the first five years after the end of their terms as Governors is reasonable and justifiable within the ambit of Article 24 of the Constitution. This is because Senators and

Members of County Assemblies directly oversight Governors, it is possible for Senators or Members of County Assemblies who were Governors to directly or indirectly influence the examination of the audit reports submitted by the Auditor General or conduct of investigations into administration and financial mismanagement during their immediate tenure.

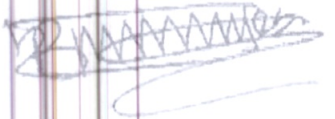
8. Barring (former) Governors from vying for the oversight positions within the first five years after the end of their tenure as Governors would:

- i. Prevent actual conflict of interest; in line with Chapter 6 of the Constitution, Leadership and Integrity Act; Public Officer Ethics Act and other laws;
- ii. Promote democratic and accountable exercise of Power: This is one of the objectives of devolution. Any inquiry or investigations into the reports or conduct during their tenure as chief executives would commence and proceed without undue interference;
- iii. Enhance the separation of powers and checks and balances which are fundamental principles and objects of our devolved system under Articles 174, 175 of the Constitution;
- iv. Promote the national values and principles of the Constitution under Article 10; and
- v. Promote the values and principles of public service enshrined under Article 232 and Public Service (Values and Principles) Act, 2015

9. The memorandum of object and purpose of the Bill promotes other key constitutional provisions including good governance, integrity, transparency and accountability under Article 10; leadership and integrity under Chapter Six; the values and principles of public service under Article 232 and public finance under Chapter Twelve.

10. The Commission is however opposed to also subjecting this limitation to positions for Members of the National Assembly since they play a minimal role in overseeing county chief executives.
11. The Commission further notes that similar restrictions have been imposed elsewhere in law. For instance, for appointment of members of the Independent Electoral and Boundaries Commission (IEBC), Article 88 (2) of the Constitution disqualifies a person from appointment as a member of the IEBC if the person has, at any time within the preceding five years, held office, or stood for election as a member of Parliament or of a county assembly; or a member of the governing body of a political party. The imposition of this requirement for former Governors under the Bill would therefore not be anything new to Kenya's constitutional and legal framework.
12. In view of these arguments therefore, the Commission recommends the enactment of the Constitution of Kenya (Amendment) (No. 2) bill (Senate Bills No. 52 of 2023).

**SIGNED BY:**



**Dr. Bernard Mogesa, PhD, CPM**  
**Secretary/CEO**

*ANNEX 4(g):* Office of the Director of Public Prosecution  
(ODPP)



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **MEMORANDUM ON THE CONSTITUTION OF KENYA (AMENDMENT)** **(NO.2) BILL, 2023 SENATE BILL NO.52 OF 2023**

#### **A. INTRODUCTION**

The Office of the Director of Public Prosecution received a letter dated 23<sup>rd</sup> Feb 2024 Ref **SEN/DGAC/DGC/JLAHRC/2024/11(h)** requiring the DPP to submit comments on the said bill to the clerk of the senate.

In exercise of the powers conferred upon the Office of the Director of Public Prosecutions under **Article 157(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.** of the Constitution as read together with the provisions of **Section 5** of the Office of the Director of Public Prosecutions Act the Office of the Director of Public Prosecutions hereby advises the Senate through the Clerk of the Senate as hereunder: -

#### **B. CONSTITUTIONALITY OF THE BILL**

The Office has subjected the Bill and the accompanying Memorandum of Objects and Reasons to scrutiny to establish whether the bill meets the test of the constitutionality in line with the **Article 255,256 and 257** of the Constitution. We have observed as an Office that the proposed amendments affect a wider array of constitutional provisions to wit: -

##### **Articles 6,10(2b),27,38,99,111 and 193.**

The question that arises from the outset is whether Senate can by way of Parliamentary initiative to seek to limit the right of sitting governors and those that have served the Office of the Governor within five (5) years preceding a General Election from contesting for elective seats of the Office of the Senator and Member of County Assembly without violating **Article 255** of the Constitution.

In our opinion, such an amendment can only be undertaken through a popular initiative as provided for under **Article 257** of the Constitution of Kenya. The amendments proposed will affect the fundamental rights of Governors as provided for under **Article 27** of the Constitution which Article gives protection to all citizens in the following terms: -

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

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

If the Senate enacts the bill as proposed the bill risks to be struck down on grounds of unconstitutionality as it will curtail political rights of Governors as provided for under Article 38(3)(c) of the Constitution. The article is clear on the rights of every adult citizen seeking elective seats in following terms: -

**(4) Every adult citizen has the right, without unreasonable restrictions:-**

**(a) ...**

**(b) ...**

**(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.**

The fact that Senate has singled out Governors for the intended Constitutional amendments will attract legal challenges in that the law seeks to advocate for class discrimination against Governors which does not conform with the provisions of **Articles 10,27 and 38** of the Constitution.

In particular **Article 10(2)(a) and (b)** provide: -

**(2) The national values and principles of governance include --**

**(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**

A reading of the above provision clearly indicate that the proposed amendments may be regarded as being discriminatory and inconsistent with the rule of law, it also seems promoting inequality against sitting governors intending to seek other elective offices.

Notably, the Bill seems to target only two (2) seats to the exclusion of the following offices of great political influence that sitting Governors may seek thus defeating the spirit of the Bill as articulated in the Memorandum of Objects and Reasons.

(a) Office of the President

(b) Deputy President

(c) Speaker of the National Assembly

(d) Speaker of the Senate

(e) Member of the National Assembly

(f) Office of the Deputy Governor

(g) Cabinet Secretaries (Treasury, Devolution and Internal Security)

- (h) Office of the Attorney General
- (i) Speaker of the County Assembly

The highlighted offices are not exhaustive since the structure of government is largely available to the creation of offices and appointments there to that may defeat the spirit of the Bill.

### **C. CONCLUSION**

In conclusion, we note the purposes, Objects and Reasons for the bill are noble but would require to be approached through the popular initiative to avoid a declaration of constitutional invalidity should any citizens or Public-spirited individuals approach the court for the interpretation through public interest litigation.

As the Office of the Director of Public Prosecution, we thank you most sincerely for extending the invitation to us to comment on the abovementioned Amendment Bill and confirm our availability for further consultation on the matter should you deemed it necessary.

Thank you.

**RENSON M. INGONGA, OGW**  
**DIRECTOR OF PUBLIC PROSECUTIONS**

*ANNEX 4(h):* County Assembly Forum (CAF)



## COUNTY ASSEMBLIES FORUM (CAF)

Flamingo Towers, 5th Floor Wing B, Mara Road, Upper Hill P.o Box 73552- 00200 Nairobi Kenya Tel: 0701 046 933  
Email: communication@countyassembliesforum.org www.countyassembliesforum.org

### CAF MEMORANDUM ON THE CONSTITUTION OF KENYA (AMENDMENT) (NATIONAL ASSEMBLY NO. 2 OF 2023)

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

**FROM:** The County Assemblies Forum.

**DATE:** 8<sup>th</sup> MARCH 2024.

**SUBJECT:** CAF Memorandum on the Constitution of Kenya (Amendment) Bill 2023



## **1.0 INTRODUCTION**

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

## **2.0. BACKGROUND**

- 2.1. The Constitution of Kenya, adopted in 2010, introduced a devolved system of government that empowered counties to govern themselves independently. This included the establishment of the position of county governors, who play a pivotal role in the administration and financial management of their respective counties. Over time, concerns have emerged regarding the potential conflicts of interest and accountability issues arising when former county governors seek election to other political offices immediately after completing their terms.
- 2.2. The primary objective of the Constitution of Kenya (Amendment) (No. 2) Bill, 2023, is to address these concerns by amending specific articles in the Constitution and corresponding sections in the Elections Act, No. 24 of 2011. The proposed amendments seek to impose a temporal restriction on former county governors, prohibiting them from vying for election as Members of Parliament or members of county assembly for the first five years immediately after serving as county governors.
- 2.3. Key provisions of the Bill include:-  
The Amendment of Articles 99 (2) and 193 (2) of the Constitution of Kenya: The Bill proposes changes to these constitutional articles to explicitly bar individuals who have served as county governors from contesting elections as Members of Parliament or members of county assembly for a stipulated period following their tenure.



Amendment of Sections 24 (2) and 25 (2) of the Elections Act, No. 24 of 2011: The Bill also addresses these sections in the Elections Act, ensuring alignment with the proposed constitutional changes. These amendments are essential to maintain consistency between the Constitution and the supporting legislation.

2.4. The rationale for the Amendment are as follows:-

- a) Former county governors are required to account for their administrative and financial decisions during their tenure. Barring them from immediate election to other offices allows ongoing accountability processes to be concluded, ensuring transparency and thorough scrutiny.
- b) Given the direct oversight role of the Senate and county assemblies in scrutinizing audit reports and holding governors accountable, the Bill aims to prevent potential conflicts of interest that could arise if former governors were to sit in these legislative bodies immediately after their terms.
- c) Restricting former county governors from vying for elections for a defined period provides voters with a reference point to make informed decisions. This ensures that accountability processes are completed, allowing voters to assess the suitability of candidates for other elective offices.
- d) Amendment of Sections 24 (2) and 25 (2) of the Elections Act, No. 24 of 2011: The Bill also addresses these sections in the Elections Act, ensuring alignment with the proposed changes to the Constitution. These amendments are essential to maintain consistency between the Constitution and the supporting legislation.

2.5. The Bill adheres to Article 256 (1) (b) of the Constitution, which limits the scope of a constitutional amendment bill to consequential amendments arising from the proposed changes. The amendments to sections 24 (2) and 25 (2) of the Elections Act are crucial to align the legislation with the amended constitutional provisions.

### 3.0. GENERAL COMMENTS.

- 3.1. CAF appreciates Hon. Chimera Mwinzagu and Senate in developing this bill which will seeks to strike a balance between political rights and accountability, ensuring that the transition of former county governors to other elective offices is accompanied by a sufficient temporal gap, promoting transparency, and avoiding potential conflicts of interest.
- 3.2. The proposed amendment provides a mechanism to enhance accountability by ensuring that former county governors are held to scrutiny for their administrative actions during their tenure. This aligns with the principles of transparency and good governance, contributing to strengthened oversight mechanisms.
- 3.3. By imposing a five-year restriction on former county governors from vying for other elective positions, the Bill aims to prevent potential conflicts of interest. This is particularly crucial for county assemblies, as it allows them to conduct their oversight functions without interference from individuals who were in leadership roles during the previous term.
- 3.4. While the justification of the Bill is sound, restricting former county governors from contesting elections for five years, may be perceived as limiting the political rights of individuals who have served in leadership roles. This could be seen as contradicting Article 38 (3) (c) of the Constitution, which grants every adult citizen the right to be a candidate for public office without undue restrictions.
- 3.5. The five-year waiting period before former county governors can seek other elective positions may result in delayed representation for communities that view these individuals as potential leaders. This delay could hinder the democratic process and the right of citizens to choose their representatives freely..
- 3.6. Restricting former county governors from immediate participation in other elective offices may limit the diversity of political voices and perspectives in the Senate and county assemblies. This could potentially hinder the democratic process by preventing individuals with valuable experience from contributing to legislative debates and decision-making.
- 3.7. CAF appreciates the opportunity to contribute to this Bill and on the basis of the foregoing proposes the following amendments:-

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

	CLAUSE	AMENDMENT	JUSTIFICATION/COMMENT
1.	<p>Clause 2, 3 4, 5</p> <p>All the clauses where they state  <i>".....immediately  preceding the date of  election....."</i></p>	<p>Kindly amend for more clarity e.g.  <i>".....within the last five years but not  exceeding 12 months before the date of  election....."</i></p>	<p>The term "immediately preceding the date of election" is used in several clauses. While the intention is clear, specifying the exact time frame within the five years could reduce ambiguity. For instance, stating "within the last five years but not exceeding 12 months before the date of election" would provide more clarity.</p>
2.	<p>The whole amendment  Clause 1 to 5</p>	<p>No Amendment</p>	<p>Countries, including Malawi, Rwanda, South Africa, and Zambia, share a common legal framework that bars county governors or equivalent local</p>

government leaders from running for political office if convicted of crimes involving dishonesty or corruption. Notably, these laws, while emphasizing integrity and ethical conduct in public office, do not explicitly address disqualification based on ongoing audit processes or the presumption of guilt.

The absence of a specific legal provision in these frameworks appears to align with the presumption of innocence until proven guilty, a fundamental tenet of fair legal processes. The positive aspect of these legal structures lies in their commitment to upholding high

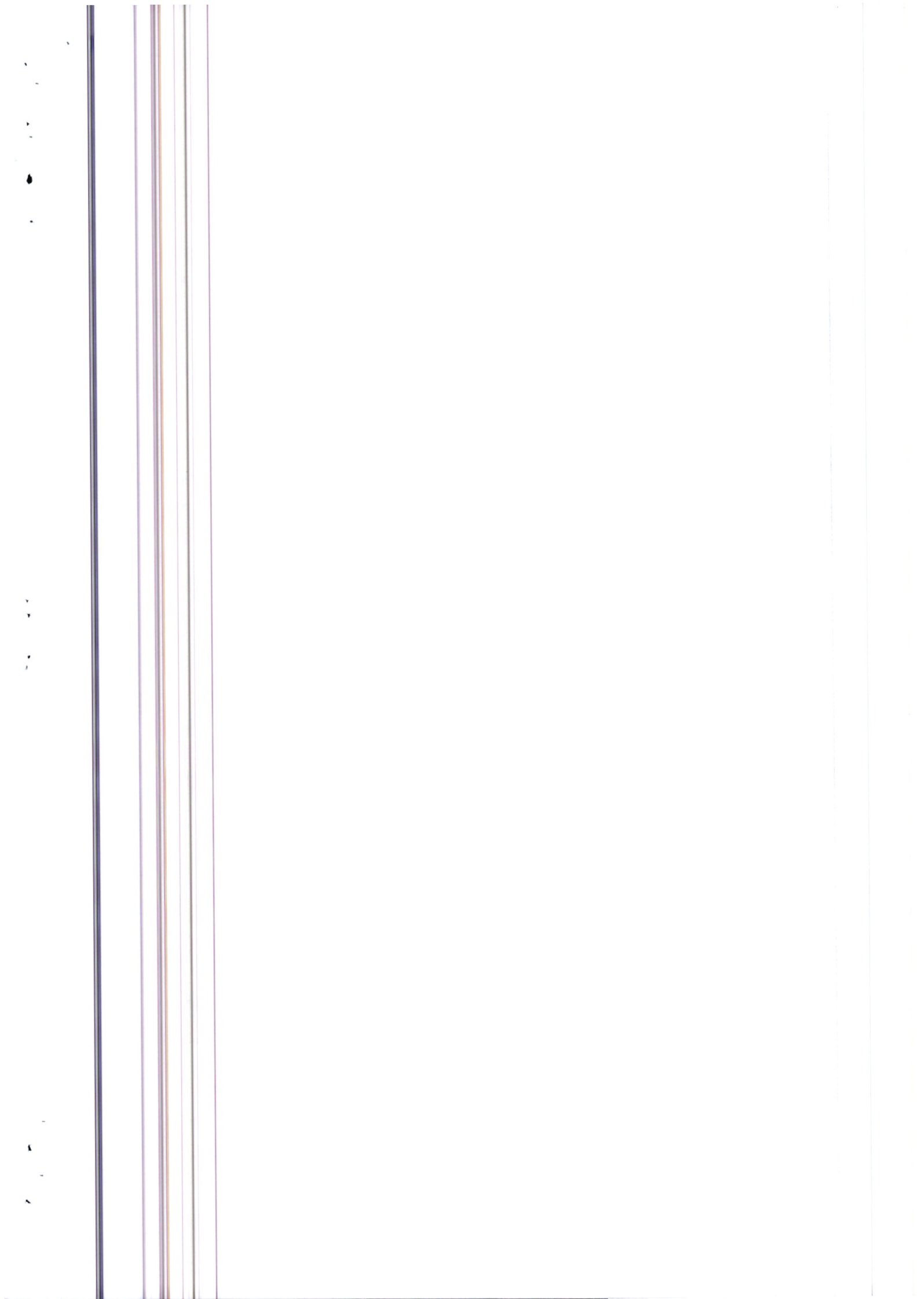
			<p>ethical standards, yet there is an opportunity for enhancement by considering amendments that specifically address situations involving ongoing audit processes and investigations.</p> <p>This approach would contribute to reinforcing transparency, accountability, and public trust in the governance of local government leaders.</p>
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Thank you.  
Yours sincerely,



HON. PHILEMON K. SABULEI,

CHAIRPERSON CAF



*ANNEX 4(i):* Electoral Law and Governance Institute for Africa  
(ELGIA)

Subject ELGIA Submission on Constitution of Kenya (Amendment) (No.2), Bill, 2023

From felix@elgia.org <felix@elgia.org>

To clerk senate <clerk.senate@parliament.go.ke>, senatejlahrc@parliament.go.ke <senatejlahrc@parliament.go.ke>

Cc

Kelvin' <kelvin@elgia.org>, 'Mark Olwal' <boniolwal@gmail.com>, 'Brenda Isabel' <brenda.isabel@gmail.com>, 'Zipporah Abaki' <abakizip@gmail.com>

Date Friday March 8, 2024 10:04:57 AM

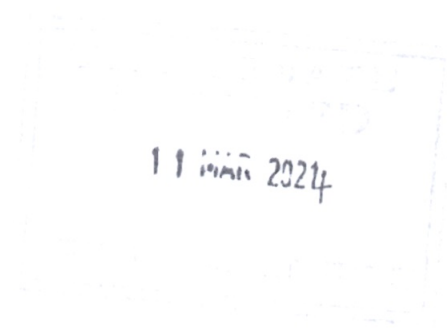
CAUTION: This Mail Originated from outside of the Organization. Do not click links or open attachments unless you can confirm the sender and know the content is safe.

Dear Sir,

Attached Please find the Submission of the Electoral Law and Governance Institute for Africa (ELGIA) on the above referenced Bill.

Thanking you in advance.

Sincerely,



**Felix O. Owuor**  
Executive Director

CVS Plaza, 5Th Floor,  
Lenana Road-Kilimani,  
P.O. BOX 8281 -00100 | Nairobi, Kenya

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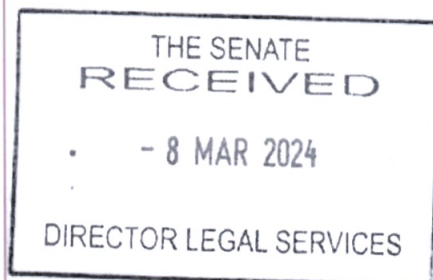


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Attachments

image001.png (80.2 kB)

Memoranda to the Clerk of the Senate.pdf (124 kB)



*Handwritten notes:*  
DGAC  
DLS  
Hok and dent  
HSD/Lead clere  
JLARC  
Please deal  
11/3/2024  
8/3/2024



## MEMORANDUM

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**From :** Electoral Law and Governance Institute for Africa  
**To :** The Clerk of the Senate  
**Date :** March, 2024  
**RE :** The Constitution of Kenya (Amendment) (No. 2) Bill 2023

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### Background

- The Standing Committee on Justice and Legal Affairs and Human Rights in Senate, inline with Article 118 of the Constitution and standing order number 145(5) of the Senate Standing Orders, invited Electoral Law and Governance Institute for Africa (ELGIA) to submit representations/Comments on the Constitutional (Amendment)(No. 2) Bill, (Senate Bills No. 52 of 2023).
- The Bill seeks to amend Articles 99(2) and 193(2) of the Constitution, and consequently Sections 24(2) and 25(2) of the Elections Act. The objective of the amendment is to bar persons who have served as County Governors from vying for election as Members of Parliament or members of County Assemblies for the first five years immediately after serving as county governors. According to the Memorandum of Objects and reasons, the reason for this amendment is to enhance accountability and prevent conflict of interest among such leaders in the decision making process.
- Electoral Law And Governance Institute For Africa (ELGIA), 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. ELGIA works with continental and sub-regional organizations among them the African Union, East African Community (EAC), Southern Africa Development Community (SADC) and ECOWAS. Through this, the institution seeks to strengthen governance and political institutions through technical assistance, capacity building, advocacy, and research.



- ELGIA has developed this Memorandum to highlight the main considerations which will inform the Committee on the proposed constitutional amendment. ELGIA presents on two thematic issues:

#### A. Political Rights : Limitation of Fundamental Rights and Freedoms.

- Chapter Four of the Constitution of Kenya provides for the Bill of Rights. Part one of the chapter lays out the general provisions relating to the Bill of Rights and Part two of the Chapter outlines the Rights and Fundamental Freedoms. The right to contest as a member of Parliament and or to contest as a member of County Assembly is a Constitutional/Political right within the Bill of Rights. Article 38(3)(c) provides that every adult citizen has the right, *without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office.*
- ELGIA submits that in amending the proposed Constitutional Articles, the Bill in its content consequentially limits the political rights provided under Article 38 of the Constitution which includes the right to vie or be a candidate for any a public office. Article 24 of the Constitution provides for the situations under which the rights and fundamental freedoms may be limited. Under the Article, the rights can be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society.
- The Constitution additionally provides that a provision limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far to derogate from its core or essential content. It is important to note that Article 24 of the Kenyan Constitution was borrowed heavily from the Canadian Supreme Court Ruling in R V. David Oakes (1986) 1 S.C.R.103 generally referred to the 'Oakes Test', which generally says that limitation must be justifiable in an open and democratic society and through a proportionality test.
- Article 24(3) of the Constitution also provides that the state or a person seeking to justify a particular limitation shall demonstrate to the court, Tribunal or other authority that the requirements of Article 24 of the Constitution have been satisfied. This is on the basis that the Constitution gives the state and state organs including parliament the duty to promote, fulfil and protect the rights and fundamental freedoms in the Bill of Rights.
- A limitation must be shown to give effect to another constitutional guarantee. Trivial objective will be rejected. In the words of Woolman S in the South African Journal entitled: *Riding the Push me pull you* he says 'Administrative convenience and the saving of costs should not justify the overriding of the constitutional

*guarantee. After all if you are going to allow rights to be trumped by efficient concurs, you might as well have left their protection to the hurl-burly of the legislative process.....'*

- The Article further outlines factors to be taken into account in an attempt to limit the Bill of Rights. These factors include, but not limited to the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- After reading the Memorandum of Objects and Reason of this Bill aiming to limit and restrict the Bill of Right, it is our submission that there are other lesser restrictive means within the electoral law and integrity framework to achieve the purpose which includes to enhance accountability and deal with conflict of interest of an elective leader. It is a settled principle that the purpose of a limitation fails the test of proportionality if there is the presence of other means to achieve the same ends with the limitations with or without restricting the rights in a minimal manner.

#### B. Comparative analysis and International law and Instruments.

- Lawful restriction on Political Rights has been an ongoing debate. Rufus King, one of the American Founding fathers once said '*He who has proved himself to be most fit for an office ought not to be excluded by the Constitution from holding it*' This is a argument he advanced during debate over the necessity of term limit in elective positions.
- Limitation of political rights in a constitutional text has to be consistent with international obligations. The International Covenants include the International Covenant on Civil and Political Rights (ICCPR). Article 5 of this Covenant provides that the covenant may not be interpreted as implying for any state, group or person to perform any act aimed at the the destruction of any of the protected rights. Article 25 of ICCPR on political participation states that there should be no unreasonable restrictions. Most jurisdictions have made reference to these international covenant provisions while developing the limitation clauses.
- On the basis of consistency with the International obligations, most jurisdictions have no specific laws restricting and limiting a person from running for other offices after reaching term limits in the current positions. In the United States, Canada and Britain there are no specific laws restricting and limiting a person from running for other offices after reaching term limits in the current positions. For instance in the United States, Mark Robert Warner the Current Senator for Virginia served as the



69<sup>th</sup> Governor of Virginia from the year 2002 to 2006. Upon reaching the maximum term limit, he ran for the Senate in 2008.

- The South Africa Constitution provides a highly sophisticated human rights architecture and lays out human rights limitation details under Article 36(2) of the Constitution. It provides that no law may limit any right entrenched in the Bill of Rights.

#### Conclusion

- The drafters of the Constitution of Kenya provided express provisions for due consideration and framework for limitation of the Bill of Rights and Fundamental freedom. Some of the International Instruments such as the ICCPR has also provided general limitation clause. This is for the purpose of allowing the enjoyment of such rights with restrictions through legislation.

*ANNEX 5: Matrix on the Committee's Consideration of the  
Stakeholder Submissions*

THE SENATE



MATRIX

THE CONSTITUTION OF KENYA (AMENDMENT) (No. 2) BILL, 2023 (SENATE BILLS NO. 52 OF 2023)

Stakeholders:

1. Ethics and Anti-Corruption Commission (EACC)
2. Office of the Director of Public Prosecutions (ODPP)
3. Council of Governors (CoG)
4. The Independent Electoral and Boundaries Commission (IEBC)
5. Electoral Law and Governance Institute for Africa (ELGIA)
6. Office of the Attorney-General & Department of Justice (OAG)
7. The Kenya Law Reform Commission (KLRC)
8. County Assemblies Forum (CAF)
9. Kenya National Commission on Human Rights (KNCHR)

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
2	EACC	The stakeholder is in agreement to the addition of Clause 2(ba) after Article 99(2)(b) of the Constitution.	This provision to bar a former Governor from vying for the position of Senator and; <ul style="list-style-type: none"><li>• Will allow for the completion of any ongoing accountability processes related to administration and financial management affairs of the County</li><li>• Aims to prevent conflict of interest (real or perceived)</li></ul>	The Committee agrees with the stakeholder's view.

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
	OAG	The stakeholder opposes the addition of Clause 2(ba) after Article 99(2)(b) of the Constitution.	<ul style="list-style-type: none"> <li>Article 99(2)(h) of the Constitution on the disqualification of persons from being elected to Parliament (Senate). The Constitution, therefore, contemplates guilty with finality before barring any person from being elected to Parliament or County Assembly.</li> <li>The proposed bill seeks to presume culpability of the said Governors pending the completion of the investigations, which is unconstitutional.</li> </ul>	
	KLRC	The stakeholder opposes the addition of Clause 2(ba) after Article 99(2)(b) of the Constitution.	<ul style="list-style-type: none"> <li>Clause (2)(a) of Article 99 provides that a State Officer or other public officer, other than a member of Parliament is disqualified from being elected a member of Parliament. Article 260 defines a State Office to include that if the Governor. The addition of Clause 2(ba) after Article 99(2)(b) of the Constitution is partly repetitive of Clause (2) which already disqualifies State Officers from being members of Parliament.</li> <li>The debarment of Governors from other elective positions is based on the assumption that the scrutiny and accountability process by the Senate and County Assemblies cannot take place when the former Governor is a member of the respective bodies and that the outcome will necessarily be against them.</li> <li>The proposals are against the provisions of Article 27 of the Constitution.</li> <li>Article 50(2)(a) provides for presumption of innocence until the contrary is proved.</li> </ul>	The Bill does not presume guilt of former governors, but instead seeks to promote the values in Chapter 6 of the Constitution by eliminating real or perceived conflict of interest.
3	EACC	The stakeholder is in agreement with the addition of Clause 2(ba) after Article	<ul style="list-style-type: none"> <li>Barring a former Governor from vying for the position of member of County Assembly provides reasonable restriction to avoid situations of</li> </ul>	The Committee agrees with the stakeholder's view.

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
		193(2)(b) of the Constitution.	conflict of interests, prevent abuse of position or undue influence.	
	OAG	The stakeholder opposes the addition of Clause 2(ba) after Article 193(2)(b) of the Constitution.	•	
	KLRC	The stakeholder opposes the addition of Clause 2(ba) after Article 193(2)(b) of the Constitution.	<ul style="list-style-type: none"> <li>Article 193(2)(b) of the Constitution on the disqualification of persons from being elected as members of County Assembly. as barring a person who has held the position of Governor from being elected member of County Assembly and ‘allowing’ the person to vie as a member of the National Assembly appears to defeat the object of the Bill as stated in paragraph 3 of the Memorandum of Objects and reasons, namely, the scrutiny and accountability process by the County Assembly and the Senate “would have a bearing on the suitability of the former Governor to hold any other elective position”.</li> <li>The amendment contemplates guilt with finality before barring any person from being elected to Parliament or County Assembly as it seeks to make an exception to this position and presume culpability of the said Governors pending the completion of the investigations, which is unconstitutional.</li> <li>The proposals are against the provisions of Article 27 of the Constitution.</li> <li>Article 50(2)(a) provides for presumption of innocence until the contrary is proved.</li> </ul>	The Committee is not in agreement with the stakeholder’s view. The proposed limitation is reasonable and justifiable as it is limited to the offices which directly exercise oversight over county governments.

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
4	EACC	The stakeholder is in agreement to the addition of Clause 2(ba) after Section 24(2)(b) of the Elections Act.	Barring a former Governor from vying for the position of Member of Parliament aids in curbing the divergence of personal and public interests.	The Committee agrees with the stakeholder's view.
	KLRC	The proposed change to Section 24(2)(b) of the Elections Act would be best captured in a Schedule to the Bill but not as a substantive clause as proposed.	This will make the bill neater.	The amendment is drafted in accordance with the Senate drafting style.
5	EACC	The stakeholder is in agreement to the addition of Clause 2(ba) after Section 25(2)(b) of the Elections Act.	The proposed length of the 5 year election cycle/one term, is reasonable and proportionate to the threat posed by the immediate former County Governors to the oversight role of the County Assembly.	The Committee agrees with the stakeholder's view.
	KLRC	The proposed change to Section 25(2)(b) of the Elections Act would be best captured in a Schedule to the Bill but not as a substantive clause as proposed.	This will make the bill neater.	The amendment is drafted in accordance with the Senate drafting style.
2, 3, 4, 5	CAF	Replace the phrase " <i>...immediately preceeding the date of election...</i> " with " <i>...within the last five years but not exceeding 12 months before the date of election...</i> "	<ul style="list-style-type: none"> <li>The term "immediately preceding the date of election" is used in several clauses. While the intention is clear, specifying the exact time frame within the 5 years could reduce ambiguity.</li> </ul>	There's no ambiguity in the clause. It's intended to cover all substantive holders of the gubernatorial positions.
Memorandum of	ODPP	The stakeholder is opposed to the Bill in its entirety as	<ul style="list-style-type: none"> <li>Senate cannot by way of Parliamentary initiative seek to limit the right of former Governors from</li> </ul>	The proposed amendment is not one

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
Objects and Reasons		the proposed amendments affect a wider array of Constitutional provisions.	<p>contesting for elective seats of the Office of Senator and Members of County Assembly without violating Article 255 of the Constitution.</p> <ul style="list-style-type: none"> <li>• The proposed amendments can only be undertaken through a popular initiative as provided for under Article 257 of the Constitution.</li> <li>• The proposed amendments will affect the fundamental rights of Governors as provided for under Article 27(1-3) of the Constitution.</li> <li>• Enacting the Bill curtails the political rights of Governors as provided for under Article 38(3)(c).</li> <li>• The fact that Senate has singled out Governors for the intended Constitutional amendments does not conform with the provisions of Articles 10(2)(a &amp; b), 27 and 38 of the Constitution.</li> <li>• The Bill seems to target only 2 seats to the exclusion of the following offices of great political influence that sitting Governors may seek thus defeating the spirit of the Bill as articulated in the Memorandum of Objects and Reasons. <ul style="list-style-type: none"> <li>a) Office of the President</li> <li>b) Deputy President</li> <li>c) Speaker of the National Assembly</li> <li>d) Speaker of the Senate</li> <li>e) Member of National Assembly</li> <li>f) Office of the Deputy Governor</li> <li>g) Cabinet Secretary (Treasury, Devolution and Internal Security)</li> <li>h) Office of the Attorney General</li> <li>i) Speaker of the County Assembly</li> </ul> </li> </ul>	that requires approval through a referendum under Article 255 of the Constitution, and it can be enacted through parliamentary initiative as provided for under Article 256 of the Constitution.

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			<p>The highlighted offices are not exhaustive since the structure of government is largely available to the creation of offices and appointments there to that may defeat the spirit of the Bill.</p>	
	CoG	The stakeholder is opposed to the Bill in its entirety	<ul style="list-style-type: none"> <li>• The Bill proposes an amendment that requires a referendum under Article 255 of the Constitution as it amends certain fundamental provisions of the Constitution.</li> <li>• The Bill offends Article 38 of the Constitution on political rights.</li> <li>• The Bill, by limiting Article 38 does not meet the threshold for limitation of rights under Article 24</li> <li>• The Bill violates Article 50(2)(a) on presumption of innocence and fair hearing. The Bill speculates that all current and former Governors are guilty of misconduct for which they will be held accountable before they exercise their constitutional right to vie for elective office.</li> <li>• The oversight role of the Senate is a collective responsibility, which negates the justification in the Bill's Memorandum of Objects and Reasons.</li> <li>• The Bill is incongruent with Article 27 in that it is selective and discriminatory in its exclusion.</li> <li>• The bill violates Article 73(2)(b) and (c) on exercising leadership objectively and in public interest. Senate in this case appears to be legislating in self-interest in a move to insulate and/or cushion its members from competition in the next general election.</li> <li>• The Bill conflicts the decision in <b>Constitutional Petition No. E005 of 2022; Carolyne Andzazi Chilango &amp; Another v. The IEBC and Others</b></li> </ul>	<p>The proposed amendment is not one that requires approval through a referendum under Article 255 of the Constitution, and it can be enacted through parliamentary initiative as provided for under Article 256 of the Constitution.</p>

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			<p>delivered on 17<sup>th</sup> June 2022 which dismissed a Petition seeking to bar former and current Governors from vying for seats as MPs as there will be an affront to the Senate's oversight role on the County Government because the MPs will essentially be over sighting functions they performed.</p> <ul style="list-style-type: none"> <li>• Governors are not immune to accountability proceedings after the lapse of their term in accordance with Article 226(5) of the Constitution.</li> </ul>	
	IEBC		<ul style="list-style-type: none"> <li>• The proposals in the Bill limit the rights provided for under Article 38(3) of the Constitution. Such a limitation to the bill of rights needs to be in conformity with Article 24 of the Constitution.</li> <li>• The Bill should consider other available mechanisms within the ethics, integrity, and electoral legal framework to achieve the desired purpose to enhance accountability and deal with conflict of interest of an elective leader.</li> <li>• Instead of limiting the rights espoused under Article 38(3) of the Constitution, consideration should be made to expand the existing legislative frameworks inherent in the Elections Act, Election Offences Act, Leadership and Integrity Act and the Ethics and Anti-Corruption Act to bar convicted office holders in future elections as anticipated under Chapter six read together with Article 99(2)(h) of the Constitution.</li> <li>• In the event the Bill is enacted, the Commission will be obligated to initiate amendments to the</li> </ul>	The right to be a candidate for public office is not absolute, and there are already certain limitations to the exercise of this right already provided for in the Constitution.

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	ELGIA		<p>electoral statutory instruments and other guidelines in the electoral operational framework.</p> <ul style="list-style-type: none"> <li>• The proposals in the Bill are a limitation to Article 38(3)(c).</li> <li>• The Constitution provides that a provision limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far to derogate from its core or essential content.</li> <li>• Article 24(3) of the Constitution provides that the state or a person seeking to justify a particular limitation shall demonstrate to the court, Tribunal or other authority that the requirements of Article 24 of the Constitution have been satisfied.</li> <li>• There are other lesser restrictive means within the electoral law and integrity framework to achieve the purpose of the Memorandum of Objects and Reasons of the Bill which includes enhancing accountability and dealing with conflict of interest of an elective leader.</li> <li>• Limitation of political rights in a constitutional text has to be consistent with international obligations like Article 25 of ICCPR on political participation which provides that there should be no unreasonable restrictions on political rights.</li> </ul>	<p>The right to be a candidate for public office is not absolute, and there are already certain limitations to the exercise of this right already provided for in the Constitution, and the proposed limitation is reasonable and justifiable as it is limited to the offices which directly exercise oversight over county governments.</p>
	OAG		<ul style="list-style-type: none"> <li>• Having former Governors in the Senate and the County Assemblies directly exercising oversight over County Governments would lead to conflict of interest and interfere in their decision-making process.</li> <li>• However, the issue of accountability of those in charge of county affairs is a multi-institutional and a multi-agency affair involving other</li> </ul>	<p>The amendment seeks to deal with conflict of interest at the legislation and oversight level. It does not seek to bar other institutions from executing their mandate.</p>

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			institutions like the Office of the Auditor-General, the EACC, the Controller of Budget, DCI and the ODPP. These institutions/agencies are independent of the Senate and the County Assemblies.	
	CAF		<ul style="list-style-type: none"> <li>Restricting former governors from contesting elective positions is a limitation of their political rights under Article 33(3)(c) of the Constitution</li> <li>The proposed gap of 5yrs proposed may result in delayed representation for communities that are of the view that the former governors as potential leaders in other capacities.</li> <li>The proposal presumes guilt of the governors before being convicted.</li> </ul>	The right to be a candidate for public office is no absolute, and there are already certain limitations to the exercise of this right already provided for in the Constitution, and the proposed limitation is reasonable and justifiable as it is limited to the offices which directly exercise oversight over county governments.
	KNCHR	<p>The Commission welcomes the proposals in the Bill.</p> <p>The Commission is however opposed to subjecting the limitation to former Governors to positions for Members of the National Assembly since they play a minimal role in over-</p>	<ul style="list-style-type: none"> <li>Barring former County Governors from vying for the positions of Members of County Assembly and Senate will allow for better completion of accountability processes related to administration and financial management affairs within the County.</li> <li>Article 38 on political rights can be restricted on legal, reasonable and justifiable grounds, and the limitation of Article 38 is within the ambit of Article 24 of the Constitution. This is because Senators and Members of County Assemblies directly oversight Governors. It is possible for</li> </ul>	The Committee agrees with the stakeholder's views.

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		sighting County chief executives.	<p>Senators or Members of County Assemblies who were Governors to directly or indirectly influence the examination of the audit reports submitted by the Auditor General or conduct of investigations into administration and financial mismanagement during their immediate tenure.</p> <ul style="list-style-type: none"> <li>• Barring former Governors from vying for the oversight positions would prevent actual conflict of interest in line with chapter 6 of the Constitution, Leadership and Integrity Act; Public Officer Ethics Act and other laws.</li> <li>• The Bill would promote democratic and accountable exercise of power without undue interference.</li> <li>• The Bill will enhance the separation of powers and checks and balances.</li> <li>• The Bill will promote the national values and principles of the Constitution under Article 10 and promote the values and principles of public service enshrined under Article 232 and the Public Service (Values and Principles) Act, 2015.</li> <li>• The proposals in the Bill present similar restrictions that have been imposed in law. For instance, for the appointment of members of the IEBC, Article 88(2) of the Constitution disqualifies a person from appointment as a member of the IEBC if the person has, <b><u>at any time within the preceding five years</u></b>, held office, or stood for election as a member of Parliament or of a County Assembly; or a member of the governing body of a political party. The imposition of this requirement for former</li> </ul>	

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			Governors under the Bill would therefore not be anything new to Kenya's constitutional and legal framework.	