

**Rt. Hon. Speaker**  
You may approve for tabling  
J. M. Nyegenye, C.B.S.,  
Clerk of the senate/secretary, PSC  
Date: 22/02/22

**REPUBLIC OF KENYA**



**THE SENATE  
RECEIVED**

22 FEB 2022

**CLERK'S OFFICE**

**TWELFTH PARLIAMENT (SIXTH SESSION)**

**THE SENATE**

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*Approved  
23/02/2022*

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

.....  
**REPORT ON THE ELECTIONS (AMENDMENT) (NO. 3) BILL (SENATE  
BILLS NO. 48 OF 2021)**  
.....

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

*DC-EG  
Recommended & Forwarded for  
approval for tabling  
22-02-2022*

**FEBRUARY, 2022**

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## FOREWORD BY THE CHAIRPERSON

1. The Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021) seeks to amend the Elections Act No. 24 of 2011 to provide for the use of a popular name which a candidate has chosen to familiarize himself or herself to the electorate during party nominations and elections.
2. The Bill was read a First Time in the Senate on 28<sup>th</sup> September, 2021, following which it stood committee to the Standing Committee on Justice, Legal Affairs and Human Rights for public participation and consideration. In this regard, a call for submission of memoranda was placed in two newspapers with national circulation on 1<sup>st</sup> October, 2021. The advertisement was also posted on the Parliament website and social media platforms. In response to the advertisement, the Committee received written submissions from seven stakeholders.
3. Based on its deliberations, the Committee has made various observations and recommendations on the Bill as set out in Chapter Three of this Report. Additionally, the Committee will present Committee stage amendments with a view of strengthening the provisions of the Bill for consideration by this House.
4. The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in undertaking this important assignment. The Committee further wishes to thank the stakeholders who submitted written memoranda on the Bill.
5. It is now my pleasant duty, pursuant to standing order 143 (1), to present a Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021).

Signed.....

Date... 16<sup>th</sup> Feb 2022 .....

**SEN. ERICK OKONG'O MOGENI, SC, MP,**  
**CHAIRPERSON,**  
**STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN**  
**RIGHTS**

## PREFACE

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to the standing 218 of and the Second Schedule to the Senate Standing Orders, 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.'*








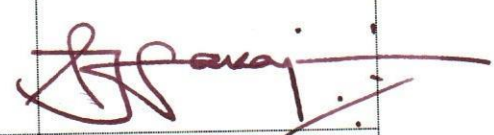

The Committee is comprised of –

- 1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
- 2) Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
- 3) Sen. Amos Wako, EGH, EBS, SC, FCI Arb, MP
- 4) Sen. James Orengo, EGH, SC, MP
- 5) Sen. Fatuma Dullo, CBS, MP
- 6) Sen. Mutula Kilonzo Junior, CBS, MP
- 7) Sen. (Dr) Irungu Kang'ata, CBS, MP
- 8) Sen. Johnson Sakaja, CBS, MP
- 9) Sen. Isaac Ngugi Githua, MP

The Minutes of the Sittings of the Committee in considering the Elections (Amendment) (No. 3) Bill (Senate Bill No. 48 of 2021) are attached to this Report collectively as *Annex I*.

**ADOPTION OF THE REPORT ON THE ELECTIONS (AMENDMENT) (NO. 3)  
BILL (SENATE BILLS NO. 48 OF 2021)**

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

Sen. Erick Okong'o Mogeni, SC, MP	-Chairperson	
Sen. (Canon) Naomi Jillo Waqo, MP	-Vice-Chairperson	
Sen. Amos Wako, EGH, EBS, SC, FCI Arb, MP	-Member	
Sen. James Orengo, EGH, SC, MP	-Member	
Sen. Fatuma Dullo, CBS, MP	-Member	
Sen. Mutula Kilonzo Junior, CBS, MP	-Member	
Sen. (Dr) Irungu Kang'ata, CBS, MP	-Member	
Sen. Johnson Sakaja, CBS, MP	-Member	
Sen. Isaac Ngugi Githua, MP	-Member	

## CHAPTER ONE: INTRODUCTION

### A. Background on the Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021)

1. The Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021) is sponsored by Sen. Ephraim Maina, MP. A copy of the Bill is attached to this Report as *Annex 2*.
2. The Bill was published on 20<sup>th</sup> August, 2021 and was read a First Time in the Senate on 28<sup>th</sup> September, 2021. Following the First Reading in the Senate, it stood committed, pursuant to Standing Order 140(1), to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

### B. Objective of the Bill

3. The Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021) seeks to amend the Elections Act No. 24 of 2011 to provide for the use of a popular name which name does not appear in a candidate's identification document and the candidate has chosen it to familiarize himself or herself to the electorate during party nominations and elections.

### C. Overview of the Bill

4. The Bill proposes the following—
  - i) *Clause 2* of the Bill proposes to amend section 2 of the Act to provide for the definition of the words 'popular name' and 'party primary';
  - ii) *Clause 3* of the Bill proposes to amend insert a new section 32A in the Act to provide for the procedure to be followed regarding the use of a popular name. A person who intends to use a popular name during party primaries or elections, shall apply to the Independent Electoral and Boundaries Commission for approval and issuance of a certificate authorizing the use of a popular name; and
  - iii) *Clause 4* of the Bill proposes to amend section 109 of the Act to give powers to the Independent Electoral and Boundaries Commission to prescribe the criteria on the use a popular during party primaries and elections. The clause also proposes to amend section 109 to require that a draft of any regulations made by

the Independent Electoral and Boundaries Commission under the Act shall be approved by both the National Assembly and the Senate.

**D. Consequences of the Bill**

5. The Bill seeks to ensure that a voter easily identifies his or her preferred candidate on a ballot paper to enable the voter make a choice he or she intends. Currently, the law only permits the use of a candidate's official name as it appears in the register of voters and in the candidate's identification documents. A candidate who wishes to have his or her popular name included on a ballot paper has to go through the lengthy process of officially changing his or her name through the Procedures set out under the Registration of Persons Act, Cap 107, and the Registration of Documents Act, Cap. 285.

## CHAPTER TWO: PUBLIC PARTICIPATION

### A. Invitation and consideration of stakeholder submissions on the Bill

6. The Standing Committee on Justice, Legal Affairs and Human Rights considered the Bill at length. A call for submission of written memoranda was placed in the Daily Nation and Standard newspapers on 1<sup>st</sup> October, 2021 (*Annex 3*). The advertisement was also posted on the Parliament website and social media platforms.
7. In response to the advertisement, the Committee received written submissions from the following stakeholders –
  - a) The Independent Electoral and Boundaries Commission;
  - b) The National Gender and Equity Commission;
  - c) The Council of County Governors;
  - d) The Centre for Multiparty Democracy – Kenya;
  - e) Kariobangi Paralegals Network;
  - f) The Elections Observer Group (ELOG) and Mzalendo; and
  - g) Lexlink Consulting.

Copies of the said submissions are attached to this Report collectively marked as *Annex 4*.

8. The Committee proceeded to consider the Bill and the submissions received thereon as set out in the matrix attached to this Report as *Annex 5*.
9. Based on its deliberations, the Committee has made various observations and recommendations as set out at Chapter Three of this Report. Additionally, the Committee has presented Committee Stage amendments for consideration by this House with a view of strengthening the provisions of the Bill (*Annex 6*).



## CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

### A. Committee Observations

10. Clause 2 of the Bill proposes to insert a definition of the term “party primary”. The proposed definition is the same as the one which was provided for under the Political Parties Act, No 11 of 2011. In January, 2022, Parliament passed the Political Parties (Amendment) Bill, (National Assembly Bills No. 56 of 2021). The Committee observed that clause 2(b) of the Political Parties (Amendment) Bill, 2021 deleted the definition of the term “party primary” and inserted a new Part IVA providing for party nominations.
11. Clause 4(b) and (c) propose to amend section 109 to provide that a draft of any regulations made by the Independent Electoral and Boundaries Commission under the Act shall be approved by both the National Assembly and the Senate. Section 109(3) and (4) of the Elections Act provides as follows –
  - (3) *The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election:  
Provided that this applies to the first general election under this Act.*
  - (4) *The Commission shall publish in the Gazette, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).*
12. The Committee observed that subsections (3) and (4) of section 109 of the Elections Act are now inoperative for the reason that the proviso to subsection (3) provides that approval of a draft of the proposed regulations by the National Assembly applied to the first elections under the Act. The Elections Act was enacted in the year 2011 and the first general elections under the Act were held in the year 2013. Therefore, after the general elections of the year 2013, subsections (3) and (4) of section 109 became inoperative.

### B. Committee Recommendation

13. Arising from the above observations, the Committee makes the following recommendations –
  - (a) That the proposed definition of the term “party primary” be deleted; and

(b) That section 109(3) of the Elections Act be amended by deleting the proviso.

14. The text of the proposed amendment is set out at *Annex 6* of this Report.

## LIST OF ANNEXES

- Annex 1:** Minutes of the Committee in considering the Bill.
- Annex 2:** The Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021)
- Annex 3:** Advertisement for submission of memoranda placed in the Nation and Standard newspapers on 1<sup>st</sup> October, 2021.
- Annex 4:** Copies of stakeholder submissions received on the Bill.
- Annex 5:** Matrix on consideration of public submissions on the Bill.
- Annex 6:** Committee stage amendments to the Elections (Amendment) (No.3) Bill (Senate Bills No. 48 of 2021)









**TWELFTH PARLIAMENT | SIXTH SESSION**

**MINUTES OF THE EIGHTEENTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON TUESDAY, 15<sup>TH</sup> FEBRUARY, 2022, AT 8:25 A.M.**

**PRESENT**

- |  |                                   |
|--|-----------------------------------|
| 1. Sen. Erick Okong'o Mogeni, SC, MP   | - Chairperson ( <b>Chairing</b> ) |
| 2. Sen. (Canon) Naomi Jillo Waqo, MP   | - Vice Chairperson                |
| 3. Sen. Fatuma Dullo, CBS, MP          | - Member                          |
| 4. Sen. Mutula Kilonzo Junior, CBS, MP | - Member                          |
| 5. Sen. Isaac Ngugi Githua, MP         | - Member                          |

**ABSENT WITH APOLOGY**

- |  |          |
|--|----------|
| 1. Sen. Amos Wako, EGH, EBS, SC, FCI Arb, MP | - Member |
| 2. Sen. James Orengo, EGH, SC, MP            | - Member |
| 3. Sen. (Dr) Irungu Kang'ata, CBS, MP        | - Member |
| 4. Sen. Johnson Sakaja, CBS, MP              | - Member |

**SECRETARIAT**

- |                         |   |
|-------------------------|---|
| 1. Mr. Charles Munyua   | - Clerk Assistant                           |
| 2. Mr. Moses Kenyanchui | - Legal Counsel                             |
| 3. Mr. Javan Nang'eyo   | - Sergeant at Arms                          |
| 4. Ms. Purity Orutwa    | - Clerk Assistant ( <i>Taking minutes</i> ) |
| 5. Ms. Hawa Abdi        | - Serjeant at Arms                          |
| 6. Mr. James Kimiti     | - Hansard/Audio Officer                     |
| 7. Mr. Titus Michubu    | - Pupil                                     |
| 8. Ms. Sandra Alusa     | - Intern                                    |

**MIN. NO. 82/2022**

**PRAYER**

The sitting commenced with a word of prayer by Sen. Isaac Ngugi Githua, MP.

**MIN. NO. 83/2022**

**ADOPTION OF THE AGENDA**

The Committee adopted the agenda of the Sitting, having been proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

- a) The Minutes of the 99<sup>th</sup> Sitting held on Wednesday, 1<sup>st</sup> December, 2021 were confirmed as a true record of deliberations, after being proposed by Sen. Isaac Ngugi Githua, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.
- b) The Minutes of the 100<sup>th</sup> Sitting held on Thursday, 2<sup>nd</sup> December, 2021 were confirmed as a true record of deliberations, after being proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.
- c) The Minutes of the 101<sup>st</sup> Sitting held on Tuesday, 7<sup>th</sup> December, 2021(AM) were confirmed as a true record of deliberations, after being proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.
- d) The Minutes of the 102<sup>nd</sup> Sitting held on Tuesday, 7<sup>th</sup> September, 2021(PM) were confirmed as a true record of deliberations, after being proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Sen. Isaac Ngugi Githua, MP.
- e) The Minutes of the 103<sup>rd</sup> Sitting held on Thursday, 9<sup>th</sup> December, 2021(AM) were confirmed as a true record of deliberations, after being proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. (Canon) Naomi Jillo Waqo, MP.
- f) The Minutes of the 104<sup>th</sup> Sitting held on Thursday, 9<sup>th</sup> December, 2021(PM) were confirmed as a true record of deliberations, after being proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.
- g) The Minutes of the 105<sup>th</sup> Sitting held on Sunday day, 19<sup>th</sup> December, 2021 were confirmed as a true record of deliberations, after being proposed by Sen. Fatuma Dullo, CBS, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.
- h) The Minutes of the 106<sup>th</sup> Sitting held on Monday, 20<sup>th</sup> December, 2021 were confirmed as a true record of deliberations, after being proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Fatuma Dullo, CBS, MP.
- i) The Minutes of the 107<sup>th</sup> Sitting held on Tuesday, 21<sup>st</sup> December, 2021 were confirmed as a true record of deliberations, after being proposed by Sen. Fatuma Dullo, CBS, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.
- j) Adoption of the Minutes of the 2<sup>nd</sup> Sitting, held on Thursday, 6<sup>th</sup> January, 2022 (AM) was deferred to a later date.



- k) Adoption of the Minutes of the 3<sup>rd</sup> Sitting, held on Thursday, 6<sup>th</sup> January, 2022 (PM) was deferred to a later date.
- l) The Minutes of the 15<sup>th</sup> Sitting held on Tuesday, 8<sup>th</sup> February, 2022 were confirmed as a true record of deliberations, after being proposed by Sen. Isaac Ngugi Githua, MP and seconded by Sen. (Canon) Naomi Jillo Waqo, MP.
- m) The Minutes of the 16<sup>th</sup> Sitting held on Wednesday, 9<sup>th</sup> February, 2022 were confirmed as a true record of deliberations, after being proposed by Sen. Isaac Ngugi Githua, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.
- n) Adoption of the Minutes of the 17<sup>th</sup> Sitting, held on Thursday, 10<sup>th</sup> February, 2022, was deferred to a later date.

**MIN. NO. 85/2022**

**MATTERS ARISING FROM PREVIOUS MINUTES**

- a) Under Ex. Min 498/2021 – *Petition regarding the ownership and status of parcels of land Nos. L. R. 3977 and 3978, leased to Muhoroni Sugar Company Limited*

The Committee resolved that the visit to Kericho County and meetings with the remaining stakeholder be scheduled during the week of 14<sup>th</sup> – 18<sup>th</sup> March, 2022.

- b) Under Ex. Min 502/2021 - *Meeting with the Independent Electoral and Boundaries Commission and other election stakeholders*

The Committee resolved that a meeting with the Independent Electoral and Boundaries Commission be scheduled for Wednesday, 23<sup>rd</sup> February, 2022 to review the status of preparedness for the 2022 General Elections.

**MIN. NO. 86/2022**

**CONSIDERATION OF THE ELECTION (AMENDMENT) BILL (SENATE BILLS NO. 42 OF 2021), AND THE ELECTION (AMENDMENT) (NO. 2) BILL (SENATE BILLS NO. 43 OF 2021)**

The Committee resumed consideration of the Election (Amendment) Bill (Senate Bills No. 42 of 2021), and the Election (Amendment) (No. 2) Bill (Senate Bills No. 43 of 2021).

Noting that the two Bills sought to amend the same provision of the Elections Act, the Committee resolved that the matrices of public submissions on the two Bills be merged into one, and that the Bills be scheduled for consideration the following day. Thereupon, further consideration of the two Bills was deferred to Wednesday, 16<sup>th</sup> February, 2022.

**MIN. NO. 87/2022**

**CONSIDERATION OF THE ELECTION (AMENDMENT  
(NO. 3) BILL (SENATE BILLS NO. 48 OF 2021)**

The Committee was taken through the draft Report and committee stage amendments to the Election (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021).

Thereupon, the Committee adopted the Report on the Bill, having been proposed by Sen. Isaac Ngugi Githua, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

**MIN. NO. 88/2022**

**ADJOURNMENT**

There being no other business, the meeting was adjourned at 9.25 a.m. The next sitting will be held on Wednesday, 16<sup>th</sup> February, 2022 at 8:00 a.m.

SIGNED:  .....

(CHAIRPERSON)

DATE: ~~16<sup>th</sup>~~ <sup>15<sup>th</sup></sup> FEB 2022: .....



**TWELFTH PARLIAMENT | FIFTH SESSION**

**MINUTES OF THE NINETY-SIXTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD AT WHITESANDS BEACH RESORT, IN MOMBASA COUNTY, ON FRIDAY, 26<sup>TH</sup> NOVEMBER, 2021 AT 10.00 A.M.**

**PRESENT**

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (**Chairing**)
2. Sen. Amos Wako, EGH, EBS, SC, FCI Arb, MP - Member
3. Sen. Fatuma Dullo, CBS, MP - Member (V)
4. Sen. (Dr.) Irungu Kang'ata, CBS, MP - Member
5. Sen. Isaac Ngugi Githua, MP - Member (V)

**ABSENT WITH APOLOGY**

1. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Mutula Kilonzo Junior, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

**SECRETARIAT**

1. Dr. Johnson Okello - Director, Legal Services
2. Ms. Mercy Thanji - Legal Counsel
3. Mr. Charles Munyua - Clerk Assistant
4. Mr. Said Osman - Research Officer
5. Mr. Moses Kenyanchui - Legal Counsel
6. Ms. Lucianne Limo - Media Relations Officer
7. Mr. Javan Nang'eyo - Sergeant at Arms
8. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
9. Ms. Hawa Abdi - Sergeant at Arms
10. Mr. James Kimiti - Hansard Officer

**MIN. NO. 462/2021**

**PRAYER**

The sitting commenced with a word of prayer by Sen. Fatuma Dullo, CBS, MP.

**MIN. NO. 463/2021**

**ADOPTION OF THE AGENDA**

The Committee adopted the agenda of the Sitting, having been proposed by Sen. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

**MIN. NO. 464/2021**

**JUDGMENT BY THE COURT OF APPEAL IN CIVIL APPEAL NO. E084 OF 2021 - SPEAKER OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA & ANOTHER Vs SENATE OF THE REPUBLIC OF KENYA & 12 OTHERS**

The Committee was taken through a brief on the Judgment delivered by the Court of Appeal on 19<sup>th</sup> November, 2021 in Civil Appeal No. E084 of 2021 - *Speaker of the National Assembly of the Republic of Kenya & Another Vs Senate of the Republic of Kenya & 12 Others*.

It was noted that the Judgment had greatly eroded the gains made in the Judgment delivered by the High Court on 29<sup>th</sup> October 2020 in HC Petition No. 284 of 2019. Consequently, it was resolved that an appeal be preferred to the Supreme Court on the aspects of the Court of Appeal Judgment that the Senate was dissatisfied with.

In this regard, the Committee directed the legal team to file the Notice of Appeal within the required timelines. The Committee would convene at a later date to consider the draft Petition and Record of Appeal to be filed at the Supreme Court.

**MIN. NO. 465/2021**

**THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)**

The Committee noted that, due to the extensive public and stakeholder submissions received on the Bill, it was important that the matrix be considered at a physical sitting during which at least five Members were present, to enable decisions to be made on the respective clauses of the Bill.

Consequently, further consideration of the Bill was deferred.

**MIN. NO. 466/2021**

**THE LIFESTYLE AUDIT BILL, (SENATE BILL NO. 36 OF 2021)**

The Committee noted that, due to the extensive public and stakeholder submissions received on the Bill, it was important that the matrix be considered at a physical sitting during which at least five Members were present, to enable decisions to be made on the respective clauses of the Bill.

Consequently, further consideration of the Bill was deferred.

**MIN. NO. 467/2021**

- I) THE ELECTION (AMENDMENT) BILL (SENATE BILLS NO. 42 OF 2021);**
- II) THE ELECTION (AMENDMENT) (NO. 2) BILL (SENATE BILLS NO. 43 OF 2021); AND**
- III) THE ELECTION (AMENDMENT) (NO 3) BILL (SENATE BILLS NO. 48 OF 2021).**

The Committee noted that a public hearing on the three Bills was scheduled to be held in Nairobi on 3<sup>rd</sup> December, 2021. The Committee further resolved to explore the possibility of undertaking public hearings on the Bills, at selected regions outside Nairobi, in January, 2022.

**MIN. NO. 468/2021**

**THE CONSTITUTION OF KENYA (AMENDMENT) BILL (SENATE BILLS NO. 46 OF 2021).**

The Committee resolved to explore the possibility of undertaking public hearings on the Bills, in Kitui County and other selected regions, in January, 2022.

**MIN. NO. 469/2021**

**ADJOURNMENT**

There being no other business, the meeting was adjourned at 12.45 pm. The next sitting will be held on Friday, 26<sup>th</sup> November, 2021 at 2.00 pm, in Mombasa County.

SIGNED: .....  


(CHAIRPERSON)

DATE: 16 Feb 2022 .....









**SPECIAL ISSUE**

*Kenya Gazette Supplement No. 161 (Senate Bills No. 48)*

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REPUBLIC OF KENYA

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***KENYA GAZETTE SUPPLEMENT***

**SENATE BILLS, 2021**

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**NAIROBI, 20th August, 2021**

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CONTENT

Bill for Introduction into the Senate—	PAGE
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**THE ELECTIONS (AMENDMENT) (No. 3) BILL,  
2021**

**A Bill for**

**AN ACT of Parliament to amend the Elections Act to allow the use of a candidate's popular name in an election; and for connected purposes**

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

1. This Act may be cited as the Elections (Amendment) (No. 3) Act, 2021.

Short title.

2. Section 2 of the Elections Act, in this Act referred to as “the principal Act” is amended by inserting the following new definitions immediately after the definition of the word “polling station” —

Amendment of section 2 of No. 24 of 2011.

“popular name” means a name by which a candidate is known to the public, but which does not appear in the national identity card or passport of the candidate; and

“party primary” means the process by which a political party elects or selects a candidate for a forthcoming general election or by-election.

3. The principal Act is amended by inserting the following new section immediately after section 32—

Insertion of new section 32A in No. 24 of 2011.

Use of popular name on nomination and election ballot papers.

**32A.** (1) A candidate's popular name may be included on a ballot paper for purposes of a party primary or an election.

(2) A candidate shall apply to the Commission, in the prescribed form, for the inclusion of the candidate's popular name in terms of subsection (1)—

(a) in the case of a party candidate, no later than twenty-one days before the submission of names under

section 31(2B);

- (b) in the case of an independent candidate, at the time of submission of the candidate's symbol under section 32(1) and (1A);

(3) The Commission shall, within seven days of receipt of an application under subsection (2), notify the candidate of its decision in writing.

(4) Where the Commission approves the use of a candidate's popular name under subsection (3)—

- (a) the Commission shall issue the candidate a certificate to prove that the Commission has authorised the use of the popular name in terms of this Act; and

- (b) the candidate's popular name shall appear on a nomination or election ballot paper—

- (i) in the format approved by the Commission;

- (ii) on the documents relating sections 31(2A), (2B), 2(C) and 2(D), 33(1)(c) and (2) and 86(1)(c); and

- (iii) on any other document originating from the candidate, candidate's party or the Commission in relation to that nomination or election.

4. Section 109 of the principal Act is amended—

- (a) in subsection (1) by inserting the following new paragraph immediately after paragraph (c)—

- (ca) prescribe the criteria for the use of a popular name during a party primary or an election;

- (b) in subsection (3) by inserting the words “and the Senate” immediately after the words “the

Amendment of  
section 109 of  
No. 24 of 2011.

National Assembly”; and

- (c) in subsection (4) by inserting the words “and the Senate” immediately after the words “the National Assembly”.

## MEMORANDUM OF OBJECTS AND REASONS

### Statement of objects and reasons

The purpose of this Bill is to amend the Elections Act, No. 24 of 2011, to allow a candidate to be presented to the electorate on party primary or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate.

Currently, the law only permits the use of a candidate's official name as it appears in the register of voters and in the candidate's identification documents. A candidate who wishes to have his or her popular name included on a ballot paper has to go through the lengthy process of officially changing his or her name through the procedures set out under the Registration of Persons Act, Cap 107, the Registration of Documents Act, Cap. 285 and the Rules and Regulations made under the two Acts.

The ultimate goal of an election is to ensure that the electorate choose their preferred leaders in a free and fair environment. Name recognition thus becomes an important aspect of a free and fair election and should be enabled to the fullest extent. It ensures that a voter easily identifies his or her preferred candidate on a ballot and therefore votes in the way he or she intended. Candidates should therefore not be unduly restricted in the way they present themselves to the electorate on the ballot and other election-related material as this hinders the realization the candidates' right to, without unreasonable restrictions, contest in an election and the electorate's right to free expression of their will, as contemplated under Article 38 of the Constitution.

This Bill therefore seeks to provide for the inclusion of a candidate's popular name on a ballot paper while at the same time safeguarding the sanctity of the electoral process.

Further, to ensure that this flexibility does not prejudice a free and fair election in any way, the Independent Electoral and Boundaries Commission would be required to approve the use of a popular name in an election.

The Bill also proposes to amend section 109 of the Elections Act to ensure compliance with Articles 94(5) of the Constitution in the approval of Regulations made pursuant to the proposed new clauses, and the Elections Act in general.

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

The Bill delegates legislative power to the Independent Electoral and Boundaries Commission to enable the Commission to determine the conditions that may limit the use of a popular name on a ballot paper.

The Bill does not limit fundamental rights and freedoms.

**Statement on how the Bill concerns county governments**

Under Article 110(1) of the Constitution, a Bill concerning county governments includes a Bill relating to the election of members of a county assembly or a county executive. This Bill seeks to amend the Elections Act to allow the use of a candidate's popular name on nomination and ballot papers. This includes a candidate who contests in a county assembly or in a gubernatorial election.

The Bill is therefore one that concerns county governments in terms of Article 110(1)(a) of the Constitution.

**Statement that the Bill is not a money Bill, within the meaning of Article 114 of the Constitution**

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

EPHRAIM MAINA,  
*Senator.*

*Section 2 of No. 24 of 2011 which it is proposed to amend—*

## 2. Interpretation

In this Act, unless the context otherwise requires—

“adult” has the meaning assigned to it in Article 260 of the Constitution;

“agent” means a person duly appointed by— (a) a political party or an independent candidate for the purposes of an election under this Act; or (b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent;

“ballot box” means a transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period;

“ballot paper” means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;

“biometric” means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures;

“campaign period” means the period specified as such in the notice issued by the Commission in relation to an election;

“candidate” means a person contesting for an elective post;

“Commission” means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

“constituency” means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;

“constituency register” means the register of voters compiled in respect of each constituency by the Commission;

“county” means one of the counties into which Kenya is divided under Article 6(1) of the Constitution and specified in the First Schedule of the Constitution;

“county assembly” means a county assembly constituted in accordance with Article 177 of the Constitution;

“county election” means one of the election of a county governor or a member of a county assembly;



“disability” has the meaning assigned to it in Article 260 of the Constitution;

“election” means a presidential, parliamentary or county election and includes a by-election;

“electoral area” means a constituency, a county or a ward;

“election court” means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution or the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of this Act;

“election material” means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election;

“election offence” means an offence under this Act;

“elections officer” means a person appointed by the Commission for the purposes of conducting an election under this Act;

“election period” means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14, 16, 17 and 19 and the Gazettement of the election results;

“election results” means the declared outcome of the casting of votes by voters at an election;

“harambee” means the public collection of monies or other property in aid or support of a cause or a project;

“identification document” means a Kenyan national identification card or a Kenyan passport;

“illegal practice” means an offence specified in Part VI; “independent candidate” means a candidate for presidential, parliamentary or county elections who is not a member of a political party;

“integrated electronic electoral system” refers to a system that includes biometric voter registration, biometric voter identification and electronic result transmission system.

“nomination” means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;

“nomination day” in respect of an election, means the day gazetted at least sixty days before an election by the Commission as the day for the nomination of candidates for that election;

“observer” means a person or an organisation accredited by the Commission to observe an election or a referendum;

“parliamentary election” means the election of one or more members of Parliament;

“party list” means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 28, 34, 35, 36 and 37;

“petition” means an application to the election court under the Constitution or under this Act;

“political party” has the meaning assigned to it in Article 260 of the Constitution;

“polling station” means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election;

“presidential election” means an election of a President in accordance with Articles 136, 139(1)(b) and 146(2)(b) of the Constitution;

“public officer” has the meaning assigned to it in Article 260 of the Constitution;

“public resources” include—

- (a) any vehicle, or equipment owned by or in the possession; or
- (b) premises owned or occupied by, any government, state organ, statutory corporation or a company in which the Government owns a controlling interest; “referendum” means a poll held under Part V;

“referendum committee” means a national or a parliamentary constituency committee comprising of persons intending to support or oppose a referendum question;

“referendum officer” means a person appointed by the Commission for the purpose of conducting a referendum;

“referendum question” means a question upon which voters shall vote in a referendum as specified in section 49;

“registration officer” means a person appointed by the Commission for the purpose of preparing a register of voters;

“Register of Voters” means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically;

“returning officer” means a person appointed by the Commission for the purpose of conducting an election under this Act;

“supporter” means a voter who supports the nomination of a candidate;

“vessel” includes any ship, boat or any other description of vessel used in navigation;

“voter” means a person whose name is included in a current register of voters;

“voter’s card” deleted by Act No. 12 of 2012, Sch.;

“voting period” means the period specified as such in the notice issued by the Commission in relation to an election;

“ward” means an electoral area within a county delimited in accordance with Article 89 of the Constitution.

*Section 109 of No. 24 of 2011 which it is proposed to amend—*

109. Regulations

(1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

- (a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;
- (b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad prisoner;
- (c) to provide for the regulation of the process by which parties nominate candidates for elections;
- (d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;
- (e) prescribe the procedure for making and determining claims to be registered and objections to registration;

- (f) authorise any registration officer to consider or determine any application, claim, objection or appeal, to summon any person to appear before them and give evidence on oath, and to administer an oath for that purpose and to order the production of any document relevant to any issue which the officer is required to consider and determine;
- (g) provide for the division of constituencies into units for the purpose of the registration of voters;
- (h) prescribe the conditions under which elections may be held in accordance with the provisions of the Constitution, this Act or any other written law relating to elections;
- (i) prescribe the amount of the deposit to be paid by or on behalf of candidates at all elections and the circumstances in which the deposit may be forfeited;
- (j) provide for the appointment of officers to preside at polling stations;
- (k) prescribe the facilities to be provided at polling stations and the persons who may be admitted to polling stations;
- (l) prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;
- (m) provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;
- (n) provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;
- (o) provide for the manner in which a voter with special needs including a person with a disability may vote or be assisted in voting;
- (p) prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;
- (q) prescribe conditions for the use of private motor vehicles, vessels or buildings at elections;
- (r) prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and

the persons entitled so to vote and the circumstances in which persons may so vote;

- (s) provide for the allocation by the Commission, in a just and equitable manner of the use of state owned radio and television broadcasting services during any election period;
- (t) prescribe the procedure to be adopted by the public in making representations for the alteration of electoral area boundaries;
- (u) prescribe the forms which may be used under this Act and the fees in respect of anything to be done under this Act;
- (v) prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, armed forces, elections officers and other citizens of Kenya providing essential services;
- (w) prescribe the procedure for voting for citizens residing outside Kenya;
- (x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;
- (y) provide for the conduct of election observers, the media, monitors and evaluators and organisations carrying out civic and voter education;
- (z) provide with reasonable grounds for the postponement of elections;
- (aa) provide for mechanisms for carrying out effective voter education;
- (bb) provide for the mode of declaration of the result of an election;
- (cc) prescribe the manner of enforcing the Electoral Code of Conduct; or
- (dd) provide for the conduct of campaigns during a referendum or an election;
- (ee) provide for the financing of campaigns during a referendum or an election;
- (ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.

(2) The power to make regulations conferred on the Commission under this Act shall be—

- (a) for the purpose and objective of giving effect to the Constitution and this Act;
- (b) limited to the nature and scope specifically stipulated in the Constitution and this Act; and
- (c) based on the general principles and standards contained in the Constitution and this Act.

(3) The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election: Provided that this applies to the first general election under this Act.

(4) The Commission shall publish in the Gazette, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).







# REPUBLIC OF KENYA



## TWELFTH PARLIAMENT | FIFTH SESSION THE SENATE

At the sittings of the Senate held on Tuesday, 28<sup>th</sup> September, 2021 and Wednesday, 29<sup>th</sup> September, 2021, 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.

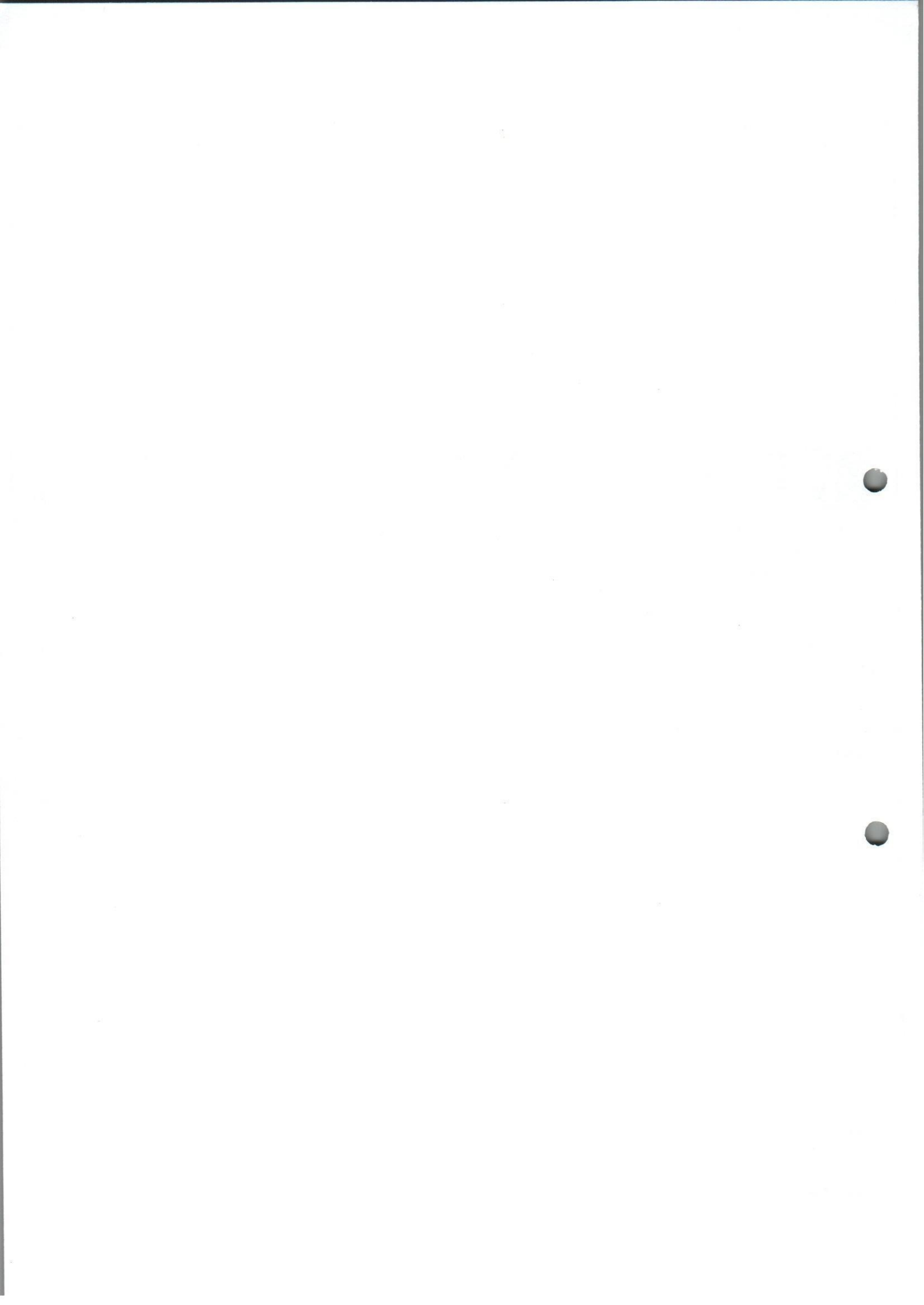
Pursuant to the provisions of Article 118 of the Constitution and Standing Order 140 (5) of the Standing Orders of the Senate, the Committees now invite interested members of the public to submit any representations that they may have on the Bills by way of written memoranda.

The Memoranda may be sent **by email** on the address: [cSenate@parliament.go.ke](mailto:cSenate@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, 15<sup>th</sup> October, 2021 at 5.00 p.m.**

	Bill	Committee Referred To	Email Address
a)	The Election (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senatejlahrc@parliament.go.ke">senatejlahrc@parliament.go.ke</a>
b)	The Constitution of Kenya (Amendment) Bill (Senate Bills No. 46 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senatejlahrc@parliament.go.ke">senatejlahrc@parliament.go.ke</a>
c)	The County Resource Development Bill (Senate Bills No. 45 of 2021)	Standing Committee on Finance and Budget	<a href="mailto:scfinanceandbudget@gmail.com">scfinanceandbudget@gmail.com</a>

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

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







INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

MEMORANDUM

TO SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS

ON

THE FOLLOWING BILLS;

1. The Elections (Amendment) Bill (Senate Bills No. 42 of 2021)
2. The Elections (Amendment) (No. 2) Bill ( Senate Bills No. 43 of 2021)
3. The Elections (Amendment) (No. 3) Bill ( Senate Bills No. 48 of 2021)

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

## I. INTRODUCTION

1. The Independent Electoral and Boundaries Commission 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 object 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 the IEBC Act.
4. The Commission notes the Bills under reference and makes submissions:

## II. THE ELECTIONS ( AMENDMENT) BILL ( SENATE BILLS No. 42 OF 2021)

### Purpose of the Bill

5. The principal object of the the Elections ( Amendment) Bill ( Senate Bills No. 42 Of 2021) is to amend the Elections Act, No. 24 of 2011, to enable a person who is at least able to read and write to be nominated as a candidate for elections as a Member of Parliament or County Assembly.
6. We welcome this draft and wish to make some comments as follows:

### General Comments

7. The Bill seeks to confer eligibility to vie on persons who may not have a degree.

### Specific Comments

8. While we note that this proposal seeks to provide for inclusivity by allowing persons who may have other attributes of a leader (apart from education) to vie for election, we take note of the provisions of Articles 99(1),(b) and 193(1),(b) of the Constitution which provide THAT-

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'A person is eligible for election as a Member of Parliament/Member of County Assembly if the person satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament'.

Current Provision Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observations	Justification
<p>A person may be nominated as a candidate for an election under this Act only if that person—</p> <p>(b) holds—</p> <p>(i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or</p> <p>(ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.</p>	<p>A person may be nominated as a candidate for an election under this Act only if that person—</p> <p>(b) is able to read and write in the English or Kiswahili language or, in the case of a person who is deaf or hard of hearing, is literate in the Kenya sign language.</p>	<p>The proposal mirrors the provisions for 'Language Tests' under the now repealed National Assembly and Presidential Elections Act ( Cap7) that required every person desirous of standing as a candidate at a parliamentary election to apply to the Electoral Commission for a test as to his proficiency in the English and Swahili languages.</p> <p>To enable the Commission uphold the tenets of the Constitution, Parliament needs to prescribe the level of qualification and/or educational standards anticipated by the Constitution.</p>	<p>Following the new constitutional dispensation-Cap 7 was repealed and the Elections Act enacted to respond to the provisions of the Constitution.</p> <p>Articles 99(1)(b) and 193 (1), (b) require that candidates contesting in an election satisfy <u>educational requirements</u></p> <p>The Constitution demands that there be some level of education. What this level of education would be was left to Parliament.</p>

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### III. THE ELECTIONS (AMENDMENT) (NO. 2) BILL ( SENATE BILLS NO. 43 OF 2021)

#### Purpose of the Bill

9. The principal object of the the Elections (Amendment) (No. 2) Bill ( Senate Bills No. 43 of 2021) is to is to amend the Election Act, No. 24 of 2011 in order to ensure equality to all candidates who aspire to vie as members of a county assembly during elections.

10. We note the proposals in the Bill and wish to make some comments as follows:

#### General Comments

11. The Bill addresses requirement of a degree for one to contest as member of county assembly taking into account low literacy levels, especially in marginalized counties.

#### Specific Comments

12. The proposals in the Bill appear to suggest that the nature of the duties and functions performed by the National Assembly and the Senate require higher educational qualifications, skills and wider exposure than the County Assembly:

Current Provision Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observations	Justification
A person may be nominated as a candidate for an election under this Act only if that person— (a) is qualified to be elected to that office under the Constitution and this Act; and (b) holds— (i) in the case of a	(1) A person may be nominated as a candidate for an election under this Act if that person is qualified to be elected to that office under the Constitution and this Act, and— (a) in the case of a Member of Parliament, holds a degree from a university recognized in Kenya; and (b) in the case of member	The law provides no direct guidance on how educational qualifications are to be arrived at however the Bill gives due regard to low literacy levels especially in Marginalized Countries.  This is an argument that would cut across all elective positions. This raises the question of the Bill being discriminatory especially since both	Discriminates and inhibits the Sovereign power of the people of Kenya to exercise their right to choose a leader of their choice.



Current Provision Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observations	Justification
Member of Parliament, a degree from a university recognized in Kenya; or (ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.	of a county assembly— (i) holds a certificate of secondary education; or (ii) does not hold a certificate of secondary education but has served for two terms, one term as a member of a county assembly under the Constitution of Kenya 2010 and another term as a member of a local authority under the repealed Local Government Act.	Parliament and the County Assembly play similar roles	

#### IV. THE ELECTIONS (AMENDMENT) (NO. 3) BILL ( SENATE BILLS NO. 48 OF 2021

##### Purpose of the Bill

13. The principal object of the the Elections (Amendment) (No. 3) Bill (Senate Bills No. 48 of 2021 is to amend the Elections Act, No. 24 of to allow a candidate to be presented to the electorate on party primary or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate

14. We note the provisions the Bill and make some comments as follows:

##### General Comments

15. While we note that this proposal seeks to ensure that a voter easily identifies his or her preferred candidate on the ballot paper, the Election Act, 2011 nonetheless provides that the

names on the ballot paper shall be as they appear on a person's identification document being either the National Identification Card or Kenyan Passport.

16. The Bill seeks to accommodate the use of popular names for elections other than by way of registering a Deed Poll pursuant to Registration of Persons Act CAP 107 and the Registration of Documents Act CAP 285 and to further empower Senate in addition to the National Assembly to approve draft regulations to the Election Act:

### Specific Comments

We further seek to highlight the following:

17. Ballot Paper Specifications: Ballot paper specifications are required to be uniform. Uniformity of Ballot paper specifications may not be attained where not all candidates have chosen popular names or vice versa. This may also affect the size and cost of ballot papers. There is no provision limiting the length or the number of popular names in the bill.
18. Placement of the Popular Name in the Ballot Paper: Regulation 51 (6)(a) of the Elections (General) Regulations, 2012 provides for names to appear in alphabetical order of surnames. There is need for clarity on the manner and order the popular names(s) is to appear in the ballot paper as this provision goes against the prescriptions provided by law.
19. Approval of Popular names: For good electoral order there is need for clarity on what constitutes a name that is not obscene, offensive or unpalatable and what mechanisms are to be put in place in the event of rejection of the popular name.
20. Further review of existing laws: to accommodate this provision would require that the Registration of Persons Act, Cap 107 and the Registration of Documents Act, Cap 285 amended to provide an exception for election purposes.

Current Provision in Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observation	Justifications
New Provision: Clause 2	Seeks to introduce interpretation of "Party Primary" under section 2 of the Act –	Party Primaries are party processes defined under Section 2 of the	'Party Primaries' are electoral process within the Elections Act as well.

Current Provision in Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observation	Justifications
	<p><b>Party primary</b>” means the process by which a political party elects or selects a candidate for a forthcoming general election or by election.</p> <p>Seeks to introduce interpretation of “Popular Name” under section 2 of the Act-</p> <p>“popular name” means a name by which a candidate is known to the public but which does not appear in the national identity card or passport of the candidate.</p>	<p>Political Parties Act, 2011.</p> <p>Adopted as a definition to be equally carried under the Elections Act.</p> <p>The Commission notes that this proposal would need to be reviewed.</p> <p>In any case: There would be need to review the interpretation of "Popular name" as provided.</p> <p>Delete <b>'Public'</b> Immediately after the word <b>'the'</b> and before the word <b>'but'</b> and insert the word <b>'electorate'</b>.</p>	<p>The introduction of use of 'popular name' raises challenges as elucidated in paragraphs 17-20 above and would not be practically achievable.</p> <p>The word “..Name by which a candidate is known to the public..” does not provide a limit that a candidate can use. Therefore, there is need to provide a limit on the number of names allowed to such a candidate.</p>
<p><b>New Provision:</b> <b>Clause 3</b></p>	<p>Seeks to introduce a section 32A which provides for procedure for application and approval of use popular name-</p> <p><b>32A.(1)-A</b> candidate's popular name may be included on a ballot paper for purposes of a party primary or an election.</p>	<p>The proposed timelines under 32 A 2 (b) will be in conflict with the timelines set for submission of symbols for Independent Candidates.</p>	<p>That there will be need to approve the popular names for candidates together whether Political Party Aspirants or Independent Candidates to avoid multiplicity of popular names.</p> <p>32 A 2 (b) to be</p>

Current Provision in Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observation	Justifications
	<p>(2)A candidate shall apply to the Commission, in the prescribed form, for the Inclusion of the candidate's popular name in terms of subsection (1)—</p> <p>(a) in the case of a party candidate no later than twenty-one days before the submission! of names under section 31(2B);and</p> <p>(b)in the case of an independent Candidate at the time of submission of the candidate's symbol under section32(1)and!(1A)l</p> <p>(3)The Commission shall within seven days of receipt of an application under subsection (2), notify the candidate of its decision in writing</p> <p>(4) Where the Commission approves the use of a candidate's popular name under subsection (3)—</p> <p>(a) the Commission shall! issue the candidate a certificate to prove that the Commission has authorised the use of the popular name in terms of this Act; and</p> <p>(b)the candidate's popular name shall appear on a</p>	<p>There is need to review the timelines for submission of "popular names".</p> <p>There is need to provide for procedures and timelines for rejection and if possible the opportunity to replace the popular name. Introduce a sub clause 5 on procedures and timelines for rejection.</p> <p>There is need to provide for management of disputes arising from two or more people claiming the same popular name or objections to the use of a submitted popular name.</p>	<p>reviewed to read; "...no later than twenty one days before the submission of names under section 31 (2B)"</p> <p>There is possibility of submission of obscene, offensive or duplicate names for the same electoral seats.</p> <p>Names are personal and distinct and as such a candidate would be unwilling to replace his/her preferred popular name.</p>

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Current Provision in Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observation	Justifications
	<p>nomination or election ballot paper—</p> <p>(i) in the format approved by the Commission</p> <p>(ii) on the documents relating sections 31(2A), (2B), 2(C) and 2(D), 33(1)(c) and (2) and 86(1) (c); and</p> <p>(iii) on any other document originating from the candidate, candidate's party or the Commission in relation to that Nomination or election.</p>		
<p>Section 109- (1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—</p>	<p>Clause 4</p> <p>Section 109 of the principal Act is amended—</p> <p>(a) in subsection (1) by inserting the following new paragraph immediately after paragraph (c)—</p> <p>(ca) prescribe the criteria for the use of a popular name during a party primary or an election.</p>	<p><u>See:</u> Comments on clause 3 above.</p>	
<p>Section 109 -</p> <p>(3) The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National</p>	<p>Section 109 of the principal Act is amended—</p> <p>(b) in subsection (3) by inserting the words “and the Senate” immediately after the words “the</p>	<p>Seeks to further empower Senate in addition to the National Assembly to approve draft regulations to the Election Act.</p>	<p>The Commission currently seeks to delete Section 109 (3) and (4) of the Elections Act, 2011 noting that Sub-Section 3 was spent after the first General Election held on 4<sup>th</sup></p>

Current Provision in Elections Act, 2011	Proposed Amendment in the Bill	IEBC Observation	Justifications
<p>Assembly, at least four months preceding a general election:</p> <p>Provided that this applies to the first general election under this Act.</p> <p>(4) The Commission shall publish in the <i>Gazette</i>, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).</p>	<p>National Assembly” and (c) in subsection (4) by inserting the words “and the Senate” immediately after the words “the National Assembly”.</p>	<p>The Commission Proposes to delete Clause 4 (a) and (b)</p>	<p>March, 2013 yet Sub - Section 4 refers to Sub - Section 3.</p> <p>That Regulations are enabling laws of institutions enacted to operationalize the substantive laws and need not necessarily be tabled in Parliament as was previously reflected in the National Assembly and Presidential Elections Act (CAP 7) (now repealed)</p>

## CONCLUSION

The Commission requests this Honourable Committee to consider the proposals herein.

  
 W.W. CHEBUKATI  
CHAIRMAN









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When replying please quote

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19<sup>th</sup>October, 2021

NATIONAL GENDER AND EQUALITY COMMISSION

**J.M. Nyegenye, CBS**  
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NAIROBI

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Dear Mr. Nyegenye,

**SUBMISSION OF MEMORANDA:**

- i. ELECTIONS (AMENDMENT) (No.2) BILL, (SENATE BILLS NO. 43 OF 2021);
- ii. ELECTIONS (AMENDMENT) BILL (No. 3) BILL (SENATE BILLS NO. 48 OF 2021), AND
- iii. THE ELECTIONS (AMENDMENT) BILL, 2021 (SENATE BILLS NO. 42 OF 2021)

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

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

In line with its mandate, the Commission presents to you a memoranda analyzing the proposed amendments and making proposals where necessary.

- a) The Commission agrees and supports the amendments as proposed in the ELECTIONS (AMENDMENT) (No.2) BILL, (SENATE BILLS NO. 43 OF 2021), and ELECTIONS (AMENDMENT) BILL (No. 3) BILL (SENATE BILLS NO. 48 OF 2021).

*"Gender Equality and Non-Discrimination"*

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The proposals in **ELECTIONS (AMENDMENT) (No.2) BILL, 2021 (SENATE BILLS NO. 43 OF 2021)** expands the scope of qualification for candidates who are from special interest groups to present themselves for election at the County Assembly. This Bill seeks to lower the minimum qualification. That is to the Kenya Certificate of secondary Education or previous experience as a member of county assembly. The Commission also notes that this Bill and the amendments are compliant with the court judgment that declared section 22 (1) (b) of the Elections Act, unconstitutional.

The Commission supports the **ELECTIONS (AMENDMENT) (No. 3) BILL, 2021 (SENATE BILLS NO. 48 OF 2021)** on premise that most of the candidates from the special interest groups among others are known by their popular names. The amendment reduces the legal administrative red tapes not only for special interest groups but for all interested candidates. These amendments promote equality of participation in the election processes.

- b) On **'THE ELECTIONS (AMENDMENT) BILL, 2021 (SENATE BILLS NO 42 OF 2021)'**, the Commission wishes to share the following proposals and suggestions in the attached Memoranda for your consideration.

*Yours sincerely,*

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Betty Sungura-Nyabuto, MBS  
COMMISSION SECRETARY/ CEO

Encl.



THE ELECTIONS (AMENDMENT) BILL, 2021, (SENATE BILLS NO 42 OF 2021)  
PROPOSALS AND SUGGESTIONS

DATE: 19<sup>th</sup> October 2021

Submitted to: [Csenate@parliament.go.ke](mailto:Csenate@parliament.go.ke), [senatedevolution@gmail.com](mailto:senatedevolution@gmail.com)

S/NO	SECTION/CLAUSE	PROPOSAL	JUSTIFICATION
1.	2. Section 22 of the Elections Act is amended in subsection (1) by deleting paragraph (b) and substituting therefor the following new paragraph— (b) is able to read and write in the English or Kiswahili language or, in the case of a person who is deaf or hard of hearing, is literate in the Kenya sign language;	Amend by inserting the following after the words sign language;  braille and other communication formats and technologies accessible to persons with disabilities	For conformity with Article 7 2(b) of the Constitution of Kenya, 2010.  The amendment also recognizes braille as a form of communication

**General Observations**

Upon consideration of these proposals, the Commission supports the Bill. This is based on many views received from our stakeholders affirming that braille is a critical form of communication commonly used and applied by the special interest groups. The Commission also notes that this Bill and the amendments are compliant with the court judgement that declared section 22 (1) (b) of the Elections Act, unconstitutional.

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## COUNCIL OF GOVERNORS

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

Tel : (020) 2403314/2403313  
+254 729 777 281  
E-mail: info@cog.go.ke

Our Ref. COG/6/10

19<sup>th</sup> October, 2021

Mr. Jeremiah Nyegenye  
Clerk of the Senate  
Parliament Buildings  
**NAIROBI**

Dear Mr. Nyegenye

**INVITATION TO A CONSULTATIVE FORUM ON THE THREE (3) ELECTION RELATED BILLS**

This has reference to the above matter and to your letter dated 14<sup>th</sup> October, 2021 under Ref: SEN./12/5/JLAHRC/2021 (60), whose contents are noted.

The Council of Governors has reviewed the Election (Amendment) (No 3) Bill (Senate Bills No 48 of 2021) which seeks to amend the Elections Act, No. 24 of 2011 and allow the usage of a candidate's popular name in an election. We note that the amendments will not in any way compromise the sanctity of the electoral process.

This is therefore, to inform your Office that the Council has no objections to the proposed amendments.

Please be assured of our highest esteem and consideration.

Yours sincerely

Mary Mwiti  
**Ag. Chief Executive Officer**

Copy: All Excellency Governors  
All County Attorneys

**URGENT**









19<sup>th</sup> October 2021

The Clerk of the Senate  
Parliament Building  
P.O. Box 41842-00100  
Nairobi.

RE: Memorandum on the Elections (Amendment) Bill(s) (Senate Bills No. 42 of 2021, 43 of 2021 & 48 of 2021).

The Centre for Multi-Party Democracy (CMD-Kenya) is a political parties-based membership organization, whose mandate is to enhance multiparty democracy and strengthen the institutional capacity of political parties in Kenya through policy influence and capacity building.

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 140 (5) of the Standing Orders of the Senate, CMD-Kenya hereby submits its memoranda on certain provisions of the Elections (Amendment) Bill (Senate No. 42 of 2021), Elections (Amendment) (No.2) Bill (Senate No. 43 of 2021) and Elections (Amendment) (No. 3) Bill (Senate No. 48 of 2021) as follows:

Elections (Amendment) Bill (Senate No. 42 of 2021)		
Section of the Bill	Proposed Amendment to the Bill Section	Justification
Section 2	The qualifications provided in Sections 22 of the Elections Act should be maintained. Alternatively, rather than doing away with the academic qualifications, consider amending section 22 (1) (b) by requiring the Members of the County Assemblies to hold at least either a diploma from a recognized institution in Kenya or a certificate of secondary education with a minimum of a C- (Minus).	Dialogue on a well-informed and better-educated class of elected representatives is timely. This is because as the country develops, it would be good to have legislators who are more conversant with complex issues and have a wide scope of National and County affairs. Those arguing against raising the minimum qualification assert that a university degree merely points to one's calibre and competence in a particular qualification and specialty. Moreover, they have cited examples of developed democracies

		<p>where no such laws exist and that enacting such a law would unfairly bar many from fulfilling their national duty and, importantly, exercising their citizen's right. However, all positions of responsibility have minimum requirements, which are definitely discriminative against those who do not meet them. Judges, teachers, commissioners, administrators and others have minimum education requirements. Discrimination is necessary to get the people best suited for the roles. The current enrolment rate at primary level is at over 10 million presently. Following the roll out of 100 per cent transition policy to complement Free Day Secondary School, primary to secondary transition rates have increased from 83.3 per cent in 2018 to 95 per cent by the first quarter (Q1) of 2020. Kenya's university enrolment rate now stands at about 0.5 million. There are 30 public universities, 30 chartered private universities and 30 universities with Letter of Interim Authority. Additionally, there are tens of Technical and Vocational Education and Training Institutions and Proprietary schools. In a country of 50</p>
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	<p>million people – with these kinds of educational institutions, commitment to access for education– would not have difficulty finding suitable candidates from respective constituencies. In cases where there are justifiable reasons for low literacy levels, the requirement could be waived for a certain period.</p> <p>A legislative body with academic and professional deficits is a burden both to a nation and to itself. This scenario creates a situation where a few competent people carry the load and are responsible for the lion’s share of the voice of the legislative body. While the minimum qualification proposal may be controversial and contentious, it is essential to ask whether Kenyan legislators particularly at County level are sufficiently competent to execute their enormous responsibilities.</p> <p>Given the lackluster performance of many MCAs, avenues must be explored to elevate the stature and competence of County Assemblies. Although other factors have impeded MCAs and that their performance is not simply the manifestation</p>
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		<p>of a lack of academic credentials, nurturing and sustaining credible and competent County legislative and executive bodies is a key component of strengthening devolved governance. Such powerful institutions must be well endowed in terms of human capital to effectively and efficiently discharge their mandated duties and obligations which have become increasingly complex and daunting. Making well thought out decisions on the use of County Funds, NG-CDF, NGAAF, making basic contributions to legislation in a legislative assembly, overseeing state organs and budgeting, all require proper education which include out of classroom interaction and exposure. The office of an elected representative requires a person with impeccable intellect because his decisions affect tens of thousands of people and his actions are emulated by other future leaders.</p>
Elections (Amendment) (No.2) Bill ( Senate No. 43 of 2021)		
Section 2, subsection (1), paragraph (b) subparagraph (i)	Amend this section to indicate the grade to be attained by the candidate in the certificate of secondary education.	Since we are striving to have in office representatives who have the capacity to comprehend legislations and

<p>Section 2, subsection (1), paragraph (b) subparagraph (ii)</p>	<p>Amend this section by deleting and or striking off this subsection (1) paragraph (b)(ii) which exempts MCA's who have served for two terms as members of the county assembly under the 2010 Constitution and another as a member of a local authority under the repealed Local Government Act from having any qualifications when wanting to vie again for the position of an MCA.</p>	<p>other issues so as to make informed decisions, then there is a need to do quality control to ensure that we get the right candidates and to also prevent ambiguities.</p> <p>This is to ensure that all members have the right educational capacity to efficiently discharge their oversight mandate. Avoid special preference as well as discrimination of any form.</p>
<p>Elections (Amendment) (No. 3) Bill (Senate No. 48 of 2021)</p>		
<p>Section 32A</p>	<p>The amendments proposed there in are in order.</p>	<p>The amendments proposed there in are in order as they pertain use of popular names by political candidates.</p>

Sincerely,



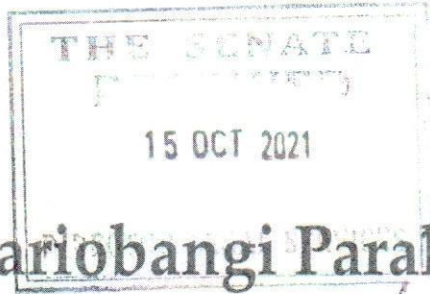
Frankline Mukwanja  
 Executive Director.











# Kariobangi Paralegal Network

Tel: 0720 201613, P.O. Box 47714, 00100 GPO, Nairobi, Kenya  
E-mail: kariobangiparanet@gmail.com

**THIS MEMORANDUM IS BASED ON A CALL BY THE SENATE TO THE GENERAL PUBLIC ON PUBLIC PARTICIPATION IN THE AMENDMENTS TO THE ELECTIONS (AMENDMENT) (BILL NO 3) OF 2021.**

Presentation by kariobangi Paralegal Network 14/10/2021



## BACKGROUND

1. THE KARIOBANGI PARALEGAL NETWORK (KAPARANET) hereby wish to register our comments and feedback;
2. With reference to the Elections Amendment Act, Bill No.3 of 2021, we therefore wish to state as follows: -
3. Kenyans acknowledge that legislative authority is derived from the people of Kenya and that parliament shall exercise legislative authority through bills passed by Parliament as captured in Article 94 and 109 of the Kenyan Constitution respectively.
4. Kenyans recognize that under article 38(3) and 38(2) of the Kenyan constitution, every Kenyan citizen has the right to be a candidate for public office and the right to free and fair elections based on universal suffrage.
5. For the sake of transparency and accountability, Kenyans would like the use of a popular name by electoral candidates to be consistent throughout the election process, and without irregularity as to the identification and use of a candidate's popular names.

C-AJ-JLASHR

Kindly deal

15/10/2021

6. Kenyans propose that in connection with any legal proceedings flowing from the use of a popular name by an electoral candidate, that candidate's name shall be sufficient for trial for purposes of legal proceedings.
7. The popular name should not be based on any discriminatory grounds and should not suggest money.
8. We are concurrence with a clear definition of the term popular name and party primary.
9. There is a need to popularize the amendments to the Elections Act, that is, S2 and S32(A) to sensitize the public.
10. As regards Section 32(A)(3), we call for adequate resourcing of the IEBC in order to facilitate the electoral process. The efficient and prompt communication from IEBC will cushion it from a plethora of litigation for failure to notify candidates of its decision in time.
11. We notice that the use of popular names is restrictive to the electoral process. What happens to the same candidate, beyond the electoral process in legal proceedings?
12. We are in harmony with the thresholds envisaged under Section 32, (A), (4). However, political parties and candidates must religiously adhere to the rule of law to the requirements in Section 31. Additionally, political parties should avoid issuing nomination certificates to the candidates that have not been authenticated as winners in party primaries, and parties that flout due process should be barred from fielding candidates from elective positions.
13. We are in agreement with the insertion of new section 32(a) which will precede article 32.

However, there is need to clarify a few issues regarding the Bill:

a. We highlight the following demerits of popular names for your attention:

1. Person with the popular name can deny the name when brought before court for commission of crime or omission in doing something.
2. As much as the voters may be able to recognize the person due to the popular name, citizens may not be in a position to recognize the person's real name even when the person does something e.g., publishing a book (importance of identity).
3. May result to violence in the sense that the candidate with popular name may reject the outcome after the conclusion of tallying of votes if defeated if he did not adhere to the processes.
4. Popular candidates should not use their popular names to radicalize members of society, inciting political upheavals which may lead to violence and disharmony.
5. We recommend that persons who use popular names in electoral processes should go ahead and include their popular names in their identification cards as part of their legal names.

DATED and SIGNED at NAIROBI on this 14<sup>th</sup> DAY OF OCTOBER 2021.

Chief Executive Officer  
Kariobangi Paralegal Network



# Kariobangi Paralegal Network

Tel: 0720 201613, P.O. Box 47714, 00100 GPO, Nairobi, Kenya

E-mail: kariobangiparanet@gmail.com



**THIS MEMORANDUM IS BASED ON A CALL BY THE SENATE TO THE GENERAL PUBLIC ON PUBLIC PARTICIPATION IN THE CONSTITUTIONAL AMENDMENT 2021. Kenya Gazette Supplement No. 155 (Senate Bills No. 46)**

**Presentation by kariobangi Paralegal Network 14/10/2021**

## **BACKGROUND**

1. THE KARIOBANGI PARALEGAL NETWORK (KAPARANET) hereby wish to register our comments and feedback; With reference to the Constitutional Amendment, we therefore wish to state as follows: -
2. Kenyans recognize that in accordance with Article 2, 5 and 89 of the Constitution of Kenya, an amendment to the Constitution touching on territorial integrity of borders, demarcations and delimitations of counties is a protected process, and thus, requires a constitutional referendum.
3. Kenyans appreciate that a constitutional amendment can be initiated through a parliamentary process as established by article 256 of the Kenyan Constitution.
4. Would like to highlight that Kenyans would like the requisite threshold of cumulative population to be met before Kitui County can be further demarcated.
5. That the government considers the challenges and objections from within Kitui County, and across other counties in Kenya to the delimitation of Mwingi from Kitui County.
6. Kenya needs an appropriate time, free from the present restrictions that restrict public gatherings where quality information can be disseminated to them, where they can comprehend the Bill and provide candid feedback.
7. That we appreciate this as an important undertaking. However, we fear that it may be drowned by the prevailing charged 2022 political environment that will divert the

attention of the citizens from participating in an important constitutional requirement like this.

8. We acknowledge that Kitui County sufficiently meets the requisite criteria needed for delimitation of Mwingi from Kitui County.
9. That the IEBC shall consult all interested parties to the delimitation of Mwingi from Kitui County as prescribed by Article 89 (7) of the Kenyan Constitution.
10. We recognize that this process may not spark clamor for similar processes by other processes, thus, causing conflict.
11. We reaffirm the need for counties to generate revenue and provide services closer to the citizens in a more prudent manner.
12. We emphasize the need for supportive skills to launch and develop Mwingi County, unlike the transition authority era in 2013. This will be in respect of the values of leadership and integrity in Chapter 6 of the Constitution, for purposes of development and stability.

However, there is valid fear that require clarification:

1. There will be a need for Kitui to de-link fully from Kitui East, including the use of a suitable name to avoid contestation of names after extensive consultation with stakeholders.
2. We would prefer that the IEBC be given authority to conduct the delimitation process as it is their preserve at once, in a one-off referendum.
3. Based on the purposes and objectives of devolution of resources and services, the community of Kariobangi thus supports the delimitation of Mwingi from Kitui County, into Kitui and Mwingi Counties, respectively. However, the role of delimiting electoral units is under the purview of the IEBC under Article 89((2) of the Kenyan Constitution.

DATED and SIGNED at NAIROBI on this 14<sup>th</sup> DAY OF OCTOBER 2021.

Chief Executive Officer

Kariobangi Paralegal Network











## ELECTION (AMENDMENT) SENATE BILLS NO. 42 of 2021, NO. 43 of 2021, No. 3 2021

### MEMORANDUM

#### Introduction

Article 99(1) (b) of the Constitution states that one qualifies as a Member of Parliament if he satisfies any educational, moral standards and ethical standards prescribed by this Constitution or any Act of Parliament. Consequently, Parliament enacted the Elections Act, No. 24 of 2011, which received Presidential Assent on 27<sup>th</sup> August 2011 and came into force on the 2<sup>nd</sup> of December 2011.

Sec. 22 of the Act states that, a person may be nominated as a candidate for an election under this act only if that person is qualified to be elected to that office under the constitution and this act, and holds, in the case of a member of parliament, a degree from a university recognized in Kenya or, in the case of a member of the county assembly, a degree from a university recognized in Kenya.

The degree requirement for legislators as tabled in parliament in 2011 was set to be implemented during the 2013 general elections. However, since the majority of MPs then did not have the qualifications, they managed to lobby for a five-year suspension of the passing of the bill. Fast-forwards in 2017, members of Parliament further amended the Section stating that, *"notwithstanding Subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general election to be held after the 2017 general election,"*. By dint of this amendment, 10 years IEBC is yet to enforce educational standards and it was anticipated that this would be implemented in the upcoming elections in 2022.

The provision has been subject to a number of litigations since 2011. In Petition 198 of 2011, Johnstone Muthama filed a petition seeking among other to declare Section 22 of the Act unconstitutional. In her judgment, Justice Mumbi Ngugi agreed with the Petitioners that Section 22 of the Act offended Art. 27 of the Constitution and stated, *"By excluding everyone who does not have a 'post-secondary qualification,' a term which is not defined in the Act, from running for any elective office established under the Constitution, the Act discriminates directly on the basis of status and social origin, for almost invariably, and as noted from the analysis of the socio-economic context above, it is the poor in society, those 18 million Kenyans*

*living in poverty, who will not get an opportunity to acquire an education, let alone a post-secondary education*<sup>1</sup>.

The case relied heavily among others statistics from National Coordinating Agency for Population and Development (NCPAD) to arrive at the decision that even on the basis of gender the Section discriminated on gender grounds considering the enrollment of girls in primary schools, the dropout rates and transition of girls to Kenyan secondary schools which was very low. Another Petition filed in 2012, relied on the precedence set by Justice Mumbi, it averred that the decision stands as it had not been perfected on appeal or review and therefore was still in force<sup>2</sup>.

In 2013, Harun Mwau filed a petition seeking among other prayers a declaration that for a Presidential Candidate to qualify for nomination he/she is not required to satisfy any other educational, moral and ethical requirements apart from those required to be satisfied by person standing for election as a Member of Parliament. Justice Lenaola, as then was, held that on the issue of education standards, he differed with J. Mumbi and stated, *the nature of the duties and functions performed by the National Assembly and the Senate in my view require higher educational qualifications, skills and wide exposure which is gained through higher education. It is important that a representative to either of the House understands the proceedings, nature of business being carried out and most important be in a position to make his/her contribution to the various and many at times complex motions and debates in Parliament*<sup>3</sup>.

In his decision, J. Lenaola noted that the taxpayer spends millions of money on free primary and secondary education and that every Kenyan from all walks of life should be in a position to attain the past secondary education hence not unreasonable for parliament to demand it as threshold. He concluded by saying that holding Section 22 of the Act unconstitutional would be absurd 50 years after independence. This ruling was upheld by the Court of appeal in 2019 and remains the precedent.

Justice Mrima in a case filed by CAF and six others, declared Section 22 of the Elections Act unconstitutional in a Ruling delivered on 15<sup>th</sup> October 2021 citing discrimination and lack of public participation.

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<sup>1</sup> Petition No. 198 of 2011 – Johnstone Muthama -Vs- Min of Justice and Constitutional Affairs

<sup>2</sup> Petition 16 of 2012, Ali Bakari Mohammed -Vs- IEBC & AG.

<sup>3</sup> John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR

This house Senate has moved amendments to the Elections Act, 2011 with a view of amending Section 22 of the Act to proposing various standards while another amendment to the Act seeks to have legislators use their popular names in the elections. The table below is a summary of the bills.

**Analysis of the Election Amendment Bills**

Bill	Objects of the Bill	Proposals/ Recommendations
<p>The Election (Amendment) Bill (Senate Bills No. 42 of 2021.</p>	<p>Seeks to amend section 22 of the Elections Act to enable a person who is able to read and write to be nominated as a candidate for election as a MP or member of CAW.</p> <ul style="list-style-type: none"> <li>• Currently, the law only allows the nomination of a candidate for election if such person holds a degree from a university recognized in Kenya.</li> <li>• This will allow for persons who may not have a degree but who may have other attributes of a leader to vie for election.</li> </ul> <p>This Section, had been delayed by Sec 1(A) of the Act and such was not applicable in the last election but its operation was to take effect in the elections in 2022.</p>	<p>While we do not support any assertion that equates good leadership with academic qualifications, we support the letter and spirit of the Constitution and the Election Act of 2011 that provides for a basis/minimum academic qualification.</p> <p>While the object of this bill is to provide inclusivity by allowing anyone who is able to read and write to vie, if fails to appreciate the fact that Parliament and County Assembly three functions require some level of professional expertise which is a function of some basic academic qualifications.</p> <p>The Bill, postulates that the law as it is offends Art. 38(3) of the Constitution that dictates that every adult has a right to be registered as a voter, vote and be candidate for public office, essentially seeking to achieve inclusivity, this could be far from the truth as the Country has made strides since the law was first enacted and consequent decisions earlier highlighted assert this fact.</p>
<p>The Election (Amendment) (No.2) Bill (Senate Bills</p>	<p>Seeks to amend Section 22 of the Elections Act by deleting: (1) and substituting therefore the following new subsection—</p>	<p>We support these changes as it recognizes the nuisances of the local politics. In other words, no every 1,450 electoral wards have the same level of exposure to academic requirement.</p>

<p>No. 43 of 2021).</p>	<ul style="list-style-type: none"> <li>• A person may be nominated as a candidate for an election under this Act if that person is qualified to be elected to that office under the Constitution and this Act, and—</li> </ul> <p>(a) in the case of a Member of Parliament, holds a degree from a university recognized in Kenya; and</p> <p>(b) in the case of member of a county assembly— (i) holds a certificate of secondary education; or (ii) does not hold a certificate of secondary education but has served for two terms, one term as a member of a county assembly under the Constitution of Kenya 2010 and another term as a member of a local authority under the repealed Local Government Act.</p>	
<p>The Elections (Amendment) (No. 3) Bill, 2021</p>	<p>The Bill seeks to amend Sec. 32 of the Elections Act, No. 24 of 2011, to allow a candidate to be presented to the electorate on party primaries or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate.</p> <p>The Bill requires IEBC to develop a standardized form for candidates to notify it of the</p>	<p>We take the position that this is to be left to the candidate/aspirant to follow the laws regarding change of names as is.</p> <p>To enact this amendments would tantamount to over-legislating.</p>

	intended use of a popular name within 21 days to the nomination day and if an independent candidate as is required under Sec. 32 of the Act. IEBC shall thereafter on receipt of the Notice communicate in writing its decision to the candidate	
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After careful considerations of the proposed amendments to the Elections Act, 2011 and the court pronouncements on the issue, we wish to make the following positions;

- **THAT** the sovereign power belongs to the people of Kenya and that power ought to be exercised in accordance with the Constitution. The people may *inter alia* exercise their sovereign power through their democratically elected representatives.
- **THAT** under Art. 99(2) (b) the people of Kenya have envisaged that a person would not be eligible to run for certain offices if they did not meet the criteria set by Parliament.
- **THAT** the Committee of Experts on Constitutional Review noted that the people of Kenya had expressed the desire for there to be a statement on the educational qualifications of Members of Parliament<sup>4</sup>.
- **THAT** Section 22 of the Election Act was enacted by Parliament pursuant to the provisions of Article 99(1) (b) of the Constitution. This Article envisages a situation where Parliament prescribes an educational threshold for those who seek to be elected as Members of Parliament.
- **THAT** Kenya as a country has invested heavily in education both at Primary and Secondary levels. Statistics from UNESCO indicate that Kenya has an adult literacy rate of 81.53%, with the male literacy rate at 84.99% and females at 78.19%. This has been increasing over the years<sup>5</sup>.
- **THAT** while there may be different decisions on the subject, the doctrine of Stare decisis applies and as such the J. Lenaola decision remains as upheld in the Court of Appeal and the Attorney General should pursue the matter with a view of correcting anomalies in the various decisions.

<sup>4</sup> Final Report of the Committee of Experts on Constitutional Review dated 11th October 2010, at paragraph 7.5.2

<sup>5</sup> <https://countryeconomy.com/demography/literacy-rate/kenya>

- **THAT** the educational requirement cannot continue to be suspended in perpetuity as this goes against the will of the people.

### **Recommendations**

Premised on the above, we recommend that;

- This committee upholds the status as contained in the Elections Act, 2011 Sec. 22 requiring that a person may be nominated as a candidate for an election under the act only if he/she is qualified to be elected to that office under the constitution and for the case of a member of parliament (MP) to have a degree from a university recognized in Kenya.
- This committee considers proposal suggested in the Election (Amendment) (Senate Bills No. 42 of 2021) for the case of a member of the county assembly, which requires a secondary school certificate, or in the absence, having served for two terms.
- The Election (Amendment) (Senate Bills No. 42 of 2021) and the Elections (Amendment) (No. 3) Bill, 2021 both be withdrawn for same reasons shown above.

We hope our recommendations will be factored in the deliberations on the referenced Bills.

Signed by

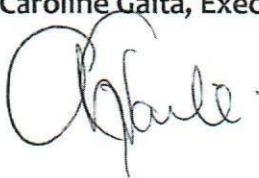
1. **Name: Mulle Musau, National Coordinator, Elections Observation Group (ELOG)**

Sign:



2. **Name: Caroline Gaita, Executive Director, Mzalendo Trust**

Sign:









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

STAKEHOLDER VIEWS ON THE ELECTION (AMENDMENT) (NO. 3) BILL, (SENATE BILLS NO. 48 OF 2021)

CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	REMARKS
2	Independent Electoral and Boundaries Commission (IEBC)	<p>1. Definition of word ‘popular name’ need to be reviewed.</p> <p><b><u>Rationale</u></b></p> <p>The introduction of popular name raises the following challenges –</p> <p>a) ballot paper specifications are required to be uniform. This uniformity may not be attained where not all candidates have chosen a popular name;</p> <p>b) the size and cost of ballot paper will be affected, since the length or number of a popular name is not limited;</p> <p>c) it has not been clarified on the manner and order of placement of a popular name on the ballot paper since Regulation 51(6)(a) of the Elections (General) Regulations, 2012 provides that names are to appear in alphabetical order of surnames;</p> <p>d) there is need for clarity on what constitutes a name that is not obscene, offensive or unpalatable, and what mechanisms are to be put in place in the event of rejection; and</p> <p>e) there is need for review of the Registration of Persons Act and the Registration of Documents Act to provide</p>	

CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	REMARKS
		<p>for exemptions for elections purposes.</p> <p>2. Delete the word 'public' appearing immediately after the words 'known to the' and replace with the word 'electorate'</p> <p><b><u>Rationale</u></b></p> <p>The name a candidate is known to the public does not provide a limit. There is therefore need to provide the limits on the number of names.</p>	
3	IEBC	<p>1. Amend the proposed section 32A(2)(b) to read –</p> <p>(b) in the case of an independent candidate, no later than twenty-one days before the submissions of names under section 31(2B).</p> <p><b><u>Rationale</u></b></p> <p>a) The proposed timelines under section 32A(2)(b) will be in conflict with the timeliness set for submission of symbols for independent candidates; and</p> <p>b) There will be need to approve popular names for both independent candidates and party candidates to avoid multiplicity of names.</p> <p>2. There is need to provide for management of disputes arising from two or more people claiming the same popular name or objection to the use of a submitted popular name.</p>	

CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	REMARKS
4	IEBC	<p><u>Rationale</u></p> <p>Names are personal and distinct, and as such, a candidate would be unwilling to replace his or her preferred popular name.</p> <p>Delete paragraph (b) and (c).</p> <p><u>Rationale</u></p> <p>a) Section 109(3) and (4) of the Elections Act that are proposed to be amended were spent after the first general elections held on 4<sup>th</sup> March, 2013; and</p> <p>b) Regulations are enabling laws of institutions enacted to operationalise the substantive laws and need not necessarily be tabled in Parliament as was the previously reflected in the National Assembly and Presidential Elections Act.</p>	

**GENERAL COMMENTS**

**1. NATIONAL GENDER AND EQUITY COMMISSION**

Supports the Bill for the reason that most candidates from the special interest groups among others are known by their popular names. The amendment reduces the legal administrative and red tapes and promotes equity of participation in the electoral process.

**2. CENTRE FOR MULTIPARTY DEMOCRACY – KENYA**

Supports the Bill.

### **3. THE COUNCIL OF COUNTY GOVERNORS**

Supports the Bill and are of the view that the amendments will not compromise the sanctity of the electoral process.

### **4. KARIOBANGI PARALEGAL NETWORK**

Supports the Bill with the following comments –

- a) that in connection with any legal proceedings flowing from the use of a popular name by a candidate, that candidate's name shall be sufficient for legal proceedings;
- b) persons with popular name can deny the name when brought before court for commission of crime;
- c) may result in violence where a candidate with a popular name rejects the outcome;
- d) popular candidates should not use their popular names to radicalize members of society, inciting political upheavals which may lead to violence or disharmony; and
- e) persons who use popular names in electoral processes to also include their popular name in their identity cards as part of their legal names.

### **5. ELECTIONS OBSERVER GROUP (ELOG), AND MZALENDO**

That the Bill be withdrawn. It was observed that candidates/aspirants to follow the laws regarding change of name, and that the proposed amendments amount to over-legislating.

16<sup>th</sup> February, 2022

The Clerk of the Senate  
Parliament Buildings

NAIROBI

**RE: COMMITTEE STAGE AMENDMENTS TO THE ELECTIONS  
(AMENDMENT) (NO. 3) BILL, SENATE BILLS NO. 48 OF 2021**

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**NOTICE** is given that Sen. Erick Okong'o Mogeni, the Chairperson to the Standing Committee on Justice, Legal Affairs and Human Rights, intends to move the following amendments to the Elections (Amendment) (No. 3) Bill, Senate Bills No. 48 of 2021, at the Committee Stage —

**CLAUSE 2**

**THAT** clause 2 of the Bill be amended by deleting the definition of the word “party primary”.

**CLAUSE 3**

**THAT** clause 3 of the Bill be amended in the proposed new section 32A(1) by deleting the words “a party primary” appearing immediately after the words “for purposes of” and substituting therefor the words “party nominations”.

**CLAUSE 4**

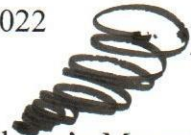
**THAT** clause 4 of the Bill be amended by deleting paragraph (b) and substituting therefor the following new paragraph —

(b) in subsection (3) —

(i) by inserting the words “and the Senate” immediately after the words “the National Assembly”; and

(ii) by deleting the proviso; and

Dated ..... 16<sup>th</sup> Feb 2022 ....., 2022

  
Erick Okong'o Mogeni,  
Chairperson,  
Standing Committee on Justice, Legal Affairs and Human Rights.

