REPUBLIC OF KENYA THE SENATE RECEIVED 3 1 MAR 2022 WELFTH PARLIAMENT (SIXTH SESSION) PAPERS LAID 25/04/2022 THE SENATE DATE TABLED BY DLM COMMITTEE CLERK AT THE TABLE MR. AMOLD STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND **HUMAN RIGHTS** REPORT ON THE POLITICAL PARTY PRIMARIES BILL (SENATE BILLS NO. 35 OF 2020) Rt. from Seeker Altrosof You way approve 31/3/2022 You for tablity 31/3/22 31/03/22 Clerk's Chambers, First Floor, Parliament Buildings, March, 2022 NAIROBI.

### TABLE OF CONTENTS

Foreword by the Chairperson	(ii)
Preface	(iv)
Adoption of the Report	(v)
Chapter 1: Introduction	
Background on the Political Party Primaries Bill, 2020	
Prepublication scrutiny	
Publication, First Reading and Committal of the Bill	
Overview of the Bill	3
Chapter 2: Consideration of the Bill	
Invitation of Stakeholder submissions on the Bill	
Consideration of the Bill by the Committee	
Chapter 3: Committee Observations and Recommendation	
Observations	13
Recommendation	13
Annexes	

### FOREWORD BY THE CHAIRPERSON

- 1. The Political Party Primaries Bill (Senate Bills No. 35 of 2020) seeks to put in place a legal framework for the conduct of political party primaries. It sets out the procedure to be followed in the conduct of party primaries for purposes of identifying candidates to stand for election in an elective post, as well as preparing party lists as required under the Constitution and the Elections Act.
- 2. The Bill was read a First Time in the Senate on 4<sup>th</sup> March, 2021 and thereafter stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration. Pursuant to Article 118 of the Constitution and standing order 140(5) of the Senate Standing Orders, the Committee proceeded to invite stakeholder and public comments on the Bill, whereupon it received written submissions from seven (7) stakeholders.
- 3. Further consideration of the Bill was however deferred following publication, on 10<sup>th</sup> May, 2021 of a Gazette Notice declaring vacant the seat held by Sen. Isaac Mwaura, CBS, MP, the sponsor of the Bill. The said notice was subsequently quashed by the High Court towards the end of the Fifth Session.
- 4. By the time the Committee resumed consideration of the Bill during the Sixth Session, it was observed that the key amendments proposed in the Bill had substantially been incorporated in the Political Parties (Amendment) Bill (National Assembly Bills No. 56 of 2021), which was passed by Parliament and gazetted on 28<sup>th</sup> January, 2022 as Act No. 2 of 2022.
- 5. The Committee further observed that it would not be possible to process amendments to the same provisions of the Political Parties Act as the period of six months had not lapsed since passage and enactment of the Political Parties (Amendment) Act, 2022. Additionally, by the time the six months lapsed, it would be a few weeks to the next General Election, and Parliament would have adjourned sine die.
- 6. Arising from the said observations, and following consultations with the sponsor of the Bill, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that the Political Party Primaries Bill (Senate Bills No. 35 of 2020) be not proceeded with, and that the sponsor withdraws the Bill, pursuant to standing order 154 of the Senate Standing Orders.

- 7. 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 assignment. The Committee further wishes to thank the stakeholders who submitted written memoranda on the Bill, as well as the sponsor of the Bill, who robustly engaged with the Committee both at pre-publication stage and during the substantive consideration of the Bill.
- 8. 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 Political Party Primaries Bill (Senate Bills No. 35 of 2020).

Signed....

Date 89 MARCY 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 Senate Standing Order 212 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, FCIArb, 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 Political Party Primaries Bill (Senate Bills No. 35 of 2020) are attached to this Report collectively as *Annex 1*.

### ADOPTION OF THE REPORT ON THE POLITICAL PARTY PRIMARIES BILL (SENATE BILLS NO. 35 OF 2020)

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 –

-Chairperson	
-Vice-Chairperson	
-Member	Corlany-
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### **CHAPTER ONE: INTRODUCTION**

### A. Background to the Bill

- 1. Political party primaries play a critical role in promoting democracy in a nation. They provide the mechanism in which members of the public are availed the earliest opportunity to participate in the nation's democracy by freely choosing the candidates that best reflect their beliefs and ideologies. In a country that is heavily characterized by ethnically divided politics, political primaries, especially in party strongholds, amounts to a large extent an assurance of victory in general and by-elections for the successful applicants. It is hence vital that the intention of the exercise as an avenue for the common inwananchi to exercise their democratic vote is safeguarded and conducted at the highest attainable standards in accordance with the principles and values of the Constitution.
- 2. Historically, political primaries have been the epitome of shambolic exercises laced with strong undertones of nepotisms, favouritism, discrimination, and corruption contrary to the democratic intention of the exercise. Following the 2007/8 post-election violence, election reforms, with an aim of addressing these misgivings, were initiated culminating in a new constitutional dispensation and an array of electoral laws that were meant to bring order and management in political party activities. One of the key objectives of these reforms was to ensure that political party primaries are conducted in a free, fair, and transparent manner so as to achieve its democratic intention. Unfortunately, this objective has never been fulfilled.
- 3. The Kenya National Commission on Human Rights (KNCHR), in their report dubbed *The Fallacious Vote: A Human Rights Account of the 2017 Political Parties Primaries* published in May, 2017, noted that during the party primaries held in March and April, 2017 there were no major deviations from the past with political parties being ill prepared for the exercise, claims of rigging being rampant and a general lack of internal disputes resolutions apparent in most of the political parties.
- 4. Article 92(c), (e) and (i) of the Constitution provides that "Parliament shall enact legislation to provide for the regulation of political parties, the registration and supervision of political parties and any other matters necessary for the management of political parties".

5. The Political Party Primaries Bill (Senate Bills No. 35 of 2020) sought to implement this provision by providing a statutory framework for political parties to undertake primaries. This was particularly noting that the Political Parties Act (No. 11 of 2011), and the Elections Act (No. 24 of 2011), fell short with respect to making provision for the conduct of political party primaries.

### B. Prepublication scrutiny

- 6. The draft Political Party Primaries Bill, 2020 was submitted to the Honourable Speaker of the Senate on 1<sup>st</sup> July, 2020 and, pursuant to Senate Standing Order 125(3)(a), referred to the Standing Committee on Justice, Legal Affairs and Human Rights for pre-publication scrutiny and comments.
- 7. The Committee considered the legislative proposal and noted that
  - a) The legislative proposal sought to put in place a statutory framework for the conduct of political party primaries in Kenya. It set out the procedure to be followed in conducting party primaries for purposes of identifying candidates to stand for elections as well as preparing party lists required under the Constitution and the Elections Act, 2011;
  - b) The legislative proposal would give rise to a special Bill concerning county governments in terms of Article 110(1)(b) and (2)(a)(i) of the Constitution; and
  - c) The legislative proposal conformed to the Constitution and the law and was in order as to format and style in accordance with the Standing Orders of the Senate.
- 8. The Committee further made proposals, for consideration by the sponsor, towards improving the provisions of the draft legislation.
- 9. Consequently, at its sitting held on Wednesday, 7<sup>th</sup> July, 2020, the Committee resolved to recommend to the Honourable Speaker of the Senate to direct that the legislative proposal be accepted and that it be published, pursuant to Senate Standing Order 126(2).

### C. Publication, First Reading and Committal of the Bill

10. The Political Party Primaries Bill (Senate Bills No. 35 of 2020) was published *vide* Kenya Gazette Supplement No. 222 of 4<sup>th</sup> December, 2020 and was introduced in

the Senate by way of First Reading on 4<sup>th</sup> March, 2021. A copy of the Bill is attached to this Report as *Annex 2*.

11. Pursuant to Article 118 of the Constitution and standing order 140(1) of the Senate Standing Orders, the Bill was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration and public participation.

### D. Overview of the Bill

- 12. The principal object of the Bill is to put in place a legal framework for the conduct of political party primaries. It sets out the procedure to be followed in the conduct of party primaries for purposes of identifying candidates to stand for election in an elective post as well as preparing party lists as required under the Constitution and the Elections Act.
- 13. Part I of the Bill contains preliminary provisions. It makes provisions with regard to the title, definition of terms, and the guiding principles for carrying out political party primaries. The guiding principles include
  - a) provision of equal opportunities for all eligible aspirants in a party primary;
  - b) non-discrimination against eligible aspirants; and
  - c) political parties ensuring that party primaries are—
    - (i) democratic, free and fair;
    - (ii) inclusive and participatory;
    - (iii) open, transparent and accountable; and
    - (iv) credible in the process and outcome, and conducted in a peaceful manner.
- 14. Part II of the Bill makes provision for political party structures for the conduct of party primaries. It mandates political parties to establish the following party organs in their respective constitution and nomination rules
  - a) a governing body;
  - b) an election board; and
  - c) an internal dispute resolution organ.
- 15. The Bill restricts the appointment of persons to party organs, providing that a person shall not be a member of more than one party organ, that at least one-third of the members of each party organ shall be of the opposite gender and that special interest groups, including persons with disabilities and the youth, shall be represented in the membership of party organs. It also mandates political parties to submit to the

Independent Electoral and Boundaries Commission and to the Registrar of political parties detailed information on persons holding office in the party organs and the authorised signatories to nomination certificates at least thirty days before a party primary.

- 16. The Bill provides the functions of a political party's governing body, which includes the recruitment and appointment of members of the party's election board, members of the party's internal disputes resolution organ and the authorised signatories to nomination certificates. It provides the qualifications for appointment as a member of a party's election board and stipulates the functions of the board, which primarily entails the conduct and supervision of party primaries and party nomination of members to relevant party lists. It also provides the qualifications for appointment of members of a party's internal dispute resolution organ and stipulates the function of the organ, which is to receive, hear and determine disputes arising from party primaries.
- 17. Part III of the Bill makes provision for the conduct of party primaries. It mandates political parties to stipulate the type of party primary to be used in identifying a candidate for an elective post or a party list in the respective constitution, nomination rules or coalition agreement. The types of party primaries include
  - a) competitive party primary: a method of identifying a candidate for an elective post where all registered members of a political party are eligible to participate in the identification of the candidate by voting;
  - b) non-competitive party primary: a method of identifying a candidate for an elective post by a delegation chosen by registered members of a political party; or
  - c) such other process as may be specified in the constitution or nomination rules of the political party.
- 18. The Bill mandates political parties to submit to the Independent Electoral and Boundaries Commission and to the Registrar of political parties the type and details of a party primary at least twenty-one days before the primary, and if the primary is rescheduled, at least seven days before the new date of the primary. It also mandates political parties to maintain updated registers of its members in accordance with section 17(1)(a) of the Political Parties Act and to make the membership list accessible to the public. The Bill also makes provision for the conduct of both competitive and non-competitive party primaries.

- 19. The Bill further makes provision for the vetting of prospective candidates by the respective election board to determine whether the candidates qualify to contest for election in the post applied for or to be included in a party list as provided for in the Constitution and other relevant laws. It further allows persons dissatisfied with the results of a party primary to file a complaint with the party internal dispute resolution organ within three days of the declaration of the contested result. The party internal dispute resolution organ is required to hear and determine complaints within thirty days. The Bill also prohibits the submission of particulars of a nominated candidate to the Independent Electoral and Boundaries Commission where a party primary result has been challenged and is yet to be determined.
- 20. Part IV of the Bill makes provision for offences. It criminalizes fraudulent registers or deregistration of persons as members of a political party, submission of false information for purposes of registration, forgery or tampering with a party membership register or failing to use the political party membership register published by the Registrar of political parties in the conduct of party primary, with those found guilty liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding one month or to both. It also criminalises the obstruction or hindering of persons from accessing or voting at a polling station, with those found guilty liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or both.
- 21. The Bill further criminalises the following, with those found guilty of committing the acts liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or to both
  - a) forging, counterfeiting or destroying a ballot paper;
  - b) printing or dealing in ballot papers without authority;
  - c) being in possession of a marked ballot paper without authorisation;
  - d) being in possession of a ballot paper outside a polling station without authorisation;
  - e) voting at a party primary election when not eligible to vote;
  - f) voting more than once;
  - g) interfering with a voter while casting their vote; or
  - h) pretending to be unable to read or write, or suffering from any disability so as to be assisted to vote
- 22. The Bill also criminalises the use of undue influence, threats, duress, intimidation, bribery or violence to influence a particular outcome in a party primary, with those

found guilty liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both. It further criminalises the aiding, abetting, counselling or procuring the commission of an offence under the Bill, with those found guilty liable to such fine or term of imprisonment as if they actually committed the offences.

- 23. Part IV of the Bill provides miscellaneous provisions. It mandates political parties to specify the fees to be paid by an aspirant at least fourteen days before the date of the party primary or nomination of party lists, which amounts shouldn't exceed those provided under the Second Schedule to the Bill i.e. Kshs. 1,000,000/- for President, Kshs. 500,000/- for county governor, Kshs. 250,000/- for member of Parliament and Kshs. 50,000/- for member of a county assembly.
- 24. The Bill allows an aspirant to appoint and submit to the relevant party election board particulars of one agent for every polling venue to observe the conduct of a party primary at least seven days before the date of the primary. It also mandates the Independent Electoral and Boundaries Commission to be responsible for conducting civic education and awareness in relation to a party primary. It further allows the Independent Electoral and Boundaries Commission to accredit institutions that may conduct party primaries on behalf of political parties.
- 25. The Bill mandates political parties to put in place affirmative action measures and infrastructure to promote the inclusion of special interest groups in party primaries. It also allows the Independent Electoral and Boundaries Commission to make regulations to facilitate the implementation of its provisions once enacted.

### CHAPTER TWO: CONSIDERATION OF THE BILL

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

- 26. The Political Party Primaries Bill (Senate Bills No. 35 of 2020) was read a First Time in the Senate on 4<sup>th</sup> March, 2021 and thereafter stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.
- Order 140 (5) of the Senate Standing Orders, the Committee proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the *Daily Nation* and *Standard* newspapers on Tuesday, 16<sup>th</sup> March, 2021 inviting members of the public to submit written memoranda on the Bill. The advertisement was also posted on the Parliament website and social media platforms. A copy of the advertisement is attached as *Annex 3*.
- 28. In response to the advertisement and invitations, the Committee received written submissions from seven (7) stakeholders, namely
  - i) African Women Studies Centre (University of Nairobi);
  - ii) Centre for Multiparty Democracy (CMD);
  - iii) Kenya National Commission on Human Rights (KNCHR);
  - iv) National Gender and Equality Commission (NGEC);
  - v) National Women Steering Committee (NWSC);
  - vi) Orange Democratic Movement (ODM); and
  - vii) Consortium of Disabled Persons Organizations in Kenya.

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

### B. Consideration of the Bill by the Committee

29. Following the receipt of stakeholder submissions on the Bill, the Standing Committee on Justice, Legal Affairs and Human Rights was scheduled to proceed with the substantive consideration of the Bill in May, 2021. However, vide a Gazette Notice dated 10<sup>th</sup> May, 2021, the seat held by the sponsor of the Bill in the Senate was declared vacant, with effect from 7<sup>th</sup> May, 2021. The Committee could therefore not proceed with further consideration of the Bill.

- 30. In a ruling issued by the High Court on Thursday, 25<sup>th</sup> November, 2021, the Court set aside the determination of the Political Parties Disputes Tribunal that paved way for removal of the sponsor from the Senate. Consequently, on commencement on the Sixth Session, and following the reinstatement of the sponsor to the Senate, the Committee resumed consideration of the Bill.
- 31. The Committee noted that, in the intervening period
  - a) The Political Parties (Amendment) Bill (National Assembly Bills No. 56 of 2021) was published on 26<sup>th</sup> November, 2021. The Bill sought to amend the Political Parties Act, No 11 of 2021. The Bill was passed by Parliament and gazetted on 28<sup>th</sup> January, 2022 as Act No. 2 of 2022 (Annex 5).
  - b) Section 24 of the Political Parties (Amendment) Act of 2022 inserts a new Part IVA in the Political Parties Act. This new Part IVA provides for party nominations. It sets out, among others, the methods of conducting nominations (direct and indirect party nominations), provides for the establishment of structures by political parties for the conduct of nominations, who can participate in its nominations, notification of party nominations, the procedure for the conduct of direct and indirect party nominations, the vetting of candidates contesting in party nominations, and the period within which political party nomination disputes should be resolved by the political party.
  - c) The main objective of section 24 of the Political Parties (Amendment) Act of 2022 and the Political Party Primaries Bill, 2020 is to put in place a legal framework to guide the conduct of party primaries.
- 32. The Committee further noted that there were some variations between the Political Party Primaries Bill, 2020 and the Political Parties (Amendment) Bill, 2022 as passed by Parliament and enacted into law. These included—

The Political Parties (Amendment) Act (No. 2 of 2022)	The Political Party Primaries Bill (No. 35 of 2020)	
a) Terms used		
Section 24 uses the terms 'party	The Bill uses the terms 'party primary',	
nominations', 'indirect party	'competitive party primary' and 'non-	
nominations' and 'direct party	competitive party primary. Clause 2	
nominations'. Pursuant to section 2 defines party primary as the process by		
direct party nomination is the process of which a political party elects or select		
election of a candidate by registered a candidate for an election, competiti		
members, and indirect party nominations		

is the process of selection of a candidate by use of delegates and interviews. identifying a candidate for an elective post by members of a political party by voting, and non-competitive party primary as a method of identifying a candidate for an elective post by a delegation chosen by registered members of a political party.

The definition of the term 'party primary' is similar to the one previously defined under section 2 of the Political Parties Act. However, 2 of the Political Parties (Amendment) Act, of 2022 deleted this definition was provided in the Political Parties Act.

### b) Guiding principles

Section 21 of the Political Parties Act sets out circumstances under which a political party may be deregistered. These circumstances include failure to promote free and fair nomination of candidates, and respect the national values and principles of the Constitution.

Clause 3 of the Bill sets out the guiding principles in conducting party primary. These principles are non-discrimination, democracy, fairness, inclusivity, transparency and credibility.

### c) Structures for the conduct of nominations

The section requires that when conducting party primaries, a political party shall establish mechanisms for the resolution of disputes arising out of the nominations, designate the person to issue nomination certificates to candidates, and prescribe the functions of the body within the political party that shall be responsible for conducting the

nominations.

Provided under the new section 38B.

Provided under Part II of the Bill. Under clause 4, a political party is required to establish a governing body,

designate authorised signatories to a nomination certificate. The establishment of these organs shall be in accordance with the Elections Act, the Political Parties Act and the Bill. The functions of the respective organs and eligibility for appointment as member of these organs are set out under clauses 6, 7 and 8.

an election board, and an internal

dispute resolution organ as well as

### d) Persons who can participate in nominations

Pursuant to section 38C of the new Part IVA, only registered members of a political party are eligible to participate in nominations and the Registrar of political parties certifies a register of members to be used for nominations.

Clause 14 of the Bill provides that only persons whose details appear in a membership register certified by the governing body pursuant are eligible to vote during a party primary.

### e) Notification of party nominations

Section 38E of the new Part IVA requires a political party to notify the Registrar of political parties not less than ten days before the date of party nominations of the method, date and venues of nominations as well as the list of contestants.

Clause 12 requires a political party to notify the Independent Electoral and Boundaries Commission and the Registrar of political parties at least twenty-one days before the date of the party primary of the type and venue of party primary as well as the list of aspirants participating in the party primary.

Additionally, clause 18 requires a submit to the political party to Registrar of political parties and the Independent Electoral and Boundaries a list of aspirants Commission, approved to contest in the party primary. Upon list of the list of aspirants, the Independent Electoral and Commission Boundaries required to publish a notice in the Gazette the names of persons vying in a party primary and the date of the party primary.

### f) Methods of nominations

Section 38A of new Part IVA sets out only two methods — direct party nominations and indirect party nominations.

Clause 10 of the Bill requires a political party to provide in its constitution and nomination rules the type of party primary for identifying a candidate for an elective post or a party list. Such a type of party primary may

include competitive party primary, non-competitive party primary, such other process as may be specified by the party.

### g) Direct party nominations (competitive party primary)

Provided under section 38D of the new Part IVA.

A political party intending to conduct direct party nominations is required to make available a list of members eligible to vote at the venue, and provide election materials such as ballot papers, pens and ballot boxes. The provision further requires a political party to submit to the Registrar of political parties and publicize in the party's website particulars of a body within the party responsible for the conduct the nominations and the procedure to be used.

Provided under clause 15.

Where a political party intends to conduct competitive party primary the political party is required to make available a list of members eligible to vote at the venue, and provide election materials such as ballot papers, pens and ballot boxes. The provision further requires a political party to use the party membership register certified by the governing body.

### h) Indirect party nominations (non-competitive party primary)

Provided under section 38G of the new Part IVA.

The provision obligates a political party that intends to conduct indirect party select delegates nominations to conduct for the responsible nominations, submit the list of delegates to the Registrar of political parties at least seven days before the date of the nominations, specify the date and venue of delegates' meeting, specify the process to be used, the mode of interviews and specify the body within the party responsible for the conduct the interviews. Additionally, a party is required to specify the procedure for Provided under clause 16.

In conducting non-competitive party primary, a party is required to submit a list of delegates to the Independent Electoral and Boundaries Commission and the Registrar of political parties at least twenty-one days before the date of the party primary.

Additionally, a party is required to specify the procedure for identifying delegates in its constitution or nomination rules.

identifying delegates in its constitution or nomination rules.

### i) Vetting of candidates/aspirants

Provided under section 38H of new Part IVA.

The provision requires a political party to ensure that nominated candidates file a self-declaration form provided for under the Leadership and Integrity Act, possess qualifications as provided for under the Constitution or any other law, and meets such other qualifications as prescribed by the party in its constitution or nomination rules.

Provided under clause 17.

The clause obligates a person intending to participate in party primary to submit a declaration form set out in the First schedule to the elections board together with the person's academic qualifications, a copy of a national identity card or passport, a selfdeclaration form provided for under the Leadership and Integrity Act and proof of payment of nomination fees. Upon receipt of these information, the elections board is required to determine whether the person qualifies to contest in an election or be included in a party list as provided for in the Constitution or other law before preparing a list of aspirants to participate in a party primary.

### j) Resolution of party nomination disputes (settlement of party primary disputes)

Section 38I of the new Part IVA requires a political party to resolve disputes arising out of the party nominations within thirty days after the date of the party nomination.

Provided for under clause 19.

The clause specifies the grounds for challenging party primary, the complaint be filed with the internal dispute resolution organ within three days of the results, a determination be made within thirty days, a person dissatisfied with the decision may appeal to the Political Party Dispute Tribunal, and that a party shall not submit to the Independent Electoral and Boundaries Commission where results of a party primary has been challenged and remain unresolved.

### CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATION

### A. Observations

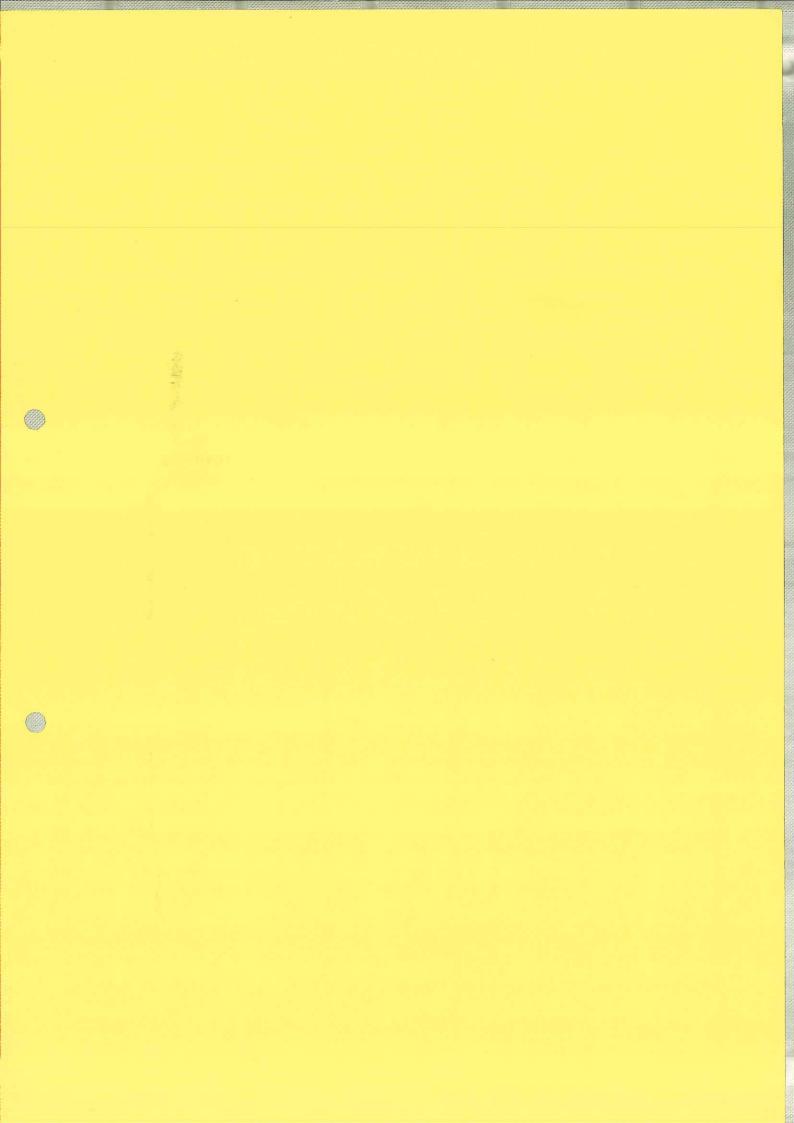
- 33. The Committee observed that, while the Political Party Primaries Bill (Senate Bills No. 35 of 2020) was published on 4<sup>th</sup> December, 2020 and read a First Time in the Senate on 4<sup>th</sup> March, 2021, the Bill had since been overtaken by the Political Parties (Amendment) Bill (National Assembly Bills No. 56 of 2021), which was passed by Parliament and gazetted on 28<sup>th</sup> January, 2022. The said Act amended key provisions of the Political Parties Act (No 11 of 2011), which the Bill also sought to amend?
- 34. The Committee further observed that it would not be possible to process amendments to the same provisions of the Political Parties Act as the period of six months had not lapsed since passage and enactment of the Political Parties (Amendment) Act (No. 2 of 2022).
- 35. Standing order 154(1) of the Senate Standing Orders provides that 'Either before the commencement of business or on the Order of the Day for any stage of the Bill being read, the Senator in charge of a Bill may, without notice, claim to withdraw the Bill.'

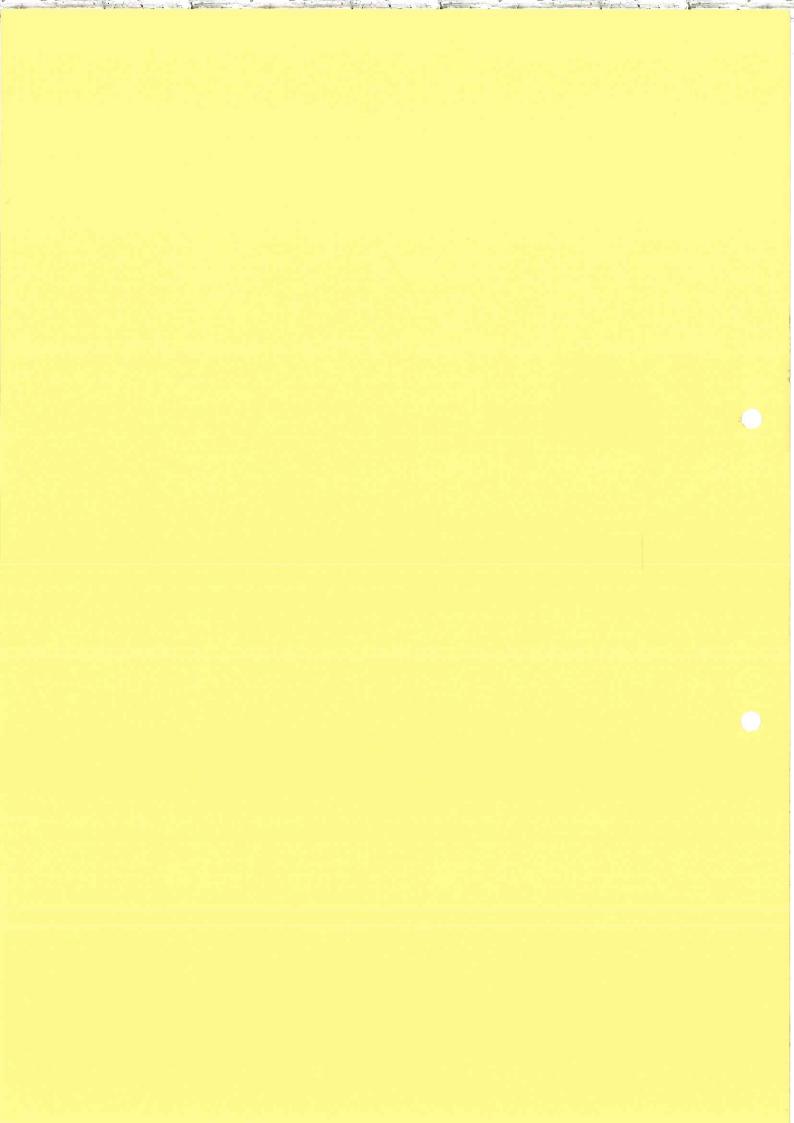
### B. Recommendation

36. Arising from the said observations, and following consultations with the sponsor of the Bill, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that the Political Party Primaries Bill (Senate Bills No. 35 of 2020) be <a href="not">not</a> proceeded with, and that the sponsor <a href="withdraws">withdraws</a> the Bill, pursuant to standing order 154 of the Senate Standing Orders.

### LIST OF ANNEXES

Annex 1:	Minutes of the Standing Committee on Justice, Legal Affairs and
	Human Rights in considering the Bill
Annex 2:	The Political Party Primaries Bill (Senate Bills No. 35 of 2020)
Annex 3:	Advertisement published in the Daily Nation and Standard newspapers
	on Tuesday, 16 <sup>th</sup> March, 2021
Annex 4:	Copies of stakeholder submissions on the Bill
Annex 5:	The Political Parties (Amendment) Act (No. 2 of 2022)







### TWELFTH PARLIAMENT | SIXTH SESSION

MINUTES OF THE THIRTY FOURTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON TUESDAY, 22<sup>ND</sup> MARCH, 2022, AT 10:30 AM.

#### PRESENT

Sen. Erick Okong'o Mogeni, SC, MP

 Sen. (Canon) Naomi Jillo Waqo, MP
 Sen. Fatuma Dullo, CBS, MP
 Sen. Mutula Kilonzo Junior, CBS, MP
 Sen. (Dr.) Irungu Kang'ata, CBS, MP
 Sen. Isaac Ngugi Githua, MP
 Chairperson (Chairing)
 Wice Chairperson
 Member
 Member
 Member
 Member

#### ABSENT WITH APOLOGY

Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
 Sen. James Orengo, EGH, SC, MP - Member
 Sen. Johnson Sakaja, CBS, MP - Member

### **SECRETARIAT**

- Clerk Assistant 1. Mr. Charles Munyua - Legal Counsel 2. Mr. Moses Kenyanchui - Legal Counsel 3. Mr. Mitchell Otoro - Research Officer 4. Mr. Said Osman - Fiscal Analyst 5. Mr. Kennedy Owuoth - Clerk Assistant (Taking minutes) 6. Ms. Purity Orutwa 7. Mr. James Kimiti - Hansard/ Audio Officer 8. Ms. Hawa Abdi - Serjeant at Arms 9. Ms. Sandra Alusa - Intern 10.Mr. Titus Michubu - Pupil

### MIN. NO. 180/2022 PRAYER

The sitting commenced with a word of prayer by the Vice Chairperson.

### MIN. NO. 181/2022 ADOPTION OF THE AGENDA

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

### MIN. NO. 182/2022 THE POLITICAL PARTY PRIMARIES BILL (SENATE BILLS NO. 35 OF 2020)

The Committee considered and adopted the Report on the Political Party Primaries Bill (Senate Bills No. 35 of 2020), having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

### MIN. NO. 183/2022 THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO.34 OF 2021)

The Committee considered and adopted the Report on the Alternative Dispute Resolution Bill (Senate Bills No.34 of 2021), having been proposed by Scn. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Scn. (Canon) Naomi Jillo Waqo, MP.

### MIN. NO. 184/2022 THE ELECTION (AMENDMENT) (NO.2) BILL (SENATE BILLS NO. 43 OF 2021)

The Committee considered and adopted the Report on the Election (Amendment) (No.2) Bill (Senate Bills No. 43 of 2021) having been proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

### MIN. NO. 185/2022 THE CONSTITUTION OF KENYA (AMENDMENT) BILL (SENATE BILLS NO. 46 OF 2021)

The Committee considered and adopted the Report on the Constitution of Kenya (Amendment) Bill (Senate Bills No. 46 of 2021), having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

# MIN. NO. 186/2022 PETITION ON AMENDMENT TO THE CONSTITUTION OF KENYA AND OTHER RELEVANT LAWS ON THE ELECTION OF A DEPUTY PRESIDENT AND A DEPUTY GOVERNOR

The Committee considered and adopted the Report on a Petition by Taratisio Ireri Kawe, regarding proposed amendments to the Constitution and various statutes on the election of a Deputy President and Deputy Governor, whenever such a position became vacant. The Report was proposed by Sen. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

### MIN. NO. 187/2022 ANY OTHER BUSINESS

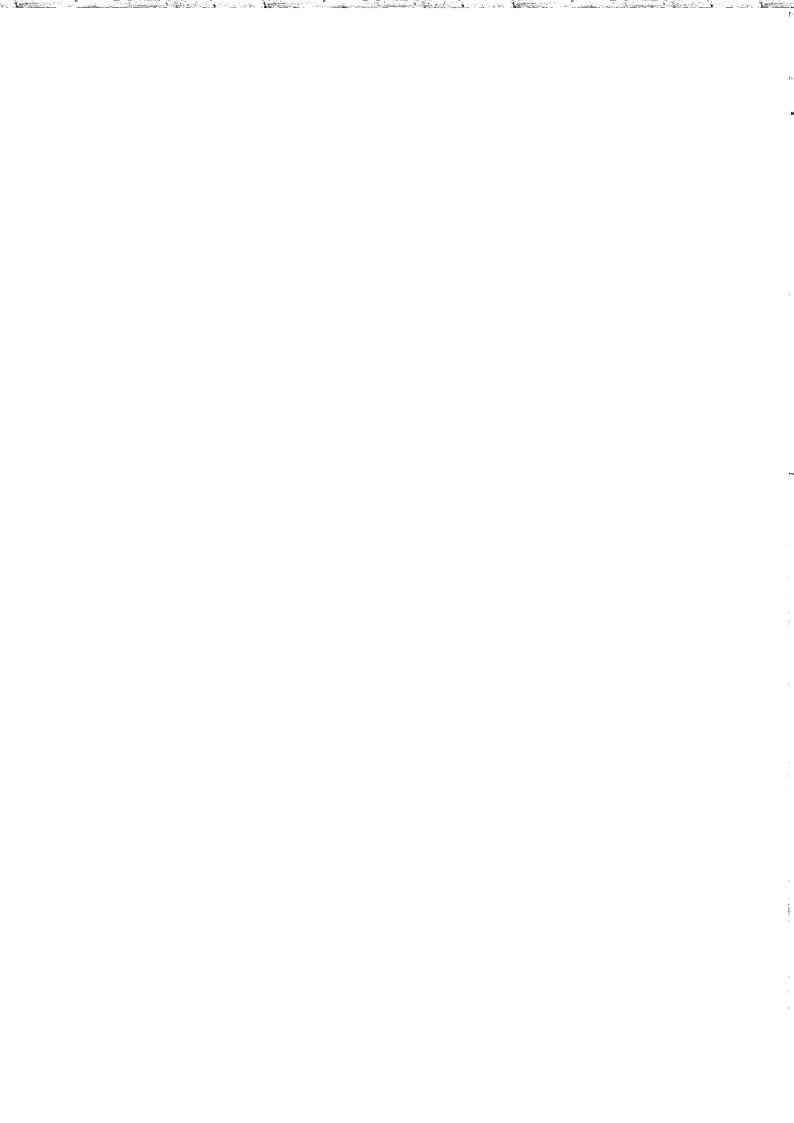
Members were informed that the following meetings were scheduled for Wednesday and Thursday that week, and that the respective stakeholders had confirmed attendance. Consequently, Members were urged to avail themselves for the meetings –

No.	Date	Time	Meeting	
a)	Wednesday, 23 <sup>rd</sup> March, 2022	8.00 am	Meeting with the Attorney General and the Law Society of Kenya to consider a Statement sought by Sen. Samson Cherarkey, MP on unqualified persons practicing as Advocates in various private companies.	
b)	Thursday, 24 <sup>th</sup> March, 2022	8.00 am	Meeting with the Chairperson of the Independent Electoral and Boundaries Commission to discuss the status of preparedness for the 2022 General Elections.	

### MIN. NO. 188/2022 ADJOURNMENT

The meeting was adjourned at 11:14am. The next meeting was scheduled for Wednesday,  $23^{rd}$  March at 8:00 am.

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### TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE NINETY-SEVENTH 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 2.00 P.M.

#### PRESENT

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

- Chairperson (Chairing)
- Member
- Member (V)
- Member
- Member (V)

### ABSENT WITH APOLOGY

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

- Vice Chairperson
- Member
- Member
- Member

#### **SECRETARIAT**

- 1. Mr. Charles Munyua
- 2. Mr. Said Osman
- 3. Mr. Moses Kenyanchui
- 4. Ms. Lucianne Limo
- 5. Mr. Javan Nang'eyo
- 6. Ms. Purity Orutwa
- 7. Ms. Hawa Abdi
- 8. Mr. James Kimiti

- Clerk Assistant
- Research Officer
- Legal Counsel
- Media Relations Officer
- Sergeant at Arms
- Clerk Assistant (Taking Minutes)
- Sergeant at Arms
- Hansard Officer

### MIN. NO. 470/2021 PRAYER

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

#### MIN. NO. 471/2021 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. Amos Wako, EGH, EBS, SC, FCIArb, MP.

### MIN. NO. 472/2021 THE POLITICAL PARTIES PRIMARIES BILL (SENATE BILLS NO. 35 OF 2020)

The Committee noted that, following the reinstatement by the High Court of Sen. Isaac Mwaura, CBS, MP, the Committee was expected to resume consideration of the Political Parties Primaries Bill (Senate Bills No. 35 of 2020). Members were informed that, previously, the Committee had considered the brief on the Bill and received submissions thereon. What was pending was for the Committee to go through the matrix on the Bill.

Thereupon, it was noted that 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. 473/2021 THE LAW OF SUCCESSION (AMENDMENT) BILL (SENATE BILLS NO. 15 OF 2021)

The Committee noted that, while it had concluded its consideration of the Bill and tabled its Report in the Senate, a similar Bill sponsored by Hon. George Kaluma, MP had been passed by the National Assembly and assented to. Some of the provisions in the said Bill affected provisions which the Senate Bill sought to amend.

Consequently, the Committee resolved that further amendments be drafted to align the Senate Bill with the Law of Succession Act, as amended.

### MIN. NO. 474/2021 CONSIDERATION OF STATEMENTS

The Committee noted that it had considered to conclusion the requests for Statements directed to it, save for the following two Statements where responses were awaited from the respective Ministries and offices –

- i) Statement sought by Sen Samson Cherarkey, MP on a public apology by the United Kingdom to the Talai Community of Kenya and compensation for horrendous violations of their rights; and
- ii) Statement sought by Sen. (Dr) Irungu Kang'ata, CBS, MP on the appointment of private law firms to represent the government in the BBI cases and the payments made to them.

### MIN. NO. 475/2021 ADJOURNMENT

There being no other business, the meeting was adjourned at 4.05 pm. The next sitting will be held on Saturday,  $27^{\rm th}$  November, 2021 at 10.00 am, in Mombasa County.

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#### TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE THIRTIETH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD AT WHITESANDS HOTEL, MOMBASA COUNTY, ON FRIDAY, 21<sup>ST</sup> MAY, 2021 AT 2.30 P.M.

#### PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (Chairing)

Sen. Amos Wako, EGH, SC, FCIArb, MP - Member
 Sen. Irungu Kang'ata, CBS, MP - Member

### ABSENT WITH APOLOGY

1. Sen. (Canon) Naomi Jillo Wago, MP - Vice Chairperson

Sen. James Orengo, EGH, SC, MP
 Sen. Fatuma Dullo, CBS, MP
 Sen. Mutula Kilonzo Junior, CBS, MP
 Member
 Member

5. Sen. Johnson Sakaja, CBS, MP - Member

#### **SECRETARIAT**

1. Mr. Charles Munyua - Clerk Assistant (*Taking minutes*)

2. Mr. Moses Kenyanchui - Legal Counsel
3. Mr. Said Osman - Research Officer

4. Ms. Lucianne Limo - Media Relations Officer

5. Mr. James Ngusya - Serjeant at Arms6. Mr. James Kimiti - Hansard Officer

#### MIN. NO. 156/2021 PRELIMINARIES

The Chairperson called the meeting to order at 2.30 pm, whereupon the Committee resumed consideration of legislative business before the Committee.

### MIN. NO. 157/2021 THE POLITICAL PARTIES PRIMARIES BILL (SENATE BILLS NO. 35 OF 2020)

The Committee took note that, *vide* a Special Issue of the Kenya Gazette No. 102, dated 10<sup>th</sup> May, 2021, it was notified that pursuant to Article 103 (1) (e) (i) of the Constitution and Section 37 of the Elections Act, the seat of the Member of the Senate elected under Article 98 (1) (d) of the Constitution and held by Senator Isaac Mwaura Maigua became vacant, with effect from the 7<sup>th</sup> May, 2021. It was further noted that the matter of removal of Sen. Mwaura, MP was pending determination in Court.

Noting the need to have the Bill considered by Parliament and enacted ahead of the next general elections, the Committee resolved that, in the event the removal of Sen. Mwaura, MP was upheld in Court, the Committee could consider sponsoring the Bill and fast-tracking its consideration.

### MIN. NO. 158/2021 THE LAW OF SUCCESSION (AMENDMENT) BILL (SENATE BILLS NO. 15 OF 2021)

The Committee noted that receipt of public submissions on the Bill was ongoing and resolved to have the Bill scheduled for consideration once the window provided in the newspaper advertisement on the Bill lapsed.

The Committee further resolved to only invite and receive oral submissions from parties who did not appear before the Committee during consideration of the previous version of the Bill.

## MIN. NO. 159/2021 STATEMENT SOUGHT BY SEN. MUTULA KILONZO JUNIOR, MP, ON THE DELAYS IN THE APPOINTMENT OF FORTY-ONE (41) JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL

The Committee noted that the delay in the appointment of Judges of the High Court and the Court of Appeal continued to adversely impact the administration of justice, with the Court of Appeal being particularly affected.

Thereupon, the Committee resolved to take the views of the Attorney General during a meeting with the Committee scheduled for later that month, following which the Committee would proceed to conclude and table its Report on the matter.

## MIN. NO. 160/2021 PETITION BY REUBEN MAGEUZI ON ALLEGED CORRUPTION AND MISMANAGEMENT IN THE NYAMIRA COUNTY GOVERNMENT

The Committee noted that one of the issues addressed in the Petition, namely the recruitment of enforcement officers by the County Government of Nyamira, was among the issues flagged by the Auditor-General as not having been undertaken procedurally. The issue of ghost workers had also been highlighted.

It was noted that, while the Petitioners indicated that they had formally reported the matters to the Ethics and Anti-Corruption Commission (EACC), no response had been received by the Petitioners regarding action taken by the EACC to investigate the matter.

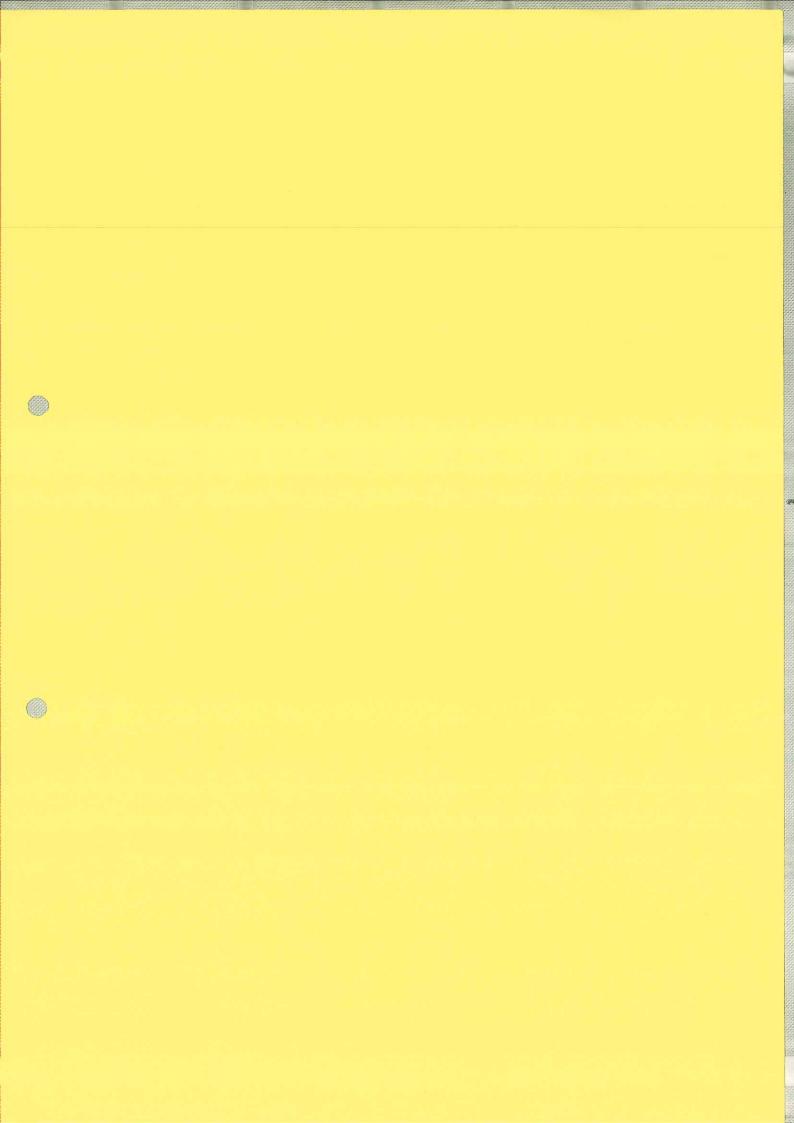
### MIN. NO. 161/2021 LEGISLATIVE BUSINESS PENDING BEFORE THE COMMITTEE

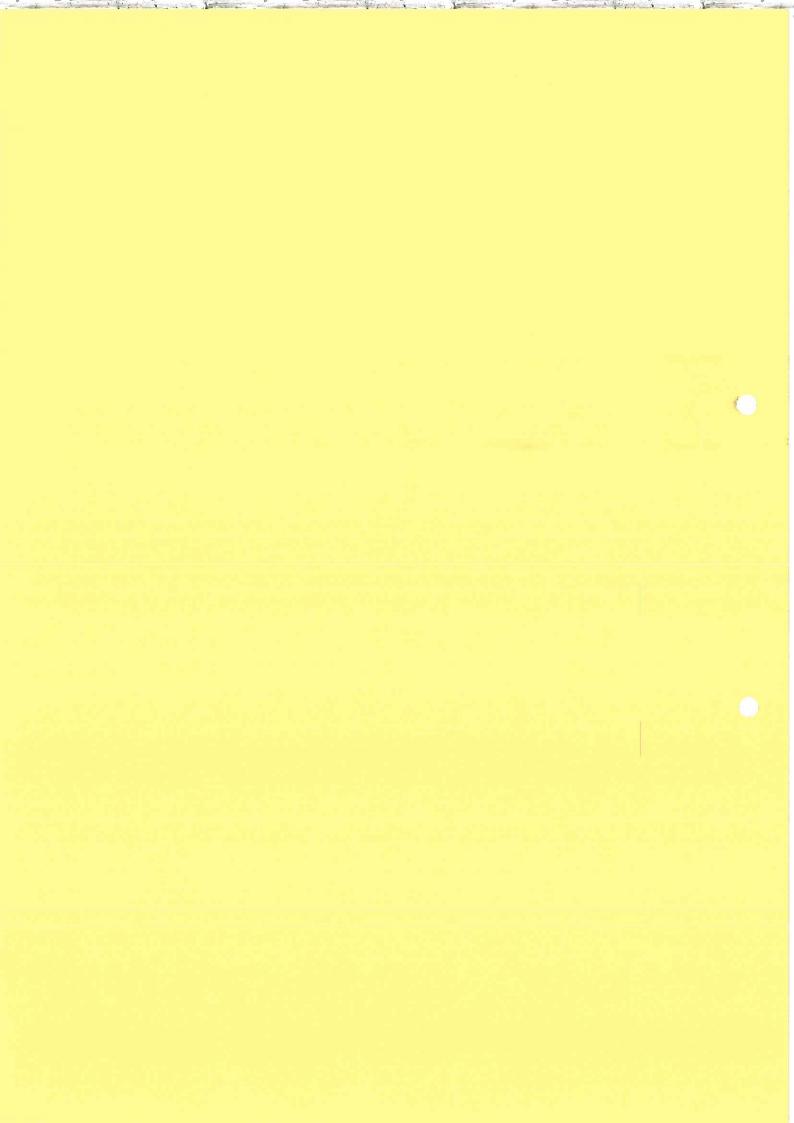
The Committee took note of the status of other legislative business before the Committee and the meetings scheduled to be held in May and June to consider the pending work.

### MIN. NO. 162/2021 ADJOURNMENT

The Chairperson adjourned the meeting at 3.55 pm. The next meeting will be held in Mombasa County on Friday,  $21^{\rm st}$  May, 2021 at 6.00 pm.

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### SPECIAL ISSUE

Kenya Gazette Supplement No. 222 (Senate Bills No. 35)



### REPUBLIC OF KENYA

### KENYA GAZETTE SUPPLEMENT

### **SENATE BILLS, 2020**

### NAIROBI, 4th December, 2020

### CONTENT

Bill for Introduction into the Senate-

PAGE

The Political Party Primaries Bill, 2020. ......861



### THE POLITICAL PARTY PRIMARIES BILL, 2020 ARRANGEMENT OF CLAUSES

Clause

### PART I—PRELIMINARY

- 1-Short title.
- 2 Interpretation.
- 3 Guiding principles.

### PART II— POLITICAL PARTY STRUCTURE FOR THE CONDUCT OF PARTY PRIMARIES

- 4 Political party organs.
- 5 Submission of particulars of office holders to the Commission.
- 6 Functions of the governing body.
- 7 The Elections board.
- 8 The internal dispute resolution organ.
- 9 Authorised signatories to a nomination certificate.

### PART III— CONDUCT OF PARTY PRIMARIES

- 10— Types of party primaries.
- 11—Date of party primary.
- 12—Party primary notification
- 13—Membership register.
- 14— Eligibility to vote.
- 15—Competitive party primary.
- 16—Non-competitive party primary.
- 17— Vetting of aspirants.
- 18—Submission of list of aspirants to the Registrar and the Commission.
- 19— Settlement of party primary disputes.
- 20—Submission of particulars to the Commission.

### PART IV—OFFENCES RELATING TO PARTY PRIMARIES

- 21—Offences relating to the political party membership register.
- 22—Obstruction.
  - 23—Offences relating to election materials.
  - 24—Undue influence.
  - 25—Bribery.
  - 26--- Use of force or violence.
  - 27-Aiding and abetting.

### PART V—MISCELLANEOUS PROVISIONS

- 28—Nomination fees.
- 29— Party primary agents.
- 30—Civic education.
- 31— Accreditation of institutions.
- 32—Special interest groups.
- 33--- Regulations.

### PART VI— CONSEQUENTIAL AMENDMENTS

- 34—Amendment of section 13 of No. 24 of 2011.
- 35— Amendment of section 31 of No. 24 of 2011.
- 36-Amendment of section 109 of No. 24 of 2011.

FIRST SCHEDULE — SELF-DECLARATION FORM SECOND SCHEDULE — NOMINATION FEES

### THE POLITICAL PARTY PRIMARIES BILL, 2020

### A Bill for

AN ACT of Parliament to provide for the conduct of political party primaries nomination of party list members; and for connected purposes

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

### PART I— PRELIMINARY

1. This Act may be cited as the Political Party Primaries Act, 2020.

Short title,

### 2. In this Act —

Interpretation.

"aspirant" means a person who has presented themselves for election in the party primary;

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

"competitive party primary" means a method of identifying a candidate for an elective post where all registered members of a political party are eligible to participate in the identification of the candidate by voting;

"non-competitive party primary" means a method of identifying a candidate for an elective post by a delegation chosen by registered members of a political party;

"member of a political party" a person who has been recruited by a political party as a member and issued with a party membership number or card.

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

"party primary election official" means the officials appointed by the elections board under section 7 (2) (f);

"party primary" means the process by which a political party elects or selects a candidate for a forthcoming general election or by-election; and

"Registrar" has the meaning assigned to it under the Political Parties Act.

No. 11 of 2011.

3. In conducting its party primary, a political party shall —

Guiding principles.

- (a) not discriminate against any eligible aspirant; and
- (b) ensure that the party primary is-
  - (i) democratic, free and fair;
  - (ii) inclusive and participatory;
  - (iii) open, transparent and accountable; and
  - (iv) credible in the process and outcome, and conducted in a peaceful manner.

### PART II —POLITICAL PARTY STRUCTURES FOR THE CONDUCT OF PARTY PRIMARIES

**4.** (1) A political party shall, in accordance with the Elections Act, the Political Parties Act and this Act establish in its constitution and nomination rules the following party organs —

Political party organs.

- (a) a governing body;
- (b) an election board; and
- (c) an internal dispute resolution organ.
- (2) A political party shall appoint persons —
- (a) to hold office in the party organs established under subsection (1); and
- (b) as authorised signatories to a nomination certificate.
- (3) In making the appointments to a party organ under subsection (1), a political party shall ensure that—
  - (a) a person is not a member of more than one organ;
  - (b) at least one-third of the members of each party organ are of the opposite gender; and
  - (c) special interest groups including persons with disability and the youth are represented.
- 5. (1) A political party shall submit to the Commission and the Registrar information on persons holding office in the party organs and the authorised signatories at least thirty days before the political party conducts a party primary.

Submission of particulars of office holders to the Commission.

- (2) The information required to be submitted under subsection (1) shall—
  - (a) be submitted in a prescribed form; and
  - (b) include
    - (i) the name;
    - (ii) the specimen signature, in the case of authorised signatories;
    - (iii) the identity card or passport number; and
    - (iv) include such other information as the Commission shall subscribe.
- **6.** The governing body of a political party shall, for purposes of this Act, be responsible for —

Functions of the governing body.

- (a) the recruitment and appointment of persons to hold office in the election board and the internal disputes resolution organ;
- (b) appointing the authorised signatories to nomination certificates;
- (c) certification of the political party membership register;
- (d) informing the Commission and the Registrar of the type of party primary to be conducted by the political party;
- (e) setting the date, time and venue of the party primary;
- (f) receiving the results and reports of the party primary from the election board;
- (g) submitting the list of nominated candidates to the Commission; and
- (h) submitting the party lists to the Commission.
- 7. (1) A person is qualified for appointment as a member of the election board if that person —

(a) is a member of the political party;

- (b) is eligible to vote at an election;
- (c) is not an aspirant in the party primary;

The election board.

- (d) has not been convicted of an election offence;
- (e) satisfies the requirements of Chapter Six of the Constitution;
- (f) holds at least a certificate of secondary education; and
- (g) meets such other requirements as may be specified in the constitution or rules of the political party.
- (2) The election board shall, for the conduct of a party primary under this Act
  - (a) conduct or supervise the party primary and party nomination of members to the party lists;
  - (b) notify members of the party of the date by which applications must be received;
  - (c) notify members of the party of the date, time and venue of the party primary;
  - (d) publicise the list of aspirants and the party membership register;
  - (e) vet the aspirants before the party primary;
  - (f) recruit and appoint party primary election officials;
  - (g) announce and declare results of the party primary;
  - (h) issue written election result slips to each aspirant participating in the party primary; and
  - (i) submit to the political party governing body, a candidate or a list of nominated candidates for an election.
- 8. (1) A person is qualified for appointment as a chairperson of the internal dispute resolution organ of a political party if that person is an advocate of the High Court of Kenya of at least five years and meets such other requirements as may be specified in the constitution or nomination rules of the political party.
- (2) A person is qualified for appointment as a member of the internal dispute resolution organ if that person has at least a certificate of secondary education and meets such other requirements as may be specified in the constitution or nomination rules of the political party.

Internal dispute resolution organ.

- (3) A person is not qualified for appointment as chairperson or member of the internal dispute resolution organ if the person participated as an aspirant in the party primary immediately preceding the dispute.
- (4) The internal dispute resolution organ shall receive, hear and determine any disputes arising from the party primary.
- (5) A political party shall provide for alternative dispute resolution mechanisms to resolve disputes arising from party primaries in its party constitution.
- **9.** The authorised signatories to a nomination certificate shall be as specified in the political party constitution or rules in accordance with section 4 of this Act and the Elections Act.

Authorised signatories to a nomination certificate.
No. 24 of 2011.

### PART III — CONDUCT OF PARTY PRIMARIES

10. (1) A political party shall provide in its party constitution and nomination rules the type of party primary to be used for identifying a candidate for an elective post or a party list.

Types of party primaries.

- (2) A party primary conducted by a political party may include
  - (a) competitive party primary;
  - (b) non-competitive party primary; or
  - (c) such other process as may be specified in the constitution or nomination rules of the political party.
- (3) A Political party that has entered into a coalition agreement shall provide in the agreement the procedure for nominating a candidate for an elective post.
- 11. (1) The Commission shall, by notice in the prescribed form, specify the day or days upon which all political parties shall conduct party primaries.
- (2) The day or days specified under subsection (1) shall be at least ninety days before a general election or at least fifty five days before a by-election.
- (3) The day or days specified by the Commission for the conduct of party primaries for a general election under subsection (1) shall be a public holiday.

Date of party primary.

- (4) An employer or any person in charge of an employee who is a member of a political party that is undertaking a party primary for a by-election shall permit that employee to participate in the relevant party primary on the day or days specified under subsection (1).
- (5) A person who contravenes the provisions of subsection (3) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.
- 12. A political party shall notify the Commission and the Registrar in writing, at least twenty-one days before the date of the party primary —

Party primary notification,

- (a) the type of party primary to be conducted;
- (b) the venue of the party primary; and
- (c) the list of aspirants participating in the party primary.
- 13. (1) A political party shall maintain an updated register of its members in accordance with section 17 (1) (a) of the Political Parties Act.

Membership register, No. 11 of 2011. No. 11 of 2011.

- (2) Notwithstanding the requirements prescribed under section 17 (1) (a) of the Political Parties Act, the register of members under subsection (1) shall comprise the
  - (a) national register;
  - (b) county register in respect of every county;
  - (c) constituency register in respect of every constituency; and
  - (d) ward register in respect of every ward.
- (3) The membership register of a political party shall be accessible to members of the public.
- 14. A person is eligible to vote in a party primary if the details of that person are contained in the membership register certified by the governing body pursuant to section 6(c) of this Act.

Eligibility to vote.

**15.** A political party that intends to conduct a competitive party primary shall —

Competitive party primary.

- (a) use the party membership register certified by the governing body;
- (b) post in a conspicuous place within the polling venue the list of members eligible to vote at that venue; and
- (c) provide at each polling venue polling materials including —
  - (i) ballot papers;
  - (ii) ballot boxes;
  - (iii) membership Register;
  - (iv) pens; and
  - (v) party primary election result slips.
- 16. (1) A political party that intends to conduct a noncompetitive party primary shall submit a list of delegates to the Commission and the Registrar at the time of making the notification under section 12 of this Act.

Non-competitive party primary.

- (2) The procedure for selection of delegates to participate in non-competitive party primary shall be specified in the party constitution or nomination rules of the political party.
- (3) The list of delegates under subsection (1) shall include the names, addresses and contact details of the delegates, who shall be members of the political party.
- 17. (1) A person who intends to contest in a party primary shall submit to the election board a self-declaration form as prescribed under the First Schedule together with—

Vetting of

- (a) the aspirant's academic qualifications;
- (b) a copy of a national identity card or passport;
- (c) a self-declaration form as prescribed under the Leadership and Integrity Act; and
- (d) proof of payment of the nomination fees.
- (2) The election board shall vet the applications received under subsection (1) to determine whether an applicant qualifies to contest for election in the post applied

aspirants.

No. 19 of 2012.

for or to be included in a party list as provided for in the Constitution and other relevant laws before preparing a list of aspirants to participate in the party primary.

18. (1)  $\Lambda$  political party shall submit to the Registrar and the Commission, a list of aspirants approved to contest in the party primary prepared under section 15 (2) of this  $\Lambda$ ct at least twenty-one days before the date of the party primary.

Submission of the list of aspirants to the Registrar and the Commission.

- (2) The Commission shall, within seven days of receipt of the names, publish a notice in the *Gazette* of the names of persons vying in a party primary and the date of the party primary.
- 19. (1) An aspirant or a member of a political party may file a complaint with the internal dispute resolution organ within three days of the declaration of party primary results on the ground that the party primary did not comply with the Constitution, this Act, the Elections Act, the Political Parties Act or any other written law.

Settlement of party primary disputes.

No. 24 of 2011, No. 11 of 2011,

- (2) The internal party dispute resolution organ shall hear and determine a complaint filed under subsection (1) within thirty days from the date the complaint was filed.
- (3) In determining a dispute under this Act, the internal dispute resolution organ shall
  - (a) record its proceedings in writing; and
  - (b) issue its decision in writing setting out the reasons for the decision.
- (4) A person dissatisfied with the decision of the internal party dispute resolution organ may appeal to the Political Party Dispute Tribunal established under section 39 of the Political Parties Act.
- (5) A political party shall not submit the particulars of a nominated candidate to the Commission where party primary result has been challenged under subsection (1) and remains undetermined.
- **20.** A political party shall submit to the Commission particulars of a nominated candidate for an election or inclusion in the party list in accordance with sections 13 and 35 of the Elections Act.

Submission of particulars to the Commission. No. 24 of 2011.

### PART IV — OFFENCES RELATING TO PARTY PRIMARIES

- 21. A person who —
- (a) fraudulently registers or deregisters a person as a member of a political party;
- (b) submits false information for purposes of registration;
- (c) forges, defaces or destroys a party membership register; or
- (d) fails to use, the political party membership register published by the Registrar, in the conduct of party primary,

commits an offence and is liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding one year or to both.

22. A person who willfully and without a justifiable reason prevents, obstructs or hinders another person from accessing a polling station or voting at a polling station where that other person is entitled to vote commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six months or both.

23. A person who ---

- (a) forges, counterfeits or destroys a ballot paper;
- (b) without authority prints, supplies, sells or purchases a ballot paper;
- (c) not being a person entitled to be in possession of a ballot paper which has been marked, has any such ballot paper in his possession;
- (d) without authority is found in possession of a ballot paper outside a polling station;
- (e) votes at a party primary election when they are not eligible to vote;
- (f) votes more than once at a party primary election;
- (g) interferes with a voter while casting his or her vote; or
- (h) pretends to be unable to read or write, or suffering from any disability so as to be assisted to vote;

Offences relating to the political party membership register.

Obstruction

Offences relating to election materials.

commits an offence and is liable on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six months or to both.

**24.** (1) A person who, directly or indirectly —

Undue influence.

- (a) uses or threatens to use any force, violence including sexual violence, restraint or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of—
  - (i) compelling a person to vote or not to vote for a particular aspirant;
  - (ii) inducing a person to refrain from becoming or to withdraw as an aspirant; or
  - (iii) preventing a person from being nominated as a candidate; or
- (b) by way of duress or intimidation
  - (i) impedes, prevents or threatens to impede or prevent a voter from voting; or
  - (ii) influences the result of an election,

commits an offence of undue influence and is liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years or to both.

### 25. A person who —

Bribery.

- (a) offers a bribe in order to influence a voter to vote or refrain from voting for a particular aspirant;
- (b) accepts or agrees to accept a bribe that is offered in order to vote or refrain from voting for a particular aspirant; or
- (c) offers or accepts a bribe in order to unlawfully influence the result of a party primary;

commits an offence and is liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years or to both. 26. A person who, directly or indirectly inflicts or threatens to inflict injury, damage, harm or loss on or against a person during party primary —

Use of force or violence

- (a) so as to induce or compel that person to support a particular aspirant;
- (b) on account of such person having voted or refrained from voting; or
- (c) in order to induce or compel that person to vote in a particular way or refrain from voting,

commits an offence and is liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years or to both.

27. A person who aids, abets, counsels or procures the commission of, or attempts to aid, abet, counsel, or procure the commission of an offence specified in this Act commits an offence and is liable, on conviction, to such penalty if the person actually committed the offence.

Aiding and abetting.

### PART V—MISCELLANEOUS PROVISIONS

**28.** (1) A political party shall, at least fourteen days before the date of a party primary or nomination of party lists, specify the fees to be paid by an aspirant.

Nomination fees.

- (2) The fees set by a political party for participation in a party primary shall not exceed the amount specified in the Second Schedule.
- (3) The fees payable by members of the marginalised groups under Article 100 of the Constitution shall not exceed half the fee charged to other aspirants.
- 29. (1) An aspirant may, at least seven days before the date of a party primary, appoint and submit to the election board particulars of one agent for every polling venue to observe the conduct of the party primary.
- (2) The particulars required to be submitted under subsection (1) shall include
  - (a) the name;
  - (b) the identity card or passport number;
  - (c) the specimen signature; and

Party primary agents.

- (d) such other information as shall be prescribed in the nomination rules of a political party.
- **30.** The Commission shall be responsible for the conduct of civic education and awareness related to party primary.

(2) The Commission may outsource the service under subsection (1) to institutions accredited by the Registrar.

- (3) The Commission shall be responsible for the development of a curriculum on civic education and awareness related to party primary.
- 31. (1) The Commission may accredit institutions to conduct party primaries on behalf of political parties.

Accreditation of institutions.

Civic education.

- (2) A political party may at its own cost hire an institution accredited under subsection (1) to conduct a party primary.
- **32.** (1) A political party shall put in place and implement affirmative action measures to promote the inclusion of special interest groups in party primary.

Special interest groups.

Regulations.

- (2) The affirmative action measures under subsection (1) shall include
  - (a) ensuring party information and party primary venues are easily accessible to persons with disabilities; and
  - (b) provision of assistance to persons with disability to vote during a party primary.
- **33.** (1) The Commission may make regulations for the better carrying into effect the provisions of this Act.
- (2) Without prejudice to the generality of subsection (1), the Commission may make regulations to
  - (a) prescribe the conduct of party primary;
  - (b) provide for the procedure of nomination of special seats under party lists;
  - (c) provide for the use of technology in a party primary;
  - (d) prescribe forms for carrying out the provisions of this Act;

- (e) require submission of details required under this Act; and
- (f) accredit institutions for provision of civic education and awareness related to party primary.

### PART VI—CONSEQUENTIAL AMENDMENTS

**34.** The Elections Act is amended by deleting section 13 and substituting therefor the following new section—

Amendment of section 13 of No. 24 of 2011.

Nomination of candidates by a political party.

- 13. (1) A political party shall nomin candidates for an election under this Act  $\varepsilon$  ninety days before a general election und Act in accordance with the Political Primaries Act.
- (2) A political party shall not chan candidate nominated after the nomination person has been received by the Commission

Provided that in the event of the resignation or incapacity of the non candidate or of the violation of the electors of conduct by the nominated candidat political party may, after notifying the car that the party seeks to substitute, where appl substitute its candidate before the dapresentation of nomination papers to Commission.

35. The Elections Act is amended by deleting section  $31.^{\circ}$ 

Amendment of section 31 of No. 24 of 2011.

- **36.** Section 109 of the Elections Act is amended in subsection (1) by—
- Amendment of section 109 of No. 24 of 2011.

- (a) deleting paragraph (c); and
- (b) deleting paragraph (d).

### FIRST SCHEDULE

(s. 17(1))

SELF-DECLA	\RA'	TION	<b>FORM</b>
------------	------	------	-------------

1. General Information			
(Surname)	(First Name)	(Middle Name)	
(Other Names)			
National ID No. / Passport N	lo.:	*************	
Passport Expiry Date:			
Party Membership No.:			
		Female ( ) Intersex ( ) .Mobile Number:	
Email Address:			•
Nationality: Kenyan ( )	Dual Citizen	( ) (provide details)	
2. Declaration			•••
I declare that I have fulfille elections, the party constitut		ents under the laws relating tation rules including	.o
(a) meeting obligations including payment of		e political party on its member ;	rs
(b) producing valid edu and	cational certifi	icates as and when requested	1;
<ul><li>(c) being of good moral</li><li>3. Oath and Affirmation</li></ul>		eiety;	
declaration under the Oaths	and Statutory D e statements in	tify, under penalty of fals Declarations Act (Cap 15 of th n this declaration are true an	ıe
Dated thisday	of	20	
Signature of Declarant		***************************************	٠.
Sworn/Declared Before Me			
This day of		, 20	٠,
At	***************************************		
Commissioner for Oath/Mag	ristrate		

### SECOND SCHEDULE NOMINATION FEES

(s. 28(2))

	Elective Position	Amount in KSh. (not more than)
1.	President	1,000,000
2.	County Governor	500,000
3.	Member of Parliament	250,000
4.	Member of a County Assembly	50,000

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### MEMORANDUM OF OBJECTS AND REASONS

### Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to put in place a legal framework for the conduct of political party primary. It sets out the procedure to be followed in the conduct of party primaries for purposes of identifying candidates to stand for election in an elective post as well as preparing party lists as required under the Constitution and the Elections Act.

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

The Bill delegates legislative powers to the Independent Electoral and Boundaries Commission to make regulations for the better carrying into effect the provisions of the Bill once enacted.

The Bill does not limit fundamental rights and freedoms.

### Statement on how the Bill concerns county governments

The Bill concerns county governments as it contains provisions relating to the identification of candidates to contest in an elective post or be included in a party list for nomination to be a member of a legislature at both the national and county level.

The Bill is therefore a Bill concerning 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.

Dated the 20th November, 2020.

ISAAC MWAURA, Senator. Section 13 of Act No. 24 of 2011 that the Bill proposes to amend-

### Nomination of candidates by a political party

- 13. (1) A political party shall nominate its candidates for an election under this Act at least ninety days before a general election under this Act in accordance with its constitution and nomination rules.
- (2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:

Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission.

- (2A) A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days.
- (3) Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall be at least fifty-five days before such election.

Section 31 of Act No. 24 of 2011 that the Bill proposes to amend—

### Nomination of political party candidates

- 31. (1) A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—
  - (a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and
  - (b) subject to subsection (4), the party certifies the nomination to the Commission.
- (2) The Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.

- (2A) Every political party shall submit the names of the party candidates who have been selected to participate in the general elections under this Act at least sixty days before the elections.
- (2B) A political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.
- (2C) The Commission shall publish, in the *Gazette* the names of the persons contesting in a party primary under subsection (1) and the date of the party primary within seven days of receipt of the names of party candidates.
- (2D) A candidate for a presidential, parliamentary or county election shall be selected by persons who are members of the respective political parties and whose names appear on the party membership list as submitted to the Commission under section 28.
- (2E) Where the Commission receives multiple requests under subsection (2), the Commission shall conduct and supervise the nomination of candidates for presidential, parliamentary or county elections for all the requesting political parties—
  - (a) on the same day;
  - (b) in the same polling centres; and
  - (c) in different polling streams for each participating political party.
- (2F) Parliament shall appropriate monies for the effective implementation of this section.
- (3) Every political party shall notify the Commission of the name of the person authorised by the party to certify to the Commission that a person has or persons have been selected by the party under subsection (1) and the person or persons so named shall deposit his or their specimen signature with the Commission in such manner as the Commission may require.
- (4) The authorised person or persons referred to in subsection (4) shall, in writing, certify that a candidate has been nominated by the party.

Section 109 of Act No. 24 of 2011 that the Bill proposes to amend-

### Regulations

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—

- (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 reallocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and reallocation;
- (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;

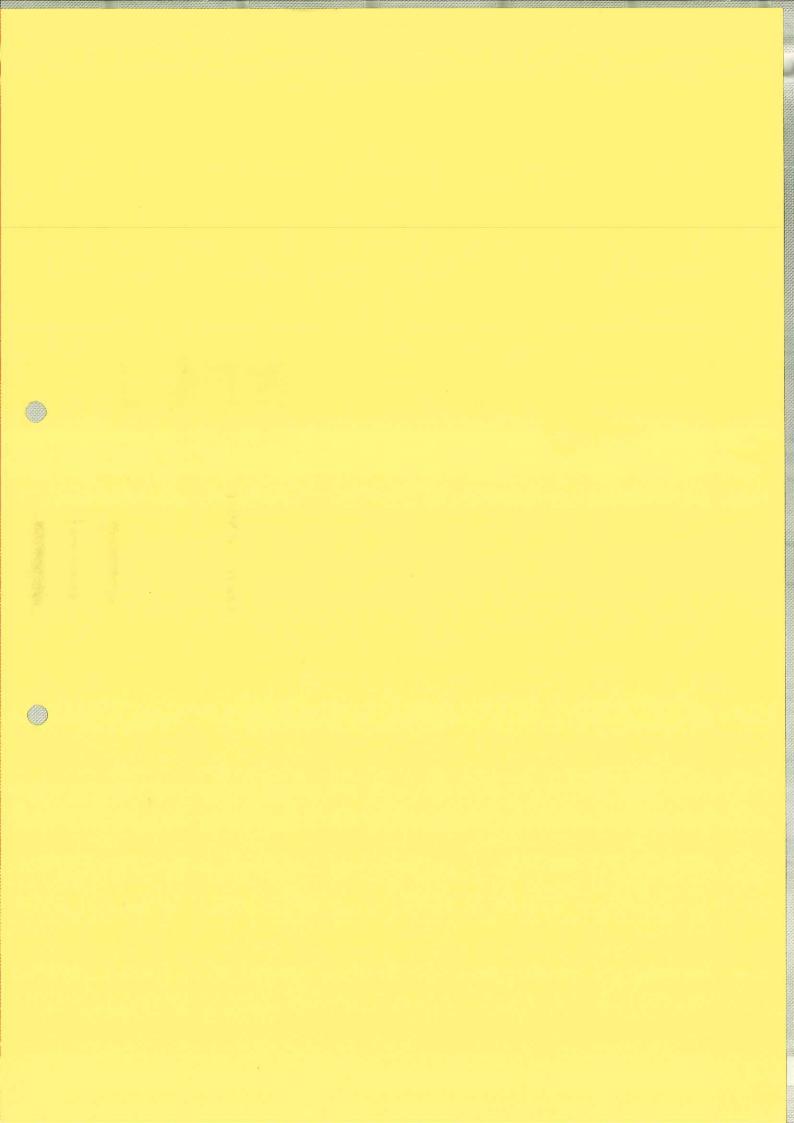
- (z) provide with reasonable grounds for the postponement of elections;
- (aa) provide for mechanisms for carrying out effective voter education;
- (bb) provide for the mode of declaration of the result of an election;
- (cc) prescribe the manner of enforcing the Electoral Code of Conduct; or
- (dd) provide for the conduct of campaigns during a referendum or an election;

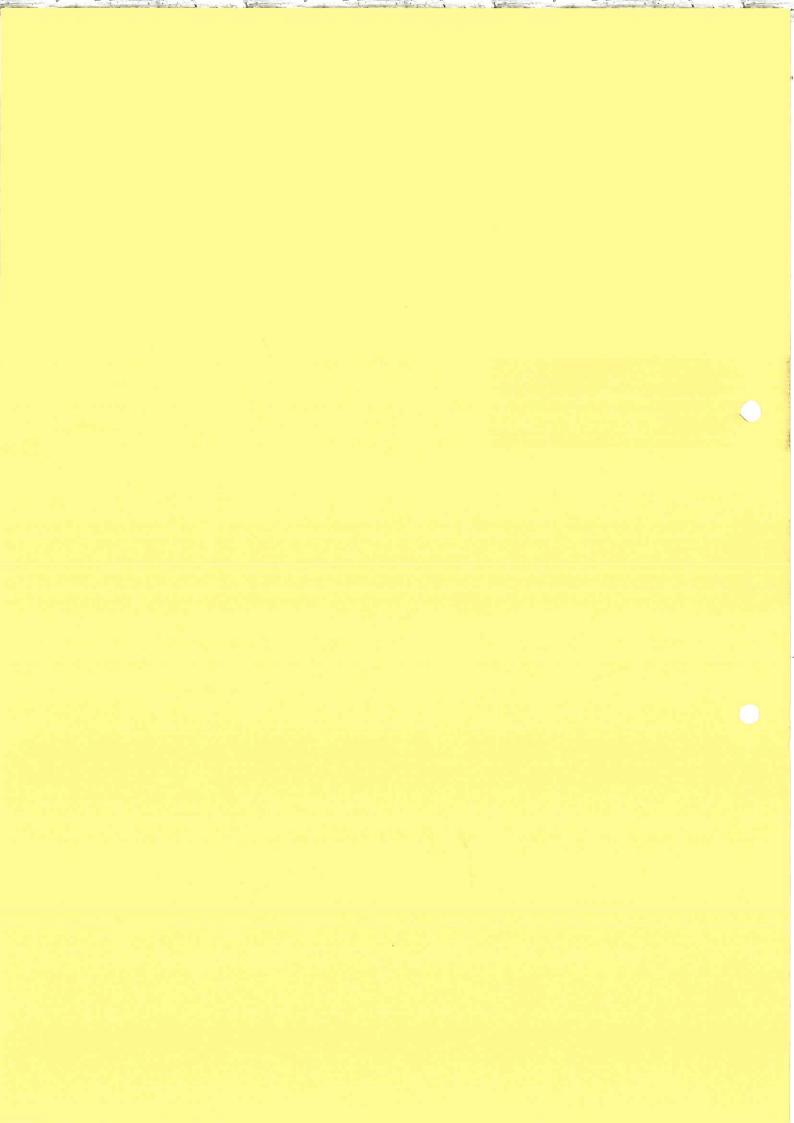
- (ee) provide for the financing of campaigns during a referendum or an election;
- (ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.
- (2) The power to make regulations conferred on the Commission under this Act shall be—
  - (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).

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### REPUBLIC OF KENYA



### TWELFTH PARLIAMENT | FIFTH SESSION

### THE SENATE

### INVITATION FOR PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA

At the sitting of the Senate held on Thursday, 4<sup>th</sup> March, 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-

- i) hand-delivered to the Office of the Clerk of the Senate, First Floor, Main Parliament Buildings, Nairobi; or
- ii) emailed to the Clerk of the Senate on the address: <u>csenate@parliament.go.ke</u> and copied to the respective Committee email addresses indicated at the fourth column below,

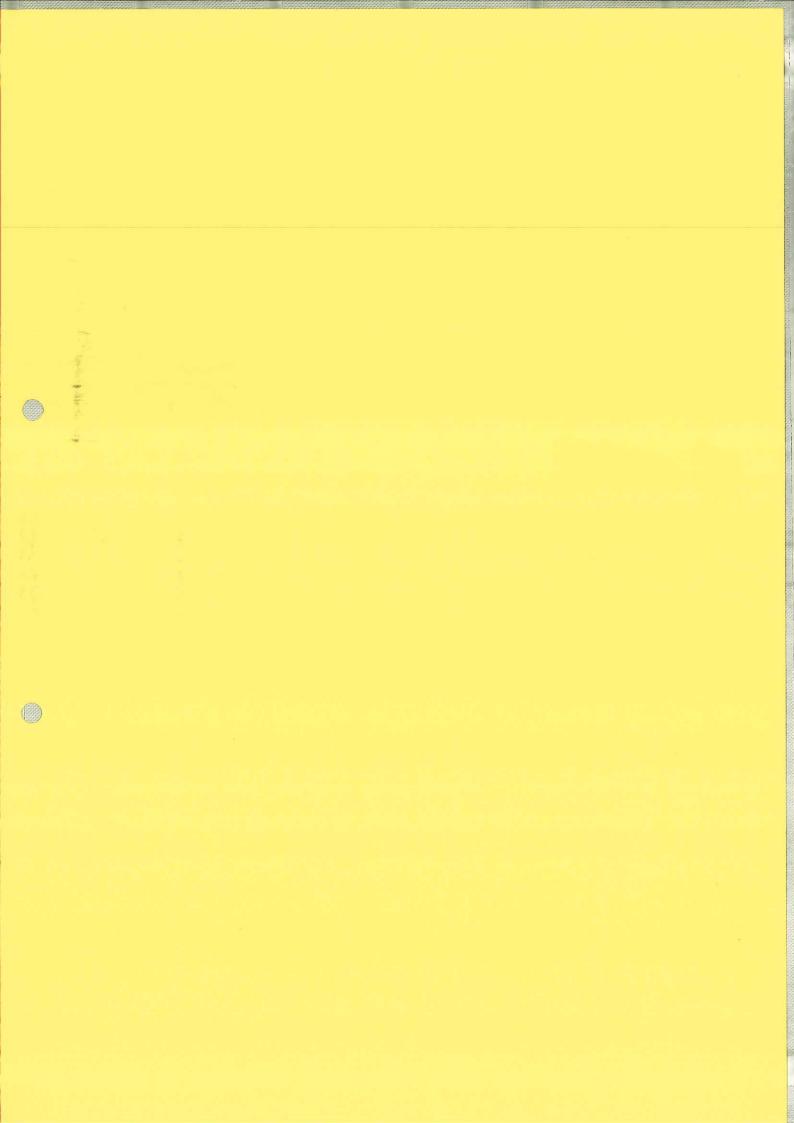
to be received on or before Wednesday, 31st March, 2021 at 5.00pm.

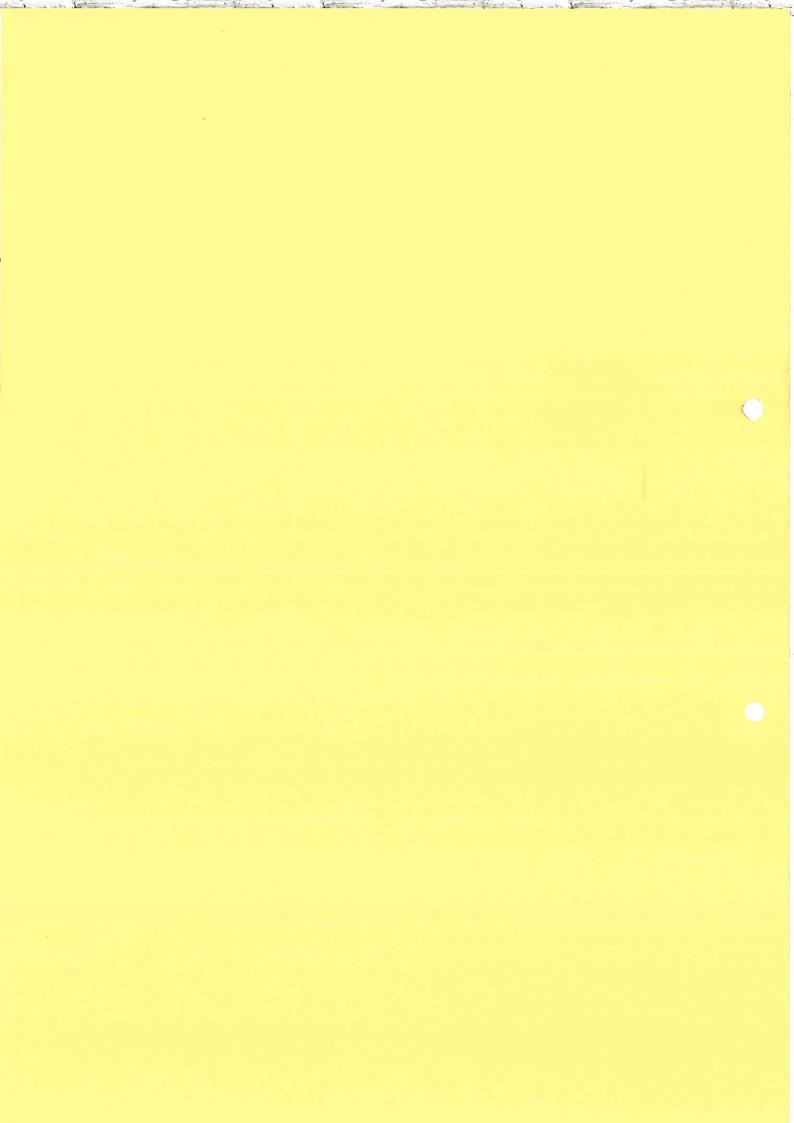
	Bill	Committee Referred To	Email Address
a)	The Mental Health	Standing Committee on	senatekehealth@gmail.com
	(Amendment) Bill (Senate	Health	
	Bills No. 28 of 2020		
b)	The Persons with	Standing Committee on	senatecommittee.labour@parliamen
	Disabilities (Amendment)	Labour and Social Welfare	t.go.ke
	Bill (Senate Bill No. 29 of		
	2020)		
c)	The Wildlife Conservation	Standing Committee on	senlandenviron@gmail.com
	and Management	Land, Environment and	
	(Amendment) Bill (Senate	Natural Resources	
	Bills No. 30 of 2020)		
d)	The Salaries and	Standing Committee on	scfinanceandbudget@gmail.com
	Remuneration Commission	Finance and Budget	
	(Amendment) Bill (Senate		
	Bills No. 31 of 2020)		

e)	The County Licensing (Uniform Procedures) Bill (Senate Bills No. 32 of 2020)	Tourism, Trade and	senatetourismandtrade@gmail.com
f)	The Parliamentary Powers and Privileges (Amendment) Bill (Senate Bills No. 33 of 2020)		senatejlahrc@gmail.com
g)	The Community Health Services Bill (Senate Bills No. 34 of 2020)	Standing Committee on Health	senatekehealth@gmail.com
h)	The Political Parties Primaries Bill (Senate Bills No. 35 of 2020)	Standing Committee on Justice, Legal Affairs and Human Rights	senatejlahre@gmail.com

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

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





### UNIVERSITY OF NAIROBI

(1)



### AFRICAN WOMEN'S STUDIES CENTRE

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Nairobi, Kenya

## AWSC MEMORUNDUM ON THE POLITICAL PARTY PRIMARIES BILL, 2020

### SENATE BILLS NO 35 OF 2020

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

# INSTITUTION: AFRICAN WOMEN STUDIES CENTRE, UNIVERSITY OF NAIROBI DATE: 31<sup>ST</sup> MARCH, 2020

s/No	S/No Sub-	Provisions of the Regulations*	Rationale for Amendment	Proposed Amendment**
	Regulation   No.		Recommendation	
<i></i>	2	Interpretation Section	i. Absence of a definition	i. "reserved seat party primary"
			clause that would make it	means a method of identifying a
			possible for political parties	candidate for an elective or
			to take deliberate lawful steps	nominative post by registered
			to ensure inclusion of	members of a political party
			women, youth, and persons	from among registered party
			with disability	

ပ္ပ	.2		S/No
10	6		Sub- Regulation No.
Types of party primaries.	Functions of the governing body -		Provisions of the Regulations*
Need to ensure that the reserved party primary is mandatory to ensure that the categories of marginalized	i. Need to identify the party strong holds to inform the process of allocating candidates for competing for electoral seats. For marginalized persons to have an opportunity to represent constituencies, it is important that they are fielded in party strongholds as opposed to being given the opportunity to vie in areas where the political party is not popular or has not invested as much to get returns.  Need to ensure that the reserved seat party primary proposed in No. 1 above is undertaken regardless of the method chosen by the political party for the Party Primary – so a new clause	ii. Absence of recognition of party strongholds where the political party has a competitive edge.	Rationale for Amendment Recommendation
In any event every party must undertake a reserved seat primary in the manner it will prescribe in order to achieve the requisite inclusion and representation of	The governing body of a political party shall, for purposes of this Act, be responsible for—  i. mapping the party strongholds; ii. prescribing the manner and ensuring that the reserved seat primary is conducted and results posted; iii. prescribing the nomination fees for persons competing for seats under the reserved seat party primary; (this should be read together with Regulation 28(3) and the governing body should be able to set a fee that is at least one-third of the prescribed fees)	members who are women, youth and/or persons with disability.  ii. "stronghold" geographical constituency or area where a political party has competitive advantage based on a mapping exercise	Proposed Amendment**

		ALABAMA A MARIAMENTA (M. V. 1997)		A
S/No	Sub- Regulation No.	Provisions of the Regulations*	Rationale for Amendment Recommendation	. Proposed Amendment**
·			persons are included for representation	women, youth and persons with disability for nomination to elective seats in at least one-third of the areas considered to be strongholds of the political party.
4	13	Membership Register 13. (1) A political party shall maintain an updated register of its members in accordance with section 17 (1)(a) of the Political Parties Act.	Need for the register to be disaggregated to clearly identify marginalized persons	13. (1) A political party shall maintain an updated <b>disaggregated</b> register of its members in accordance with section 17 (1)(a) of the Political Parties Act.
ശ്		New Clause	It is important that the Political Party sensitizes members well in advance of when it intends to carry out its party primatics so that interested persons can express their interest.	A political party intent on participating in the next general elections shall inform its members of its intention to carry out party primaries at least 12 months in advance of the proposed date.
.9		New Clause	Having informed its membership of its intention to carry out party primaries 12 months in advance as suggested in No. 5 above, the political party needs to invest in the preparation of candidates who so express their interest to participate in the primaries.	A political party will carry out training and capacity building programmes for candidates who so express their interest in participating in the party primaries at least four months before the party primaries are held.
7.		New Clause	It is essential that a political party develop training guides and relevant literature to guide prospective candidates on the party ideals and the dos and don'ts pertaining to the primaries so that they are well informed.	A political party shall develop and publish relevant material to inform, educate and guide prospective candidates about the ideals of the political party and the manner in which the political party intends to carry out its party primaries including any considerations on which decisionmaking processes in this regard rely on.

gender equality in filling vacant positions. Constitution. In upholding constitutionalism, the nominating bodies should also ensure two-thirds gender principle and should ensure As illustrated in the above analysis, AWSC supports these amendments as they are geared towards ensuring compliance with the

### Submitted by:

Prof Wanjiku M. Kabira Director

African Women Studies Centre (AWSC)

Name:

Signature: Bukshir

Date: March 31st, 2021

Page 4 of 4



30th March 2021

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

RE: Memorandum on the Political Parties Primaries Bill (Senate Bills No. 35 of 2020).

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 Political Parties Primaries Bill (Senate Bills No. 35 of 2020) as follows:

Section of the Bill	Proposed Amendment to the Bill Section	Justification
Section 8 (2)	Indicate the minimum grade on the	This is to provide a cut off mark
	certificate of secondary education to be	for qualifications so as to ensure
	at least a C	that members who make up the
		dispute resolution body have
		the pre-requisite knowledge
		needed to comprehend the
		dispute resolution procedures.
Section 10 (3)	Amend this section to remove the	Political parties hold party
	requirements of having the days set aside	primaries at different times and
	for the conduct of party primaries to be	having these days declared as
	public holidays.	holiday's will not be viable for
	The requirement of having the day of	the country.
	the general election being a public	
	holiday can be maintained.	
Section 10 (4)	Amend the referred subsection (3) to	This section provides for
	read subsection (4).	penalties to employers who may
		deny party members leave to
		participate in the party
		primaries or by-elections.
Section 13 (2)	Add a new clause ( e) to include a	This is to ensure that a political
	diaspora member register	party has a register of its
		members who are in the
		diaspora.
Section 15 (c ) (ii)	Define what consists ballot boxes. i.e	This is to ensure that proper
	clear transparent boxes.	ballot boxes as described by the

	<u> </u>	· · · · · · · · · · · · · · · · · · ·
		IEBC are provided during the voting period to promote transparency during the voting process as there have been instances where political parties have been seen to use carton boxes as ballot boxes which end up being staffed up with ballot papers even before the elections are conducted.
Section 18 (1) & 20	State clearly the body within the political party that will be mandates to submit the list of aspirants under section 18 (1) and the particulars of a nominated candidate for an election or inclusion in the party list under section (20) to the registrar and the commission Also, state the means through which the list shall be submitted. i.e specify if it is through email or delivery of the hard copies by the party officials or through certified courier service.	This is to ensure that the names and particulars of the right individuals have been submitted as there have been instances where aspirants have had their names replaced with other people's names when the transmission is done to the commission and in most time, no one is held responsible.
Proposed NEW Section	a. Add a new clause (5) under section 19 to require the National Elections Board to honor pronouncements made by the special county appeals tribunals put in place by the political parties to solve disputes that arise during the conduct of primaries. And also provide the timelines within which IEBC has to pick up the decisions of the appeal tribunals and declare one as the nominee after the decision of the tribunal court I.e like after 3 or 4 days where the party fails to acknowledge the declared winner by the dispute's tribunal.	This is to give the disputes tribunal a force of law.
Section 29 (1)	Amend the section to increase the number of agents to observe the elections	This is because sometimes the voting and poll counting



	at a particular polling venue to two (2). The bill can further indicate that only one agent is allowed to be present to observe at a time.	process goes into the night and one agent will be so exhausted and thus may not be very productive.
Section 30	Include Civil Society organizations, Non- governmental organizations and even political parties to the list of institutions that may provide civic education and awareness related to party primaries	Expanding the scope of the civic educators is importance so as to ensure that other credited institutions are not locked out from educating the public.
Proposed NEW clause	Add a NEW clause in the offence section to deal with Cyber Bulling	The bill lacks to indicate how cyber bullying i.e fake news and cyber bulling of the aspirants will be dealt with; it is therefore important that we ensure that aspirants are protected under the data protection laws. The data protection director can take this up.

Sincerely,

Frankline Mukwanja

Executive Director, CMD-Kenya.

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### KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

### ADVISORY ON THE POLITICAL PARTIES PRIMARIES BILL, 2020

### PRESENTED TO

# THE SENATE STANDING COMMITEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

SUBMISSION DATE: 31ST MARCH 2021

Kenya National Commission on Human Rights (KNCHR) CVS Plaza 1st Floor, Kasuku Lane, Off Lenana Road,

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## **Table of Contents**

A. INTRODUCTION		
B. BACKGROUND		
Human rights principles related to Part	y primaries	<u>C</u>
C. ADVISORY/RECOMMENDATIONS		12
Scope of the Bill- Long title; Memorand	dum of Objects and Reasons	12
Interpretation- Clause 2		12
Guiding principles governing political p	arty nominations- Clause 3	13
Political Party Structure- Part II (Clause	es 4-9)	14
Types of party primaries- Clause 10		15
Date of party primary- Clause 11		16
Party Primary notification- Clause 12		16
Membership Register- Clause 13		17
Vetting of Aspirants- Clause 17		18
Submission of List of Aspirants- Clause	e 18	18
Dispute resolution- Clause 19		19
Submission of particulars to the Comm	ission- Clause 20	.,,,,,,,,,,,,,,,,21
Financing for political parties nomination	ons	23
Offences Relating to Party Primaries- I	Part IV (Clauses 21-27)	23
Nomination fees- Clause 28		23
Civic Education and Accreditation of In	stitutions- Clauses 30 and 31	24
Special Interest Groups- Clause 32		24
Regulations- Clause 33		25
,		
D. CONCLUSION		27

### A. INTRODUCTION

- 1. The Kenya National Commission on Human Rights ("KNCHR" or "National Commission") is an independent National Human Rights Institution established under Article 59 of the Constitution with a broad mandate to promote a culture of respect of human rights in the Republic of Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of independent national human rights institutions commonly referred to as the Paris Principles and as such enjoys an "A" status accreditation.
- 2. The National Commission has a mandate under Article 249 of the Constitution to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.
- 3. Through a notice, the Senate pursuant to Article 118 of the Constitution and its standing orders invited members of the public to provide their views and any representations by way of memoranda. Drawing on the Commission's mandate, and having had the benefit of extensive monitoring of party primaries in previous electoral cycles as well as general elections, we submit the following views for consideration by the Honourable House.

### B. BACKGROUND

- 4. The repeal of section 2A of then Constitution of Kenya in 1991<sup>1</sup> ushered in a multiparty era in Kenya. Political parties then lacked corporate status and were registered and regulated under the Societies Act<sup>2</sup>, until 2007 when the Political Parties Act<sup>3</sup> was enacted.
- 5. The Constitution of Kenya 2010 declares Kenya to be a "multi-party democratic state". The rule of law, democracy, good governance, integrity, transparency and accountability are among the cherished national values and principles enshrined under Article 10 of the Constitution. Article 260 defines political party as, "an association contemplated in Part 3 of Chapter Seven".
- 6. Article 91 of the Constitution encapsulates the basic requirements for political parties. A political party is to inter alia, "abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party and to, "promote the objects and principles of the Constitution and the rule of law". 5 A political party is also constitutionally duty bound to, "observe the code of conduct for political parties" as well as, "promote inclusiveness, democracy and participation of the people" in its processes including 'nomination of candidates for elections'. 7 Article 92 of the Constitution directs Parliament to enact legislation to provide for the regulation and supervision of political parties and any other matters. The Code of conduct for political parties requires them to inter alia uphold the constitution, human rights, all electoral laws relating to elections and political parties. The Code also requires them to respect and uphold their respective political party constitutions, political party election rules, political party nomination rules'.8
- 7. In a democracy, the role of political parties and political actors is of vital importance as they provide the means through which ordinary citizens can control their own governance. In a multi democratic state like Kenya, political parties play a critical role of protecting and promoting the various political rights as enshrined in the Constitution including the freedom of association, right to vote and be voted. Political parties also play the role of shadow government by acting as the alternative platform and highlighting the shortcomings and performance of the ruling government. This role is undertaken by monitoring the government's pledges and service delivery and creating awareness of the people on the obligations of the

<sup>2</sup> Chapter 108 Laws of Kenya.

<sup>4</sup> Art 4 Constitution of Kenya 2010.

<sup>8</sup> Para 6, First Schedule, Political Parties Act, 2011.

<sup>&</sup>lt;sup>1</sup>S 2 The Constitution of Kenya (Amendment) (No. 2) Act, 1991 (No. 12 of 991).

<sup>&</sup>lt;sup>3</sup> Political Parties Act, 2007 (No. 10 of 2007) which took effect on 1 July 2008. This was later repealed and replaced by the Political Parties Act, 2011(No. 11 of 2011), s 50.

<sup>&</sup>lt;sup>5</sup> Art 91(1)(g) Constitution of Kenya 2010. <sup>6</sup> Art 91(1)(h) Constitution of Kenya 2010.

<sup>7</sup> S 3(1A) Political Parties Act, 2011 (as amended by Political Parties (Amendment) (No. 2) Act, 2016.

government. In addition, the two houses of parliament at national and county level are composed of members of various political parties thereby playing the important role of shaping the type of laws and policies that are debated and passed.

- 8. The Political Parties Act, 2011 is the primary statute which regulates the formation and conduct of all parties. In accordance with this law, all political parties must be formed in compliance and for purposes that are not contrary to the Constitution of Kenya. A key tenet of all political parties therefore is the promotion of democracy, good governance, participation of the people and inclusivity. For any political party to be fully registered, Section 6 of the Act requires the mandatory obligation of among others a disaggregated full membership list to be deposited with the Registrar of political parties. This membership list and composition of the governing body must have an ethnic, regional and gender balance as well as inclusion of special interest groups which must also be reflected in the governing body.
- 9. In 2016, amendments to the Political Parties Act 2011 were introduced which altered this landscape in two significant ways:
  - The interpretation section of the Act was amended to distinguish nominations from party primaries. Party primaries were defined as, "the process by which a political party elects or selects a candidate for a forthcoming general election or for a forthcoming by-election". The enactment of the Elections (Party Primaries and Party Lists) Regulations 2017 further bolstered this distinction by adopting the distinction between party primaries and nominations. Nomination on the other hand was is the process by which candidates submit their nomination documents to the IEBC. This definition delineated the process in such a way that there were two distinct watersheds with dispute resolution mandates being given to two distinct bodies.
  - The second amendment was to section 40 of the Political Parties Act which amended the categories of disputes that may be handled by the PPDT. The Act delimits party primary disputes as being the preserve of the PPDT, while disputes arising from submission of nomination documents are handled by the IEBC.<sup>11</sup> In addition, the IEBC and PPDT signed a Memorandum of Understanding to provide clear guidance to political parties and candidates on the respective mandates of the two bodies and minimise forum shopping.<sup>12</sup>

<sup>9</sup> Sec 2 Political Parties Act

<sup>&</sup>lt;sup>10</sup>. Legal Notice No. 69 of 2017

<sup>&</sup>lt;sup>11</sup> Sec 40 (1) (fa) was introduced by Amendment Act 21 of 2016.

<sup>&</sup>lt;sup>12</sup>See <a href="http://www.ppdt.judiciary.go.ke/wp-content/uploads/2017/04/PPDT-IEBC-MOU-28-March-2017.pdf">http://www.ppdt.judiciary.go.ke/wp-content/uploads/2017/04/PPDT-IEBC-MOU-28-March-2017.pdf</a> (accessed 24 March 2021).

- 10. Political parties through their party primaries and nomination processes act as a filter for future representatives in elective position and are perceived as the "vehicle" through which individuals attain political power and the building blocks of representative democracy.
- 11. In consideration of the party primaries, it is important to interrogate party internal structures, rules and values, and processes and practices since every party has its internal environment, which is guided by the constitutional and legal framework of the political system within which it operates. Equally important is the way in which political parties select their candidates, which is a test of how democratically parties conduct their internal affairs.
- 12. It has often been said that he who controls the nomination process, is the owner of the party<sup>13</sup>. This, means that parties' internal processes if not regulated by legislation may be prone to the control of the party leaders and the party elites. This has been the case in past of some political parties in Kenya during the nomination processes, where party elites often gave direct nominations, not on the basis of the popularity of candidates during party nominations, but due to other considerations, hence subverting democratic ideals and constitutional principles.
- 13. Since its inception, KNCHR has been at the forefront in advocating for a Human Rights Based Approach (HRBA) to electoral processes in order to promote accountability of leadership which can only be achieved through enhanced public participation mechanisms. It is in this regard, that KNCHR has over the years undertaken to engage in electoral reforms processes through voter education, preparation of advisories, litigation, monitoring and observation. As such, KNCHR, Monitored and observed the 2007,2013 and 2017 party nomination exercises and the electoral cycle through a human rights lens and documented accounts of human rights violations in the reports namely: On the brink of the Precipice, 14 2013

<sup>&</sup>lt;sup>13</sup> Schattschneider, E., E., 2004, 'What the political parties are not', Enduring controversies in Presidential nominating politics, in E. H. Buell, E. H., Jr. & Mayer W.G., (eds.), pg 230 Pittsburgh, University of Pittsburgh Press.or

https://books.google.co.ke/books?id=gyTwza6RMCsC&printsec=frontcover&dq=Enduring+Controversies+in+Presidential+Nominating+Politics&hl=en&sa=X&ved=2ahUKEwiikMgnz8fvAhXOSxUIHffyAw4Q6AEwAHoECAiQAg#v=onepage&q=Enduring%20Controversies%20in%20Presidential%20Nominating%20Politics&f=false accessed on 19th March 2021.

<sup>14</sup>See On the Brink of the Precipice: a Human Rights Account of Kenya's 2007Post election Violence <a href="http://knchr.org/Portals/0/Reports/KNCHR">http://knchr.org/Portals/0/Reports/KNCHR</a> REPORT ON THE BRINK OF THE PRECIPE.pdf?ver=2013 -02-12-102316-493.

Elections: Safeguarding rights, 15 The fallacious Vote 16, Mirage at Dusk, 17 Still a Mirage at Dusk, 18 and Silhouettes of Brutality 19.

- 14. Throughout the these reports, KNCHR was concerned about the lack of preparedness demonstrated by political parties in the party primaries despite having ample time, based on the timelines that had been gazzetted in advance by the Independent Electoral and Boundaries Commission (IEBC). The gaps brought about by this unpreparedness greatly affected the credibility and integrity of the entire exercise; Key among these issues included the lack of party registers and adequate voting materials. Therefore, these amounted to election offences as stipulated under the Election Offences Act, 2015 and political parties ought to be held liable for election offences committed.
- 15. KNCHR also noted incidences that threatened to compromise the right to vote and the outcome of the nominations that were caused by aspirants, their supporters and party officials. These included briberies, use of violence, intimidation and harassment; destruction of voting material, lack of co-ordination at the tallying centres and targeted attacks meted against minority and marginalized groups such as women aspirants.
- 16. It is worth noting that, Political party nominations are not optional but are mandatory and a prerequisite for all aspirants' clearance to contest in the general elections. The blatant non-adherence to electoral laws, code of conduct and party rules point to a worrying trend of lawlessness and disregard to democratic ideals and good governance. In an already polarized and highly charged election environment, the above threatens the rule of law and perpetuates a culture of impunity.
- 17. The raison d'être (most important purpose) of political parties is to organize political competition and to gain access to power, and are thus "indispensable" for democracy.20This can only be realised if political parties strengthened their internal structures by developing popular polices, ideology which leaders and members

http://www.knchr.org/Portals/0/CivifAndPoliticalReports/The%20Fallacious B5 210518 2215.pdf?ver=201 8-05-23-092645-480

17 See Mirage at Dusk: A human rights account of the 2017 elections

https://www.knchr.org/Articles/ArtMID/2432/ArticleID/17/Mirage-at-Dusk-A-Human-Rights-Account-of-The-

2017-General-Election

18 See Still a Mirage at Dusk: A human rights account of the 2017 Fresh Presidential Elections https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1031/Still-a-Mirage-at-Dusk-A-Human-Rights-

Accounts-of-the-2017-Fresh-Presidential-Elections

19 See Silhouettes of Brutality: A human rights account of Sexual Violence during and after the 2017 elections http://www.knchr.org/Portals/0/KNCHR\_Silhouettes\_of\_Brutality.pdf

<sup>20</sup> Lipset, Seymour Martin (2000): The Indispensability of Political Parties, in: Journal of Democracy, No. 1, Vol. 11, pp. 48-55. https://muse.jhu.edu/article/17013 Accessed on 19th March 2021

<sup>15</sup> See 2013 Elections: Safeguarding Rights – An account of Hotspots, elections 2013 http://www.knchr.org/Portals/0/CivilAndPoliticalReports/2013%20Elections Safeguarding%20rights.pdf 6 See The fallacious Vote

- can use to run the party, choose their leaders and officials, broaden their support, and campaign effectively in elections.
- 18. Suffice it to say, it is imperative that the entire electoral management system depends on how political parties are effective in their implementation of party processes, especially selection and nomination of candidates as this to a large extent determines the future of our leadership, democracy, peace and stability of our beloved country.

### Human rights principles related to Party primaries

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- 19. There are well-established principles and evolving body of public international law related to elections and participatory rights in party primaries that serve as commonly accepted international norms and standards for genuine elections.
- 20. The following principles are based on international human rights law, which offers valuable standards for protecting fundamental human rights during elections. Relevant law can be found in the International Covenant on Civil and Political Rights (articles 2, 6, 9, 21, 22, 25),; the International Convention on the Elimination of All Forms of Racial Discrimination (articles 1, 4, 5); and the Universal Declaration of Human Rights (articles 20, 21), which is considered reflective of customary international law. Many of these provisions are reflected in our Constitution and statute law.
- 21. These principles include securing the right to vote and the right to be voted for without discrimination, access to electoral information, voter education, Allowing unfettered monitoring by impartial, non-partisan election observers, right to peaceful assembly, Regulating and minimising the use of Force in Responding to Protests, Preventing voter intimidation and violence by extremist and other groups, freedom of association, adherence to 2/3rds gender principle and the provision of prompt review, appeal, and remedy for voting rights violations.
- **22.** The inclusion of elections and by extension party primaries as a means of ensuring the right to participate in public affairs in international and regional instruments means that these processes are subject to human rights norms and standards, and scrutiny by international and regional human rights mechanisms.
- 23. KNCHR wishes to bring to the attention of this Committee the concluding observations of the Universal Periodic Review (UPR)<sup>21</sup>, that was conducted in 2020

<sup>&</sup>lt;sup>21</sup> Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 193 UN member States once every 4.5 years. The UPR mechanism was created through UN *General Assembly Resolution 60/251* on 15 March 2006. Under the UPR mechanism, the Human

where recommendations made to Kenya by various Countries assessing its Progress as captured in the <u>report</u><sup>22</sup> of the Working group on the UPR. The following recommendations were made regarding our electoral processes:

- a. 142.24 Continue reform measures with a view to promoting political democracy in Kenya (Azerbaijan);
- b. 142.25 Further continue its political reforms in order to promote political democracy in the country (Kyrgyzstan);
- c. 142.133 Continue to prosecute acts of racial discrimination and hate speech and adopt a comprehensive strategy to eliminate harmful cultural practices (Afghanistan);
- d. 142.134 Combat hate speech, particularly during election periods, and punish incitement to racial or ethnic hatred (Mexico);<sup>23</sup>
- e. 142.136 Intensify efforts to secure redress for survivors of sexual violence following the 2007 and 2017 presidential elections, and establish mechanisms to ensure such crimes are never repeated (United Kingdom of Great Britain and Northern Ireland);
- f. 142.153 Ensure unimpeded functioning of democratic processes in the country, including transparent regulations on exercising the right of assembly and the use of force by police only as a means of last resort and solely in fully justified situations (Poland);
- g. 142.154 Uphold the right to freedom of expression, including for media organizations and human rights defenders, in accordance with article 19 of the International Covenant on Civil and Political Rights (Australia);
- h. 142.155 Implement the recommendations of the 2017 European Union Election Observation Mission, especially to strengthen the independence of the media and journalists and to provide protection for civil society (Czechia);<sup>24</sup>
- i. 142.165 Increase efforts to promote women's political participation (Japan);
- j. 142.166 Establish mechanisms to increase the participation of women in political and public life, in decision-making positions, and make efforts to eradicate gender stereotypes that result in violence against women (Costa Rica);
- k. 142.167 Ensure that all human rights are duly respected and protected in the run-up to and during the coming general elections, in 2022 (Japan);

Rights Council assesses the human rights situation in each of the UN member states. The Human Rights Council (HRC) is a subsidiary organ of the UN General Assembly comprising 47 United Nations Member States which are elected by the UN General Assembly.

<sup>&</sup>lt;sup>22</sup> Report of the Working Group on the Universal Periodic Review – Kenya, 44<sup>th</sup> Session of the Human Rights Council 15 June–3 July 2020 <a href="https://undocs.org/A/HRC/44/9">https://undocs.org/A/HRC/44/9</a> ld., at 16.

<sup>&</sup>lt;sup>24</sup> ld., at 17.

- 1. 142.168 Acknowledge the violations of the rights of survivors of electoral related sexual violence and start a process of consultations with survivors and civil society to inform the design and implementation of reparations measures and programmes (Croatia);
- m. 142.169 Undertake electoral reforms aimed at reducing conflicts that have been associated with elections (Vanuatu);<sup>25</sup>
- 24. It is important to note that Kenya agreed to the above recommendations and made commitments towards their implementation and we are hopeful that our engagement with this Committee will bring to light the need for follow up on the implementation towards the realisation of the above human rights issues before the next cycle of review. For instance, the discussions around the Political Primaries bill is a step towards the implementation of not only the above recommendations on Kenya's electoral processes, but also the realisation of Article 82 (1) (b) of the Constitution requiring parliament to enact a legislation on the nomination of candidates.
- 25. Additionally, the Sustainable Development Goal target 16.7 aims to ensure responsive, inclusive, participatory, and representative decision making at all levels. Effective participation in public affairs through elections may be key in attainment of this target. Similarly, Political pillar of the Mid-term Plan III 2018 2022 of Kenya's Vision 2030<sup>26</sup> seeks to achieve of the "Big Four" initiatives through enabling legal, policy and regulatory framework that ensures that elections are free, fair and violence free, under the target outcomes of monitoring the Mid-term plan III of Kenya's Vision 2030 on electoral processes sets targets including involves the automation of electoral processes and the geo-coordinates of all 25% of polling stations.<sup>27</sup>

<sup>25</sup> ld., at 18.

<sup>&</sup>lt;sup>26</sup> Third Medium Term Plan 2018 – 2022 Transforming Lives: Advancing socio-economic development through the "Big Four", Pg. 122 <a href="https://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/">https://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/</a> Visited on 19th 2021

<sup>&</sup>lt;sup>27</sup> http://monitoring.planning.go.ke/wpcontent/uploads/2019/07/MTPill%20Indicator%20Handbook%202019%20PC.pdf pg. 66 visited on 19<sup>th</sup> March 2021

### C. ADVISORY/RECOMMENDATIONS

### Scope of the Bill- Long title; Memorandum of Objects and Reasons

- 26. There appears to be some inconsistency between the long title of the Act and the name of the Bill. The long title provides that the Bill is for, "AN ACT of Parliament to provide for the conduct of political party primaries nomination of party list members; and for connected purposes". The Memorandum of objects also sets out the principal aim of the proposed law as putting in place 'a legal framework for the conduct of political party primary'. However, it goes on to state that the proposed law will also address the procedure for preparing party lists in accordance with the Constitution and the Elections Act.
- 27. Since 'party primary' has a very specific meaning (the process of selecting or electing candidates for a general election or by-election) it cannot be taken to include party lists. If the intention is to regulate both party primaries and party list nominations, it is proposed that the nomenclature used in the current regulatory framework be retained. The existing regulations which deal with both party primaries and party lists include a specific regulation on the application of the regulations which specifies their scope to include party primaries and party nomination of party lists.<sup>28</sup> This may also be worth adopting for clarity, particularly because the bulk of the provisions deal with party primaries. It is also noteworthy that despite the indication that party list nominations are also covered, there is scant reference to party list nominations compared to the scope of the 2017 rules.<sup>29</sup>

### Interpretation- Clause 2

28. The interpretation section of the Bill introduces the definition of the term 'aspirant' to mean a person who presents themselves for election in a party primary. This definition is critical since the existing legal framework only provides for candidates. Since a person can only be a candidate once their nomination papers have been accepted by the IEBC, the inclusion of this nomenclature is crucial to bringing persons intending to be nominated within the ambit of the law. However, since the law anticipates that one can become a candidate either by selection or election, this definition should be broadened to include persons who present themselves for selection through non-competitive party primaries.

<sup>&</sup>lt;sup>28</sup> Elections (Party Primaries and Party Lists) Regulations 2017, Legal Notice No. 69 of 2017, regulation 3. <sup>29</sup> Clause 33 (2) (b) appears to indicate that the intention is for the procedure for party list nomina tions to be prescribed in regulations rather than the proposed legislation. There is therefore need for clarity on the s∞pe of this Act.

### Guiding principles governing political party nominations- Clause 3

- **29.** KNCHR proposes an amendment to Clause 3 of the Guiding principles on management of political parties the inclusion of the following:
  - (a) "Prompt review, appeal and remedy to disputes"
- 30. This principle is of importance as it safeguards rights of aggrieved members of parties. A person who reports that their rights have been denied or violated during the party primary process should have a prompt, fair hearing and appeal, and the right to a speedy and effective solution. Such review should ensure voters the opportunity to find solutions and would allow voters to exercise their voting rights within the election timeframes
  - (b) "Access to information"
- **31.** KNCHR seeks to have this included as a principle since it is a way in which the party gains trust and integrity from the electorate by making information regarding their party functions and procedures open to the members of the public.
- 32. Political parties are to make information about the nomination process accessible for reliability and trustworthiness. Such information include the Party Constitution, Manifesto, nomination rules, party lists, voter or members register be made accessible to the public for verification. Similarly information relating the functions, operations and policies they should adopted in clear, pre-determined policies governing those functions of the party. Those policies should be based on objectively justifiable criteria that can be both easily accessed and understood, with clear information about how they are enforced. For instance, information on how a member wishing to declare interest in a political position or the information regarding the disciplinary procedures of the party regarding the breach of their code of conduct.
  - (c) "Voter or member education"
- 33. This principle should be included as it seeks to ensure that the members of the parties are informed and serves as a mechanism for disseminating the party rules, codes of conduct to their members and candidates. Voter education seeks to ensure informed and effective participation by the members of the party and provides an avenue for recruitment of new members to the party. In this context, voter education is viewed as a necessary component of democracy within political parties that will assist parties have embedded a culture of responsible political behaviour and accountability and also to attain consensus on critical party or societal/national issues.

### Political Party Structure- Part II (Clauses 4-9)

Separation of party organs conducting nominations and dispute resolution.

- 34. KNCHR welcomes the separation between the party organs that conduct the party primaries and the organs for the dispute resolution mechanism. This Chinese wall to address issues related to conflict of interest that may arise should the same body that undertakes the nomination exercise becomes the same one to determine disputes arising from the said nomination process.
- 35. Additionally, the KNCHR proposes that the appointment to the membership of any person to the party organs should be subjected to a criterion of eligibility and a vetting process before the appointment. We propose that there should be a provision for a vetting mechanism to ascertain the integrity of the members of the various organs boards. The creation of a clause to determine the criteria that disqualifies a member from being appointed to the organs or committees of the party is also key in order to standardise the criteria from which a member would be disqualified.
- **36.** In light of the above, we propose the addition of the following provisions to the bill: Amend Clause 4 (3) of the bill by inserting the following clause
  - "Members of the party organ shall be vetted and approved by the governing body or members of the party.
- 37. Amend Clause 4 by inserting the following:
  - "A member is disqualified from appointment as a party organ if the person:
  - a) Adjudged bankrupt
  - b) Convicted of an election offence
  - c) Has been a member of the IEBC
  - d) Is found unfit for public office by a court of law or to have contravened chapter six of the Constitution."

Membership and party lists

38. KNCHR welcomes the criteria on which memberships of political parties are to be determined. As political parties try to build large and broad-based membership as possible. The party primaries should be reflective of political parties that have recruited their members who are committed to their ideology and principles and who will be able to participate in party governance, policy formulation, campaigning and nomination or election of their leaders. By joining a political party, members of the public achieve a higher level of political participation than those who merely vote. Therefore, the level of membership in political parties among the voting population of a country is an important indicator of the political maturity of the people.

- 39. However, regardless of the nature or breadth of the membership base of a political party, the said membership should be verifiable and determinate. Memberships drawn from the grassroots, ward, Constituency, county, regional and national should be easily known and the lists of party members accessible at the various levels of the party structures to all members of the public.
- 40. During the 2017 party primaries, KNCHR noted with concern the manner in which membership lists of political parties were conducted. Indeed, what was glaring about the 2017 party primaries was the indeterminateness of membership of the parties. The Commission noted that Political parties were using the 2013 IEBC voter register and changing its membership. In its report, Commission recorded incidences of some parties using attendance lists as their membership registers. Incidences of double voting across political parties and within the political parties were also recorded. KNCHR observed that, Further The absence of political party registers and use of alternative ones like the 2013 IEBC registers meant that in the strict sense, those who voted in the 2017 primaries were not party members" and recommended to political parties inter alia to, "ensure that they have proper membership registers during party primaries".<sup>30</sup> Submission of membership list of the party to the IEBC within the stipulated timelines is critical to addressing this challenge. Section 28 of the Elections Act stipulates a period of atleast 120 days in the case of a General Election and 45 days before a by-elections

### Types of party primaries- Clause 10

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- 41. The interpretation section as read with clause 10 also makes a distinction between instances when the party candidate is elected by the party membership (competitive party primaries) and instances where the party candidate is selected through a delegation selected by the party membership (non-competitive party primaries). This appears to offer greater clarity on how a party may choose candidates for general elections. The current law provides for selection or election without requiring that the party membership be involved in the selection process. This opens the process to non-democratic practices and lack of transparency, contrary to the guiding principles of the process and the requirements of promotion of democracy set out for political parties in Article 91.
- 42. The process by which direct nominations have been awarded to party candidates in the past has not always been transparent. The requirement of members' participation in this process not only facilitates public participation as mandated by Article 10 of the Constitution but also makes the process more transparent. However, since clause 10 (3) allows for a party to formulate a process for choosing candidates outside of the two specified ones, by making reference to "such other process as may be specified in the party constitution or nomination rules", it is

<sup>&</sup>lt;sup>30</sup> KNCHR, <u>The Fallacious Vote</u> p 53.

important to safeguard **public participation** in such processes as well. Moreover, the law should require that the criteria on which the party settles on the procedure to be used be specified in the party constitution.<sup>31</sup>

43. Clause 10 (3) is a welcome addition to the legislative framework as it requires that where coalitions are formed, there be provision of the procedure for nomination of candidates in the coalition agreement. Some of the disputes settled by the PPDT in 2017 involved disputes between coalition partners where the manner of choosing candidates was not settled in the coalition agreement. However, given that nomination has a specified meaning under the Political Parties Act (process of submitting nomination documents to the IEBC), the Commission thus recommends that the clause be amended to read 'selecting or electing candidates' to align with the definition of party primary.

### Date of party primary- Clause 11

44. Clause 11 proposes that the IEBC require political parties, through publication of a notice, to conduct party primaries at least 90 days before a general election and at least 55 days before a by-election. The date on which the primaries are conducted for all political parties is proposed to be designated as a public holiday. The Commission welcomes this proposal as it is advantageous in two ways. Firstly, it alters the manner in which the time in set for primaries at present where parties designate the date and notify the IEBC of the same.<sup>32</sup> Secondly, by requiring that party primaries are conducted at least 90 days before a general election, this clause will create sufficient time for the party primaries and attendant dispute resolution processes, which will obviate the crisis created within the PPDT and the IEBC when party primaries are conducted too close to the general election. In some instances, directions given either by the PPDT or the courts could not be effected because the IEBC had already prepared ballot material by the time the decision of the adjudicating body was rendered.

### Party Primary notification- Clause 12

45. Clause 12 requires a political party to notify the IEBC of the date and type of party primary it has selected as well as availing the list of aspirants participating in the primary. Clause 16 also requires that the list of delegates to take part in the non-competitive primary is to be notified to the IEBC while notifying the IEBC of the mode of primary selected and that the mode of selecting delegates be specified in the party constitution or rules. This would allow the IEBC to actively and effectively

<sup>&</sup>lt;sup>31</sup> See for example regulation 7(3) of the Party Primaries and Party List Regulations of 2017 which requires that 'the criteria, procedure and circumstances under which non-competitive nomination methods, including direct nomination and consensus may be employed' be set out in the party nomination rules.

<sup>32</sup> Sec 31 (2 B) Elections Act 24 of 2011.

play its regulatory role under Article 88(1) (d) of the Constitution. The current regulatory framework limits the participation of the IEBC to setting the date for the primaries, publishing the names of aspirants, receiving nomination documents and solving disputes that may arise from nominations.<sup>33</sup>

### Membership Register- Clause 13

- 46. Some of the challenges that have constantly bedevilled the party primary process include the lack of credible voter registers as well failure to avail sufficient voting materials to party members.<sup>34</sup> Clauses 13-15 if adopted would compel political parties to maintain and update the party registers at all voting levels, to use these registers to determine eligibility to participate and to notify the public of the list of persons eligible to participate in the primaries. These parties would also be required to avail sufficient voting material for the primaries. Failure to use the party register is one of the offences created by clause 21.
- 47. One of the shortcomings of the current nomination process is the ability of the electoral management body to assess whether candidates have met the educational, ethical and moral requirements for election to office. Many cases challenging the eligibility of candidates for not meeting the educational requirements under section 22 of the Elections Act have gone unresolved by the courts.<sup>35</sup> It has been suggested that the IEBC is ill-equipped to handle such disputes. According to Justice Maraga CJ & P (as he then was) in his dissenting opinion in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*:<sup>36</sup>

[155] The second reason why, in my view, IEBC should not have exclusive jurisdiction to determine all pre-election nomination disputes has to do with its mandate. Given IEBC's core mandate, Article 88(4)(e) must be understood to vest it with jurisdiction to determine pre-election nomination disputes in a summary manner and determine the candidates whose names are to appear on the ballot papers in good time for the election. IEBC's primary function or mandate, as is clear from Article 88(4) of the Constitution and Section 4 of the IEBC Act, is the management of elections as well as referenda and not the settlement of electoral disputes. Its added function of settlement of electoral disputes under Article 88(4)(e) of the Constitution is collateral or ancillary to its

<sup>34</sup> See Kenya National Commission on Human Rights (KNCHR) 'The Fallacious Vote', (2018) 46; KNCHR'A Human Rights Monitoring Report on the 2017 Repeat Presidential Elections' (2017) 20.

<sup>&</sup>lt;sup>33</sup> Sec 31 Elections Act as read with Article 88 of the Constitution.

<sup>&</sup>lt;sup>35</sup> See for example *Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others* Voi Election Petition 1 of 2017 which was struck out to await the judgment of the High Court in a similar petition in *Ethics & Anti-corruption Commission v Granton Graham Samboja & Kenyatta University* Constitutional Petition No. 382 of 2017. The latter is pending to date. See also *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* Supreme Court Petition 7 of 2018 where the Supreme Court declined to address the issue of educational requirements of the Wajir governor, who had been found unqualified to hold office by the High Court and the Court of Appeal, asserting it ought to have been dealt with in the pre-election stage.

<sup>36</sup> Supreme Court Petition 7 of 2018.

said primary function. It does not even have enough time for this additional function. Look at the following scenario.

[156] Sixty days prior to any general election, IEBC runs a frenetic schedule of activities. The Elections Act, (Sections 14(1), 16(1), 17(1) and 19(1)), requires IEBC to "publish a notice of the holding of the election in the Gazette and in electronic and print media of national circulation... at least sixty days before the date of the election." After that publication, the PPDT has 30 days to resolve intra-party nomination disputes before the political parties present the names of their respective candidates for election to the six electoral positions. That leaves IEBC with only 30 days to complete the nomination process of one Presidential position; 47 gubernatorial positions; 47 senatorial positions; 290 parliamentary positions; 47 women representative positions; about 1860 MCA positions; and party lists for several other positions. All these activities are besides IEBC's role of ensuring that the Voters Register is revised and up-dated and the tendering for and printing of the ballot papers is completed in good time. That is why, under Section 74(2) of the Elections Act, IEBC has only ten (10) days to settle preelection nomination disputes. It is common knowledge that it employs a summary procedure in the determination of those disputes

### Vetting of Aspirants- Clause 17

48. Clause 17 proposes to include political parties in the process of vetting aspirants by requiring candidates to supply proof of educational requirements and a self-declaration form under the Leadership and Integrity Act alongside proof of payment of nomination fees and their identification document. While this inclusion is laudable, it raises questions as to the capacity of political parties to assess the genuineness of educational qualification documents presented by aspirants. It is noteworthy that the bulk of cases on this issue have turned on the question of authenticity of educational qualification documents and ethical issues.<sup>37</sup> Further guidance may need to be given to political parties in this regard; for example, requiring that in addition to the qualifications, the aspirants provide proof of authenticity from regulatory body such as the Commission for University Education and the Kenya National Qualifications Authority.

### Submission of List of Aspirants- Clause 18

**49.** Clause 18 appears redundant. It refers to the requirement for submission of the list of aspirants for party primaries to the IEBC 21 days before the primary, which

<sup>&</sup>lt;sup>37</sup> See L Thuo Compendium of 2017 Election Petitions Volume 4: Select Decisions, Issues and Themes Arising From the 2017 Elections in Kenya (International Commission of Jurists, Nairobi 2019) 310 ff.

is already provided for in clause 12. It also refers to section 15 (2) which does not exist. It is proposed that clause 18 (2) be moved to become clause 12 (2).

### Dispute resolution- Clause 19

Previously party primaries were not provided for in the Political Parties Act. It was therefore not clear who between the IEBC and the PPDT had the mandate of resolving dispute arising from party primaries. This created an unfortunate situation where aspirants would forum shop in an attempt to secure favourable outcomes.

- 50. The Commission welcomes this provision stipulating the timeframe for resolving disputes arising from party primaries. It requires any disputes to be filed with the internal dispute resolution mechanism (IDRM) within 3 days of the primary. This provides greater clarity to section 40 (2) of the Political Parties Act. While section 40 (1) had been amended in 2016 to include party primary disputes in the category of disputes within the jurisdiction of the Tribunal, party primary disputes were not included in those categories of disputes required to be subjected to IDRM as a precondition for accessing the PPDT in section 40 (2). It is now clear that party primaries are subject to IDRM. The IDRM is required to hear and determine a complaint within thirty days of the filing of the complaint. This clause also facilitates the review of decisions of the IDRM as the proceedings and reasons for the decision of the IDRM are required to be in writing.
  - 51. The Clause also clarifies the relationship between IDRM and the PPDT. It provides that one may appeal against the decision of the IDRM to the PPDT. This clarifies that in the context of party primaries, the PPDT sits on appeal rather than being a court of first instance. This was not clear in the 2017 elections. To avoid instances where nomination decisions are reversed by the PPDT but not effected by the IEBC, this clause also freezes the process of forwarding the names of persons where primaries are challenged, until the decision of the PPDT is rendered.
  - **52.** In respect to dispute resolution, the Political Parties Act provides that all political parties must provide for internal dispute resolution mechanism. However, the Act does not clearly state the content of the contemplated internal mechanism. However, Articles 91 and 92 of the Constitution and the provisions of the Elections Act suggest that such mechanisms should abide by democratic principles of good governance, namely political participation by all people, promotes human rights and promotes the objectives of the constitution and the rule of law. <sup>38</sup>

<sup>&</sup>lt;sup>38</sup> Pre-election Dispute Management: Between Judicial and Administrative Dispute Management Mechanisms

http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/

- 53. While political parties have established various committees of dispute resolution, the lack of standardisation has exposed gaps which in previous exercises have pointed to inability of some mechanism to effectively resolve the disputes that occur during nominations. This is going by the numerous appeals that were lodged to the IEBC Dispute Resolution Committee and the Political Parties Dispute tribunal.
- 54. KNCHR welcomes the qualifications criteria for the chairperson of the Dispute resolution organs within the parties as they would go a long way to standardise the dispute resolution organs of all the political parties. However, lowering the academic qualification to at least form four of the member of the Dispute resolution organ may to some extent reduce the quality of membership and by extension the determinations of the dispute organs. This is light of the fact that, some political parties have devolved their dispute resolution organs to the County, and Constituencies. KNCHR recommends that, criteria and standard for the Chairperson should be maintained at all levels of dispute resolution. The Commission opines that that the member qualification should be enhanced to a degree qualification. This should enable the members engage at the complexities of dispute resolution including Alternative Dispute resolution procedures.
- 55. The procedures of the dispute resolutions should be clear, structured and transparent that also provides adequate time for hearing and determination of the matters and also adheres to the rules of natural justice. The timelines for considering appeals were too short for disputants to articulate and prosecute their matters. In some political parties, members have as little as 48 hours to file their appeals and the tribunal to determine their outcomes in 48 hours was not conducive for the resolution of disputes.
- **56.** KNCHR proposes that the bill makes provisions for parties to develop procedures for lodging complaints in compliance to the rules of natural justice and our Constitution and statutory provisions. To this end we recommend the amendment of Clause 8 by inserting the following provision:
  - (6)"A party shall develop practice procedures for the determination of disputes based on principles of natural justice"

Consideration for Women and Special interest groups

57. In determining who a would be categorised as a nominee for Special interest groups, the Courts determined this issue and noted "the nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to times any special interests may emerge in future and which the political party may consider require representation." Thus IEBC, in formulating its guidelines, left it to the parties to define the special

interests and to indicate in their respective party lists the special kind of interests the person so nominated represented.<sup>39</sup>

- 58. The courts further have reiterated the fact that the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties. The role of IEBC in conducting and supervising the elections of seats as per Article 90 of the Constitution is merely to accept party lists, and to ensure that the provisions of the statute are adhered to. This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. IEBC is not supposed to micro-manage the process or enter into the internal affairs of the Political Parties. Where the Political Parties fail to comply with the regulations in the nomination processes, the aggrieved Party has recourse in the PPDT.<sup>40</sup>
- 59. A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the "elections" for these special seats. In the event of non-compliance by political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh list or by amending the list already submitted."<sup>41</sup> Nonetheless, it imposes on the IEBC an obligation to ensure that the lists submitted by the parties also comply with the Constitution and with statutory provisions that promote the rights of persons with disability and marginalised groups and generally promote community and cultural diversity within the County.

### Submission of particulars to the Commission- Clause 20

60. The Clause deals with party lists. It does not however provide for the timelines within which the particulars of nominees to the party list are to be submitted to the IEBC but makes reference to sections 13 and 35 of the Elections Act stating as follows: "A political party shall submit to the Commission particulars of a nominated candidate for an election or inclusion in the party list in accordance with sections 13 and 35 of the Elections Act". This means the timelines remain those stipulated by section 35 of the Elections Act which provide that, "A political party shall submit its party list to the Commission at least forty-five days before the date of the general election".

The Commission highly recommends that the clause be revised and provision made to have both the party list and party primary nominees submitted to the IEBC

<sup>&</sup>lt;sup>39</sup> Micah Kigen and 2 Others v Attorney General and 2 Others Nairobi Petition No. 268 and 398 of 2012 [2012] eKLR. http://kenyalaw.org/caselaw/cases/view/85078/.

<sup>&</sup>lt;sup>40</sup> National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] eKLR Petition No. 147 of 2013 available at <a href="http://kenyalaw.org/caselaw/cases/view/87523">http://kenyalaw.org/caselaw/cases/view/87523</a>.

<sup>41</sup> National Gender and Equality Commission (NGEC) v Independent Electoral & Boundaries Commission (IEBC) & 3 others [2018] eKLR Petition available at <a href="http://kenyalaw.org/caselaw/cases/view/151912/">http://kenyalaw.org/caselaw/cases/view/151912/</a>

simultaneously. In the alternative, that the party list must be submitted first. This would cure the mischief witnessed previously whereby the party list is used to reward party cronies who lose in party primaries, contrary to the intention of the framers of the Constitution.<sup>42</sup>

- 61. Furthermore, the Commission proposes that party lists should adhere to 50% women and 50% men, adopting the zebra model, alternating the genders on party lists and proposes that Political Parties nominate at least 30% women candidates for all positions, especially in their strongholds, where they have higher chances of winning the seats. In the case of Katiba Institute v Independent Electoral & Boundaries Commission,43 the High Court in a judgment dated 20 April 2017 held that political parties are bound by the two thirds gender rule. That, "Political Parties are bound by the provisions of Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the Constitution and hence any action under taken by them, including nomination process for candidates for members of parliament, must comply with the requirements of those provisions". The High Court ordered Political parties to, "take measures to formulate rules and regulations for purposes of actualizing the two-third gender principle during nominations for the 290-constituency based elective positions for members of National Assembly and 47-County based elective positions for the members of Senate within SIX months from the date of [the] judgment". In the event political parties failed to comply with this order, the Court directed the IEBC to, "devise an administrative mechanism to ensure that the twothird gender principle was realized among Political Parties". The directive was suspended to begin operation after the August 2017 General elections.
- **62.** One of the ways to achieve gender parity in political representation is to have as many members of the disadvantaged gender- women for now be elected during the polls. This can only be possible if the structure at the political primaries is conducive and indeed has affirmative action mechanisms to ensure SIGs end up on the ballot paper. The false myth that SIGs are only reserved for party lists and not party primaries needs to be debunked. Indeed, it has been reported that women in particular have been previously intimidated to drop out of contesting elective positions in favour of men or with the promise of a nominated slot.<sup>44</sup>

<sup>&</sup>lt;sup>42</sup> See for example Kennedy Kimanthi 'IEBC audit report reveals big flaws in nominated MCAs list nation.co.ke/kenya/news/iebc-audit-report-reveals-big-flaws-in-nominated-mcas-list-101070 accessed 3 August 2020; NDI & FIDA reported that women in particular were often intimidated to drop out of contesting elective positions in favour of men or with the promise of a nominated slot, which promises were sometimes not honoured. See National Democratic Institute & Federation of Women Lawyers 'A Gender Analysis of the 2017 Kenya General Elections' (2018) 9 & 37.

<sup>&</sup>lt;sup>43</sup> High Court of Kenya, *Katiba Institute v Independent Electoral & Boundaries Commission [2017] eKLR*, Constitutional Petition No. 19 of 2017, Judgement, 20 April 2017, available at <a href="http://kenyalaw.org/caselaw/cases/view/144567/">http://kenyalaw.org/caselaw/cases/view/144567/</a> para. 85.

<sup>&</sup>lt;sup>44</sup> See National Democratic Institute & Federation of Women Lawyers 'A Gender Analysis of the 2017 Kenya General Elections' (2018) 9 & 37.

### Financing for political parties nominations

- 63. For the party primaries to be conducted effectively, the Political party financing becomes a critical aspect and concern. Parties need sufficient and sustained financing to perform their functions, especially in the management of the nominations exercise such as the provision of election material, preparation and dissemination of party members register, incorporation of ICT gadgets, Ballot boxes ballot papers, provision of security, hiring of election centres among.
- **64.** KNCHR thus proposes that political parties could receive direct funding from government; or incentives; apart from the membership fees; voluntary contributions; donations. The funds should be allocated to all political parties participating in the party primaries in order to level the playing field and enhance the active participation of voters in the primaries.

### Offences Relating to Party Primaries- Part IV (Clauses 21-27)

- 65. Part IV which creates offences relating to party primaries is a welcome addition to the legislative framework as it provides means of holding persons accountable for violations during party primaries. The current legal framework (the 2017 Regulations) extends the provisions of the Election Offences Act. Regulation 28 provides that the contravention of the Election Offences Act and the Electoral Code of €onduct shall constitute election malpractices in respect of party primaries and party list nominations. This may have been inadequate for the 2017 elections as many incidents of electoral malpractice were recorded.⁴⁵
- 66. While the KNCHR welcomes the creation of the offences in the bill, we are of the view that the stiff penalties should be reviewed downwards to correspond to similar offences under the Penal Code and the Election Offences Act. The sentencing and policy guidelines should enable the court exercise their discretion and issue a fine accordingly.
- **67.** Additionally, Article 49 of the Constitution expressly makes provision for the avoidance of remanding persons charged with offences whose punishment is imprisonment of a period not more than six months. It is our view that these offences are categorised as petty and non-custodial sentences are encouraged to reduce the congestion of prisons.

### Nomination fees- Clause 28

**68.** The Clause sets out the parameters for nomination fees for both party primaries and party list nominations. While the current regulatory framework gives discretion

<sup>&</sup>lt;sup>45</sup> See Kenya National Commission on Human Rights (KNCHR) 'The Fallacious Vote',(2018) 46; KNCHR'A Human Rights Monitoring Report on the 2017 Repeat Presidential Elections' (2017) 19 ff.

to parties to set nomination fees, the Bill proposes to set caps for nomination which are graduated based on the elective position contested. It also proposes to elevate to principal legislation the status the affirmative action measure that requires political parties to charge no more than half of the nomination fees for candidates from marginalised groups.<sup>46</sup> This is a welcome addition.

### Civic Education and Accreditation of Institutions - Clauses 30 and 31

69. These provisions expand on the role of the IEBC in relation to party primaries. They provide for the role of the IEBC in conducting civic education and at the request of a party, to conduct party primaries on their behalf. Where so accredited by the Registrar, an institution may be outsourced either by the IEBC to carry out civic education or to conduct a primary on behalf of a party. This addresses instances when the IEBC, as noted by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*<sup>47</sup> when the frenetic schedule run by the IEBC does not allow it to play these roles. Allowing for the outsourcing of these roles when the IEBC is unable to effectively carry them out safeguards the integrity of these processes.

### Special Interest Groups- Clause 32

70. The Commission lauds the inclusion of this provision which seeks to facilitate the participation of persons with disabilities in party primaries. The provision proposes to require parties to put in place affirmative action measures, including ensuring that information and venues for party primaries are easily accessible and providing assisted voting during the primaries. However, reports from the 2017 elections indicate that when it comes to the participation of marginalised groups, it is difficult to assess measures taken by political parties without requiring that political parties plan and budget for and account for how their resources have been used to promote the participation of marginalised groups. The Commission therefore recommends an attendant amendment to the Political Parties Act requiring proof of a plan and/or budgetary allocation for affirmation action/inclusion efforts, which would then offer a basis for evaluation/audit by the Registrar of Political Parties. This may also require some training/capacity building efforts for political parties by the ORPP and organisations representing marginalised groups on how to plan for inclusion activities that meet the needs of the diverse marginalised groups.<sup>48</sup>

<sup>&</sup>lt;sup>46</sup> This is currently provided for in the Elections (General) Regulations, 2012 Regulations 19, 25, 29, 33 and 37

<sup>37.</sup>  $^{47}$  Supreme Court Petition 7 of 2018, para 156.

<sup>&</sup>lt;sup>48</sup> Research by the Centre for Multiparty Democracy indicates that parties also lack guidance on how to plan and account for the 15% of funds from the PPF to be designated for marginalised groups. This gives political parties an excuse for failure to implement the provisions of section 25 of the PPA. It recommends training for parties on how to plan for activities for inclusion. See Centre for Multiparty Democracy 'Political Parties' Utilization of the Political Parties' Fund (PPF) to Promote Political Participation of Marginalized and Minority Groups in Kenya' (2020) 9,14.

71. As an incentive to increasing the participation of persons with disabilities and other SIGs as candidates, KNCHR proposes that Parties should reduce or waive nomination fees for persons with disabilities or additionally provide financial support to counteract their disadvantaged socioeconomic conditions, as part of the affirmative action, to encourage women to vie for seats. Political parties should equip them with special political funding, including that which provided for in the Political Parties Act 2011, to empower them run successful campaigns.

### Regulations- Clause 33

72. This is a welcome contingency provision as it retains to the IEBC the power to make regulations to better give effect to the proposed law's provisions. These regulations include the conduct of party primaries, the procedure for nomination of special seats, the use of technology in primaries, to prescribe forms, to require any details required by the proposed Act and accredit institutions for civic education and awareness on party primaries. It is proposed that accreditation of institutions to carry out party primaries on behalf of a political party be added to this list in line with clause 31.

### **Proposed additional Provisions**

- 73. The Commission proposes that provisions be added to the Bill regulating the following pertinent matters:
  - I. Submission of nomination rules of a political party: While acknowledging provisions on this under section 27 of the Elections Act and Rule 6 of the 2017 Rules, the Commission highly recommends that this being a core element of party primaries, that it must not be missed in the present stand-alone legislation. Indeed, this has been one of the mischief areas in previous elections. The timely submission of the nomination rules to the IEBC and making the same available to the public is crucial for accountability purposes and forms the framework under which compliance may be monitored.
  - II. **Technology:** Provision for the adoption of information technologies which promise a more efficient electoral processes and can be used to verify the identity of voters and to tabulate vote counts.
- III. Pandemic situations: The bill should also be cognisant of the unprecedented times we live in and respond to the manner in which pandemics can have an impact on the party primaries. To this end, provisions related to the adherence to health guidelines for the managing of the pandemics such as COVID 19 and any other pandemics should be made available.

- IV. Polling officials: Political parties should endeavor to recruit and deploy duly credited, properly trained and qualified party/polling officials to all polling stations and the various tallying centers. These officials should be deployed in time to enable them effectively and efficiently discharge their duties.<sup>49</sup>
- V. Defined polling stations: Political parties must not shift polling centers on short notice and also avoid amalgamating polling stations so as to avoid confusing the voters. This lack of defined polling centers not only denies people the right to participate in the primaries but also creates lethargy among voters leading to trivialization of the whole exercise.<sup>50</sup>
- VI. Deterrence of violence and misuse of public resources: KNCHR welcomes the measures to ensure that the party sets mechanisms to deter incidents of electoral violence, hate speech, bribery. We note however that the misuse of public resources and public-school grounds, the misuse of children and disruption of learning among others should also be prohibited within the bill. In addition, the KNCHR recommends the sustained collaboration between the Political Parties Liaison Committees<sup>51</sup> and Peace Committees<sup>52</sup> at various levels at ward, Constituency, County and National to ensure that early warning and response mechanism are put in place to curb any election related violence
- VII. **Diaspora voters and prisoners:** In response to the courts determining the rights of prisoners<sup>53</sup> and Kenyan citizens in the diaspora<sup>54</sup> to vote as fundamental and inalienable, provisions should be made within the bill to enable this category of voters actively participate in the party primaries.
- VIII. Relevant legislation: The Commission further wishes to draw attention to the Representation of Special Interest Groups Laws (Amendment) Bill, 2019, which was passed by the National Assembly on 11th march 2020. The Bill was made pursuant to Article 100 and seeks to enhance the representation of marginalised groups, some of which provisions may also have a bearing on some provisions on special interest groups presented in the present Party Primaries Bill.

<sup>50</sup> KNCHR, The Fallacious Vote p 54.

<sup>&</sup>lt;sup>49</sup> KNCHR, The Fallacious Vote p 53.

<sup>&</sup>lt;sup>51</sup> Section 38 of the Political Parties Act establishes Political Parties Liaison Committees at the National and County levels so as to sustain structured dialogues between the IEBC, Registrar of Political Parties and Political parties and champion for free, fair, peaceful and transparent elections.

<sup>&</sup>lt;sup>52</sup> Peace Committees are committees established at various levels under the National Steering Committees on Peace Building and Conflict management under the Ministry of Interior and Coordination of National Government.

<sup>&</sup>lt;sup>53</sup> See Kituo Cha Sheria V Independent Electoral And Boundaries Commission & Another [2013] Eklr <a href="http://kenyalaw.org/caselaw/cases/view/87145">http://kenyalaw.org/caselaw/cases/view/87145</a>.

<sup>&</sup>lt;sup>54</sup>See Independent Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others [2015] eKLR <a href="http://kenyalaw.org/caselaw/cases/view/109734">http://kenyalaw.org/caselaw/cases/view/109734</a>.

### D. CONCLUSION

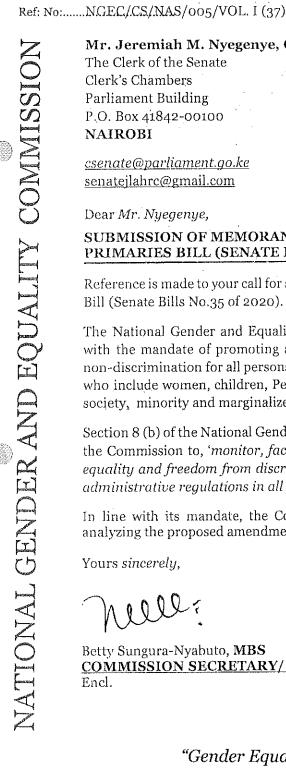
- 74. Political parties are important vehicles of electoral democracy in the country; they are gatekeepers to the electoral seats. The manner in which they conduct their primaries, therefore, must be accorded the requisite seriousness and sanctity. As independent associations, political parties are designed to largely conduct their internal party affairs freely and independently without unwarranted external interference. Even so, affairs of political parties must however strictly adhere to and operate within the wider confines set by the Constitution and the law.
- 75. The Kenya National Commission on Human Rights welcomes the enactment of a comprehensive framework for regulating the Party Primaries in Kenya through the Party Primaries Bill 2020. The Commission welcomes many of the provisions as they will strengthen the conduct of party primaries in Kenya, addressing a variety of challenges and chaos witnessed in elections of yester years. In so doing, it is hoped that this will secure political parties as the vehicles for enhancing electoral democracy and enjoyment of political rights secured under Article 38 of the Constitution. This is the starting point to making meaning of the principles of the electoral system entrenched under Article 81 of the Constitution.
- **76.** Nonetheless, the Commission has identified various gaps and made proposals which, if effected, will strengthen the legislative framework. We urge the House to keenly consider and effect these recommendations.
- 77. Even then, the Commission must point out that a sound legal framework though important but not enough. Implementation and enforcement has been identified to be a major gap in the previous elections. The Commission therefore calls on the electoral management body and the office of registrar of political parties to play their requisite roles in ensuring the implementation and adherence to the layed down legal framework governing not only party primaries and nominations but also the election process itself. The relevant committees of both Houses (in exercise of their oversight should (even though interested) be at the forefront to advocating for adherence of the laws they enact to govern elections.
- 78. That said, political parties in Kenya should strive to articulate their ideologies and develop concrete political programmes, as they establish national following so as to ensure we do not have a significant number of political parties serving as electoral vehicles, only heard of during the election time, with little known contacts in between elections.

79. The KNCHR notes the need to engage further with political parties in advance of elections to identify particular challenges as regards their roles in party primaries and devise solutions to better prepare for future elections. Indeed, there is need for concerted efforts by the political party leadership and stakeholders to work towards enforcing internal party democratic processes. The conduct of party primaries remains a key litmus of the maturity of party democracy and unless this part of the electoral process is streamlined, it threatens to remain the weakest link and hindrance to free and fair elections in the country.

Yours Sincerely,

Dr. Bernard Mogesa, PhD, CPM

Secretary to The Commission/Chief Executive Officer





When replying please quote

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31st March 2021

Mr. Jeremiah M. Nyegenye, CBS

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

csenate@parliament.go.ke senatejlahrc@gmail.com

Dear Mr. Nyegenye,

SUBMISSION OF MEMORANDUM ON THE POLITICAL PARTIES PRIMARIES BILL (SENATE BILLS NO.35 OF 2020)

Reference is made to your call for submission of memoranda on the Political Party Primaries Bill (Senate Bills No.35 of 2020).

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, 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 the enclosed memorandum analyzing the proposed amendments and making proposals where necessary.

Yours sincerely,

Betty Sungura-Nyabuto, MBS

COMMISSION SECRETARY/ CEO

Encl.

"Gender Equality and Non-Discrimination"





# MEMORANDUM ON THE POLITICAL PARTIES PRIMARIES BILL (SENATE BILLS NO.35 OF 2020)

Submitted to: csenate@parliament.go.ke cc. senatejlahrc@gmail.com

REMARKS	The Commission proposes that the clause should first establish the Governing Body, then provide for	the composition of the Governing body then the	which should be compliant. Clause 6 only provides	for the functions.		Clause 4 of the Bill provides for General principles	i.e.(The overview requirements)and that calls for	establishment of each organ, the composition	including compliance and the qualifications.		Clause 4 -Political Party Organs	(1) A political party shall, in accordance	with the Elections Act, the Political Parties	Act and this Act establish in its constitution	and nomination rules the following party	organs —	$a \mid (a)$ a governing body;	(b) An election board; and (c) an internal	dispute resolution organ.
PROVISIONS	The governing body of a political party shall, for purposes of this Act, be responsible for —	(a) the recruitment and appointment of persons	internal disputes resolution organ;	(b) appointing the authorized signatories to	nomination certificates;	(c) certification of the political party	membership register; (d) informing the	Commission and the Registrar of the type of	party primary to be conducted by the political	party;	(e) setting the date, time and venue of the party	primary;	(f) receiving the results and reports of the party	primary from the election board;	(g) submitting the list of nominated candidates	to the Commission; and	(h) submitting the party lists to the Commission		
CLAUSE	6.		-								Name of the last o		•						
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The clause should first establish the Internal Dispute Resolution Organ, then provide for the composition and finally the membership which will then tie in with compliance.	Internal dispute resolution organ 8. (1) A person is qualified for appointment as a chairperson of the internal dispute resolution organ of a political party if that person is an		ယ
t _ (0 Fi ]	(b) is eligible to vote at an election; (c) is not an aspirant in the party primary; (d) has not been convicted of an election offence; (e) satisfies the requirements of Chapter Six of the Constitution; (f) holds at least a certificate of secondary education; and (g) Meets such other requirements as may be specified in the constitution or rules of the political party.		
Clause 7 only gives the qualifications without providing for the composition which should be	. (1) A person is qualified for appointment as a member of the election board if that person — (a) is a member of the political party;	7	io
(a) to hold office in the party organs established under subsection (1); and (b) As authorised signatories to a nomination certificate.  (3) In making the appointments to a party organ under subsection (1), a political party shall ensure that— (a) a person is not a member of more than one organ; (b) at least one-third of the members of each party organ are of the opposite gender; and  (c) Special interest groups including persons with disability and the youth are represented. Political party			
(2) A political party shall appoint persons			

		advocate of the High Court of Kenya of at least five years and meets such other requirements as may be specified in the constitution or nomination rules of the political party.  (2) A person is qualified for appointment as a member of the internal dispute resolution organ if that person has at least a certificate of secondary education and meets such other requirements as may be specified in the constitution or nomination rules of the political party	
4	10.(1)	Types of party primaries	
		A political party shall provide in its party constitution and nomination rules the type of party primary to be used for identifying a candidate for an elective post or a party list.	A party has membership and by the time they register as members they find the constitution which already stipulates the type of party primary among other issues.
	·	(2) A party primary conducted by a political party may include —	Who or what organ decides on the type of party primary to be used to identify a candidate.
		(a) competitive party primary, (b) non-competitive party primary; or (c) Such other process as may be specified in the constitution or nomination rules of the political party.	There is a need to canvass more around this requirement because this provision could be a source of discontent among party members and elicit feelings of discrimination or unfairness.
		(3) A Political party that has entered into a coalition agreement shall provide in the agreement the procedure for nominating a candidate for an elective post.	The Commission proposes to amend the clause by inserting a new sub clause (4.) As follows -; (4) Political Parties shall submit the party nomination rules to the IEBC for approval.
			This will ensure the Parties are bound by their own rules.

c. The polling venue must be accessible to persons with physical disability and the materials in			
b. There are party members who have visual impairment and may not be able to access the posted list of members who are eligible. If the party's Register has disaggregated data, then such members will easily be identified and information relayed to them in accessible format.	(b) post in a conspicuous place within the polling venue the list of members eligible to vote at that venue; and		
The party must ensure that there is inclusivity and meaningful participation by persons with disability.	A political party that intends to conduct a competitive party primary shall  (a) use the party membership register certified by the governing body;		
	Competitive party primary.	15	6.
	(3) The membership register of a political party shall be accessible to members of the public.		-
	(d) Ward register in respect of every Ward.		
terms of age, categories of disability, ethnicity and gender.	<ul><li>(b) county register in respect of every county;</li><li>(c) constituency register in respect of every</li></ul>		•
(4)The Register shall have disaggregated data in	(a) national register;		
The Commission proposes to amend by inserting	Political Parties Act, the register of members		
This list should also be posted on its website	(2) Notwithstanding the requirements	•	
i.e. (3) The membership register of a political party shall be <b>in</b> accessible <b>format</b> to members of the public	register of its members in accordance with Section 17 (1) (a) of the Political Parties Act.		
by inserting between the word "be" and "to" the word "format"	(1) A political party shall maintain an updated		
The Commission proposes to amend Section 13 (3)	13 Membership register	13	ပ္၊

		:[[	F
		(c) Provide at each polling venue polling materials including — (i) ballot papers; (ii) ballot boxes; (iii) membership Register; (iv) pens; and (v) party primary election result slips.	accessible format for persons with visual impairment.
7.	17	Vetting of aspirants 7. (1) A person who intends to contest in a party	We proposed an insertion of a new sub -clause (e)as follows-;
		declaration form as prescribed under the First Schedule together with—	(e) A valid disability Registration card if the
		(a) the aspirant's academic qualifications; (b) a copy of a national identity card or passport;	aspirant is a person with disability.
		the Leadership and Integrity Act; and (d) proof of payment of the nomination fees.	
×.	32(1).	Special interest groups	This is commendable as it ensures meaningful inclusion and participation however it is not very
		(1) A political party shall put in place and implement affirmative action measures to	clear in which party document the affirmative measures will be provided for
		promote the inclusion of special interest groups	The Commission also notes that the provisions of
		in party primary.	this clause do not consider the process of nomination for the reserved seats for special
		subsection (1) shall include —	interest groups who are also recognized as
		(a) ensuring party information and party	membership of the houses in Articles 97, 98 and 177 of the Constitution
		with disabilities; and	
			Article 100 requires Parliament to enact legislation
		usability to vote untilig a party prilliary.	special interest groups and so far there is no
			legislated method of implementing the Article.
			The proposed Bill envisages to bring order in the Political Party Primaries and as per the Preamble the Act is to provide for the conduct of political

## General Comment

competitively elect someone of their own choice to represent them at designated levels. nomination processes for both elective and nominative positions. This will also allow the special interest groups to electoral college framework. Rationale: The framework proposed herein will ensure inclusion and fairness in the Art 90 (2) of the COK provides that the Independent Electoral and Boundaries Commission shall be responsible for the interest groups at both national and county levels. The Commission is happy to present to your committee the model that would allow IEBC to sufficiently conduct and supervise. This involves establishment of Electoral Colleges for special the members of county assemblies under 177 (1) (b) and (c). The Commission proposes an effective strategy and mechanisms conduct and supervision of elections for seats provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for



## NATIONAL WOMEN STEERING COMMITTEE

WE makes ME stronger

Mr. Jeremiah Nyegenye The Clerk of the Senate Parliament of Kenya P.O Box 41842-00100 Nairobi.

31st March, 2021

## RE: MEMORANDUM OF THE NATIONAL WOMEN STEERING COMMITTEE-NWSC TO THE SENATE ON THE POLITICAL PARTY PRIMARIES BILL, 2020

## About the NWSC-National Women Steering Committee

The National Women Steering Committee-NWSC, is a coalition platform that brings together individuals and organizations working for women's political and economic emancipation. The platform brings the women together from the county level to the national level united to bring value, voice and strength in our work in leadership and development. The NWSC platform aims to translate women's numerical strength into greater bargaining power for the socio-cultural, political and economic transformative change within women's spheres of influence and is united on the irreducible minimums that bring women out of political and economic exclusion. Currently the membership of the NWSC comprises over 100 organizations from the County to the National level.

On the political front, the coalition has been effective in raising awareness on women's constitutionally guaranteed political rights and enabling women claim those rights as well as supporting women actively hold the line while participating in leadership and decision making spaces from the local to the national levels.

## Introduction

The Constitution of Kenya 2010 in its preamble celebrates the diversity of Kenyans and the Kenyan values of human rights, equality, freedom, democracy, social justice and the rule of law. In Chapter four, Article 27, it guarantees all citizens equality and freedom from discrimination, which includes the equal treatment of women and men, including the right to equal opportunities in the political, economic, cultural and social spheres. The Constitution further provides that the State or any person shall not discriminate directly or indirectly against any person on any grounds, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief,

4th floor All Africa Conference of Churches Complex, off Waiyaki Way.
P.O.BOX 943-00621 Nairobi.
Tel- 020-2664505, Email: nationalwomenke@gmail.com

culture, dress, language or birth. The Constitution is the supreme law of the land and it binds all persons and all State organs at both levels of government. It therefore, renders any law that is inconsistent with the Constitution void.

Article 2 of the Constitution of Kenya provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. Kenya is a party to several treaties that guarantee gender equity and gender equality. Key among these are: The International Covenant on Civil and Political Rights Convention on the Elimination of All forms of Discrimination against Women, 1981 (CEDAW), the Banjul Charter and East Africa Community Treaty, 1999. In particular, Article 7 of CEDAW acceded to by Kenya on 9th March 1984 requires the State to take all appropriate measures to eliminate discrimination against women in political and public life and in particular to ensure that women enjoy equal terms with men, which includes the right to participate in the formation of government policy and the implementation thereof and... to hold public office and perform all public functions at all levels of government. Likewise, Kenya is a signatory to the Beijing Declaration and Platform for Action, 1995 calling on the governments to take measures to ensure women's equal access and full participation in power structures and decision-making, as well as to increase women's capacity to participate in decision-making and leadership.

On women's political participation, Article 38 of the Constitution of Kenya 2010 provides for the rights of any adult Kenya citizen to be registered as a voter, vote by secret ballot in any election or referendum, to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. However, systemic and structural hindrances have barred Kenyan women from fully and effectively participating in electoral and political processes towards governance positions.

Cognizant of the provision under Article 27 of the Constitution of Kenya 2010 which states that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, the National Women Steering committee would like to give input into the Political Parties Primary Bill 2020 which has been tabled in the Senate and is at the stage of public participation.

We therefore make our submissions and recommendations as follows:

## PART I— PRELIMINARY

## 3. b) ensure that the party primary is-

Recommendation: to insert an additional requirement to read;

Free from violence, intimidation and undue violence.

4(3) In making the appointments to a party organ under subsection (1), a political party shall ensure that—

Recommendation: to insert an additional requirement to read;

Regional diversity/representation is observed.

## PART II —POLITICAL PARTY STRUCTURES FOR THE CONDUCT OF PARTY PRIMARIES

4(3)(b) at least one-third of the members of each party organ are of the opposite gender;

Recommendation 1: To rephrase the sub-section to read;

(b) not more than two-thirds of the members of each party organ are of the same gender.

\*Note on the recommendation: It is important that the wording is in keeping with the Constitutional requirement to satisfy the not more than two-thirds gender principle in Articles 27(8), 81(b), & 177(b). To ensure this, we must begin by identifying the proportions. So what is not more two-thirds? Simple arithmetic: 100 divide by 3 multiply by 2=66.6 percent; we submit that if we proceed to round up the number to the nearest that is 67 percent we offend the gender principle because the measure surpasses the two-thirds therefore offending the NOT MORE than two-thirds principle. The only logical way of complying with the Constitution especially in view of Article 27(8) which makes it a non derogable right, is by lowering the percentage to the whole and leaving out the fraction (.6). Therefore, taking the not more than two-thirds as 66 percent and the minimum percentage as 34 percent.

The law does not frown on the excluded gender being above one-third but frowns, in fact prohibits more than two-thirds of any gender. Having 67 percent of any gender in elective or appointive positions is out rightly unconstitutional where's having 34 percent or 40 percent or even 50 percent of any gender is lawful. The constitutional minimum and maximum limits are to start us off on the journey to equality. Not getting this bare minimum undermines the constitutional principles of inclusiveness, non-discrimination and gender equality and the human rights of the excluded gender.

Recommendation 2: To introduce a new clause that reads;

"A political party list shall have an appropriate number of qualified candidates and alternates between male and female aspirants".

Recommendation 3: To introduce a new clause that will read;

A political party shall submit an updated and accurate party membership list to the Independent Electoral and Boundaries Commission and the Office of the Registrar of Political Parties at least 4 months before the general election or a by-election.

5. (1) A political party shall submit to the Commission and the Registrar information on persons holding office in the party organs and the authorised signatories at least thirty days before the political party conducts a party primary.

Recommendation: We recommend that that the timeline be amended to at least 3 months so that the people holding office are not just members but are conversant with party policies and procedures and to also avoid last minute changes which may not be transparent.

- 6. The governing body of a political party shall, for purposes of this Act, be responsible for —
- (c) certification of the political party membership register;
- (d) informing the Commission and the Registrar of the type of party primary to be conducted by the political party;
- (e) setting the date, time and venue of the party primary;
- (f) receiving the results and reports of the party primary from the election board;

Recommendation: The above should be the role of the election board of the party to avoid undue influence and interference.

8. (1) A person is qualified for appointment as a chairperson of the internal dispute resolution organ of a political party if that person is an advocate of the High Court of Kenya of at least five years and meets such other requirements as may be specified in the constitution or nomination rules of the political party.

Recommendation: The position should be open to other people too besides lawyers as long as they understand the party rules and are fair in the execution of their role. We recommend that persons who are certified arbitrators of at least five years standing who may not necessarily be lawyers be considered for this position and any other persons who are well versed in dispute resolution matters with at least five years experience in the role.

8. (3) A person is not qualified for appointment as chairperson or member of the internal dispute resolution organ if the person participated as an aspirant in the party primary immediately preceding the dispute

Recommendation: Delete this clause as the organ should be in place before the party primaries.

Other Recommendations under Article 8:

Recommendation 1: Insert a new clause indicating that the dispute resolution organs should be free from conflict of interest, nepotism, cronyism and such other conflicts as provided for in Chapter 6 of the Constitution of Kenya 2010.

Recommendation 2: Insert a new clause directing that dispute resolution should take place within 14 days and should be complete at least a month before a general election or a by-election.

## PART III — CONDUCT OF PARTY PRIMARIES

11. (3) The day or days specified by the Commission for the conduct of party primaries for a general election under subsection (1) shall be a public holiday.

Recommendation: To add a directive that all parties be bound by this provision and must therefore conduct their party primaries on the same day to make enforcement of this clause practical.

Recommendation 2: To add a directive that the political party should notify its members of the venue and other logistics of the party primaries at least fourteen days before the date of the party primaries.

11. (4) An employer or any person in charge of an employee who is a member of a political party that is undertaking a party primary for a by-election shall permit that employee to participate in the relevant party primary on the day or days specified under subsection (1).

Recommendation: To provide clarity on how this will be achieved.

- 15. A political party that intends to conduct a competitive party primary shall Competitive party primary. The Political Party Primaries Bill, 2020 869
- (a) use the party membership register certified by the governing body;

Recommendation: to edit the clause to read;

- (a) use the party membership register certified by the ORPP and the political party elections board;
- 19. (1) An aspirant or a member of a political party may file a complaint with the internal dispute resolution organ within three days of the declaration of party primary results on the ground that the party primary did not comply with the Constitution, this Act, the Elections Act, the Political Parties Act or any other written law.

Recommendation: to edit the clause to add compliance/adherence to the political party rules.

19. (2) The internal party dispute resolution organ shall hear and determine a complaint filed under subsection (1) within thirty days from the date the complaint was filed.

Recommendation 1: to edit the clause to provide for 14 days from the date the complaint is received as 30 days is too long and can greatly jeopardize the complainant's candidature.

Recommendation 2: To introduce a new clause to read;

The dispute resolution organ/ committee shall comply with the not more than two thirds gender principle.

## PART IV — OFFENCES RELATING TO PARTY PRIMARIES

## 23. A person who ---

Recommendation: to edit the clause to read;

23. A person or a party official who-

## 24. (1) A person who, directly or indirectly —

(a) uses or threatens to use any force, violence including sexual violence, restraint or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of —

Recommendation: to edit the clause to read;

(a) uses or threatens to use any force, violence including sexual violence, restraint or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick, deception or uses technology of any kind to defame, intimidate or character assassinate for the purpose of —

26. A person who, directly or indirectly inflicts or threatens to inflict injury, damage, harm or loss on or against a person during party primary

Recommendation: to edit the clause to make it more specific, to read;

26. A person who, directly or indirectly inflicts or threatens including through the use of technology for incitement to violence, hate speech, fake news, to inflict injury damage, harm or loss, on or against a person including threats or harm to property during party primary.

## PART V—MISCELLANEOUS PROVISIONS

30. (2) The Commission may outsource the service under subsection (1) to institutions accredited by the Registrar.

Recommendation:

To clarify which commission this is and to edit the clause to replace the commission with the Office of the Registrar of Political Parties-ORPP who are mandated to regulate political parties to ensure compliance with the Constitution and the Laws of Kenya.

31. (1) The Commission may accredit institutions to conduct party primaries on behalf of political parties.

Recommendation:

To edit the clause to replace the commission with ORPP who are mandated with this.

## 31. (2) A political party may at its own cost hire an institution accredited under subsection (1) to conduct a party primary.

Recommendation: To offer clarity on which institutions or what type of institutions would qualify for such accreditation.

In addition, include that a political party shall provide for the accreditation of observers.

## 32. (1) A political party shall put in place and implement affirmative action measures to promote the inclusion of special interest groups in party primary.

Recommendation: To offer clarity on which special interest groups this clause is referring to. The Constitution of Kenya 2010 recognizes marginalized groups and not special interest groups.

## 32. (2) (b) provision of assistance to persons with disability to vote during a party primary.

Recommendation: To offer clarity on what support for which groups such as the visually impaired an those with hearing impairment. We recommend the use of braille and assistance for the hearing impaired such as sign language interpreters.

## 33. (2) (b) provide for the procedure of nomination of special seats under party lists;

Recommendation 1: To give a directive on Electoral Colleges for the marginalized groups.

Recommendation 2: To introduce a new clause to read;

:30

Political Parties will be required to have Electoral Colleges to select candidates for positions that are to be filled by women, youth and persons with disabilities. Further, we recommend that not more than two thirds of the electoral college shall be of the same gender except for women colleges.

\*Note on the recommendation: Political Parties are notorious for using the provisions for marginalised groups to reward relatives and cronies of senior party officials and ignoring party members of the women, youth and PWDs leagues. There has been contention even from party supporters that nominations have been abused by party officials to reward people who have not committed to or worked for the party. To address this issue, Political Parties should be required to allow each respective league of the party to form Electoral Colleges and to select the candidates from among their rank and file. That way there will be fairness and fair representation of the marginalised groups.

## 33. (2) (f) accredit institutions for provision of civic education and awareness related to party primary.

Recommendation: To edit the clause to include accreditation of election observers. To also ensure that civic education and awareness is carried out by the ORPP

Submitted by the		en steering co.	
On the 31st of Mai	ch 2021.		



## ORANGE DEMOCRATIC MOVEMENT

## 31st March 2021

JEREMIAH M. NYEGENYE, CBS Clerk of the Senate P.O Box 41842 – 00100 NAIROBI

Email: senatejlachrc@gmail.com, csenate@parliament.go.ke

Dear Sir,

## RE: MEMORANDA ON THE POLITICAL PARTY PRIMARIES BILL, 2020

The Orange Democratic Movement (ODM) Party appreciates this opportunity to make representations on the content of the Political Parties Primaries Bill, 2020.

The Bill introduced in Senate seeks to:

- i) Put in place a legal framework for the conduct of political party primaries;
- ii) Set out the procedure to be followed in the conduct of party primaries for purposes of identifying candidates to stand for election as well as preparing Party Lists as required under the law.

We believe that the Bill will streamline the conduct of Party Primaries in the country. There are some progressive provisions in the Bill if fully implemented by political parties will help to stem the confusion witnessed in past party primaries.

Equally, the Bill has some provisions that require fine tuning so as to enable a seamless process of conducting party primaries as highlighted below:

# TUKO TAYARI ORANGE DEMOCRATIC MOVEMENT

	TOOK / TITLE PIN DILL I TO VINCO	roposar/ recommendations
5 (1)	The Bill requires political parties to submit to the	Since the mandate to conduct elections
Submission of		is vested with the party's electoral body
		as set out in the Party Constitution,
particulars of office	holding office in party organs and the authorized	political parties should only submit the
holders to the	signatories at least 30 days before the Party conducts	names of persons holding office in that
		electoral body and the adminised
Commission	a harry brillian	Signatories and not bersons morning
		positions in other Party organs.
		The submission envisaged in this clause
		should only be to the Commission and
		not to the Registrar as these records are
		already filed with the Office of the
		Registrar of Political Parties.
6. Functions of the	The Bill lists the functions of the governing body to	The functions of the governing body as
governing body	include:-	well as those of the electoral body are
		clearly stipulated in the Party
	(d) informing the Commission and Registrar of the	Constitution and the Party Election and
		Nomination Rules.



# ORANGE DEMOCRATIC MOVEMENT

	type of party primary to be conducted by the political	
	party	The proposal in these provisions interfere
	with the date time and wente of the narty hody and will be a regine for chaos	with the cold mail has recipe for chaos
	(c) setting the tate, time and vehice of the party	body and will be a recipe for chaos.
	primary	This mandate should be left to the
		electoral body of the Party.
10 (2)	The Bill provides for two methods a Party can use in There are more than 2 methods of	There are more than 2 methods of
Ç	on direction its martin mimary - indiversal suffice as and	nomination and the restriction to only
	raity community its party primary - minorisal surrage and	two amounts to interference with party
Primaries	delegate system	internal operations and amounts to
		micromanaging of political parties and
		their conduct of their elections.
		The best case scenario should be to
		comply with the party constitution and
		its election rules and regulations.
11. Date of Party	Th	This rule is restrictive for the following
Disso	(1) the Commission shall specify the day or days	reasons:
rimitedy	upon which all political parties shall conduct	1. 3 months to elections is not
	party primaries;	adequate time for national parties
	(2) at least ninety days before the general election	to conduct credible party primary
		elections. This time should be
		extended to 'at least 6 months' to
	A COLOR OF THE PROPERTY OF THE	the date of elections and parties

## TUKO TAYAR

## ORANGE DEMOCRATIC MOVEMENT

time. deadline date for Party Primaries and What IEBC should do is to set the deliver credible elections in such short unrealistic timelines for conducting party Parliament and IEBC must not set primaries and expect political parties to Ņ If this language is agreed then starting deem fit. I think it would amount political parties may choose to resolution. adequate time for internal dispute including staggering elections and allowed bearer for the presidential ticket. processes if IEBC were to decide to interference with the party different seats as early as they identify their flag bearers for the its programme of identifying its flag that ODM is wrong to have started early any method also

allow Parties the latitude to work



## ORANGE DEMOCRATIC MOVEMENT

		backwards.
12. Party Primary notification	The Bill obligates Political Parties to notify the Commission and Registrar in writing at least 21 days before the date of the Party Primary –	-Clauses 12 and 18 seems to have repetitions.
18. Submission of	a) the type of b) the venue c) the list of Primary	of the party primary of the party primary aspirants participating in the Party double work. It is our view that there is
list of aspirants	Politic Comm the party	no justifiable reason to notify the registrar as proposed. The role of the registrar is confined to verifying the party membership of aspirants and members of the party.
		It is our considered view that submitting the Party Primary requirements to the Commission would be sufficient.
Participation in party primaries	in The Bill should include a clause that limits the This clause is critical to restoring the participation in party primary elections to only integrity of political party primaries from registered party members of the particular party.	include a clause that limits the This clause is critical to restoring the party primary elections to only integrity of political party primaries from embers of the particular party.



## ORANGE DEMOCRATIC MOVEMENT

()	The Bill should include a clause that restricts change of political parties to at least 6 months before the general elections.	Party Hopping
The first step for establishing integrity r should be in the party primaries; it should be agreed that the use of members of other political parties to influence party primaries in another party amounts to fraud and should be prohibited. This will help to instil party discipline and to encourage those who want to participate in electing the party candidates to register as members.	by the Registrar of Political Parties.  The IEBC register should not be used other than for the verification of the polling stations in which members are registered.  An election offense should be created to sanction participation by persons who are not party members because this is a fraud.  The first step for establishing integrity should be in the party primaries; it should be agreed that the use of members of other political parties to influence party primaries in another participation by persons who are not party members because this is a fraud.  The first step for establishing integrity should be in the party primaries; it should be agreed that the use of influence party primaries in all parties.  The first step for establishing integrity should be agreed that the use of influence party primaries in all parties.	

In view of the foregoing, we fully support the Political Party Primaries Bill, 2020 with the aforementioned amendments.

Yours Sincerely,

Catherine Muyeka Mumma

CHAIRPERSON - NATIONAL ELECTIONS BOARD





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

Senate Standing Committee on Justice, Legal Affairs and Human Rights.

22<sup>nd</sup> March 2021.

RE: Memorandum on the Political Parties Primaries Bill (Senate Bills No. 35 of 2020)

Westminster Foundation for Democracy (WFD) works with parliaments, political parties, and civil society groups as well as on elections to help make countries' political systems fairer and more inclusive, accountable, and transparent. WFD through the Kenya Inclusive Political Parties (KIPP) programme works in partnership with 12 political parties and 15 DPOs/CSOs towards ensuring that effective provisions are in place in political parties to respond to the strategic and practical needs of PWDs within their internal party structures, political commitments, and policies.

Consortium of Disabled Persons Organizations of Kenya is an UMBRELLA of Disabled Persons Organizations in Kenya that brings together organizations formed by and for persons with Disabilities and organizations working for persons with disabilities together to speak in one voice that advocates for improved service delivery to PWDs through networking collaboration and partnership with government and non-government actors.

In accordance with the provisions of Article 118(1)(b) of the Constitution and Standing Order 140(5) of the Standing Orders of the Senate, we hereby submit our representations on certain provisions of the Political Parties Primaries Bill (Senate Bill No. 35 of 2020) as follows:

Section of the Bill	Proposed Amendment to the Bill Section	Justification
Section 4 (3) (c)	Amend to requirement that 'persons with disability' be duly registered with National Council for Persons with Disability	This would ensure avoidance of potential cases of impersonation/Secure genuine representation of persons with disability.

Respectfully,

Westminster Foundation for Democracy, Disabled Persons Organizations and Civil Society Organizations

## **Disabled Persons Organizations and Parliamentary Association.**







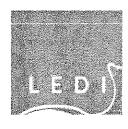




















Persons With Disabilities in Decision Making

## **Political parties**











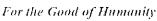








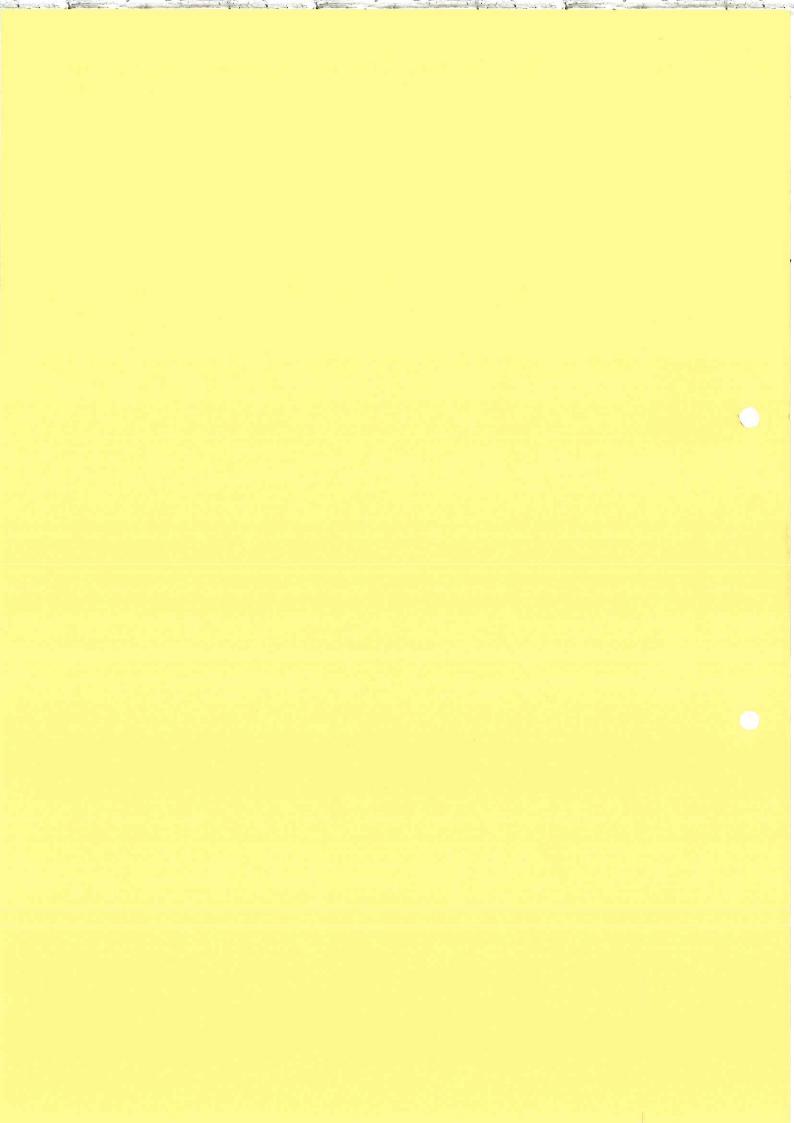












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## SPECIAL ISSUE

Kenya Gazette Supplement No. 11 (Acts No. 2)



## REPUBLIC OF KENYA

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## NAIROBI, 28th January, 2022

## CONTENT

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## THE POLITICAL PARTIES (AMENDMENT) ACT No. 2 of 2022

Date of Assent: 27th January, 2022

Date of Commencement: 11th February, 2022

## AN ACT of Parliament to amend the Political Parties Act; and for connected purposes

ENACTED by the Parliament of Kenya as follows-

1. This Act may be cited as the Political Parties (Amendment) Act, 2022.

Short title.

2. Section 2 of the Political Parties Act, 2011 (hereinafter referred to as "the principal Act") is amended by—

Amendment of section 2 of No. 11 of 2011.

- (a) deleting the definition of the term "political party" and substituting therefor the following new definition—
  - "political party" --
  - (a) means an association of citizens with an identifiable ideology or programme that is constituted for the purpose of influencing public policy or nominating candidates to contest elections; and
  - (b) includes a coalition political party;
- (b) deleting the definition of the term "party primary"; and
- (c) inserting the following new definitions in proper alphabetical sequence—

"coalition political party" means a coalition that is registered by the Registrar as a political party;

"direct party nomination" means the process by which a political party, through its registered members, elects its candidates for an election;

"indirect party nomination" means the process by which a political party, through the use of delegates selected from registered members of the political party and interviews, selects its candidates for an election; and "statement of ideology" means a statement setting out the doctrine, ethical ideals, and principles of the party.

3. Section 3 of the principal Act is amended by inserting the following new subsection immediately after subsection (2) —

Amendment of section 3 of No. 11 of 2011.

- "(2A) A citizen of Kenya who has attained the age of eighteen years may, subject to the provisions of this Act and any other law join a political party—
- (a) upon the payment of the party's membership fees; and
- (b) complying with any other requirements as prescribed by the party".
- 4. The principal Act is amended by inserting the following new sections immediately after section 4—

Insertion of new section 4A in No. 11 of 2011.

Roles and functions of a political party.

- 4A. A political party may—
- (a) recruit and enlist members;
- (b) nominate candidates for elections;
- (c) promote representation in Parliament and county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities;
- (d) sensitize the public on the functioning of the political and electoral system;
- (e) promote and enhance national unity;
- (f) mobilize citizens into participating in political decisions;
- (g) solicit and articulate public policy priorities as identified by its members; and
- (h) shape and influence public policy.

Reservation of name, symbol and slogan.

4B. (1) An association of persons or organisation may apply in writing to the Registrar for the reservation of a name,

symbol and slogan for a proposed political party.

- (2) Where a name, symbol or slogan has not been reserved for a proposed or registered political party by any other association of persons or organisation, the Registrar shall reserve the name, symbol or slogan in respect of the applicant under subsection (1) for ninety days.
- (3) The Registrar shall notify the applicant in writing of the availability of the name, symbol or slogan within fourteen days of the application under subsection (1).
- 5. Section 5 of the principal Act is amended—

Amendment of section 5 of No. 11 of 2011.

- (a) by inserting the following new subsection immediately after subsection (1)—
  - (1A) An application for provisional registration under subsection (1) may be made after the notification by the Registrar under section 4B (3):

Provided that if the application is not made within the period specified in section 4B (2), the reservation of the name, symbol or slogan of the proposed political party shall lapse.

- (b) in subsection (5), by deleting the words "one hundred and eighty days" and substituting therefor the words "two hundred and seventy days".
  - 6. Section 6 of the principal Act is amended—

Amendment of section 6 of No. 11 of 2011.

- (a) in subsection (2), by inserting the following new paragraph immediately after paragraph (d)—
  - (da) be accompanied by a statement of the ideology of the proposed political party;
- (b) in subsection (3), by inserting the words "and slogan" immediately after the word "symbol".
- 7. Section 7 of the principal Act is amended—

Amendment of section 7 of No. 11 of 2011.

(a) in subsection (2) (f), by inserting the following new item immediately after item (iv).—

- (v) the address of the official website of the political party.
- (b) by inserting the following new subsections immediately after subsection (5)—
- (6) A coalition political party shall not be required to comply with the provisions of sections 5 and 6.
- (7) The Registrar shall, upon the deposit of a coalition agreement for the formation of a coalition political party, issue the coalition political party with a certificate of full registration.
- (8) The governance of a coalition political party shall be in accordance with the provisions of the Act relating to the governance of a coalition and the Regulations made in that regard.
- (9) A member of a coalition shall not be a member of another coalition.
- 8. Section 8 of the principal Act is amended—

Amendment of section 8 of No. 11 of 2011.

- (a) in the opening statement, by inserting the words "the slogan" immediately after the word "name";
- (b) in paragraph (c), by inserting the word "slogan" immediately after the word "name";
- (c) by inserting the following new paragraphs immediately after paragraph (c)—
  - (d) is similar to, or associated with, a group or association that has been proscribed under any written law; or
  - (e) is against the public interest.
- 9. Section 10 of the principal Act is amended—

Amendment of section 10 of No. 11 of 2011.

- (a) in subsection (1), by inserting the words "or a coalition political party" immediately after the words "form a coalition"; and
- (b) by inserting the following proviso to subsection (2)—

Provided that in the case of a coalition political party, the coalition political party shall submit the coalition agreement at least one hundred and twenty days before a general election.

10. Section 14 of the principal Act is amended by—

Amendment of section 14 of No. 11 of 2011.

- (a) deleting subsection (5);
- (b) deleting subsection (5A);
- (c) deleting subsection (6); and
- (d) deleting subsection (7).
- 11. The principal Act is amended by inserting the following new sections immediately after section 14—

Insertion of new section 14A in No. 11 of 2011.

When a member may be deemed to have resigned from a political party.

- 14A. (1) A person who, while being a member of a political party shall be deemed to have resigned from that party if that person—
  - (a) forms another political party;
  - (b) joins in the formation of another political party;
  - (c) joins another political party;
  - (d) in any way or manner, publicly advocates for the formation of another political party; or
  - (e) promotes the ideology, interests or policies of another political party.
- (2) A political party shall, before deeming a member to have resigned under subsection (1)—
  - (a) notify the member that he or she has been deemed to have resigned from the political party and that the political party intends to remove his or her name from the list of its members; and
  - (b) afford the member a fair opportunity to be heard in accordance with the procedure set out in the constitution of the political party.

- (3) A political party which deems a member to have resigned from the political party shall notify the Registrar in writing of the member's resignation and request the Registrar to remove that person's name from the register of members of that political party.
- (4) Upon the notification under subsection (3), the Registrar may, where the Registrar is satisfied that the political party has complied with the procedure under subsection (2), remove the member's name from the register of members of the political party within seven days of the notification and notify the member in writing that he or she has ceased to be a member of that political party.
- (5) Where the Registrar is not satisfied in accordance with subsection (4), the Registrar shall refer the matter back to the concerned political party for reconsideration.
- (6) Subsection (1) (c), (d) and (e) shall not apply to a member of a political party which enters or proposes to enter into a merger or a coalition with another political party.

Expulsion of a member from a political party.

- 14B. (1) A person may be expelled from a political party if that person contravenes any of the provisions of the constitution of the political party.
- (2) A political party shall, before expelling a member under subsection (1), afford such member a fair opportunity to be heard in accordance with the internal party disputes resolution mechanism prescribed in the constitution of the political party.
- 12. Section 16 of the principal Act is amended in subsection (4) by inserting the words "and in the political party's official website" immediately after the word "circulation".

Amendment of section 16 of No. 11 of 2011.

## 13. Section 20 of the principal Act is amended—

Amendment of section 20 of No. 11 of 2011.

- (a) in subsection (2), by—
  - (i) deleting the word "two" and substituting therefor the word "one"; and
  - (ii) inserting the words "and in the political party's official website" immediately after the word "circulation";
- (b) by inserting the following new subsections immediately after subsection (3A)—
  - (4) An objection to the proposed change, amendment or alteration contemplated under subsection (1) shall be dealt with in accordance with the constitution of the political party and the political party shall inform the Registrar of the manner in which the objection was dealt with.
  - (5) Where the Registrar is satisfied that the political party has complied with the provisions of this section, the Registrar shall, within fourteen days after the notification under section (3A), notify the political party in writing that the change, amendment or alteration has been made to the constitution of the political party.
- 14. Section 21 of the principal Act is amended—

Amendment of section 21 of No. 11 of 2011.

(a) by deleting the marginal note and replacing it with the following new marginal note—

Suspension and deregistration of a political party.

- (b) in subsection (1), by inserting the word "suspend or" immediately after the word "may";
- (c) by inserting the following new subsection immediately after subsection (1)—
  - (1A) Where a registered political party contravenes the provisions of subsection (1), the Registrar may—
    - (a) serve the party with a notice in writing specifying the nature of the contravention, requiring the political party to redress the contravention within the period specified in the notice:

2022

Provided that the period of the notice shall not exceed three months;

- (b) where the political party fails to comply with the notice under paragraph (a) within the specified period, suspend the registration of the political party for a period not exceeding one year; and
- (c) where, after the expiry of the period specified in paragraph (b), the party fails to remedy the contravention and persists in contravening the provisions of this Act, deregister the party.
- (d) in subsection (2), by inserting the words "suspending and" immediately after the word "before";
- (e) by deleting subsection (3); and
- (f) by inserting the following new subsection immediately after subsection (4)—
  - (4A) A political party that is dissatisfied with the decision to suspend it under this section may, within thirty days of receiving the notice of suspension, apply to the Registrar for a review of the decision.
- (g) by inserting the following new subsection immediately after subsection (6)—
  - (7) A political party which is dissatisfied with the decision of the Registrar under subsections (1) or (2) may appeal to the Tribunal against the decision.
- 15. Section 22 of the principal Act is amended by-

Amendment of section 22 of No. 11 of 2011.

- (a) deleting subsection (2) and substituting therefor the following new subsection—
  - (2) A member of a deregistered political party holding an elective office established by the Constitution at the time of the political party's deregistration shall continue to hold office for the remainder of the elective term as a member of another political party or independent of any political party.

- (b) deleting subsection (3).
- 16. Section 24 of the principal Act is amended in subsection (1) (a) by deleting the words "the revenue collected by the national government as may be provided by Parliament" and substituting therefor the words "all the national government's share of revenue as divided by the annual Division of Revenue Act enacted pursuant to Article 218 of the Constitution as may be determined by the National Assembly".

Amendment of section 24 of No. 11 of 2011.

17. Section 25 of the principal Act is amended—

Amendment of section 25 of No. 11 of 2011.

- (a) by deleting subsection (1) and substituting therefor the following new subsection—
  - (1) The Fund shall be distributed as follows—
    - (a) seventy per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election;
    - (b) fifteen per cent of the Fund proportionately to political parties based on the number of candidates of the political party from special interest groups elected in the preceding general election;
    - Fund cent of the (c) ten per proportionately to political parties number total the based on representatives from the political party preceding general elected in the election; and
    - (d) five per cent for the administration expenses of the Fund.
  - (b) by deleting subsection (2) and substituting therefor the following new subsection —
- (2) Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund under subsection (1) if—
  - (a) more than two-thirds of its registered office bearers are of the same gender;

- (b) the party does not have, in its governing body, representation of special interest groups;
- . (c) the party does not have—
  - (i) an elected member of the National Assembly;
  - (ii) an elected member of the Senate;
  - (iii) an elected Governor; or
  - (iv) an elected member of a county assembly.
- 18. Section 26 of the principal Act is amended—

Amendment of section 26 of No. 11 of 2011.

- (a) by inserting the following new subsection immediately after subsection (1)—
  - (1A) The monies allocated to a coalition political party shall be distributed by the Registrar in accordance with the coalition agreement;
- (b) in subsection (3)(a) by deleting the words "a member of staff" appearing at the end of the subsection and substituting therefor the words "a party election agent or a contracted person in furtherance of the objectives under sub section (1) or an employee of the political party".
- 19. Section 29 of the principal Act is amended in subsection (2) by—

Amendment of section 29 of No. 11 of 2011.

- (a) deleting the word "two" and substituting therefor "one"; and
- (b) inserting the words "and in the political party's official website" immediately after the word "circulation".
- 20. Section 30 of the principal Act is amended in subsection (1) by deleting the word "sixty" and substituting therefor the word "ninety".

Amendment of section 30 of No... 11 of 2011.

21. Section 31 of the principal Act is amended by deleting subsection (3).

Amendment of section 31 of No. 11 of 2011.

22. Section 34 of the principal Act is amended—

Amendment of section 34 of No. 11 of 2011.

(a) by inserting the following new paragraph immediately after paragraph (d)—

- (da) keep and maintain a register of members of registered political parties;
- (b) in paragraph (f), by deleting the word "his" appearing immediately after the words "the Commission of" and substituting therefor the word "the";
- (c) by inserting the following new paragraphs immediately after paragraph (f)—
  - (fa) certify that an independent candidate in an election is not a member of any registered political party;
  - (fb) certify that the symbol intended to be used by an independent candidate in an election does not resemble the symbol of a registered political party;
  - (fc) certify that the names appearing in a party list are the names of members of the political party presenting the party list;
  - (fd) regulate political party nominations in accordance with this Act; and
  - (fe) train political party election agents upon the request and financing by the political party.

23. The principal Act is amended by inserting the following new sections immediately after section 34A—

Insertion of new section in No. 11 of 2011.

Use of technology.

- 34B. (1) Subject to this section, the Registrar shall establish a political parties management information system.
- (2) The Registrar shall use the system established under subsection (1) for processing political parties' data and records for the purposes of this Act.
- (3) The Registrar shall ensure that the technology established under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.
- (4) The Registrar shall make Regulations for the better carrying into effect of the provisions of this section.

Powers of the Registrar in respect of political party records.

- 34C. (1) The Registrar may make changes to the records of political parties submitted to the Registrar under this Act where—
  - (a) the application by a provisionally registered political party for full registration has not been granted;
  - (b) a political party has been deregistered;
  - (c) a member of a political party resigns or is deemed to have resigned from the political party and the Registrar has been notified of the resignation;
  - (d) a member of a political party has been expelled from the political party and the Registrar has been notified of the expulsion;
  - (e) a member of a political party dies;
  - (f) a member of a political party has ceased to be a citizen of Kenya;
  - (g) a political party has merged with another political party;
  - (h) the constitution of a political party has been amended, changed or altered; or
  - (i) any other event that justifies the changes occurs.
- (2) The changes contemplated under subsection (1) may include—
  - (a) amendment of the register of members of a political party;
  - (b) amendment, change or alteration of the constitution of a political party;
  - (c) addition or deletion of records;
  - (d) addition, deletion or alteration of names; and

- (e) any other change that is consistent with the provisions of this Act.
- (3) The Registrar shall notify the political party of any change made to its records under subsection (1).
- (4) A political party that is dissatisfied by the decision of the Registrar under subsection (1) may appeal to the Tribunal.
- 24. The principal Act is amended by inserting the following new Part immediately after section 38—

Insertion of new Part in No. 11 of 2011.

## PART IVA -- PARTY NOMINATIONS

Methods of conducting party nominations.

- 38A. A political party may conduct party nominations using any of the following methods—
  - (a) direct party nomination method; or
  - (b) indirect party nomination method.

Establishment of party structures.

- **38B.** (1) When conducting party nominations, a political party shall—
  - (a) establish mechanisms for the resolution of disputes arising out of the nominations;
  - (b) designate the person who shall issue nomination certificates to candidates after political party nominations; and
  - (c) prescribe the functions of the body within the political party that shall be responsible for conducting the nominations.

Registered members to participate in party nominations.

- **38C.** (1) A registered member of a political party shall be entitled to participate in the nominations conducted by the political party.
- (2) A political party that intends to conduct political party nominations under this Act shall use a certified register of members for the nominations.

- (3) A political party that intends to conduct political party nominations under this Act shall apply in writing to the Registrar for a certified copy of the register of members at least twenty-one days before the date of the nominations.
- (4) The Registrar shall issue the political party with a certified copy of the register of the political party's members within seven days after the application under subsection (3).
- (5) A political party shall not allow any person who is not a registered member of the political party to participate in the party nominations.
- (6) Notwithstanding the provisions of subsection (5), a person may only participate in the nominations of a coalition political party if such person is a registered member of a party forming the coalition political party.

Access to register.

38D. A political party shall ensure that the register of members used in party nominations is accessible to the registered members of the party.

Notification on party nominations.

- 38E. (1) A political party shall, not less than ten days before the date of party nominations, notify the Registrar in writing of—
  - (a) the method it intends to use in conducting party nominations, which method shall be in accordance with the nomination rules of the political party;
  - (b) the date of the party nominations;
  - (c) the venue or venues for the party nominations; and
  - (d) the list of members of the party who wish to be nominated by the party.

- (2) At least seven days before the date of the nominations, the—
  - (a) political party shall publish in the official website of the political party the dates and venues of the nominations; and
  - (b) Registrar shall publish in the Registrar's website the dates and venues of the political party's nominations.

Conduct of direct party nominations.

- **38F.** (1) A political party that intends to conduct direct party nominations shall—
  - (a) post in a conspicuous place within each venue where the nominations will be held the list of members of the party who are eligible to participate in the nominations at that venue; and
  - (b) provide at each polling venue essential election materials including—
    - (i) ballot papers;
    - (ii) ballot boxes;
    - (iii) a copy of the register of the members of the party;
    - (iv) pens; and
    - (v) nomination results slips.
- (2) A political party that intends to use direct nomination method shall submit to the Registrar and publish in the party's official website the—
  - (a) particulars of the body within the party that shall conduct the nominations; and
  - (b) procedure intended to be used in direct nomination.

Conduct of indirect party nominations.

**38G.** (1) A political party that intends to conduct indirect party nominations shall—

- (a) select delegates who shall participate in the party nominations from among the registered members of the party;
- (b) submit the list of delegates to the Registrar at least seven days before the date of the party nominations;
- (c) specify the date and venue of the delegates' meeting;
- (d) specify the polling process used by the delegates during the nominations;
- (e) specify the mode of interviews; and
- (f) specify the body within the party that shall conduct the interviews of potential candidates.
- (2) The procedure for the selection of delegates to participate in the indirect party nominations shall be provided for in the party nomination rules of the political party.
- (3) The list of delegates shall contain the names, addresses and identifying particulars of the delegates.

Vetting of candidates.

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- **38H.** A political party conducting party nominations shall ensure that each candidate who is nominated—
  - (a) makes and deposits a selfdeclaration form in the prescribed form under the Leadership and Integrity Act, 2012;
  - (b) possesses the qualifications to hold the elective office as specified in the Constitution and any other relevant written law; and
  - (c) meets such other requirements as may be prescribed by the constitution and nomination rules of the political party.

2022

Resolution of party

381. A political party shall resolve any nominations disputes arising out of the party nominations within thirty days after the date of the party nominations.

Amendment of section 39 of No. 11 of 2011.

- 25. Section 39 of the principal Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (b) --
- "(c) The members of the Tribunal shall elect a vice chairperson from among the members who are Advocates of the High Court of Kenya under paragraph (b)".

Insertion of new section 39A in No.11 of 2011.

26. The principal Act is amended by following new section inserting the immediately after section 39-

39A. (1) At least six months to the date of a general election, the Judicial Service Commission shall appoint not more than eighteen ad hoc members of the Tribunal of whom---

Appointment of ad hoc members of the Tribunal.

- nine shall be Advocates of the High Court of (a) Kenya of at least seven years standing; and
- nine shall be professionals with outstanding governance, administrative, social, political, economic and other record.
- (2) The ad hoc members of the Tribunal shall hold office for a term not exceeding one year.
- (3) The ad hoc members of the Tribunal shall serve together with the members of the Tribunal appointed under section 39 and they shall be responsible to the Chairperson of the Tribunal.
- (4) A person shall not be qualified to be appointed as an ad hoc member of the Tribunal if that person is a public officer or holds office in a political party.
- (5)A person shall not be qualified for appointment under this section unless the person meets the requirements of chapter six of the Constitution.
  - 27. Section 40 of the principal Act is amended—

Amendment of section 40 of No. 11 of 2011.

- (a) in subsection (1), by—
  - (i) deleting the words "a political party and a political party" appearing in paragraph (b) and substituting therefor the words "a political party and the political party"; and
  - (ii) by deleting the words "party primaries" appearing in paragraph (fa) and substituting therefor the words "party nominations";
  - (b) by deleting subsection (2) and substituting therefor the following new subsection—
  - (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.
- (c) by inserting the following new subsection immediately after subsection (2)—
- (3) A coalition agreement shall provide for internal dispute resolution mechanisms.
  - 28. Section 41 of the principal Act is amended –

Amendment of section 41 of No. 11 of 2011.

- (a) in subsection (2), by deleting the words "to both the Court of Appeal and the Supreme Court" and substituting therefor the words "to the Court of Appeal and the decision of the Court of Appeal shall be final";
- (b) in subsection (3), by inserting the words "but the Tribunal shall have the powers of the High Court to punish for any acts or omissions amounting to contempt of the Tribunal" immediately after the words "Magistrates Court".
  - 29. Section 45 of the principal Act is amended by inserting the following new subsection immediately after subsection (1)—

(1A) A person who enlists another person to be a member of a political party without obtaining the consent of that other person commits an offence. Amendment of section 45 of No. 11 of 2011.

30. The principal Act is amended in the Second Schedule by inserting the following new paragraph immediately after paragraph 5—

Amendment of the Second Schedule to No. 11 of 2011.

5A. The address of the official website of the political party.

31. The Elections Act, 2011 is amended—

Amendment of No. 24 of 2011.

- (a) in section 27, by inserting the following new subsection immediately after subsection (1)—
  - (1A) The Registrar of Political Parties shall certify the nomination rules submitted under subsection (1).
- (b) by inserting the following new section immediately after section 28—

Certification of party membership lists.

- 28A. (1) A political party that nominates a person for an election under this Act shall, at least fourteen days before submitting the party membership list to the Commission under section 28 (1), submit the party membership list to the Registrar of Political Parties for certification.
- (2) The Registrar shall verify the names contained in the party membership list submitted by a political party under subsection (1) and, where the names are of members of that political party, certify the membership list within seven days after receiving the application under subsection (1).
- (c) by inserting the following new section immediately after section 35—

Certification of party lists.

- 35A. (1) A political party intending to submit a party list to the Commission shall, at least fourteen days before the submission of the party list to the Commission under section 35, submit the party list to the Registrar for certification.
- (2) The Registrar shall verify that the names appearing in the party list belong to registered members of the political party and certify the party list within

seven days after the application under subsection (1).

(3) Any dispute arising out of the certification of a party list under this section shall be referred to the Political **Parties** Dispute Tribunal determination.

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