

ELECTION (AMENDMENT) 2022 ANALYSIS

Clause	Proposed Amendments / Ramifications	Comments on Proposed Amendments / Recommendations
2	<p>The Bill seeks to amend Sec. 2 of the Act i.e. the Definition Section by substituting the definition of the following words;</p> <p><i>'Nomination'</i> to mean the process through which a Party elects/selects its candidates for elections. Under the principal Act it is <i>defined to mean the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act.</i></p> <p>Deleting the definition of the <i>'Nomination day'</i> currently defined...in respect of an election, means the day gazzeted by the Commission as the day for the nomination of candidates for that election.</p> <p>Deleting the definition of the word <i>'Political Party'</i> to give it the meaning assigned under the Political Parties (Amendment) Act, 2021 i.e. <i>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 includes a coalition of political party/s.</i></p> <p><i>'Registration of a candidate'</i> process through which a person applies to the commission to contest an election.</p>	<p>There is need for comprehensiveness of definitions/motives</p> <p>Black's Law Dictionary defines Nomination as an appointment or designation of a person to fill an office or dis- charge a duty. The act of suggesting or proposing a person by name as a candidate for an office.</p> <p>The definition of a political party under Art. 260 of the Constitution, meaning an association contemplated under Part 3 of Chapter 7 (Basic requirements of a political party & legislation on political parties).</p> <p>The proposed amendments are in aligned with Political Parties (Amendment) Act, 2021 and in line with the definition as encapsulated under the Constitution.</p> <p>This is one of the recommendations of IEBC to the extent that the Elections Act does not use the term Party Primaries at all, the Election Laws (Amendment) Act of 2016 and 2017 use the term party primaries. It uses the term party nomination to mean registration of candidates for election. This calls for harmonization of the laws to cure the incoherence and uncertainty.</p>

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3	<p>Seeks to amend Sec. 5 of the Act inserting the word 'Valid' immediately after the words 'identity card or a'. The principal Act, just reads a Kenyan passport.</p>	<p>The proposed amendment is contentious as the question of the validity of a passport was unnecessary as the same was only required to be used as a verification document of identity and citizenship and not for purposes of travel where validity of the document would arise.</p> <p>Other documents used and accepted in Kenya for identification purposes should be accepted for purposes of registration.</p> <p>The word 'validity' should be deleted.</p>
4	<p>The Bill seeks to amend Sec. 6 of the Act by deleting Subsection 2.</p> <p>Subsection 2 of the Act reads, (2) <i>The Commission shall, within sixty days from the date of the notice for a general election, open the Principal Register of Voters for inspection for a period of at least fourteen days or such period as the Commission may consider necessary.</i></p> <p>This essentially means that IEBC will be under an obligation to have the register opened for inspection by members of the public at all times for the purpose of rectifying the particulars as dictated in Sec. 6(1) of the principal Act.</p>	<p>Sec. 4 of the Election Act dictates that there be a register in respect of every polling station, ward, constituency, county and voters residing outside Kenya.</p> <p>Sec. 5(1) of the Elections Act, voter registration is a continuous process.</p> <p>Prior to the amendments introduced to the Elections Act in 2016, there was confusion as to the status of the Register of Voters. In the cases of <i>Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others</i> [2013] eKLR and <i>Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others</i> (2013) eKLR, the court recognized that the register of voters is not a single document,</p>

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		<p>but is an amalgam of several parts prepared to cater for diverse groups of electors.</p> <p>Sec. 4(2) of the Elections Act as read together with Regulation 12(3) of the Elections (Registration of Voters) Regulations, 2012 requires the Commission to compile the register of voters comprising of components under Section 4 of the Act. However, the law does not assign a name to the compiled register.</p> <p><i>“Principal Register of Voters”</i> Section 2(d) of the Elections Laws (Amendment) Act No. 36 of 2016 by deleting the expression ‘principal register’ and substituting it with ‘register of voters’. The intention was to cure the problem of multiplicity of registers that was experienced during the 2013 elections.</p> <p>The proposed deletion of Section 6 (2) welcome. However, the wording of Subsection 1 needed to be amended to ensure that the timeframe for the opening of the Principal Register of Voters was specified and not left at the discretion of the IEBC. In particular, the wordings <i>“except for such period of time as the Commission may consider appropriate”</i> needed to be deleted.</p>
5	The Bill proposes to amend Sec. 7 of the Act by insertion of Clause 3 to the effect	IEBC Recommendation in its Post 2017 Election Evaluation Report had

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	<p>that a voter may not transfer his/her registration on the date of application to transfer registration if the voter has been; ordinarily resident, carrying on business, employed or possess land or residential building in a constituency he intends register 6months preceding the date of application for transfer of registration.</p> <p>This is to the effect that if one doesn't qualify with the conditions introduced, then he will not be able to transfer is vote to the desired constituency of his choice.</p>	<p>proposed an amendment the Elections Act to prohibit prospective candidates from vying in electoral areas other than those in which they are registered as voters, its recommendation did not touch on voters but prospective candidates.</p> <p>The proposed amendment is contentious and it contravened Article 38(1) (2) (3) and 81 of the Constitution of Kenya, it infringed on individual political rights while intending to cure a moral issue.</p> <p>The Amendment should be expunged in totality.</p>
6	<p>The Bill proposes to amend the principal Act by deleting 8A (b) by deleting subsection 3.</p> <p>Subsection 3 of the principal Act reads...<i>for purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of section, engage a professional reputable firm to conduct an audit of the Register of Voters.</i></p> <p>This has already been bypassed by events</p>	<p>The proposed amendment is in order as it was meant for the first election after the amendment though it leaves a lacuna on the requirement for IEBC to conduct audits since Sec. 8A uses the word may and as such giving discretion to IEBC to decide if it is necessary to conduct an audit, the word <i>may</i> should be replaced with <i>shall</i>.</p>
7	<p>Proposes to amend the Act by deleting subsection 2(a) by introducing a new paragraph ...<i>that the day or days for the registration of candidates for the presidential election.</i></p>	<p>In line with the terminologies as used in the Political Parties (Amendment) Act, 2021.</p>

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	<p>This substitutes it with what is in the Act, <i>in the case of a general election, at least sixty days before the date of the election.</i></p> <p>Word '<i>nomination</i>' removed in the proposed amendment and replaced with '<i>the registration of candidates</i>'</p>	
8	Same above - Word <i>nomination</i> replaced by <i>registration</i> – Sec. 16	This is one of the recommendations of IEBC to the extent that the Elections Act does not use the term Party Primaries at all, the Election Laws (Amendment) Act of 2016 and 2017 use the term party primaries. It uses the term party nomination to mean registration of candidates for election. This calls for harmonization of the laws to cure the incoherence and uncertainty
9	Same above - Word <i>nomination</i> replaced by <i>registration</i> – Sec. 17	Proposal in line with the Political Parties (Amendment) Act, 2022.
10	Same above - Word <i>nomination</i> replaced by <i>registration</i> – Sec. 19	Proposal in line with the Political Parties (Amendment) Act, 2022.
11	Same above - Word <i>nomination</i> replaced by <i>registration</i> – Sec. 22	Proposal in line with the Political Parties (Amendment) Act, 2022.
12	Same above – Word <i>nomination</i> replaced by <i>registration</i> – Sec 23	Proposal in line with the Political Parties (Amendment) Act, 2022.
13	<p>Word <i>nomination</i> replaced by <i>registration</i> – Sec.25</p> <p>The Bill proposes to amend Sec. 24(1) by deleting subsection 1 and replacing it with, <i>(a) is a registered voter at the time of</i></p>	IEBC proposed an amendment to the Elections Act to prohibit prospective candidates from vying in electoral areas other than those in which they are registered as voters. Was this

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	<p><i>occurrence of vacancy.</i></p> <p>Currently reads, <i>is registered as a voter</i></p> <p>*Qualifications and disqualifications for nomination as member of Parliament.</p>	<p>constitutional or a recommendation to deal with a morally untidy situation???</p> <p>As the bare minimum constitutional requirement was that one be a registered voter, the same needed to be maintained and the proposed wordings "<i>at the time of occurrence of vacancy</i>" be done away with.</p>
14	<p>Word <i>nomination</i> replaced by <i>registration</i> – Sec.25</p> <p>The Bill proposes to amend Sec. 25(1) by deleting subsection 1 and replacing it with, <i>(a) is a registered voter at the time of occurrence of vacancy.</i></p> <p>Currently reads, <i>is registered as a voter</i></p> <p>*Qualifications and disqualifications for nomination as member of County Assembly</p>	<p>As the bare minimum constitutional requirement was that one be a registered voter, the same needed to be maintained and the proposed wordings "<i>at the time of occurrence of vacancy</i>" be done away with.</p>
15	<p>The Bill proposes to amend Sec. 27 by deleting subsection (1) removing the words its '<i>nomination rules</i>' and replacing it with '<i>a copy of the political party's nomination rules certified by the Registrar of Political Parties</i>'.</p> <p>Bill proposes to insert a new subsection to the extent that a coalition political party shall within 14days of its registration submit to the Commission a copy of the coalition political party's nomination rules certified by the Registrar of political parties.</p>	<p>Proposal in line with the Political Parties (Amendment) Act, 2022.</p>
16	<p>Bill proposes to amend Sec. 28 of the Act</p>	

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	<p>by deleting in subsection 1 the words <i>'membership list'</i> and substituting it with <i>'a copy of the membership list certified by the Registrar of Political Parties'</i></p> <p>It further proposes to amend Sec. 28(a) by deleting the words 120 days within which parties should submit a copy of certified membership list to 90 days.</p> <p>Duration reduced by a month.</p>	<p>Requirement under the Political Parties Amendment Act, 2021 for parties to use certified Registers by the Political Parties Registrar.</p> <p>The proposed amendments were an alignment with Political Parties (Amendment) Act, 2021.</p> <p>The duration proposed was in line with the election timelines.</p>
17	<p>The Bill proposes an amendment to Sec. 31 (2) of the Principal Act by deleting subsection (2) (2B) (2C) (2E) (2F) to the extent that parties no longer have an option to request IEBC to, 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.</p>	<p>IEBC had made a proposal to seek a repeal of Sec 31 (2) of the Elections Act to remove the conflict of interest where the Commission conducts, and supervises party primaries, then sits thereafter later to determine disputes arising in the said primaries.</p> <p>The proposed amendment is welcome as indicated that IEBC could not conduct elections and adjudicate issues arising from the same elections.</p>
18	<p>Word <i>'nomination day'</i> replaced by <i>'the date of registration of candidates'</i> – Sec. 32</p>	<p>As contained in the Political Parties (Amendment) Act, 2021</p>
19	<p>Word <i>nomination</i> replaced by <i>registration</i> – in the marginal notes – Sec. 33</p>	<p>As contained in the Political Parties (Amendment) Act, 2021</p>
20	<p>Bill proposes to amend Sec. 39 of the Act by deleting subsection 1C, which reads, (1C) <i>For purposes of a presidential election the Commission shall – (a) electronically transmit, in the prescribed form, the tabulated</i></p>	<p>The addition of Section 39 (c) and (d) defeated the spirit of the Maina Kiai case that declared the transmission of results from a polling station as final. Furthermore, the clause was</p>

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	<p><i>results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the national tallying centre; and (c) publish the polling result forms on an online public portal maintained by the Commission.</i></p> <p>And replaces it with the requirement;</p> <ul style="list-style-type: none"> • the presiding officer shall electronically transmit the image the image of the results in the prescribed form to the National Tallying Center • the presiding officer shall deliver the results in person from the polling station to the constituency Tallying center • the Constituency Returning Officer shall collate the results in the prescribed form and deliver the results in person from the polling station together with the collation form to the National Tallying Center • the Constituency Returning Officer shall electronically transmit, the prescribed form, the tabulated results of an election for the president and deliver in person the tabulated results from the constituency tallying center to the national tallying center • the Commission shall tally, verify and declare the results of the presidential election from the polling station results. 	<p>contentious as it would occasion delays in the announcement of the presidential results as the same needed to be tabulated at the Constituencies by the Returning Officers.</p> <p>The provision also requires the Presiding Officers to only send “images” and not “results” which is not practical. If Presiding Officers declare final results and presidential tallying is based on results from POs, then there is no need for them to send only images.</p> <p>It also increases the risk of result tampering and discrepancies between ROs results and PO images.</p> <p>The provision also conflicts with clause 20 (e) which requires the commission to use results from the POs to tally, verify and declare results yet the POs will not be sending any results directly to the commission</p>
21	The Bill seeks to amend Sec. 44 A of the	The contention on this clause is that

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	<p>Act by inserting the words 44A <i>and transmission of results</i> immediately after the words <i>identification of voters</i>.</p> <p>Introducing a new Subsection (2) to the effect that the Commission shall develop Regulations for effecting this provision.</p> <p>Sec 44 A of the Act talks about having a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.</p>	<p>with its adoption we risk having two parallel results.</p> <p>It diminishes the requirement to have simultaneous transmission of results which was specifically meant to ensure there was no room for manipulation of results.</p>
22	<p>Bill proposes to amend Sec. 74 of the Act by adding subsection 1A, which reads, "<i>An electoral dispute under subsection (1) shall be lodged with the Commission within forty-eight hours after the last day for registration of candidates specified in the notice.</i>"</p>	<p>The proposed amendment is welcome as the Principal Act did not provide timelines for the lodging of an electoral dispute with IEBC</p>
22	<p>Bill proposes to amend Sec. 74 of the Act by adding subsection 5, which reads, "<i>The determination of the appeal under section (4) by the High Court shall be final</i>"</p> <p>Litigants would no longer have the option of taking the cases up to the Supreme Court.</p>	<p>The proposed amendment is justified, litigation has to end at some point as the existing avenues of appeal were enough.</p>