

THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2017

A Bill for

AN ACT of Parliament to amend the Constitution of Kenya by popular initiative

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Constitution of Kenya (Amendment) Act, 2017. Short title

2. Sub-Article 138(3) of the Constitution is amended – Amendment of Sub-Article 138(3) of the Constitution.
 - (a) in clause (a), by inserting the following new paragraphs immediately after paragraph (a) -
 - (aa) There shall be no tallying at the national level of the votes cast in a presidential election;
 - (ab) Each one of the 47 counties shall constitute one presidential electoral point and each one of the 290 constituencies shall also constitute one presidential electoral point;
 - (ac) Total number of the electoral points for electing the President shall be 337, representing 290 constituencies plus 47 counties;
 - (ad) Each county is apportioned presidential electoral points equal to the number of its constituencies plus one point for the county;
 - (ae) All the presidential electoral points in a county are given on a winner-take-all basis to the candidate who wins the presidential ballot, by direct popular vote;
 - (af) The electoral points presidential candidates win on a county-by-county basis shall be aggregated nationally to determine the winner;
 - (ag) To be elected President, one must win at least 169 presidential electoral points, being more than half of the 337 possible points.
 - (b) in clause (b), by deleting the word “and” after the semi-colon.
 - (c) in clause (c), by inserting the expression “on a county-by-county basis,” between the first comma and the word “the”, and by deleting the full stop after the word “result” substituting therefore the expression “for each of

the 47 counties;” and by inserting the following new paragraphs immediately after paragraph (c) -.

(ca) The winner of the popular vote at the county tally shall be declared the winner of that county’s presidential points;

(cb) The winner of the presidential election shall be the candidate who wins at least 169 presidential electoral points nationally; and

(cc) the electoral points so announced and/or declared shall be the official, final and binding results of the presidential election.

3. Sub-Article 138(4) of the Constitution is amended –

Amendment of Sub-Article 138(4) of the Constitution.

- a) in (4), by deleting the hyphen.
- b) in clause (a), by deleting the number “(a)”, and by deleting the expression “votes cast” and substituting therefore the expression “presidential electoral points,” and deleting the semicolon and the word “and” and substituting therefore with a full stop,
- c) in clause (b), by deleting the entire clause.
- d) by joining the resultant parts to form one sentence.

4. Sub-Article 138(5) of the Constitution is amended –

Amendment of Sub-Article 138(5) of the Constitution.

- a) in clause (a), by deleting the word “votes” and substituting therefore the expression “presidential electoral points,”
- b) in clause (b), by deleting the word “votes” and substituting therefore the expression “presidential electoral points.”

5. Sub-Article 138(6) of the Constitution is amended – by deleting the word “votes” and substituting therefore the expression “presidential electoral points.”

Amendment of Sub-Article 138(6) of the Constitution.

6. Sub-Article 138(7) of the Constitution is amended – by deleting the word “votes” and substituting therefore the expression “presidential electoral points,”

Amendment of Sub-Article 138(7) of the Constitution.

7. Sub-Article 138(10) of the Constitution is amended –

Amendment of Sub-Article 138(10) of the Constitution.

- a) in (10), by deleting the hyphen.

- b) in clause (a), by deleting the entire clause.
- c) in clause (b), by deleting the number “(b)”.
- d) by joining the resultant parts to form one sentence.

MEMORANDUM OF OBJECTS AND REASONS

The Bill aims to amend Article 138 of the Constitution of Kenya to provide for the election of the President and the Deputy President directly by popular vote, on a county-by-county basis, as opposed to the current system, where both are elected directly nationally.

Whereas the Constitution requires the President to be the symbol of national unity, and to promote and enhance that unity, the current presidential electoral system polarises the nation, because it has been reduced to an acrimonious census of tribal numbers, is prone to electoral fraud, and marginalises sparsely populated regions, and smaller ethnic groups in what is provocatively called the “*tyranny of numbers*.”

The 2010 Constitution was supposed to cure the dangerous polarisation of Kenya along ethnic fault lines during presidential elections. Unfortunately, both the first General Election under the 2010 Constitution, on March 4, 2013, and the second one on August 8 2017, saw the usual tribal fallout due to heightened mobilisation of ethnic blocs across the nation.

Within this faulty construct, a new provocative concept of the “tyranny of numbers” was introduced, meaning that it is only the candidates from the larger tribes, who are entitled to and can lay claim to the nation’s presidency because of their numerical strength.

This degeneration of democratic elections into a zero-sum political competition between ethnic groups or their alliances does not only threaten the unity of the State; it denies the country development since it does not allow leaders to emerge on the basis of the policy platforms they articulate.

Kenya is faced with a major problem that could in future snowball into a violent ethnic conflagration, when some tribes or alliances capture the State and monopolise power to the point where others feel excluded, with no chance of ever ruling or influencing power.

The noble aim of the proposed amendment to Article 138 is to prevent the country from sliding into the abyss of ethnic conflict by devolving the presidency to the 47 counties that make up the Republic of Kenya.

Kenya is a multi-ethnic state composed of 42 officially recognised tribes. The 2009 census figures give the ethnic composition as follows (out of a total population of 38.6 million): Kikuyu (6,622,576 or 17%); Luhya (5,338,666 or 14%); Kalenjin (4,967,328 or 13%); Luo (4,044,440 or 10.5%); Kamba (3,893,157 or 10%); Somali (2,385,572 or 6%); Kisii (2,205,669 or 5.7%); Mijikenda (1,960,574 or 5%); Meru (1,658,108 or 4%); Turkana (988,592 or 2.6%); Masai (841,622 or 2%); Teso (338,833 or 0.9%); Embu (324,092 or 0.84%); Taita (273,519 or 0.71%); Kuria (260,401 or 0.7%); Samburu (237,179 or 0.6%); Tharaka (175,905 or 0.5%); Mbeere (168,155 or 0.43%); Borana (161,399 or 0.4%); Basuba (139,271 or 0.36%); Swahili (110,614 or 0.29%); Gabra (89,515 or 0.23%); Orma (66,275 or 0.17%); Rendile (60,437 or 0.16%); Kenyan Asians (46,782 or 0.12%); Kenyan Arabs (40,760 or 0.11%); Ilchamus (27,288 or 0.071%); Sakuye (26,784 or 0.069%); Burji (23,735 or 0.061%); Gosha (21,864 or 0.057%); Taveta (20,828 or 0.054%); Walwana (16,803 or 0.044%); Nubi (15,463 or 0.04%); Dasenach (12,530 or 0.032%); Galla (8,146 or 0.021%); Galjeel (7,553 or 0.019%); Waat (6,900 or 0.018%); Leysan (5,941 or 0.015%); Njemps (5,228 or 0.013%); Isaak (3,160 or 0.008%); Konso (1,758 or 0.005%); Kenyan Americans (2,422 or 0.006%); Kenyan Europeans (5,166 or 0.013%); and Kenyans (so stated) – (610,122 or 1.58%).

[Source: Kenya National Bureau of Statistics – <http://www.knbs.or.ke/censusethnic.php>]

Kenya is divided into 47 counties, whose democratically elected county governments are distinct but inter-dependent with the national government. The two levels of government conduct their mutual relations on the basis of consultation and cooperation. Secondly, under devolution, all resources, including national political power, should be equitably shared. (*Constitution, Articles 6 and 174.*)

Hence, the collective opinion of even a small county merits attention at the national level greater than that given to a small, though numerically equivalent, portion of a very populous tribe.

The proposed system of devolving the presidency will enhance the profile of each county, within constitutional bounds, by forcing presidential candidates to pay attention to even sparsely populated counties, and reinforcing the role of devolution in the republic. Given the devolved nature of the Kenyan State, a victorious presidential candidate ought to be one who has built a popular base that is geographically broad and diverse in voter interests.

The proposed system of devolving the presidency will also enhance the status of minority groups. By making the votes of a given county an all-or-nothing affair, minority groups can provide the critical edge that enables a candidate to win. This will encourage candidates to court a wide variety of such minorities and advocacy groups.

The proposed system of devolving the presidency is designed to allow effective participation in national affairs of even the smallest groups, and it achieves the higher goal of inclusiveness in national affairs, aware that Kenya is a negotiated space.

By making it possible for all communities and counties to have a say in the election of the President and the Deputy President, the proposed system of devolving the presidency is in tandem with an affirmative action, which is a key doctrine in the Constitution of Kenya, 2010, and which seeks to end all forms of marginalisation and discrimination.

The system will create what we may want to call the “*safety of numbers*” since it will be suicidal for political campaigners to focus on a few heavily populated counties while ignoring the rest of the country.

An important fact about the large tribes is that sizeable numbers of their members are dispersed across the republic, where they live and own property away from their ancestral lands. When the presidential vote is determined by a popular vote nationally, these ‘diasporas’ are mobilised by their elites to gang up with their kinsmen in their ancestral lands to form tribal voting blocs across the country.

Limiting the presidential vote to the counties by devolving the presidency, where each and every voter can only vote where he or she is registered and not nationally, will deny the large tribes the national stage they require to flaunt their tyranny of numbers.

Populous ethnic groups will not use large numbers to tyrannise and impose themselves on others and neither can they create a hegemony that reduces smaller groups to mere spectators in the choice of the President and the Deputy President.

Relying on the popular vote nationally shifts disproportionate focus to large ethnic groups at the expense of the smaller ones.

The system of devolving the presidency will eliminate disenfranchisement within counties. For example, if a county tries to disfranchise a particular group, perhaps by voter suppression methods such as evictions of minorities, then, even though voting inside that county would be reduced, the county's electoral count would remain the same. So disenfranchisement has no effect on the overall electoral tally.

The system of devolving the presidency will prevent an ethno-centric victory. The county based electoral system will prevent a candidate from winning the presidency by simply taking in heavily populated counties. This means that candidates from large ethnic groups must make a wider geographical appeal than they otherwise would if they simply had to win the national popular vote, which is dominated by their tribes.

The system of devolving the presidency encourages stability by disadvantaging fringe parties and candidates. In practice, the winner-take-all manner of allocating a county's electoral votes will generally decrease the importance of fringe parties and candidates, helping reduce the number of political parties and candidates nationally. It will provide stability because it encourages a delayed adjustment during times of rapid political and cultural change. It will also protect the most powerful office in the country from capture

and control by dominant elitist regional groups without broad, long-term support across the nation.

The county electoral system isolates the impact of any election fraud, or other such problems, to the county where it occurs. It prevents instances where a party dominant in one region may inflate the votes of a certain candidate and thereby affect the election outcome. For instance, required recounts will occur only on a county-by-county basis, and not nationwide.

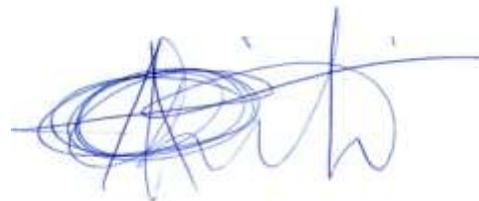
The fear that the system will lead to low voter turnout is taken care of by the fact that the presidential elections are held at the same time as the parliamentary and county polls, which have local candidates that will bring out the voters.

The Bill aims at giving full effect to the following:

- i. Article 10, as read with articles 24 and 27, and clause 33.2c provide for national values, including national unity, sharing and devolution of power, equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised, and affirmative action.
- ii. Clause 56(a) obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.
- iii. Clause 38.2a requires fairness in elections so everybody who desires can effectively vie for any elective public body or office established under the Constitution.

Finally, by eliminating the National Results Transmission System for transmitting results from the counties to the National Tallying Centre, the amendment will contribute substantially to the establishment of a tamperproof presidential electoral system as recommended by The Independent Review Commission (popularly known as the Kriegler Commission, i.e., the international commission appointed by the Government of Kenya in February 2008, to inquire into all aspects of the 2007 General Election, with particular emphasis on the presidential election). The Kriegler Commission rejected the very low standard of free and fair elections, and set the very high ‘tamperproof’ standard as being the ideal for Kenya.

Dated at Nairobi this 22nd Day of August 2017.



Okiya Omtatah Okoiti,
Proposer

Article 138 of the Constitution of Kenya which it is proposed to amend-

Procedure at presidential election

- 138.** (1) If only one candidate for President is nominated, that candidate shall be declared elected.
- (2) If two or more candidates for President are nominated, an election shall be held in each constituency.
- (3) In a presidential election—
- (a) all persons registered as voters for the purposes of parliamentary elections are entitled to vote;
 - (b) the poll shall be taken by secret ballot on the day specified in Article 101 (1) at the time, in the places and in the manner prescribed under an Act of Parliament; and
 - (c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.
- (4) A candidate shall be declared elected as President if the candidate receives—
- (a) more than half of all the votes cast in the election; and
 - (b) at least twenty-five per cent of the votes cast in each of more than half of the counties.
- (5) If no candidate is elected, a fresh election shall be held within thirty days after the previous election and in that fresh election the only candidates shall be—
- (a) the candidate, or the candidates, who received the greatest number of votes; and
 - (b) the candidate, or the candidates, who received the second greatest number of votes.
- (6) If more than one candidate receives the greatest number of votes, clause (5)(b) shall not apply and the only candidates in the fresh election shall be those contemplated in clause (5)(a).
- (7) The candidate who receives the most votes in the fresh election shall be declared elected as President.
- (8) A presidential election shall be cancelled and a new election held if—
- (a) no person has been nominated as a candidate before the expiry of the period set for the delivery of nominations;

- (b) a candidate for election as President or Deputy President dies on or before the scheduled election date; or
 - (c) a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President.
- (9) A new presidential election under clause (8) shall be held within sixty days after the date set for the previous presidential election.
- (10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—
- (a) declare the result of the election; and
 - (b) deliver a written notification of the result to the Chief Justice and the incumbent President.

Article 138 of the Constitution of Kenya after effecting the proposed amendments-

Procedure at presidential election

- 138.** (1) If only one candidate for President is nominated, that candidate shall be declared elected.
- (2) If two or more candidates for President are nominated, an election shall be held in each constituency.
- (3) In a presidential election—
- (a) all persons registered as voters for the purposes of parliamentary elections are entitled to vote;
 - (aa) there shall be no tallying at the national level of the votes cast in a presidential election;*
 - (ab) each one of the 47 counties shall constitute one presidential electoral point and each one of the 290 constituencies shall also constitute one presidential electoral point;*
 - (ac) total number of electoral points for electing the President shall be 337, representing 290 constituencies plus 47 counties;*
 - (ad) each county is apportioned presidential electoral points equal to the number of its constituencies plus one point for the county;*

- (ae) all the presidential electoral points in a county are given on a winner-take-all basis to the candidate who wins the presidential ballot, by direct popular vote;*
- (af) the electoral points presidential candidates win on a county-by-county basis shall be aggregated nationally to determine the winner.*
- (ag) To be elected President, one must win at least 169 presidential electoral points, being more than half of the 337 possible points.*
- (b) the poll shall be taken by secret ballot on the day specified in Article 101 (1) at the time, in the places and in the manner prescribed under an Act of Parliament;
- (c) after counting the votes in the polling stations, *on a county-by-county basis*, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result *for each of the 47 counties*;
- (ca) The winner of the popular vote at the county tally shall be declared the winner of that county's presidential points;*
- (cb) The winner of the presidential election shall be the candidate who wins at least 169 presidential electoral points nationally;*
- (cc) the electoral points so announced and/or declared shall be the official, final and binding results of the presidential election.*
- (4) A candidate shall be declared elected as President if the candidate receives more than half of all the *presidential electoral points* in the election.
- (5) If no candidate is elected, a fresh election shall be held within thirty days after the previous election and in that fresh election the only candidates shall be—
- (a) the candidate, or the candidates, who received the greatest number of *presidential electoral points*; and
- (b) the candidate, or the candidates, who received the second greatest number of *presidential electoral points*.
- (6) If more than one candidate receives the greatest number of *presidential electoral points*, clause (5) (b) shall not apply and the only candidates in the fresh election shall be those contemplated in clause (5) (a).
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- (7) The candidate who receives the most ***presidential electoral points*** in the fresh election shall be declared elected as President.
- (8) A presidential election shall be cancelled and a new election held if—
- (a) no person has been nominated as a candidate before the expiry of the period set for the delivery of nominations;
 - (b) a candidate for election as President or Deputy President dies on or before the scheduled election date; or
 - (c) a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President.
- (9) A new presidential election under clause (8) shall be held within sixty days after the date set for the previous presidential election.
- (10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall deliver a written notification of the result to the Chief Justice and the incumbent President.