## THE CONSTITUTION OF KENYA, 2010 (AMENDMENT) BILL, 2015



### THE REPUBLIC OF KENYA

BILL FOR THE AMENDMENT OF THE CONSTITUTION OF KENYA, 2010 BY POPULAR INITIATIVE PURSUANT TO ARTICLE 257

PUBLISHED BY THE COMMITTEE OF EXPERTS, OKOA KENYA MOVEMENT

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#### A Bill for

**AN ACT** of Parliament to amend the Constitution of Kenya, 2010 by popular initiative pursuant to Article 257 of the Constitution of Kenya.

#### **ENACTED** by the Parliament of Kenya as follows-

Short title.

**1.** This Act may be cited as the Constitution of Kenya, 2010 (Amendment) Act, 2015.

Amendment of the Constitution.

**2.** The Constitution of Kenya is amended in the manner set out herein below.

Amendment to Article 12 of the Constitution.

- **3.** The Constitution of Kenya is amended at Article 12 as follows
  - a) At sub clause 1(a) by deleting the word "and" at the end of the sub clause.
  - b) At sub clause (1)(b) by adding a comma after the word "passport" and adding the words "national identity card" before the words "and any document" and deleting the full stop after the word "citizens" and substituting therefor a semicolon. The sub clause is further amended by adding the word "and" after the semicolon.
  - c) By introducing a new sub clause (1)(c)-
    - (c) The State shall issue the documents referred to in clause (b) to citizens within sixty days of application.

Amendment to Article 67 of the Constitution.

- **4.** The Constitution of Kenya is amended at Article 67 (2) by renumbering sub clauses (g) and (h) as sub clauses (h) and (i) respectively and introducing a new sub clause after sub clause (g) as follows-
  - (g) administer all registries, processes and dispositions in respect of all private, public and community land.

Insertion of new Article 71A to

**5.** The Constitution of Kenya is amended by introducing a new Article 71A as follows-

the Constitution.

- 1) The role of, and benefits for, communities in the management of natural resources shall be determined by legislation.
- 2) The national government shall ensure that:-
  - (a) at least fifteen per cent of revenue derived by the national government from natural resources is allocated to the county where the natural resources are extracted; and
  - (b) at least five per cent of revenue derived by the national government from natural resources is allocated to the communities where the resources are extracted.
- 3) The allocation under clause 2(b) shall be administered through a representative community management framework and structure.
- 4) Parliament shall enact legislation to give effect to this provision.

Amendment to article 79 of the Constitution.

- **6.** The Constitution of Kenya is amended by deleting the current Article 79 and substituting therefor a new Article as follows:
  - (1) There is hereby established the Ethics and Anti-Corruption Commission.
  - (2) The Commission shall have the powers to ensure compliance with, and enforcement of, the provisions of this Chapter and other functions allocated to it by Parliament.
  - (3) Parliament shall enact legislation to give effect to this Article.

Insertion of a new Article 83A to the Constitution.

- **7.** The Constitution of Kenya is amended by introducing a new Article 83B as follows-
  - (a) The Independent Electoral and Boundaries Commission shall have one single national register

of voters.

- (b) The Commission shall ensure that:
- i) The voter registration system and method used shall be simple, accurate, verifiable, secure, accountable, and transparent.
- ii) The voter registration system shall capture any two of the following biometric features: the finger prints, the facial features or Iris recognition.
- iii) There shall be one biometric voter registration kit in every polling station for purposes of registration of voters.
- iv) Voter registration shall be done at every designated and gazetted polling station.
- v) The Commission shall cause to be published in the Gazette the national register of voters sixty days before the date of the general election
- vi) In the case of a by-election, the Commission shall publish in the Gazette the relevant portion of the national register of voters thirty days before the by-election
- vii) The Commission shall within sixty days of the commencement of each year cause to be published in the Gazette and to make available to every political party, the names and addresses of each person registered during the preceding year.
- viii) The Commission shall ensure in respect of each constituency not less than 80% of the eligible voters in any electoral area are registered, based on the last population census or the government projected population whichever is the most recent.
- ix) The Commission shall ensure that there is full and complete disclosure to the public of all its processes, infrastructure, decisions, and transactions, including award of services and contracts related to voter registration.

Insertion of a new Article 86A to the Constitution

- **8.** The Constitution of Kenya is amended by introducing a new Article 86A as follows:
  - (i) The Independent Electoral and Boundaries Commission shall appoint a returning officer for

each constituency and a presiding officer for each polling station who shall be responsible for all the elective seats namely presidential, senate, governor, national assembly and women representative and county assembly.

Insertion of a new Article 86B to the Constitution.

- **9.** The Constitution of Kenya is amended by introducing a new Article 86B as follows-
  - (i) The system of voter identification shall be electronic;
  - (ii) The electronic system adopted for voter identification shall be simple, accurate, verifiable, secure, accountable, and transparent;
  - (iii) The electronic voter identification system shall have a count and a record of all voters so identified;
  - (iv) the presiding officer shall ensure that only the electronically identified voters shall be allowed to vote;

Insertion of a new Article 86C to the Constitution.

- **10.** The Constitution of Kenya is amended by introducing a new Article 86C to be titled "results transmission" as follows-
  - (i) The system of results transmission shall be manual and electronic. The electronic transmission shall be real time;
  - (ii) The results of all elections conducted in each constituency shall be announced by the constituency returning officer, after collating the results transmitted by the polling station presiding officers.
  - (iii) The counting of votes at the polling station and announcement of results at the polling stations shall be announced in the following order: presidential, senate, governor, women representative, member of national assembly and members of the county assembly
  - (iv) The Returning Officer shall ensure that the vote results are announced publicly, through a Video-link and beamed to the public through at least three accredited television stations, Media

- houses and to the Commission.
- (v) The results shall be scanned, recorded and simultaneously sent by electronic means to the Commission and the participating political parties.
- (vi) Subject to this Constitution, the announcement by the constituency returning officer of the results in respect of each and all results for that constituency shall be final.

## Insertion of a new Article 88A

- **11.** The Constitution is amended by introducing a new Article 88A as follows:
  - (a) The Commission shall carry out its operations and activities in an open and transparent manner;
  - (b) The Commission shall have an obligation of complete disclosure of all its operations both administrative and in the conduct and management of elections;
  - (c) The commission shall make complete disclosure and provide access to all services procured, contracts entered into and general access to its systems;
  - (d) The Commission shall at all times share its decisions and operations with all political parties and actors throughout the entire electoral process.

## Amendment to Article 88 of the Constitution.

- **12.** The Constitution of Kenya is amended at Article 88 by inserting a clause (1A) as follows-
  - (i) The members of the Commission shall consist of seven persons nominated by political parties based on their numerical strength in Parliament in the previous general elections and gazetted by the President within seven days of receiving the nominees by the political parties.
  - (ii) The commissioners shall elect a chairperson from among their number.
  - (iii) No member of the Commission shall hold the position of chairperson for a period exceeding twelve months.

#### Insertion of a new Article 96 (4)

- **13.** The Constitution is amended by introducing a new Article 93 (4) and re-numbering the current clause (4) to read clause (5) as follows:
  - (4) Each Governor shall be required to file quarterly reports of the County expenditures and developments priorities with the Senate and the respective county assemblies.

#### Insertion of a new Article 110 (4) & (5)

- **14.** The Constitution sis amended by introducing a new Article 110 (4) & (5) and by re-numbering the current clause (4) as clause (6) as follows:
  - (5) The joint resolution of the two speakers shall be shall be before the 1<sup>st</sup> reading of the bill.
  - (6) Each speaker shall report the decision so reached to their respective houses within seven days of the decision.

# Amendment to Article 138 of the Constitution.

- **15.** The Constitution is amended at Article 138 at clause 10 by deleting the word "and" at the end of sub clause (a) and renumbering sub clause (b) as (c) and introducing a new sub clause (b) as follows-
  - (c) publish the results received from the constituency returning officers in the Gazette; and

## Amendment of Article 140 of the Constitution.

- **16.** The Constitution of Kenya is amended by deleting the current Article 140 and substituting therefor the following new Article-
  - (1) Within fourteen days after the declaration of the results of a presidential election any voter may lodge at the Supreme Court a petition challenging the Presidential election results.
  - (2) Within seven days after lodging and service of the Petition at the Supreme Court the Commission and the Respondents shall file their responses to the petition.

- (3) Within seven days after the Commission and the Respondents file and serve their responses the Petitioner shall file further affidavits in response to the Commission and the Respondents.
- (4) The Supreme Court shall hear and determine the Petition within sixty days from the date of the declaration of results.
- (5) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.

Amendment of Article 166 of the Constitution.

- **17.** The Constitution of Kenya is amended at Article 166 (1)(a) by deleting clause (1)(a) and substituting therefore a new clause 1(a) as follows-
  - (1) The Judicial Service Commission shall appoint-
    - (a) the Chief Justice and the Deputy Chief Justice subject to the approval of the National Assembly; and

Amendment of Article 167 of the Constitution.

- **18.** The Constitution of Kenya is amended at Article 167 by deleting clause (1) and substituting therefor a new clause as follows-
  - (1) A judge shall retire from office on attaining the age of seventy five years, but may elect to retire at any time after attaining the age of seventy years.

Amendment of Article 172 of the Constitution.

- **19.** The Constitution of Kenya is amended at Article 172 by deleting clause (1)(a) and substituting therefor new clause (1)(a) as follows:
  - (a) appoint judges;

Amendment of Article 203 of the Constitution.

**20.** The Constitution of Kenya is amended at Article 203 by deleting clause (3). The Article is further amended at clause (2) by deleting the word "fifteen" and substituting therefor the words "forty five" and by adding the words "in the preceding financial year" after the words "national government."

Insertion of new Article 204A to the Constitution.

- **21.** The Constitution of Kenya is amended by introducing Article 204A as follows-
  - (1) There is hereby established a Fund to be known as the Ward Development Fund.
  - (2) For every financial year, at least five per cent of the equitable revenue allocated to a county government shall be paid into the Fund and shall be utilized in each county to implement projects in accordance with development priorities of the ward representation.
  - (3) Parliament shall enact legislation to make provision for the management of the Fund and to give further effect to this provision.

Insertion of new Article 206A to the Constitution.

- **22.** The Constitution of Kenya is amended by introducing Article 206A as follows-
  - (1) There is hereby established a Fund to be known as the Constituency Development Fund.
  - (2) For every financial year, a portion of the revenue allocated to the National Government in the annual budget shall be paid into the Fund to undertake approved functions of the National Government in each Constituency.
  - (4) Parliament shall enact legislation to make provision for the management of the Constituency Development fund.

Amendment to Article 232 of the Constitution.

- **23.** The Constitution of Kenya is amended at Article 232 by introducing a new clause 2A as follows-
  - (a) Subject to the protection of minorities and the marginalized in Articles 10, 100 and 232 of this Constitution, no ethnic community shall have more than fifteen per cent of appointments in any state organ of the National Government, all Government agencies, and departments of Government.
  - (b) The provisions of this clause shall apply to all appointments at all levels of Government.
  - (c) This provision shall apply to all private

enterprises that are contracted by the National Government and its agencies.

# Insertion of a new Article 246A to the Constitution.

- **24.** The Constitution is amended by introducing a new Article 246A as follows-
  - (1) There shall be a County Security Advisory Council in respect of each county.
  - (2) The membership of the Council shall include representatives of security agencies, county government representatives and members of the public.
  - (3) The functions of the Council shall be to-
    - (a) develop proposals on priorities, objectives and targets for the performance of security agencies;
    - (b) provide feedback on performance of the security agencies to the Inter-governmental relations forum;
    - (c) Facilitate public participation;
    - (d) and such other functions as may be determined in national legislation.
  - (3) Parliament shall enact legislation to give effect to the provisions of this Article.

# Amendment of Article 248 of the Constitution.

- **25.** The Constitution of Kenya is amended at Article 248 (2) by introducing a new clause (k) as follows:
  - (k) The Ethics and Anti-Corruption Commission.

## Amendment to Article 255 of the Constitution.

**26.** The Constitution of Kenya is amended at Article 255(1)(i) by adding the words "revenue allocation," after the word "objects".

#### MEMORANDUM OF OBJECTS AND REASONS

The Constitution of Kenya came into force on 27<sup>th</sup> of October 2010 upon its public promulgation. Many Kenyans pinned their hopes on the provisions of the Constitution. Owing to this, a vast majority had their dreams and aspiration tied to the efficacy and efficiency of implementation of the Constitution. This has not been possible without enabling provisions to help clarify and define responsibilities, duties, powers and functions of different organs; to wit the Judiciary, the Independent Electoral and Boundaries Commission, the National Land Commission *inter alia*. The objective of this Bill is therefore to amend various provisions of the Constitution in order to take into account the invaluable lessons learnt through three years of implementation of the Constitution in order to give effect to the aspirations of the people of Kenya. The following are the explanatory notes of the clauses.

#### Clause 3

The amendment in this Article entrenches the rights of all citizen to a Kenya National Identity Card. The National Identity Card is a pre-requisite for all citizens if they are to enjoy their political right under Article 38 of the Constitution.

#### Clauses 4

This clause has been introduced to define the specific roles between the National Government and the National Land Commission on management of public, community and private land. This is with respect to the management of registries, processes and dispositions. The clause grant exclusivity to the National Land Commission to administer public, private and community land while the National Government role is limited to policy formulation in relation to land.

#### Clause 5

The amendment has been introduced to clarify the roles of the different levels of government in management of natural resources. It enshrines the rights of communities from where the resources are extracted to share in the income. The clause anticipates legislation to guide the involvement of county governments and the development of a community management framework for the better management of natural resources by the two levels of government.

#### Clause 6

This clause establishes and entrenches the Ethics and Anti Corruption Commission as a constitutional commission with powers to enforce the provisions of Chapter Six of Constitution. This clause grants more autonomy to the Commission under the Constitution.

#### Clause 7

The amendment enhances accountability and the management of the electoral process in Kenya and removing any loopholes which may make the voter registration process suffer legitimacy confidence. It gives the parties to the election to ascertain the contents of the register and allow individuals who may have been omitted from the register to seek redress. It also imposes a duty on the Commission to maintain only one single national register of voters and a requirement to adopt an electronic voter registration system that is simple, accurate, verifiable and accountable. The Commission will also have a duty to publish the National register of voters within 60 days for the preceding year and avail the register to all political parties.

#### Clause 8

The clause introduces a new Article 86A to provide for the appointment of a returning officer for each constituency and a presiding officer for every poling station and who shall be responsible for all election of all electives seats including the position of president, governor, and senator, member of the national assembly, women representative and county assembly representative. The clause is intended to ensure that in the Presidential election there shall be 290 returning officers whose results announcement shall be final and not the chairperson of the Commission.

#### Clause 9

This clause introduces a new Article 86B to provide for proper voter identification process which is electronic and is to be simple, accurate, verifiable and accountable. The new clause also requires the Commission to appoint a returning officer and a presiding officer for each of the elective positions namely presidential, senate, governor, women Representative and National Assembly positions.

#### Clause 10

This clause introduces a new Article 86C to deal with vote transmission which shall be electronic and simple, accountable, verifiable and transparent. The transmission system shall be real time and streamed simultaneously to all political parties. The results shall be announced by the Constituency returning officer and shall be final and to be beamed in public before a video camera and transmitted to all registered television stations, then subsequently scanned and sent to the Commission and to all political parties at the same time.

#### Clause 11

The clause introduces an obligation on the Commission to carry out its operations and conduct of elections in an open and transparent manner and to make full disclosure of all engagements including contracts of services it enters into.

#### Clause 12

This amendment provides for the nomination and appointment of Commissioners of the Independent Electoral and Boundaries Commission by political parties based on their numerical strength in parliament based on the last election results. The chair of the Commission is to be appointed by the members of the Commission on a rotational basis for a period not exceeding twelve months.

#### Clause 13

The amendment has been introduced to ensure accountability of County Governments for resources allocated to them by making a requirement that they file quarterly reports with the Senate to show how expenditure has been undertake and to shed light on their development priorities for the subsequent quarter of the year.

#### Clause 14

The amendment has been introduce to streamline the procedure and process through which the speakers of both houses arrive at a joint resolution as to how to determine which bill must pass through senate. It places a requirement on both speakers to carry out such consultation or resolution before the 1<sup>st</sup> reading of the bill and to communicate their decision to the respective houses within seven days of the resolution.

#### Clause 15

The amendment is introduced to place an obligation on the Commission to publish results as received from the constituency returning officer into the Kenya Gazette.

#### Clause 16

The amendment sets out in great detail the dispute resolution process in the event of any electoral disputes arising out of the presidential elections. It offers adequate timelines to enable filing, exchange and determination of presidential election disputes. It offers an adequate timeline to enable filing, service of documents and determination of presidential elections disputes.

#### Clause 17

The amendment provides for a procedure of appointment of the Chief Justice and the deputy by the Judicial Service Commission and takes away the powers of the President to carry out any appointments.

#### Clause 18

This clause harmonizes the retirement age of the judges appointed under the old constitution and those under the new Constitution.

#### Clauses 19

The two clauses deepen the independence of the judiciary by allowing the Judicial Service Commission to appoint judges without the involvement of the executive.

#### Clause 20

This amendment ensures that county governments have adequate finances to carry out their functions. This is achieved through:

- a) Enhancing county allocation of the national revenue from the current minimum of fifteen percent to a minimum of forty five percent.
- b) Providing that the base for calculating the minimum allocation above is "the preceding financial" year as opposed to the "most recently audited and approved account" which have tended to be outdated and not reflecting the current economic realities.

#### Clause 21

The clause introduces the Ward Development Fund which constitutes five percent of the equitable share of the funds allocated to county governments. The clause also allows county assemblies to legislate for the better management of the Fund.

#### Clause 22

The clause establishes the Constituency Development Fund which shall be a portion of the revenue allocated to the National Government to carry out approved functions of the National Government.

#### Clause 23

This clause ensures that all communities are effectively represented in all public service appointments by restricting the appointments in all state agencies, government departments and corporations to no more than fifteen per cent of based on the population of any one ethnic community. It also entrenches affirmative action in favour of ethnic minorities in public appointment. It is creates a duty on private enterprises that are contracted by the National Government to ensure that provide employment of Kenyans across the ethnic divide.

#### Clause 24

This amendment establishes the County Security Advisory Council at the county level. This seeks to strengthen community involvement in the security at the county level.

#### Clause 25

This clause seeks to entrench the independence of the Ethics and Anti-Corruption Commission as a constitutional commission. This is further to the amendment to Article 79 of the constitution.

#### Clause 26

This Bill seeks to protect devolution by ensuring that adequate funds are disbursed to the devolved government structures. This clause protects the provisions of Article 203 so that the equitable share of revenue to the devolved governments may only be altered at a referendum.

DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF APRIL 2015 OKOA KENYA MOVEMENT