



**MEMORANDUM ON THE CONSTITUTION OF KENYA (AMENDMENT) BILL 2024  
PRESENTED TO THE NATIONAL ASSEMBLY AND THE SENATE**

**SUBMITTED TO**

**CLERK OF THE NATIONAL ASSEMBLY**

**AND**

**CLERK OF THE SENATE**

**PO BOX 41842-00100, NAIROBI**

**IN THE MATTER OF CONSIDERATION BY THE JOINT COMMITTEE OF THE NATIONAL  
ASSEMBLY AND THE SENATE: THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2024**

**25<sup>TH</sup> OCTOBER 2024.**

**SUBMITTED BY:**

The Kenyan Section of the International Commission of Jurists

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# CONTENTS

<u>Introduction</u> .....	3
A. <u>Presidential Term Limit</u> .....	3
B. <u>MPs, MCAs and Governor Term Limits</u> .....	7
C. <u>Prime Minister</u> .....	9
D. <u>State of Emergency</u> .....	11
E. <u>The Deployment of the Kenya Defense Forces</u> .....	13
F. <u>Allocation of County Government Resources</u> .....	15
<u>Conclusion and Recommendations</u> .....	17

## INTRODUCTION

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, nonprofit, and member-based organisation whose objectives include the development, protection of the rule of law, democracy, governance, promotion of human rights, and safeguarding of independence of the Judiciary and the legal profession.

ICJ Kenya has reviewed and interrogated the Constitution of Kenya (Amendment) Bill 2024. It submits this memorandum in line with its mandate. This memorandum highlights ICJ Kenya's **select** views of the proposals included in the Bill.

### A. Presidential Term Limit

**Clause 10 of the proposed amendment seeks to amend the term of President from five years to seven years.** - Article 136 of the Constitution of Kenya is amended in clause (2) by deleting the word “fifth” appearing immediately after the words “in every” and substituting therefore the word “seventh”

#### ICJ Kenya Submissions

**Article 136 of the Constitution of Kenya, 2010**, pertains to the election of the President. It specifies the process, eligibility, and timing of the presidential election:

- 1) The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections.
2. An election of the President shall be held-
  - a) on the same day as a general election of Members of Parliament. being the second Tuesday in August, in every fifth year: or
  - b) in the circumstances contemplated in Article 146.

Scholars such as **Larry Diamond** and **Nic Cheeseman** have made significant contributions to the discourse on the importance of term limits and regular elections as key ingredients of democratic governance. Their works argue that term limits serve as essential safeguards against the centralization of executive power, the erosion of democratic institutions, and the weakening of political accountability.

In his seminal work *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform (2015)*, **Nic Cheeseman** provides a comprehensive analysis of the impact of term limits on African democracies. He asserts that “weakening term limits, whether by extending terms or removing them entirely, is often the precursor to the collapse of democratic institutions.” Cheeseman’s research highlights that term limits not only foster political renewal and leadership rotation but also play a crucial role in preventing the entrenchment of authoritarian regimes. The weakening or removal of term limits, according to Cheeseman, often leads to democratic backsliding, as incumbents manipulate political systems to extend their rule **indefinitely**.

Cheeseman’s observations are particularly relevant in the context of Africa, where several countries have experienced the erosion of democratic institutions following the extension or removal of presidential term limits. For instance, he notes that in countries like **Rwanda, Uganda, and Burundi**, leaders have amended their constitutions

to remain in power beyond their original term limits. This has often been accompanied by a decline in political freedoms, suppression of opposition voices, and the centralization of power in the executive branch. Cheeseman argues that term limits are fundamental to the democratic process because they ensure that no single individual or political group remains in power for too long, thereby preventing the personalisation of political power.

Similarly, **Larry Diamond**, a renowned scholar on democracy, emphasizes the critical role of term limits in his analysis of democratic systems. In his work *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World (2008)*, Diamond warns that extending presidential terms frequently results in the erosion of other democratic institutions, such as the judiciary, parliament, and the media. He notes that when presidents seek to extend their terms, they often undermine the independence of these institutions in an effort to consolidate power. Diamond's research shows that such actions lead to a domino effect, where the concentration of executive power erodes checks and balances, weakens the rule of law, and stifles public accountability.

Diamond also highlights that term limits are vital in maintaining a vibrant political system by allowing new political leaders and ideas to emerge. Without term limits, incumbents are often tempted to use state resources and influence to perpetuate their rule, thereby stifling political competition and weakening democracy.

*“Term limits are one of the few mechanisms that guarantee peaceful transitions of power and political renewal, which are essential for the long-term health of any democracy.”*

Diamond

**Alexander Baturo** in his book *Democracy, Dictatorship, and Term Limits (2014)* adds that term limits provide an essential check on the abuse of executive power. He asserts that when term limits are absent or violated, presidents often manipulate institutions, undermine judicial independence, and engage in electoral fraud to remain in power. Baturo's analysis, like that of Diamond and Cheeseman, underscores the importance of maintaining constitutional term limits as a fundamental pillar of democracy and good governance.

The extension of presidential terms, as proposed in Clause 10, risks undermining the delicate balance of power established by Kenya's Constitution, leading to the weakening of democratic institutions. Both Cheeseman and Diamond caution that any attempt to extend term limits should be approached with extreme caution, as such moves have historically led to democratic decay and the consolidation of autocratic rule in many countries. **This underscores the importance of upholding the five-year presidential term limit in Kenya to preserve the country's democratic integrity and ensure regular, accountable leadership transitions.**

**Extending a presidential term limit poses significant dangers to democracy, undermining the principles of accountability, power balance, and citizens' rights. Such an extension would be disastrous for democratic integrity for the following reasons:**

### **1. Violation of Core and Integral parts of the Constitutions.**

The 2010 Kenyan Constitution is grounded on the principle of popular sovereignty, which means that all political power ultimately originates with the people. Articles 1(1) and 1(2), affirm that the Kenyan people own all sovereign power, which may only be exercised in conformity with the Constitution. The Constitution's regular elections, particularly Article 136(2)(a), which stipulates that presidential elections must take place every five years, further demonstrate this sovereignty.

A key component of the accountability concept is the five-year term limit, which requires a president to seek a new mandate from the people after each set amount of time. The spirit of accountability and regular democratic renewal envisioned in the Constitution is violated by extending this tenure to seven years.

Political instability and a reversal of democratic governance have frequently befallen nations that have tried to prolong presidential terms without sufficient public consultation or democratic governance. In Burundi, for example, President Pierre Nkurunziza's 2015 attempt to prolong his term without broad consensus or a valid legal process resulted in civic turmoil, international condemnation, and widespread unrest. His term extension was viewed as a violation of democratic principles and constitutional norms, which further weakened the nation's governing structures.

Similar to this, Uganda saw a rise in authoritarianism, curtailment of civil liberties, and political opposition after eliminating term limits for presidents in 2005 and extending them in 2017. The dangers of changing presidential term limits without a thorough, inclusive process that represents the will of the people are illustrated by Uganda's experience. Long-term damage to democratic institutions resulted from the constitutional amendments that prolonged the periods in these nations, which were seen as a clear breach of the popular sovereignty principle.

## 2. Violation of Democratic Principles

Presidential term limits are essential to democratic governance because they prevent power from being concentrated in the hands of one person. The proposed increase in the presidential term from five to seven years would go against this core democratic tenet.

The court stressed that democracy, public engagement, and the rule of law must be the cornerstones of governance in **The Institute of Social Accountability & Others v. National Assembly & 4 others [2015] eKLR**. The amendment runs the risk of solidifying long-serving incumbents and establishing a political climate that encourages authoritarianism, erodes democratic accountability, and reduces the function of checks and balances on executive power by prolonging presidential terms.

According to **Robert Dahl's theory of pluralism**, competitive elections and frequent leadership changes are essential for democracy to flourish. Extended periods of incumbency erode the competitiveness of elections, deter opposition parties, and foster an atmosphere conducive to the rise of autocratic government. Kenya could follow the example of Burundi and Uganda, where constitutional revisions to extend presidential terms resulted in the entrenchment of authoritarian rule and the deterioration of democratic institutions, by extending the term limit. The Ugandan situation serves as an example of how power concentration can lead to reduced opposition, manipulated elections, and restricted civil liberties, especially following President Museveni's 2017 decision to extend the term limit.

## 3. Undermining Constitutional Integrity

The 2010 ratification of Kenya's Constitution is based on the ideas of transparency, accountability, and regular leadership changes. The integrity of the Constitution is seriously threatened when presidential term limits are changed. Article 136(2) of the Constitution provides that the people should exercise their sovereignty through periodic elections held every five years. The people's will and the fundamentals of democratic governance are upheld by these clauses.

The public's confidence in the Constitution is damaged when these term restrictions are changed for political reasons. The ruling in **Republic v. Independent Electoral and Boundaries Commission (IEBC) & Others ex parte CORD [2017] eKLR** confirmed that broad public participation is necessary for any changes that substantially affect the accountability mechanisms or the distribution of power within the government. Changing term limits to extend the presidency without adequate public consent threatens the Constitution's foundational commitments to fair and just governance.

#### 4. Disregard for the Rule of Law - Violation of Article 255

A referendum is required for any alteration to the Kenyan Constitution that affects the president's term of office, as stated in Article 255(1)(f). This suggests that a referendum involving the public is necessary to implement the fundamental change outlined in Clause 10 and cannot be accomplished by merely legislative methods. The rationale is to ensure that any extension of power, which could potentially entrench autocracy, must be approved directly by the electorate.

Additionally, Article 255(1)(g) and (i) mandates a referendum for any change that impacts the “independence of the judiciary” or the “structure of devolution.” Since the presidency plays a critical role in appointing judicial officers and in the devolved government structures, lengthening the presidential term could indirectly affect these areas, warranting even more scrutiny.

The Constitutional Court addressed objections to presidential term extensions in the 2016 case of **Daniel Munkombwe v. Attorney General in Zambia**, reinforcing the need of abiding by constitutional provisions that set time limits for presidential terms. In order to maintain the values of democracy and the rule of law, the court emphasized the importance of term limits for the rotation of leadership and to make sure that no one person gains an excessive amount of authority. Kenya may learn from Zambia's example, which shows how attempts to prolong presidential terms can erode democratic institutions and cause political instability.

In the case of **Independent Electoral and Boundaries Commission (IEBC) v. Maina Kiai & 5 others [2017] eKLR**, the Court of Appeal reiterated that elections serve as a means of holding political leaders accountable. This mechanism is weakened when the president's tenure is extended since the public's ability to hold him accountable is diminished. Regular elections are essential to democracy because they guarantee that the people retain control and that those in positions of authority are held accountable.

#### 5. Threat to Political Stability

Political instability and tension are expected to result from extending the presidential term limit. Public protests, violence, and political instability have accompanied term limit extensions in several countries. For instance, Nkurunziza's decision to prolong his term as president of Burundi caused widespread demonstrations and political unrest that jeopardized the country's unity. Similar political crises, including recurrent demonstrations against President Gnassingbé Eyadéma's prolonged tenure, were brought on by Togo's elimination of term limits.

Similar political instability would result from Kenya's possible increase of presidential terms since it would erode public confidence in the democratic process, limit chances for leadership changes, and foster an atmosphere that is conducive to violence after elections. Maintaining constitutional term limits encourages the orderly transition of power, which is a crucial component of political stability.

Similar political instability would result from Kenya's possible increase of presidential terms since it would erode public confidence in the democratic process, limit chances for leadership changes, and foster an atmosphere that is conducive to violence after elections. One of the major pillars of political stability and upholding constitutional terms is the peaceful transition of power.

Changing the rules around term limits can lead to institutional instability, as it often involves altering constitutional structures. This can foster distrust among citizens and other political actors, creating a volatile political environment. Instability can deter investors, lower public morale, and hinder economic and social progress.

#### 6. Erosion of Checks and Balances

Presidential term limits are a fundamental check on executive power, ensuring that no one individual or party monopolizes authority. Extending term limits often disrupts the separation of powers, allowing the president to influence legislative and judicial institutions, eroding their independence and effectiveness. This can lead to a concentration of power in the executive, making democratic institutions vulnerable to manipulation.

## 7. Encouragement of Authoritarianism

Prolonged power often emboldens leaders to consolidate authority, making it easier to shift from democratic to authoritarian practices. By staying in office beyond the originally mandated period, presidents can gradually dismantle democratic norms, potentially weakening electoral processes, suppressing dissent, and silencing opposition to maintain control.

## 8. Suppression of Political Diversity and Competition

Term limits encourage healthy competition, providing opportunities for new leaders and perspectives. When limits are extended, it reduces political diversity, marginalizes opposition, and discourages capable leaders from running for office. A lack of competition stifles policy innovation and reduces the quality of governance, as those in power may not feel pressured to respond to citizens' needs.

## 9. Increased Risk of Corruption

The longer a president remains in power, the more likely they are to build networks of loyalty through patronage and corruption. Extending term limits can enable leaders to entrench corrupt practices within government structures, using state resources to reward allies, buy support, and marginalize opponents, ultimately draining public resources and eroding public trust.

## 10. Weakening of Democratic Accountability

Presidential term limits create an automatic exit mechanism that holds leaders accountable. When removed or extended, this accountability is weakened, reducing incentives for ethical governance. Presidents with extended terms may prioritize personal agendas over national welfare, enacting policies that benefit a few while neglecting public needs.

## 11. Undermining of Peaceful Power Transitions

Peaceful transfer of power is a hallmark of democratic governance. By extending terms, leaders risk creating a precedent that encourages future incumbents to follow suit, perpetuating a cycle of power retention. This undermines the principle of peaceful transitions, as leaders become more reluctant to relinquish power, sometimes triggering crises when eventually forced out.

## 12. International Reputation and Relations

Countries that manipulate term limits often face international criticism, which can lead to strained relations, reduced foreign aid, and isolation in diplomatic and trade networks. A country's adherence to democratic norms is a key factor in its international standing, and extending term limits can damage its reputation and credibility on the global stage.

## B. MPs, MCAs and Governor Term Limits

**Clause 4 of the amendment bill proposes to amend of Article 101 of the Constitution of Kenya to extend the term of a Member of Parliament from five years to seven years - Amend Art. 101 Election of members of parliament** in clause (1) by deleting the word “fifth” appearing immediately after the words “in every” and substituting therefor the word “seventh”

**Clause 18 seeks to amend Art. 177 of the Constitution to amend the term of Members of County Assembly from five to seven years - Article 177 of the Constitution of Kenya is amended in clause (1) by deleting the word “fifth” appearing immediately after the words “August, in every” in paragraph (a) and substituting**

**Clause 19 seeks to extend the term of county and deputy governor from five years to ten years - Article 180 of the Constitution of Kenya is amended in clause (1) by deleting the word “fifth” appearing immediately after the words “August, in every” and substituting therefor the word “seventh**

## **ICJ Kenya Submissions.**

These amendments present similar concerns about democratic governance, constitutional integrity, and accountability as discussed in the context of presidential term extensions.

Similar to presidential terms, the proposed extension would encourage long-term incumbency, making it more difficult for voters to regularly evaluate and replace their representatives. Changing such term restrictions frequently erodes democratic checks and creates an atmosphere where elected individuals become more autocratic in their leadership, as Cheeseman's research on African democracies highlights.

Due to their important roles in local governance and legislative processes, MPs, MCAs and Governors are equally subject to the Democratic Principles. Extending their terms reduces the accountability that comes from regular elections and risks consolidating power within political elites, who may be incentivized to act more in their own interests than in those of their constituents. The present five-year cycle for county and parliamentary elections encourages democratic renewal, much like the five-year presidential term does. Extending these terms would deter people from actively participating in government and make Kenya's political competition less vibrant.

The 2010 Kenyan Constitution was based on the principles of transparency, accountability, and leadership renewal at all levels of government. Important elements of this constitutional structure are Article 101 and Article 177, which require frequent elections for MPs and MCAs every five years. The opportunity for individuals to routinely examine and select their legislative representatives is guaranteed by these recurring elections.

Like the presidential term, extending the terms of MPs, MCAs and County Governors jeopardizes constitutional integrity. The extension of terms amounts to an attempt to radically change the governing structure without the necessary public participation or constitutionally mandated referendum.

Extending these terms carries a considerable risk of strengthening legislative dominance and undermining checks on power. Local governance, budgets, and legislation are all heavily influenced by MPs and MCAs. The change may strengthen long-standing incumbents who control legislative procedures and local government choices by prolonging their terms, which would reduce accountability and responsiveness in governance.

Long legislative terms raise the possibility that corrupt practices will become more entrenched. Long-serving MPs and MCAs may have more chances to dominate local and national resources, create networks of patronage, and erode accountability mechanisms. By decreasing the frequency of elections to hold elected officials accountable, the extension of terms for MPs and MCAs will exacerbate corruption, which is already a major problem in Kenya.

Long terms foster conditions where oversight is diminished, and lawmakers may not feel as compelled to attend to the concerns of their people. Greater entrenchment of local power brokers who are less accountable to their communities is certain.

Regular elections for MPs and MCAs encourage leadership renewal and provide for the introduction of new ideas into government, much like the presidential term does. At both the national and local levels, extending their tenure erases political competition and limits the chance for new leaders to emerge. The proposed modifications inhibit political innovation and responsiveness to shifting public requirements by restricting opportunities for fresh and diverse leadership.

The demand for more responsibility from elected leaders is a recurring theme in Kenyan public opinion. In addition to violating the Doctrine of Popular Sovereignty, extending the terms of MPs and MCAs without broad public demand or input would disregard the people's desire for regular elections and a change of leadership.

It is clear from the legal reasons and precedents that the proposed modifications that aim to increase the term limitations for the President, Parliamentary Members, and County Assembly Members from five to seven years endanger the fundamental foundation of Kenya's constitutional democracy. Important democratic tenets like accountability, transparency, and regular leadership renewal are compromised by these amendments.

The Kenyan Constitution's term limits were put in place to guarantee that elected leaders would continue to be accountable to the people and that elections would continue to be a forum for democratic expression and transformation. Historical lessons, scholarly insights, and other countries' experiences show that increasing term limits frequently results in authoritarianism, undermines democratic institutions, and upsets political stability. The rule of law in Kenya dictates that such fundamental changes to the Constitution cannot be made without broad public participation and approval through a referendum.

**Therefore, we vehemently oppose all proposed amendments that seek to extend the term limits of the President, Members of Parliament, Members of the County Assembly and County Governors. These amendments erode the constitutional safeguards that protect our democracy and must be rejected in order to preserve the integrity of Kenya's governance and the sovereignty of the people.**

## C. The office of Prime Minister

**Clause 11 seeks to Amend Art. 151 by inserting Article 151 A which proposes to create the office of the Prime Minister who shall be appointed by the president from amongst the members of Parliament. The Prime Minister shall be the leader of the largest party or coalition of parties in Parliament -** The Constitution of Kenya is amended by inserting the following new Article immediately after Article 151 – 151A.

1. There shall be a Prime Minister of Kenya who shall be a Member of Parliament appointed by the President from the party or a coalition of majority parties in Parliament.
- 2) The Prime Minister shall be the head of government, responsible for the day-to-day administration of the government, and shall be accountable to Parliament.
- 3) The Prime Minister shall serve at the pleasure of the President, and the President may, terminate the appointment of the Prime Minister.

### 1. Violation of the Presidential System Enshrined in the 2010 Constitution

A pure presidential system of government was firmly established by the 2010 Kenyan Constitution. The President, who is both the Head of State and the Head of Government, is directly chosen by the people and has executive authority under Article 1(3) of the Constitution. The proposed change creates a quasi-parliamentary system by establishing the Office of the Prime Minister, which is fundamentally at odds with the Constitution's established presidential paradigm.

Article 129(1), "Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution." As stated in Article 136, the writers of the Constitution intended for the President to be the sole executive authority holder and to be answerable to the people through regular elections.

The creation of a Prime Minister accountable to the President, rather than directly to the electorate, dilutes the concept of executive authority vested in a single, directly elected individual. This modification constitutes a major alteration to the fundamental framework of Kenya's government model, which cannot be accomplished without a referendum.

### 2. Historical Experiences

Prior to the National Accord and Reconciliation Act of 2008, which was passed in the wake of the 2007–2008 post-election violence, Kenya had the Office of the Prime Minister under the 1963 Independence Constitution. In an effort to bring peace and stability back, the National Accord established a power-sharing agreement between the president and prime minister, but it also brought attention to the challenges associated with a dual executive system.

Scholarly writings by constitutional experts such as *Yash Ghai* and *Nic Cheeseman* point out the inefficiencies and tensions that arise from a dual executive model. In their writings on Kenya's constitutional development, they argue that the **2008 power-sharing agreement created confusion in governance** and overlapping authority

between the President and Prime Minister. This arrangement led to significant challenges in decision-making, policy implementation, and accountability, often causing political gridlock.

Confusion over the separation of powers between the president and prime minister, particularly if they come from opposing political parties or have divergent policy agendas, could result from reintroducing the office of the prime minister, which runs the danger of repeating similar historical mistakes.

### **3. A deterioration in the division of powers**

A fundamental tenet of Kenya's constitutional democracy, the separation of powers, is undermined when a prime minister is introduced in a system that is mostly presidential. The legislative, executive, and judicial branches of government each have specific functions and duties. The proposed change blurs the boundaries between the legislative and executive institutions by choosing the prime minister from the legislature, running the risk of establishing an overbearing administration that compromises legislative independence.

This blurring of the division of powers is in opposition to Article 94, which gives Parliament independent legislative independence from the Executive. In addition to violating this constitutional safeguard, allowing the Prime Minister to serve as both the head of Parliament and a member of the Executive diminishes Parliament's ability to serve as an effective check on executive power.

**Bruce Ackerman's** work on the importance of strong checks and balances emphasizes that a system with concentrated or ambiguous executive power risks undermining democratic accountability. The proposed dual executive model, with a President and Prime Minister, creates fertile ground for such ambiguity, weakening Kenya's democratic institutions.

### **4. Disruption of Political Stability**

By encouraging power battles between the president and prime minister, particularly if they represent opposing political factions or coalitions, the appointment of a prime minister runs the risk of escalating political instability. Political impasse, factionalism in Parliament, and increased polarization in the political sphere are likely.

Dual executive models can result in protracted political instability, as seen by historical instances from countries like Zimbabwe and Côte d'Ivoire that have implemented them during tense political times. Despite being intended to promote peace, Zimbabwe's power-sharing agreement between President Mugabe and Prime Minister Tsvangirai was tainted by ongoing hostilities and ineffective leadership. The appointment of a prime minister in Kenya runs the risk of upsetting the delicate balance of political power, particularly in a multiparty system where coalition politics are crucial. The political history of Kenya demonstrates that coalition politics are frequently erratic and prone to factionalism, which exacerbates internal governmental tensions and erodes democratic institutions.

### **5. Undermining the Accountability Principle**

Article 136 of the Constitution provides that a president who is directly elected is accountable to the people. This direct responsibility is compromised by the proposed amendment, which would establish a Prime Minister chosen by the President from Parliament. As the head of the majority party or coalition and a member of the legislature, the prime minister is largely answerable to Parliament rather than the general public.

The democratic tenet that the executive branch must answer directly to the people is undermined by this change. The 2010 Constitution established a direct line of accountability between the President and the people by requiring the Head of Government to face the electorate every five years. When a prime minister is appointed, the people's power to choose their executive leadership is diminished, undermining the constitutionally mandated accountability mechanisms.

### **6. Absence of Consent and Public Involvement**

Article 255 of the Constitution explicitly states that any significant changes to the governance system must be approved by a referendum and involve public engagement. Kenya's government structure would undergo a significant change with the planned establishment of the Prime Minister's office, moving from a strictly presidential to a hybrid one.

The Kenyan people must be given the chance to determine if they desire such a change in their system of government, since they are the sovereign power under Article 1 of the Constitution. The establishment of this post would violate the constitutional concept of popular sovereignty if it were not preceded by a thorough public debate and a referendum.

**The proposed creation of the Office of the Prime Minister through Clause 11 of the amendment bill poses a serious threat to the established constitutional framework in Kenya. It undermines the presidential system, weakens the separation of powers, threatens political stability, and diminishes the principle of accountability. Furthermore, it risks repeating historical governance failures and violates the constitutional principles of public participation and popular sovereignty. For these reasons, we strongly oppose the proposed creation of the Office of the Prime Minister and urge a reconsideration of this amendment in light of Kenya’s constitutional integrity, democratic governance, and political stability.**

## D. State of Emergency

**Clause 2 of the bill proposes to amend Article 58 of the Constitution to provide for the involvement of the Senate and the National Assembly as the Houses of Parliament in the approval of an extension of a state of emergency. A state of emergency affects the stability and functioning of the national and county governments and the nation as a whole. Consequently, it is important that both Houses be involved in this process - Amend Article 58-State of Emergency**

a) in clause (2) by deleting the words “the National Assembly” appearing immediately after the words “the declaration, unless” in paragraph (b) and substituting therefore the word **“Parliament”**;

b) by deleting clause (3) and substituting therefor the following new clause –

### **1.Parliament may extend a declaration of a state of emergency-**

a) by a resolution adopted-

(i) following a public debate in Parliament; and

(ii) by majorities specified in clause (4); and

b) for not longer than **two months** at a time.

c)by deleting clause (4) and substituting therefor the following new clause –

2. The first extension of the declaration of a state of emergency requires a supporting vote of **at least two-thirds** of all the members of the **National Assembly** and **two thirds** of all the county delegations in the **Senate**, and any subsequent extension requires a supporting vote of at least **three-quarters** of all the members of the National Assembly and **three-quarters** of all the county delegations in the **Senate**.

### **ICJ Kenya Submissions**

The declaration of a state of emergency is a presidential prerogative under Article 58 of the Kenyan Constitution, but it is subject to parliamentary oversight to provide accountability and guard against abuse of executive power. To ensure that the representatives of the people check the executive’s power, Article 58(2) now mandates that a declaration of emergency be ratified by the National Assembly within 14 days after its issue.

It may appear that the amendment’s proposal to include the Senate in the approval process encourages more democratic scrutiny. Nonetheless, the Senate is given a specific responsibility to safeguard the interests of county governments under Article 96(1) of the Constitution.

The National Assembly, on the other hand, is the main entity in charge of national legislation, national executive oversight, and representing the people at the national level. Therefore, the National Assembly’s constitutional

obligation to supervise executive decisions, including those pertaining to national security, is in line with the current clause requiring approval.

The amendment is also abit ambitious for the following reasons

### 1. Procedural Delays and Redundancy

During periods of national crisis, involving the Senate and the National Assembly in the approval process for extending a state of emergency could result in needless delays. By definition, a state of emergency is a unique circumstance that necessitates swift and decisive action to protect public order, national security, or the country's territorial integrity. Such choices must be approved quickly and effectively due to their time-sensitive nature.

If the Senate and the National Assembly are politically divided, requiring agreement from both Houses could result in drawn-out debates, political squabbling, and procedural deadlock. Such delays could make it more difficult for the government to act quickly and efficiently during a crisis, which could exacerbate the situation and jeopardize public safety.

### 2. Diluting Mechanisms for Accountability

The current requirement for National Assembly approval strikes a careful balance between executive authority and legislative oversight. By distributing responsibilities over two houses, the Senate's inclusion may weaken accountability and make it more challenging to clearly identify who is in charge of decisions pertaining to the extension of a state of emergency.

There is a risk of diluted accountability when too many parties participate in the decision-making process, meaning that no one institution can be held entirely accountable for accepting or rejecting a critical decision.

The integrity of the decision-making process may be compromised if this increase in parliamentary involvement politicizes the process by enabling political groups in the Senate to use their influence to demand concessions or favors from the executive.

### 3. Preserving the Separation of Powers

Kenya's Constitution, which upholds the principle of separation of powers, aims to prevent any one department of government, executive, legislative, or judicial, from having unbridled authority. In an emergency, the executive branch is tasked with protecting the country, but legislative monitoring ensures that its actions are not abused.

By including both Houses of Parliament in an essentially executive activity, the proposed change runs the risk of obfuscating the separation of powers. Ensuring that the executive's declaration of emergency conforms with constitutional safeguards is already the responsibility of the National Assembly. Incorporating the Senate into this procedure might tip the scales too much in the Legislature's favor, making it more difficult for the administration to take prompt action during emergencies.

### 4. Historical Lessons

According to **Constitutional Design Theory**, there may be inefficiencies and fragmentation when several legislative bodies participate in emergency decision-making. In his works on states of exception, **Carl Schmitt** pointed out that in order to avoid institutional paralysis in times of crisis, democratic governments need clear, centralized authority.

By distributing power among several entities, the government runs the risk of being too sluggish or fragmented to react to rapidly changing situations.

Kenya's past experiences, especially those of the Mau Mau Emergency in the 1950s and the post-independence states of emergency in the 1980s showcase the necessity of streamlined, clear and accountable mechanisms for managing national emergencies. In the past, political instability, violations of human rights, and economic disruptions have been caused by delays or ambiguities in the designation or extension of emergencies.

## 5. Undermining the primary role of the Senate

Article 96 states that the Senate's main responsibility is to represent and defend the interests of local governments. The proposed change runs the risk of diverting the Senate's attention from its primary duty of concentrating on devolution and county-level issues by allowing the Senate to approve a state of emergency, which is a national security problem primarily pertaining to national governance.

The Senate's involvement in this process seems pointless and goes against the **subsidiarity principle**, which states that decisions should be made at the appropriate levels of government. Article 187 of the Constitution already establishes procedures for the transfer of responsibilities between the national and county governments in the event of an emergency that predominantly impacts county governments, such as a health crisis or local insurgency. The Senate's participation in the national extension of a state of emergency appears redundant and could take away from its primary duty of safeguarding the country's interests.

To guarantee promptness and clarity in decision-making, a single legislative body has the authority to approve a state of emergency or extend one in many established democracies. In the United States, for example, the President may declare a national emergency, and although Congress may revoke it, the declaration itself does not need Senate and House of Representatives approval. Similar to this, the President of France may declare a state of emergency under the Fifth Republic Constitution, subject to parliamentary and judicial supervision but without the participation of several chambers of Parliament.

These worldwide standards are in line with the Kenyan model, which presently needs National Assembly approval. An already well-balanced emergency governance system runs the risk of becoming overly complicated if the Senate is included in the process.

**While the intention may be to promote greater oversight, the existing framework, which empowers the National Assembly to check executive authority, provides sufficient accountability without risking political or procedural gridlock. In times of emergency, Kenya's governance system must remain agile, decisive, and accountable. Therefore, we oppose the proposed amendment to Article 58 of the Constitution.**

## E. The Deployment of the Kenya Defense Forces

**Clause 30 seeks to amend art 241 of the Constitution to require the approval of both Houses of Parliament before the deployment of the Kenya Defense Forces in any part of Kenya - Article 241 of the Constitution of Kenya is amended in clause (3) by**

a) deleting the words "the National Assembly" appearing immediately after the words "report to the" in paragraph (b) and substituting therefor the word "Parliament"; and

deleting the words "the National Assembly" appearing immediately after the words "approval of the" in paragraph (c) and substituting therefore the word "Parliament"

### **ICJ Kenya Submissions**

The Kenya Defense Forces' duties, including protecting Kenya from both internal and external threats, are outlined in Article 241(3) of the Kenyan Constitution. The deployment of KDF in response to national security concerns is essentially an executive function, and the President has the power to act quickly on national defense choices in his capacity as Commander-in-Chief.

Currently, Article 241(3)(c) provides that the KDF may be deployed to restore peace in any area of Kenya, although this must be approved by the National Assembly. This clause maintains a careful balance between the necessity of prompt military action and the preservation of democratic accountability by guaranteeing both executive agility and parliamentary oversight.

This amendment doesn't work for several reasons;

### **1. Need for Swift and Decisive Action**

Response time is crucial in circumstances that call for military action, such as armed insurgencies, terrorist attacks, or domestic conflict. Significant delays could arise from requiring Senate and National Assembly consent before deploying the KDF, particularly in the event of a political impasse or while the Houses are not in session.

Making decisions quickly is frequently necessary for military operations in order to stop the security situation from getting worse. By adding needless red tape, involving both Houses in this decision-making process could jeopardize national security. Delays like these might allow security risks to worsen, leading to fatalities, property damage, and destabilization of the country.

### **2. Duplicative and Inefficient Parliamentary Oversight**

Under the existing structure, the National Assembly is in a good position to authorize KDF deployments since it is the main legislative body in charge of monitoring national affairs. Article 96 of the Constitution provides that the Senate's duty is to protect the interests of local governments. Although KDF deployments may have an impact on county governments, national defense is essentially a national duty, and the Senate's involvement in this process may make it more difficult to distinguish between national and local duties.

The requirement that KDF deployments be approved by both Houses runs the risk of causing duplicative oversight, in which the same decision must be approved by two different legislative bodies that may have competing political agendas or interests. This redundancy just adds possible delays and inefficiencies to the decision-making process; it adds no value.

### **3. Practical Experience**

Countries all around the world have put in place systems to guarantee prompt and efficient military deployments in response to ongoing threats to their internal and external security. Many cases, like in South Africa, India, and Israel, decisions about military deployment are mostly made by the executive branch, with post-deployment oversight from parliamentary committees. This preserves the integrity of democratic supervision while guaranteeing that protracted parliamentary procedures won't impede military operations.

Ethiopia and Nigeria, which have both had internal insurgencies, provide the executive significant discretion to quickly deploy military forces, subject to post-deployment reviews by their respective legislatures. These models highlight the necessity of executive flexibility in handling risks to national security, which ought to direct Kenya's military governance as well.

### **4. The Role of the Senate and Devolution**

The Senate's role, as defined by the Constitution, is primarily to represent county interests and to ensure that devolution functions effectively. While the Senate has an important role in governance, requiring its involvement in military deployments risks overstressing its mandate. National defense, especially in response to security threats, is a function of the national government, and involving the Senate in such decisions may distort the careful balance of powers designed by the Constitution.

The Senate's role in protecting county interests does not align with the immediate national security imperatives that govern military deployments. Counties are already protected by Article 187, which allows for the transfer of functions between the national and county governments during emergencies, without the need for Senate approval of KDF deployments.

**The proposed amendment's clause 30, which aims to include the Senate and National Assembly in approving KDF deployments, adds needless complexity, risks, and delays to the process of making decisions about national security. The existing system, which only needs National Assembly approval, already offers adequate checks on executive power while guaranteeing that the KDF can respond quickly to national**

threats, even though legislative scrutiny is crucial. The Senate’s involvement in this process weakens the executive branch’s ability to successfully protect national security, dilutes responsibility, and increases the possibility of political meddling. Thus, we are against the proposed constitutional amendment to Article 241.

## F. Allocation of County Government Resources

Clause 20 of the Bill proposes to amend Article 203 of the Constitution to enhance the percentage of the allocation of resources to county governments from fifteen percent to forty percent. - Article 203 of the Constitution of Kenya is amended in clause (2) by deleting the word “fifteen” appearing immediately after the words “not less than” and substituting therefor the word “forty”.

### ICJ Kenya Submissions

The **Constitution of Kenya 2010** provides a robust framework to ensure that leaders use public resources responsibly and remain accountable to the public. **Article 10** outlines the national values and principles of governance, including integrity, transparency, and accountability, which apply to all public officers, ensuring that they manage resources in a manner that benefits the people. **Article 73**, which details the responsibilities of leadership, emphasizes that state officers hold their positions in trust for the public and must act with integrity, accountability, and selflessness. This means that leaders are expected to serve the public interest rather than pursue personal gain, and their actions should inspire public confidence.

Additionally, **Article 75** prohibits state officers from engaging in activities that create conflicts of interest or compromise public trust, reinforcing the expectation that public resources must be managed in a manner that upholds the dignity and integrity of public office. **Article 201**, which outlines the principles of public finance, mandates openness, accountability, and the prudent use of public funds. This provision ensures that leaders allocate resources equitably and in ways that promote sustainable development. Similarly, **Article 226** holds public officers personally liable for any losses incurred due to the misuse of public funds, meaning that those found guilty of mismanagement must repay the lost funds, even if they have left office.

**Chapter Six** of the Constitution, which focuses on leadership and integrity, further enforces these principles by prohibiting leaders from using their office to unlawfully enrich themselves and requiring them to declare their assets. This chapter ensures that leaders maintain the highest standards of professional ethics and are transparent in their financial dealings. The Constitution also assigns an oversight role to the **National Assembly** under **Article 95**, giving Parliament the power to scrutinize the use of public resources by the executive and other public bodies.

The mismanagement of resources, audit reports, and the country’s current fiscal constraints raise serious concerns, even though this idea seems to be in line with the objectives of devolution. These problems raise questions about the ability of county governments to handle such a large increase in resource distribution.

### 1. Mismanagement and Misappropriation of Funds at the County Level

Countless Auditor-General reports have consistently highlighted the pervasive embezzlement, waste, and poor management of public monies at the county level. It has often been discovered that county governments lack adequate financial management systems, which results in the wasteful use of the funds allotted to them. For example:

- **The 2018-2019 Auditor-General Report** revealed that 26 county governments could not account for more than KSh 83 billion in funds allocated to them, with some counties spending large sums on non-priority projects.
- **In the 2020-2021 audit**, many counties were found to have engaged in irregular procurement processes, inflated project costs, and unapproved expenditures. These reports expose the vulnerabilities in financial oversight and the urgent need for counties to improve their governance before receiving additional funds.

Governors are regularly called to explain the misappropriation of resources, and Senate hearings have also revealed widespread mismanagement in a number of counties. There is a backlog of unfinished projects and unpaid salaries in vital sectors like health and education as a result of certain county governments' inability to show that they can successfully absorb and use even the present 15% allocation.

This history of embezzlement makes raising the allotment to 40% problematic. It implies that increasing county resources could result in more waste, corruption, and inefficiency if strong financial management reforms are not implemented.

## 2. Weak oversight mechanisms and a lack of financial accountability

The lack of financial discipline in counties has been a frequent area of concern for the Controller of Budget and the Auditor-General. **The Public Finance Management Act (2012)**, which mandates accountability, transparency, and efficient use of public funds, is not adhered to by many county governments.

Reports from oversight bodies indicate that county assemblies, which are responsible for ensuring the proper use of funds, have not always played their role effectively. In many cases, the oversight role has been compromised due to political alignments between the executive and the assemblies, leading to unchecked spending.

Counties have also failed to provide proper financial records during audits according to the **Senate's Public Accounts and Investments Committee (PAIC)**. This lack of **transparency** and **accountability** suggests that simply increasing resource allocation will not solve the underlying governance challenges at the county level. Instead, it could exacerbate the problem if there are no measures in place to ensure that funds are managed and utilized appropriately.

## 3. There are no funds available to support the increase.

Kenya is currently facing serious financial difficulties, such as budget deficits and a heavy national debt load. Delays in disbursements to counties are becoming a common problem, and the national government is already having difficulty meeting its financial obligations.

According to numerous reports from the National Treasury and the Commission on Revenue Allocation (CRA), there is just not enough revenue to significantly boost county allocations. There is simply nothing to give.

The government gave counties KSh 385.4 billion in the 2023–2024 budget, just a little more than the 15% constitutional requirement. Counties have reported cash flow issues and service delivery difficulties, resulting in delayed payout of even this sum. Given the other urgent demands like infrastructure, education, and debt repayment, raising the ratio to 40% would necessitate a significant reallocation of resources, which may place an excessive burden on the national budget.

## 4. Inefficiencies in County-Level Resource Utilization

Practical experiences have demonstrated that counties have not made the best use of the money they now get. For instance;

- **The 2020 Senate Report** on county expenditures indicated that many counties had large amounts of unspent funds at the end of each financial year, even though essential services were suffering due to lack of resources.
- A **2021 meeting of the Council of Governors (CoG)** identified that counties were struggling with financial management issues, including poor absorption rates and delays in project implementation.

These inefficiencies in the use of allotted monies raise questions about the ability of counties to efficiently handle a larger portion of the national revenue. Efforts should be undertaken to enhance county-level accountability systems, develop capacity, and enhance financial management procedures rather than raising the allocation.

## 5. Increased Resource Allocation Without Addressing Underlying Governance Issues

Devolution cannot succeed if county governments lack the capacity and accountability to manage resources, even though its goal is to support equitable resource distribution and local development. **Fiscal federalism**, according to constitutional theorists, can only function when subnational governments possess the tools and governance frameworks necessary to efficiently manage their resources.

Kenya's devolution experience has demonstrated that improving service delivery by increasing resources alone is not possible unless the problems with financial management and governance are resolved first.

Scholars such as **Paul Smoke** in his work on **fiscal decentralization in developing countries** argue that merely increasing funding without addressing structural governance problems can lead to more significant inefficiencies and governance failures. The same is true in Kenya, where corruption risks are high, and mismanagement has plagued many counties. Therefore, if these governance issues are not resolved, raising the allocation from 15% to 40% may result in even more misappropriation of public monies.

**Okiya Omtatah Okoiti v. Nairobi City County Government & 4 Others [2019] eKLR** addressed the alleged misappropriation of funds by the Nairobi City County Government, where public funds were being allocated to projects that never materialized. The High Court emphasized the need for counties to be accountable for public resources and held that misappropriation of funds by the county government violated the Constitution's provisions on public finance and good governance.

**John Githongo & 3 Others v. Harun Mwau & 2 Others [2018] eKLR**. The case examined issues around the misallocation and mismanagement of public resources and how it affects service delivery. The High Court reaffirmed that public officials and entities, including county governments, must adhere to principles of transparency, accountability, and efficiency in managing public resources. Mismanagement or diversion of public funds undermines the Constitution's objectives of devolution.

**Although strengthening devolution is a commendable goal, there are serious difficulties with the idea to increase the percentage of revenue given to county governments from 15% to 40%. Rather than increasing funding, the emphasis should be on strengthening county-level capacity, financial accountability, and governance. These reforms would ensure that counties can make better use of the resources they currently receive, ultimately leading to improved service delivery and more effective devolution. For these reasons, we oppose the proposed increase in county revenue allocation until the underlying governance challenges are addressed and the national fiscal constraints are resolved.**

## CONCLUSION AND RECOMMENDATIONS

Considering the above observations, ICJ Kenya maintains that the amendments under consideration significantly undermine core constitutional principles, including accountability, the separation of powers, and the protection of democratic governance. Altering the supreme law of the land is a matter of profound gravity, one that demands thorough public engagement, thorough debate, and, most importantly, adherence to constitutional principles.

This is not the time to initiate changes that, while possibly well-meaning, would ultimately erode the structure that safeguards Kenya's democracy and the integrity of its institutions. Constitutional amendments should strengthen, not weaken our democratic fabric. We therefore urge for careful reconsideration of these proposed changes, as any modification to our Constitution must be approached with extreme caution, ensuring that the spirit of the Constitution and the will of the people are preserved above all else. Mutilating the supreme law is not something that should be undertaken lightly, for it affects not only the present but also the future stability and prosperity of our nation.

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