



CSPEN MEMORANDUM ON THE PROPOSED CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL, 2024.

1.0 BACKGROUND AND INTRODUCTION

The [Civil Society Parliamentary Engagement Network \(CSPEN\)](#) is a forum for Non-state Actors, bringing together civil society organizations, professional associations, think tanks and research institutions whose programme areas involve working with the legislature. The network was established in 2019 as a joint initiative of the Westminster Foundation for Democracy and Mzalendo Trust to provide a coordinated engagement with the Kenyan legislature, its committees and members in their oversight, legislation, and representation roles. Broadly, CSPEN seeks to engage with the legislature to ensure that legislative output meets the constitutional requirements of leadership, accountability, and integrity and is reflective of and aligns with the broader public interest. Currently, CSPEN has a Membership of Thirty-Five National Civil Society Organizations, and the priority areas are guided by the design and architectural framework of the parliamentary committees of the 13th Parliament ranging from, Public Finance Management (PFM) and Devolution; Inclusion and Representation; Leadership and Integrity; Human Rights and Access to Justice; Public Participation & Service Delivery; Climate Justice and Environmental democracy.

Parliament derives its legislative authority from the people and has further put in place measures to comply with the principle of public participation as enlisted under Articles 10 & 118 of the Constitution of Kenya, 2010. This includes convening public forums, submitting calls for memorandum through print and electronic media, and inviting members of the public, including representatives of civil society organizations to present their views - a key tenet of entrenching good governance. It is on this premise that CSPEN alongside other stakeholders, collectively submit this memorandum on the Constitution of Kenya (Amendment) (No.2) Bill, 2024 and pray that it be considered.

Sincerely,
Caroline Gaita
Executive Director, Mzalendo Trust | CSPEN Co-convenor,
P. O. Box 21765 – 00505, NAIROBI.
Email: caroline@mzalendo.com

PROPOSED AMENDMENTS TO CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL, 2024

Clause	Proposed Provision	Comments on the Proposed Amendments
4, 10, 18 & 19	<p>Article 101 of the Constitution of Kenya is amended in clause (1) by deleting the word “fifth” appearing immediately after the words “in every” and substituting therefore the word “seventh.”</p> <p>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 therefor the word “seventh”</p> <p>Article 177 of the Constitution of Kenya is amended in clause (1) by deleting the word “fifth” appearing immediately after the words appearing after the words “August, in every” in paragraph (a) and substituting therefor the word “seventh”</p>	<p>“Any man who is given power tends to abuse it; he does so until he encounters limits and that in order to avoid the abuse of power, steps must be taken for power to limit power.” Montesquieu. This position has over the years been backed by consolidated history across Africa and the world.</p> <p>We proffer that this Clause should not be passed, as is, and effected for the reason that the amendments if passed, will afoul the entrenchment of the democracy and governance, the principles of Article 10 of the National Values and Principles of Governance and under Article 1 on the sovereignty of the power under the Constitution of Kenya 2010 (the Constitution) and the spirit that drove the limitation of the term of office of the Members of the National Assembly.</p> <p>First, under Article 1, the Constitution provides that, “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.” This therefore mean that the people of Kenya must be governed as they wish. The People of Kenya gave themselves the Constitution of Kenya and in that Constitution decided under Article 1(2) to grant authority to rule to the three arms of government, i.e, the Parliament, the Executive and the Judiciary. In the Constitution they issued a structure of governance on how the elected leaders under Parliament and the Executive must undertake governance.</p> <p>Term limit for Office Holders including the President, the Governors, the Members National Assembly and the Members of County Assemblies was set at a term of five years. For the President and the Governors, the Constitution limits only a two-term of five (5) years each. Ideally, the Constitution anticipated that a scorecard for the elected leaders would be made by the people of Kenya at the end of this 5-year period. Has it come to that it has become apparently difficult under the Constitution for these elected leaders to perform their functions and obligations within the timelines under the Constitution? There is no evidence for this radical shift and this would amount to a naked power grab as the Term Limit is set herein for purposes of accountability, innovation, fight against corruption and for the purposes of enhancing and promoting democracy.</p> <p>Further, term limits are crucial to not only the growth of a country’s democracy, but also its peace and stability. This in Africa is evidenced in countries where as a result of attempts to extend term limits, there was political unrest and security issues, an example being Burundi where conflict</p>

	<p>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”</p>	<p>stemmed from a “struggle by the political class to accede to and/or remain in power.” Kenya risks falling into a pit of political instability over term limits which have been conclusively provided for in the Constitution if the proposals in this clause are adopted.</p> <p><i>We propose that these Clauses should therefore be deleted.</i></p>
7	<p>Article 111 A</p> <p>“(1) A County Allocation of Revenue Bill shall proceed in the same manner as any other Bill subject to clauses (2) to (5).</p> <p>(2) A Division of Revenue Bill shall originate in the National Assembly while a County Allocation of Revenue Bill shall originate in the Senate.</p> <p>(3) A Division of Revenue Bill or a County Allocation of Revenue Bill that has passed by the respective House may be amended or vetoed only by a resolution supported by at least two-thirds of all the members of the National Assembly and two-thirds of all the county delegations in the Senate.</p>	<p>We proffer that the provisions under this Clause has been proposed and well-intended at ensuring that one House of Parliament abuses not its powers under the Constitution by creating an unconscionable Division of Revenue Act and the County Allocation of Revenue Act, which does not reflect on the aspirations of the people of Kenya and the Constitution and more particularly not reflective on the needs and desires of the people of Kenya. Essentially, one House of Parliament overlooks the other. Where the County Allocation of Revenue Bill is initiated at the Senate, the National Assembly shall oversight the mandate of the Senate and undertakes the checks and where the Division of Revenue Bill is initiated at the National Assembly, the Senate shall undertake the checks.</p> <p>Therefore, it beats any logical reasoning why after the initiating house has considered the Bill and the approving house considers the same, the initiating house is given a veto power over the Bill. This proposal to veto or amend the Bill thereafter is not in tandem with the principles of good governance, integrity, transparency and accountability as provided under Article 10 (2) (c) of the Constitution of Kenya, 2010.</p> <p><i>We therefore propose that the provisions under Clause 7 of the Bill intending to introduce Article 111 (5) should be deleted.</i></p>

	<p>(4) If a resolution to amend or veto a Division of Revenue Bill or a County Allocation of Revenue Bill fails to pass, the Bill shall be referred to the President for assent in accordance with Article 109 (5).</p> <p>(5) The Senate may veto a resolution of the National Assembly to amend or veto a County Allocation of Revenue Bill under clause (4) by a resolution supported by at least two-thirds of all county delegations in the Senate and the Bill shall thereafter be referred to the President for assent in accordance with Article 109 (5).</p>	
8	<p>The Constitution of Kenya is amended by inserting the following new Article immediately after Article 111 of the Constitution-</p> <p>“Procedure for Appropriation Bill and Supplementary Appropriation Bill</p>	<p><i>Refer to the comments as above.</i></p> <p><i>We propose that the provision of Clause 8 of the Bill intending to introduce Article 111A (5) should be deleted.</i></p>

111A. (1) An Appropriation Bill or a Supplementary Appropriation Bill shall proceed in the same manner as any other Bill subject to clauses (2) to (5).

(2) An Appropriation Bill and a Supplementary Appropriation Bill shall originate in the National Assembly and thereafter referred to the Senate for consideration.

(3) The Senate may amend or veto an Appropriation Bill or a Supplementary Appropriation Bill that has been passed by the National Assembly only by a resolution supported by at least two-thirds of all the county delegations in the Senate.

(4) If a resolution in the Senate to amend or veto an Appropriation Bill or Supplementary Appropriation Bill fails to pass, the Bill shall be referred to the President for assent in accordance with Article 109 (5).

(5) The National Assembly may veto a resolution of the Senate to amend or veto an Appropriation

	<p>Bill or a Supplementary Appropriation Bill under clause (4) by a resolution supported by at least two-thirds of the members of the National Assembly and the Bill shall thereafter be referred to the President for assent in accordance with Article 109 (5).</p>	
11	<p>The Constitution of Kenya is amended by inserting the following new Article immediately after Article 151-</p> <p>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.</p> <p>(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.</p> <p>(3). The Prime Minister shall serve at the pleasure of the President, and the President may, terminate the appointment of the Prime Minister.</p>	<p>Under the Constitution of Kenya, 2010 the people of Kenya adopted the Presidential system of government which system of governance is based on the principle of separation of power between the executive and the legislature. Under this system of governance, the executive branch is independent of the control of the legislature. To buttress this position, we shall address the following-</p> <ol style="list-style-type: none"> 1. Article 131 of the Constitution of Kenya, 2010 provides for the Authority of the President as the Head of State and Government, and exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries. 2. On the separation of powers, the Constitution of Kenya, 2010 provides for the three (3) arms of government namely, the Legislature, Judiciary and the Executive. Each arm of government is assigned its powers and functions to avert encroachment and overlapping. More importantly, the Parliament has the functions of making laws, overseeing the Executive and representing the people of Kenya. 3. Under Article 152 (3) of the Constitution of Kenya, 2010 a Cabinet Secretary shall not be a Member of Parliament. <p>However, Clause 11 of the Bill seeks to create the Office of Prime Minister, who shall be a Member of Parliament but shall be the Head of Government, responsible for the day-to-day administration of the government and shall be accountable to Parliament. Further, the Prime Minister shall be appointed from the Party or Coalition of majority parties in Parliament, which now attempts to introduce a Parliamentary system of government, which system is not entrenched in the Constitution of Kenya, 2010. This is not the architect and the desire of the Constitution of Kenya, 2010 for the following reasons-</p> <ol style="list-style-type: none"> 1. The President is the Head of Government under the Constitution of Kenya, 2010. The creation of the office of the Prime Minister is a creation of another centre of power away from Article

		<p>131 of the Constitution.</p> <p>2. The Prime Minister shall be the only member of Cabinet sitting in Parliament and running government and this shall deeply affect the ability of the majority party of Parliament to undertake checks and balances against the basic architecture of the Constitution of Kenya, 2010.</p> <p><i>It is our view, therefore, that clause 11 be deleted from this Bill.</i></p>
21	<p>The Constitution of Kenya is amended by inserting the following new Article immediately after Article 181-</p> <p>“181A (1) A person may file a petition in the Supreme Court to challenge the decision of the Senate under Article 181 within a period of seven days from the date of the resolution of the Senate.</p> <p>(2) A petition filed under clause (1) shall be heard and determined within thirty days.</p>	<p>The jurisdiction of an Honourable Court to entertain a dispute is quite very important. Jurisdiction is everything and matters most in any arising dispute. The Supreme Court is established under Article 163 of the Constitution of Kenya, 2010 and shall have the following jurisdiction-</p> <ul style="list-style-type: none"> (a) Exclusive jurisdiction to hear and determine disputes relating to the election to the office of the President arising under Article 140; (b) Appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation; and (c) Advisory opinion jurisdiction at the request of the national government, any State Organ or any county government on any matter touching on county government. <p>On the question of the jurisdiction to determine disputes relating to the election to the office of Governor, the Elections Act provides that the High Court shall have jurisdiction. The High Court is established under Article 165 of the Constitution of Kenya, 2010 and amongst others, it has jurisdiction to</p> <ul style="list-style-type: none"> a) Jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144: and b) Jurisdiction to hear any question respecting the interpretation of the Constitution and including the question of whether anything said to be done under the authority of this Constitution or of any law is inconsistent with or in contravention of the Constitution. <p>Further, impeachment proceedings are akin to criminal proceedings as the Governor subject of impeachment faces charges of personal culpability which may at times arise to criminal charges pre and/or post-impeachment proceedings. Consequently-</p> <ul style="list-style-type: none"> a) In promoting the principles of the Constitution and addressing the thresholds set out under Article 259 of the Constitution on the need to construe the Constitution in a manner that promotes its purposes, values and principles, advancing the rule of law, human rights and fundamental freedoms, it is just that the election court of Governor position deals with

		<p>Appeals of the decision of Senate to impeach a Governor, hence the High Court should have the inherent power, authority and jurisdiction to deal.</p> <p>b) To allow for the promotion and the protection of the right to a fair hearing under the Bill of Rights considering the magnitude of impeachment, it is in the best interest of justice that Governors subject to impeachment have the right to appeal up to the Supreme Court and thus the High Court, remain the first port of call to challenge the validity of their impeachment.</p> <p><i>It is our view, therefore, that clause 21 be deleted from this Bill.</i></p>
--	--	---