



**30 March 2017**

**Memorandum on the Constitution of Kenya (Amendment) Bill (NO. 2), 2016**

To:  
The Clerk Senate  
Parliament Buildings  
P.O. Box 41842-00100  
Nairobi

Cc:  
Hon. Amos Wako  
Chairperson – Standing Committee on Legal Affairs and Human Rights  
Senate  
Parliament Buildings  
P.O. Box 41842-00100  
Nairobi

**About TISA**

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

**1. The Bill does not provide adequate justification for the proposed amendments:**

The Statutory Instruments Act, 2013 compels law-makers to promote the legal effectiveness, clarity and intelligibility of proposed edicts to anticipated users through an ‘explanatory memorandum’. This is a statement which explains the purpose, effect and operation of a proposed instrument, including a Bill. It should give a brief description of its purpose, legislative context, policy background, impact, among other considerations.

The memorandum of the Bill states: **The Constitution of Kenya (Amendment) (No.2) Bill of 2016 proposes to amend the Constitution so as to reduce the number of counties to forty-six, by excluding Nairobi from the ambit of county governments and placing it under the leadership of the National**

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<sup>1</sup> Section 3 (2) of the Act states “Nothing under this section may be construed as precluding Parliament from applying the provisions of this Act to any published bills awaiting parliamentary consideration”

**Government. The Bill further seeks to establish Nairobi as the National Capital City and empowers the president to nominate a Cabinet Secretary to head the City.** This memorandum of objects does not offer adequate justification for the proposed amendment. In addition, it does not tell the reader what the potential impact may be, for example management of public monies, the social and political effects; how it may affect service delivery, and even residents' voting rights.

In the absence of a rationale, one is unable to interrogate the Bill with context in mind. There should be a succinct description of the problem, of any attempts made to rectify it, and how the Bill offers the best solution. We aver that the woes that plague Nairobi are rooted in unresolved transition issues. Nairobi County's wage bill problem is largely attributable to the failure to rationalize the human resources as anticipated in Report of the Task Force of Devolved Government 2011 and provided under the Transition to Devolved Government Act 2011. The poorly executed transition also caused the county to inherit a substantial portion of the county's debt portfolio. Fully decentralizing and operationalizing devolution will go a long way towards solving some of the county's challenges.

The memorandum goes on to state that **the Bill is alive to the power of the people and their right to be represented. As such this right will continue to be fulfilled through the election of representatives to the National Assembly.** In addition to the Statutory Instruments Act, the Senate Standing Orders at 117 and 122 require every Bill to be accompanied by, among others i) a memorandum containing a statement of the objects and reasons of the Bill; ii) disclosure on limitation of fundamental rights and freedoms, if any; iii) a statement of how it concerns county governments; iv) and a statement that the Bill is not a money Bill.

With regards to the limitation of rights this Bill affects the sovereign and inalienable constitutional right of the citizens and residents of the affected county to freely make political choices and determine the form of governance of their country, having participated fully in the making of the Constitution<sup>2</sup>. During the constitutional review processes there was a recurring theme of widespread dissatisfaction with centralization of power in the national government and its spatial concentration in the capital city<sup>3</sup>. These changes are a subversion of the will of the people to distribute power and have two levels of government - national and county. It also disregards the object of devolution which expressly decentralize state powers, functions and services. This would be due to the fact there would be no decentralization below the county level in Nairobi to the ward and village units as envisioned in the constitution thus contrary to the principle of subsidiarity as provided for in Article 187.

The Bill will also undermine the rights of minorities in the county, contrary to Article 56, to enjoy the objects of devolution specifically object (c) on devolution availing the powers of self-governance to the people of Kenya, object (d) on the right of communities to self-govern, and object (e) on the promotion and protection of minority rights.

## **2. The Bill will have the effect of distorting devolution fundamentally:**

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<sup>2</sup> The Preamble

<sup>3</sup> The CKRC final report; P. 234

The Bill seeks to make drastic changes to the architecture of devolution and the territorial integrity of the counties. The Bill makes mention of **administrative structures**<sup>4</sup>. There is no clarity on the nature of these structures or how they are to operate.

Article 184 of the Constitution allows for the designation of decentralized units as urban areas or cities provided they satisfy, among others, the population, institutional capacity and service delivery criteria set out by the law. The Urban Areas Act 2011 Act lays out the procedure for Presidential conferment of city status pursuant to a Senate resolution, after an application for the same has been made. There is not, however, a laid out procedure envisaged for changing a city county from being within the ambit of the second layer of devolution to the national level. Indeed, the Act stipulates that the capital city shall be governed and managed in the same manner as a county governments. This means that it is bound to operate distinctly from national and other county governments; in an interdependent manner; and on the basis of consultation and cooperation<sup>6</sup>. The use of the word distinct bars it from taking on the features and functions of the national government. This also goes against one of the objects of the devolution of government which is in no vague terms expressed to be the facilitation of decentralization *from the capital of Kenya*.<sup>7</sup>

#### **Conclusion:**

**This bill fails to provide the basic information needs required under the Statutory Instruments Act of 2013, and it is therefore not possible to have informed debate on it nor make useful contributions. This bill also purports to alter the fundamental structure of the Constitution by challenging the basis of devolved government. Given Senate’s role to protect the counties, the Senate would be better placed in identifying the challenges facing administration in Nairobi County and propose remedies through the intergovernmental framework. It is our considered view that this bill does not warrant public debate and should be withdrawn.**

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<sup>4</sup> Ss 3, 4

<sup>5</sup> The Urban Areas and Cities Act, 2011; Section 6 (1), (2)

<sup>6</sup> Article 6 (2)

<sup>7</sup> Article 174 (h)