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# **MOVING FROM THE TYRANNY TO THE SAFETY OF NUMBERS IN KENYA'S PRESIDENTIAL ELECTIONS**

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**Raising one million signatures as required under Article 257 of the Constitution (the popular initiative) to amend Article 138 to provide for the election of the President and the Deputy President indirectly by popular vote on a county-by-county basis as opposed to the current system where they are elected directly in a popular vote nationally in a process which has been reduced to an acrimonious census of tribal numbers, which is prone to electoral fraud, and which marginalises sparsely populated regions and ethnic groups in what is called a tyranny of numbers.**

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## Table of Contents

1. Overview .....	3
2. Tyranny of Numbers.....	3
3. Safety of Numbers.....	4
4. The county based electoral system.....	5
5. Criticisms of the county based electoral system.....	6
(i) Violates the principle of political equality .....	6
(ii) A candidate who loses nationwide popular vote can be elected president.....	6
(iii) Danger of focusing only on a few key counties.....	6
(iv) Favours less populous counties.....	6
(v) Discourages turnout and participation.....	6
6. Support of the county electoral system.....	7
(i) Affirmative Action .....	7
(ii) The safety of numbers .....	7
(iii) Eliminates disenfranchisement within counties.....	7
(iv) Prevents an Ethno-centric victory.....	7
(v) Maintains the devolved character of the republic.....	7
(vi) Enhances status of minority groups.....	8
(vii) Encourages stability by disadvantaging fringe parties and fringe candidates.....	8
(viii) Isolation of election problems.....	8
(ix) High voter turnout will be guaranteed .....	8
7. Why counties and not Parliament should elect the President.....	8
8. County Electoral Votes & what the 2013 election results would have been.....	9

## 1. Overview

Kenya is a multi-ethnic state, composed of 42 officially recognised tribes. The 2009 census figures give the ethnic composition as follows (out of a total population of 38.6 million): Kikuyu 17%, Luhya 14%, Kalenjin 13%, Luo 10%, Kamba 10%, Kisii 6%, Mijikenda 5%, Meru 4%, Turkana 2.5%, and Maasai 2.1%. About 9% of the population consist of smaller groups below 1% each, and non-African groups (Arabs, Indians and Europeans) are estimated to total to about 1%.

Ever since Kenya's independence in 1963, Kenyan politics have been characterized by ethnic tensions and rivalry between the larger groups, escalating into the 2007–2008 postelection violence that nearly plunged the country into a civil war.

## 2. Tyranny of Numbers

Out of the fact that most Kenyans vote on tribal bases emerges what political analyst Mutahi Ngunyi provocatively called a tyranny of numbers, stating prophetically that Uhuru Kenyatta and William Ruto would win the March 4, 2013 presidential elections simply because they were backed by the two largest voting ethnic blocks, the Kikuyu and Kalenjin, to which the two belong respectively. He went on to state that Raila Odinga would lose the elections because he had not mobilised the tribes backing him to register as voters in large numbers. The meaning being that national elections in Kenya are pre-determined by the sizes of tribes backing a candidate and by the numbers they mobilise to register as voters, not by policies proffered by candidates on the campaign trail. This fact of tribal size literally introduces certainty into what ought to be an uncertain world of politics.

The reduction of the presidential election to a mere census of tribes, with the large tribes exercising the so-called tyranny of numbers over the smaller ones, disadvantages otherwise able politicians who have no huge flocks of tribal block voters to sit back on since they don't enjoy support from the large tribes.

Further, it entrenches tribalism as each of the large tribes feel challenged to forcibly mobilise their communities across the country to register as voters and to vote. Already, in the 2013 elections, we saw some groups breaking the law by forcing members of their communities to register and to vote; yet voting is voluntary in Kenya.

By law Kenyan ethnic groups are held together by consensus not by force and all must have a system that allows them to influence how executive power is acquired and deployed. There is no room for domination of any group or individuals by others.

Hence, there is need to counter the so-called tyranny of numbers, where two or three large ethnic groups form an alliance of convenience, and proceed to win a presidential election on the basis of their dominant numbers, while paying scant or no attention to the

other communities, save for the need to raise at least 25% support in more than half the counties as required by the Constitution in Article 138.4b.

It is also important to note that the Constitution separates government into three branches that check each other to minimize threats to liberty and encourage deliberation of governmental acts. But the arrangement is undermined where state power is captured on the basis of tribal or regional loyalty and dominance, and not on an all-inclusive ideological and policy framework, which gives all Kenyan communities an equal footing in national politics.

### **3. Safety of Numbers**

The beauty of Kenya's diversity is such that there is no majority tribe. There are large tribes but none is more than 50% of the population. For example, its largest ethnic group, the Kikuyu, make up for less than a fifth of the total population. In reality, therefore, Kenya has a safety of numbers, and not a tyranny of numbers, among its ethnic groups. However, to exploit this reality, Kenya must institute a presidential electoral system where all ethnic groups, large and small, feel safe and important in the prosecution of national affairs, especially as embodied in the election of the President and the Deputy President, who are symbols both of national consensus and of the unity of the Republic.

Such a system is only where the President and the Deputy President are not elected directly in a popular vote nationally. Instead, they are elected indirectly by popular vote on a county-by-county basis.

The United States of America elects its politically powerful president via an electoral college designed to both ensure the election of the president through a popular vote and to protect the interests of the states. The founders of the USA wanted each state to have a voice in the election of the president and, therefore, even small states have political influence nationally. The US Constitution specifies that the president and vice president be chosen through the votes cast by electors chosen by the states, rather than by a direct popular vote. Hence, the President and Vice President are not elected directly by the voters. Instead, they are elected indirectly by "electors" who are elected by popular vote on a state-by-state basis. And a candidate can become president without having obtained the highest number of votes nationally in the sole or final round of popular voting.

Adopting a similar system for Kenya will move the country away from the current sorry state of affairs where large tribes tyrannise smaller ones during elections, and where the main criteria for occupying the Presidency is the numerical size of the ethnic blocks backing a candidate. The system will boost the process of devolving power from Nairobi, an act that will improve local governance and reduce marginalisation and the risk of conflict between communities.

The fact that the system will mean that members of tribes can only act locally within the county when electing the national president will undermine the suffocating hold tribalism has on the nation, and within a short time Kenya will be rid of the monster. The system will make the Kikuyu in Kakamega not to feel joined at the hip with those in Kiambu; they will be more concerned about what goes on in Kakamega than in Kiambu. Likewise, the Luo in Mombasa will be more concerned about Mombasa than Kisumu. The same goes for all the other communities being concerned more about where they reside and not their tribes ancestral homeland.

Further, the incentive to rig presidential elections in strongholds where candidates come from will be eliminated since inflating votes in an area won't change the number of Presidential Electoral Votes that a county can produce. Right now, if you inflate figures in Bondo, you affect votes nationally. Under the system, such vote frauds will only affect the elections in Bondo and can be dealt with locally.

Such a county based system will engender the 'safety' and not the 'tyranny' of the numbers. The tribal diversities of Kenya's peoples will become the building blocks of a stable democracy, where all ethnic groups and regions play an important role in the election of the all-important President and the Deputy President.

#### **4. The county based electoral system**

The county electoral system is a block, or weighed, voting system that is designed to give more power to the counties with more votes, but allows for small counties to swing an election. Under this system, each county is assigned a specific number of votes that is proportional to its population, so that each county's power is representative of its population. So, while winning the popular vote may not ensure a candidate's victory, a candidate must gain popular support of a particular county to win the votes in that county.

Each county is apportioned electoral votes equal to the number of its elected Members of National Assembly plus one for both the elected Senator and Women's Representative. Hence, there would be 337 electoral votes, being 290 Members of the National Assembly and 47 Senators and 47 Women's Representative elected into Parliament, with the latter two combining to produce one vote in their counties. The county electoral votes are then taken on a "winner-take-all" basis. That is, all electoral votes in a county are given to the winning presidential candidate. To be elected President, one must get at least 169 votes, being 50% + 1 of the electoral votes. The goal of any candidate would be to put together the right combination of counties that will give him or her 169 electoral votes.

Should none of the candidates win 169 electoral votes a runoff between the top two candidates will be conducted.

## 5. Criticisms of the county based electoral system

(i) **Violates the principle of political equality**

The outcomes of the county based electoral system do not logically follow the normative concept of how a democratic system should function. The county based electoral system violates the principle of political equality, since presidential elections are not decided by the one-person-one-vote principle.

(ii) **A candidate who loses nationwide popular vote can be elected president**

The system allows the possibility of a candidate actually losing the nationwide popular vote, but being elected president by the electoral vote. In a two-candidate race, with equal voter turnout in every county, a candidate could win the county electoral votes while winning less than 50% of the nationwide popular vote. Most voters would be unhappy to see their candidate win the most votes but lose the election. Scenarios exhibiting this outcome would typically result when the winning candidate wins the requisite configuration of counties (and thus their votes) by small margins, but the losing candidate captures large voter margins in the remaining counties. In this case, the very large margins secured by the losing candidate in the other counties would aggregate to well over 50% of the ballots cast nationally.

(iii) **Danger of focusing only on a few key counties**

Since the counties use a winner-takes-all arrangement in which the candidate with the most votes in that county receives all of the county's electoral votes, there is a clear incentive to focus almost exclusively on only a few key undecided counties. Since the national popular vote is irrelevant as it bears no legal or factual significance on determining the outcome of the election, both voters and candidates are assumed to base their campaign strategies around the existence of the county electoral votes; any close race has candidates campaigning to maximize electoral votes by capturing coveted swing counties, not to maximize national popular vote totals. Such fears are misplaced since only seven counties (Nairobi 18, Kiambu 13, Kakamega 13, Nakuru 12, Bungoma 10, Meru 10, and Kisii 10) have 10 or more electoral votes, and these add up to only 86 votes.

(iv) **Favours less populous counties**

As a consequence of giving more *per capita* voting power to the less populated counties, the county electoral system gives extra power to voters in those counties.

(v) **Discourages turnout and participation**

Voter turnout is largely insignificant due to entrenched political party domination in most counties. The county-based system decreases the advantage a political party or campaign might gain for encouraging voters to turn out. Where a presidential election is decided by a national popular vote, in contrast, campaigns and parties will have a strong incentive to work to increase turnout everywhere. Individuals would similarly have a stronger incentive to persuade their friends and neighbours to turn out to vote.

## 6. Support of the county electoral system

### (i) **Affirmative Action**

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

### (ii) **The safety of numbers**

- The system will create what we may want to call the safety of numbers since it will be suicidal for political campaigners to focus on a few heavily populated counties while ignoring the rest of the country.
- Populous ethnic groups will not use large numbers to tyrannise and impose themselves on others and neither can they create a hegemony that reduces smaller groups to mere passengers or spectators in the choice of the President and the Deputy President.
- Relying on the popular vote nationally shifts disproportionate focus to large ethnic groups at the expense of smaller ones.

### (iii) **Eliminates disenfranchisement within counties**

For example, if a county would like to disenfranchise a particular group, perhaps by voter suppression methods such as evictions of specific minority groups, then, even though voting inside that county would be reduced, the county's electoral count would be the same. So disenfranchisement has no effect on the overall electoral tally.

### (iv) **Prevents an Ethno-centric victory**

The county electoral system prevents a candidate from winning the Presidency by simply winning in heavily populated counties. This means that candidates from large ethnic groups must make a wider geographic appeal than they otherwise would if they simply had to win the national popular vote which is dominated by members of their tribes.

### (v) **Maintains the devolved character of the republic**

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

Hence, the collective opinion of even a small county merits attention at the national level greater than that given to a small, though numerically equivalent, portion of a very populous tribe. The system also enhances the profile of each county, within constitutional bounds, by forcing presidential candidates to pay attention to lightly populated counties,

and reinforcing the role of devolution in the republic. Given the devolved nature of the Kenyan state, candidates must build a popular base that is geographically broad and diverse in voter interests.

**(vi) Enhances status of minority groups**

By making the votes of a given county an all-or-nothing affair, minority groups can provide the critical edge that allows a candidate to win. This encourages candidates to court a wide variety of such minorities and advocacy groups. Hence, the system is an affirmative action intervention designed to allow the effective participation in national affairs of even the smallest of groups, and it achieves the higher goal of inclusiveness in national affairs.

**(vii) Encourages stability by disadvantaging fringe parties and fringe candidates**

In practice, the winner-take-all manner of allocating a county's electoral votes will generally decrease the importance of fringe parties and candidates, helping reduce the number of political parties and candidates nationally. It will provide stability because it encourages a delayed adjustment during times of rapid political and cultural change. It will also protect the most powerful office in the country from capture and control by dominant elitist regional groups without broad, long-term support across the nation.

**(viii) Isolation of election problems**

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

**(ix) High voter turnout will be guaranteed**

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

## **7. Why counties and not Parliament should elect the President**

Under the separation of powers framework, it is necessary that both the Members of Parliament and the President are elected directly by people. The election of the President by a vote in Parliament would affect the separation of powers, and affect the independence of the President from the Legislature if he was elected by MPs. The people must be given direct input in choosing their president. On the other hand, election by Parliament would require the members to both accurately assess the desires of the people of their counties and to actually vote accordingly. This will lead to elections that better reflect the opinions and political agendas of the members of Parliament than the actual will of the people.



## 8. County Electoral Votes & what the 2013 election results would have been

PROVINCE	COUNTY	POPULATION	CONSTITUENCIES	ELECTORAL VOTES	KENYATTA 2013	RAILA 2013	MUDAVIDI 2013
Coast Province	1	Mombasa	939,370	6	7	7	
	2	Kwale	649,931	4	5	5	
	3	Kilifi	1,109,735	7	8	8	
	4	Tana River	240,075	3	4	4	
	5	Lamu	101,539	2	3	3	
	6	Taita Taveta	284,657	4	5	5	
North Eastern Province	7	Garissa	623,060	6	7	7	
	8	Wajir	661,941	6	7	7	
	9	Mandera	1,025,756	6	7	7	
	10	Marsabit	291,166	4	5	5	
Eastern Province	11	Isiolo	143,294	2	3	3	
	12	Meru	1,356,301	9	10	10	
	13	Tharaka Nithi	365,330	3	4	4	
	14	Embu	516,212	4	5	5	
	15	Kitui	1,012,709	8	9	9	
	16	Machakos	1,098,584	8	9	9	
	17	Makueni	884,527	6	7	7	
Central Province	18	Nyandarua	596,268	5	6	6	
	19	Nyeri	693,558	6	7	7	
	20	Kirinyaga	528,054	4	5	5	
	21	Murang'a	942,581	7	8	8	
	22	Kiambu	1,623,282	12	13	13	
Rift Valley Province	23	Turkana	855,399	6	7	7	
	24	West Pokot	512,690	4	5	5	
	25	Samburu	223,947	3	4	4	
	26	Trans Nzoia	818,757	5	6	6	
	27	Uasin Gishu	894,179	6	7	7	
	28	Elgeyo Marakwet	369,998	4	5	5	
	29	Nandi	752,965	6	7	7	
	30	Baringo	555,561	6	7	7	
	31	Laikipia	399,227	3	4	4	
	32	Nakuru	1,603,325	11	12	12	
	33	Narok	850,920	6	7	7	
	34	Kajiado	687,312	5	6	6	
	35	Kericho	758,339	6	7	7	
	36	Bomet	724,186	5	6	6	
Western Province	37	Kakamega	1,660,651	12	13	13	
	38	Vihiga	554,652	5	6	6	6
	39	Bungoma	1,630,934	9	10	10	
	40	Busia	488,075	7	8	8	
Nyanza Province	41	Siaya	842,304	6	7	7	
	42	Kisumu	968,909	7	8	8	
	43	Homa Bay	963,794	8	9	9	
	44	Migori	1,028,579	8	9	9	
	45	Kisii	1,152,282	9	10	10	
	46	Nyamira	598,252	4	5	5	
Nairobi	47	Nairobi	3,138,369	17	18	18	
<b>TOTALS</b>		<b>38,721,536</b>	<b>290</b>	<b>337</b>	<b>134</b>	<b>197</b>	<b>6</b>