



## **Katiba Institute challenges the push to amend the Constitution.**

**Nairobi, 02 May 2025**

Katiba Institute and its CSO partners have filed a petition before the High Court of Kenya challenging the National Assembly's push to amend the **Constitution**.

### **The Constitution of Kenya (Amendment) Bill, 2025**

The National Assembly is considering the Constitution of Kenya (Amendment) Bill, 2025. The Bill is sponsored by MPs Hon. Otiende Amollo and Hon. Samuel Chepkonga. It was first introduced in the National Assembly on 12 March 2025, when it was read for the first time. The National Assembly has since scheduled and called for public participation across all the 290 constituencies in Kenya to start on Monday, 7 May 2025. This was done through various newspaper adverts and the National Assembly's website.

### **The Contents of the Bill**

The sole objective behind the Bill is to add three Funds to the current Constitution: the National Government Constituency Fund (NGCF), the Senate Oversight Fund (SOF), and the National Government Affirmative Action Fund (NGAAF).

### **What is Katiba Institute's case against the Bill?**

KI makes two broad arguments:

1. The entire Bill is constitutionally superfluous, and the Funds it seeks to create are inconsistent with the letter and spirit of the Constitution. The Bill and any associated processes, including the scheduled public participation, are unnecessary and violate the Constitutional requirement for prudence and responsibility in public spending.
2. Furthermore, the Bill contains provisions that will need to be approved in a referendum. Therefore, Parliament should be compelled to enact a referendum law, which it has failed to do for the past 14 years, before embarking on any constitutional amendment process.

### **What do we mean by the Amendments being superfluous?**

This means that the amendments are unnecessary because all that they are trying to do can still be lawfully done under the Constitution as it is.

- The proposed NGAAF is currently being implemented through the Public Finance Management Act (National Government Affirmative Action Fund) Regulations, 2016. Article 206(1)(a) of the Constitution allows for the creation of special-purpose Funds.
- Various court decisions, including that of the Supreme Court, have emphasised that the proposed NGCF can be lawfully implemented within the confines of the current Constitution.

- The idea behind the proposed SOF is presently implemented through the budgetary provisions relating to Parliament under the Constitution.

The Bill and any expenditure related to it are therefore unnecessary and a waste of the scarce public resources that could otherwise be redirected to provide basic services.

### **What do we mean by the Amendments being inconsistent with the Constitution?**

This means that unless other related provisions of the Constitution are amended, the proposed amendments will conflict with those provisions and the principles that they establish. This will undermine the intention of the drafters of the Constitution and the Kenyan people.

The Constitution confers functions on State Organs, establishes structures for their implementation and provides for how these organs will be financed to carry out these functions.

- The NGCF is stated to be seeking to implement functions belonging to the national government. The national executive bears the obligation to implement these functions, and the annual budget provides funding for them. Establishing a separate Fund and structures to implement these functions under NGCF conflicts with this constitutional structure. This will be like amending the Constitution to establish separate Funds and structures through which counties will implement their functions.
- The Senate exists to carry out four (4) main functions under Article 96 of the Constitution. Two of these functions are to oversee county spending of national revenue and to oversee State officers. To enable the Senate to perform these functions, the Parliamentary Service Commission is required to independently ensure the Senate is adequately resourced through the annual budget. Establishing a separate Fund financed from the National executive's money to facilitate Senate oversight duplicates Senate funding (which means wastage) and interferes with the constitutional intention to fund parliament independently from the executive to facilitate the separation of powers.

Going ahead with these amendments will, therefore, undermine the letter and spirit of the Constitution.

### **Do the proposed amendments require a referendum?**

Yes. The Bill seeks to, among other things, entrench the Senate Oversight Fund. This is stated to be aimed at facilitating the Senate's oversight functions. The Senate serves as a critical institutional structure of devolved government. Based on these two facts, the Bill touches on the entrenched provisions under Article 255(1)(h) & (i) of the Constitution: the functions of Parliament and the structure of devolved government.

### **Why is a referendum law a MUST before any constitutional amendment?**

The sanctity and uniquely important nature of constitution-making and remaking processes demand a high level of clarity and certainty of the applicable rules and procedures. To achieve this, the Constitution explicitly directs parliament to pass a referendum law.

The lack of legislation has created a gap in how referenda are to be understood and conducted. One of the fundamental gaps in the law regards the transition of the consideration of

constitutional amendments from the Parliamentary route to a referendum, where the Bill touches on the entrenched provisions under Article 255 of the Constitution. For instance, who makes the decision whether a Bill touches on protected provisions of the Constitution and would hence require approval in a referendum, Parliament or the President? At what stage should that decision be made? This is not clear both under the Constitution and legislation.

### **What orders is Katiba Institute seeking from the Court?**

Katiba Institute seeks orders at two levels: before and after the petition is fully heard.

Before the Petition is heard, Katiba Institute wants the Court to:

- a. Suspend the public participation exercise scheduled for 5 May 2025 to 7 May 2025.
- b. Stop the Controller of Budget from approving any money for public participation.
- c. Bar Parliament from forwarding the Bill, if approved, to the President for assent.
- d. Bar the President from assenting to the bill if approved and forwarded to him.
- e. Recommend that the Chief Justice selects at least three(3) judges to hear and determine the Petition.

Once the Court concludes hearing the case, Katiba Institute is asking the Court to:

- i. Declare that the proposed Constitution of Kenya (Amendment) Bill, 2025 is unnecessary and that it violates the constitutional requirement for prudent and responsible use of public resources, good governance and sustainable development.
- ii. Declare that the proposed amendments under Articles 204A and 204B seeking to entrench NGCF and SOF are inconsistent with the letter and spirit of the Constitution.
- iii. Declare that the proposed amendments under Article 204C are constitutionally redundant as the NGAAF can be implemented and is actually currently being lawfully implemented through Article 206(1)(a) of the Constitution.
- iv. Declare that the constitutional imperatives under Articles 201(d) & (e), as read with Article 10 (2) (c) & (d), require that constitutional amendments should not be initiated to provide for issues that the Constitution already sufficiently considers and provides for.
- v. Declare that Parliament should habitually scrutinise proposed constitutional amendments and ensure that the issues sought to be addressed are only those that cannot be adequately addressed under the existing Constitution so as to preserve the sanctity of the Constitution and ensure the prudent and responsible use of public resources
- vi. Declare that the failure by Parliament to enact a referendum law is a violation of the right to vote in referenda.
- vii. Declare that Parliament's failure to enact a referendum law after 14 years is an abdication of responsibility and, therefore, unconstitutional for violating Articles 10, 94, 95 and 96 of the Constitution.
- viii. Declare that the National Assembly and Senate have violated Articles 10, 38, 47, 201, 259(8) and 261 of the Constitution of Kenya for failing to enact a referendum law after 14 years since the promulgation of the Constitution
- ix. Issue a directive that before any further action can be taken relating to processing and/or consideration of any constitutional amendments, including the Constitution of Kenya

Amendment Act, 2025, Parliament must enact the referendum law as required under Article 82 and as recommended by the Courts.

- x. Restrain the Respondents and any other state agency from introducing in parliament or considering a constitutional amendment bill without a referendum law having been enacted.
- xi. Declare that the referendum law enacted by Parliament should, among other things, ensure that a mechanism is provided for contesting the classification of a Constitution Amendment Bill as either requiring or not requiring approval in a referendum.
- xii. Declare that the Constitution of Kenya Amendment Act, 2025 is unconstitutional for failing to explain in its memorandum whether the proposed amendments touch on provisions of the Constitution whose amendment would require approval in a referendum.
- xiii. Order the Respondents to report to the Court after six months to update the Court on the status of compliance with all the orders issued by the Court in the case.

## **Conclusion**

The Constitution is the supreme law of the land and must be treated as such. It safeguards our most fundamental rights and freedoms. State Organs, such as **Parliament**, have a solemn obligation to ensure that the discharge of their functions does not undermine the Constitution or negate constitutional gains. The push by the National Assembly to amend the Constitution, while within the sovereign prerogative of the Kenyan people, is presently being misused to entrench unnecessary matters without regard to the implications, in terms of wastage of public resources, on the sustainable delivery of essential services to the Kenyan people. Parliament ought instead to redirect its efforts to its legislative role to enact a referendum law as required under the Constitution to provide guidelines for when the Kenyan people have real issues that would necessitate the exercise of their sovereignty in favour of a constitutional amendment. It is vital that the Constitution and constitutional safeguards are respected.

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**More Information:** [The Constitution of Kenya \(Amendment\) Bill, 2025](#)

**About Katiba Institute:** [www.katibainstitute.org](http://www.katibainstitute.org)