

**THE LINDA JAMII (CONSTITUTION OF KENYA AMENDMENT) BILL, 2023**

**A BILL to amend the Constitution of Kenya of the Constitution of Kenya 2010 Pursuant to Chapter Sixteen.**

**ENACTED** by the Parliament of Kenya, as follows-

- Short title.** 1. This Bill may be cited as the **LINDA JAMII** (Constitution of Kenya Amendment) **Bill, 2023**.
- Amendment of Article 2 of the Constitution.** 2. Article 2 (5) of the Constitution is amended by inserting the following phrase “in so far as it is not inconsistent with the constitution and the laws of Kenya”
- Amendment of Article 10 of the Constitution** 3. Article 10 of the Constitution is amended by inserting the phrases “sanctity of human life” and “family values” immediately human dignity in sub-article 2 (b) as follows:
- (b) human dignity, **sanctity of human life**, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- Amendment of Article 24 of the Constitution** 4. Article 24 (1) (d) of the Constitution can be amended to include the phrase “**or the well-being of individuals, families or communities**” and to read as follows”
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others or the well-being of individuals, families or communities; and
- Amendment of Article 26 of the Constitution.** 5. Article 26 of the Constitution is amended by -
- a. deleting the word “**abortion**” in sub-article (4); and inserting the words “**deliberate termination of pregnancy**” in its place
- b. inserting the word “medical” before opinion “professional” and further introducing the phrase, “or the unborn child”

after mother, deleting the phrase “or if permitted by any other written law” and adding the word “grave” before the word danger so that the new clause reads thus:

26. (4) Deliberate termination of pregnancy is not permitted unless, in the medical opinion of a trained health professional there is need for emergency treatment, or the life or health of the mother or the unborn child is in grave danger.

**Amendment  
of Article 32  
of the  
Constitution**

6. Article 32 (3) is amended by deleting the entire sub-article and replacing it as follows:

A person shall not be denied access to or employment in any public institution or facility because of the person’s belief or religion

---

**Amendment of  
Article 33 of  
the  
Constitution**

7. Article 33 (2) of the Constitution is amended by addition of clause (e) as follows:

(e) pornography, lewd or indecent behaviour, or obscene material

**Amendment of Article 36 of the Constitution**

- 8.** Article 36 shall be amended by renumbering sub-article 2 to 2 (a) and adding a new sub article 2 (b) as follows:

The government shall not be compelled to register any organization whose objects promote or support illegal conduct.

**Amendment of Article 45 of the Constitution**

- 9.** Article 45 of the Constitution is amended by renumbering sub article 2 as sub article 2(a) and adding a new sub article 2 (b) as follows:

2 (b) Marriage or unions between persons of the same sex is prohibited.

**Amendment of Article 260**

- 10.** Article 260 is amended by adding the following new definitions:

“conception” means the union between the male and female gametes to form a human being.

“sex” means the biological state of being male or female and includes intersex but does not include sexual attraction, orientation or behaviour.

“gender” means biological male or female person.

“unborn child” means an individual person from conception till birth.

“intersex” means a condition in which a person is born with sexual anatomy, reproductive organs or chromosome patterns that do not fit the typical definition of male/female

**MEMORANDUM OF OBJECTS AND REASONS**

**THE LINDA UHAI CONSTITUTIONAL AMENDMENT BILL THEMATIC  
ARRANGEMENT OF ARTICLES**

**BACKGROUND**

This Bill is necessitated by the current clamor for a referendum by both government and members of the public following the recent decision of the Supreme Court in **NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment)**.<sup>1</sup> Previously, the political class through the Building Bridges Initiative(BBI) had taken the country in the direction of constitutional change the areas of focus being, among other things, the need to calm political tension, to review the structure of the executive in order to make government more inclusive and the tribal clashes that have hitherto plagued the country with every full electoral cycle.<sup>2</sup> Admittedly, there were already calls to amend the constitution before the BBI and prior to the August 2017 General Elections.<sup>3</sup>

Following the unsuccessful bid to stop the passing of the current constitution by the church and stakeholders vouching for family values in 2010, the recent decision cited hereinbefore is the culmination of the fears expressed at the time. In fact, proposals to have the clauses that are the subject of this bill changes during the constitution making process were ignored. This being the case, and seeing the fruits of the unclear clauses inserted emerge an ripen, it is, at this juncture

---

<sup>1</sup> Petition No 16 of 2019, See also Patrick Gathara, How an LGBTQ court ruling sent Kenya into a moral panic: The legal pushback against Kenya’s anti-LGBTQ colonial-era laws has unleashed vicious homophobia in the public space. Available at <https://www.aljazeera.com/opinions/2023/3/15/how-an-lgbtq-court-ruling-sent-kenya-into-a-moral-panic#:~:text=A%20February%20ruling%20by%20the,civilisation%20as%20we%20know%20it>. Lister Nyaringo, “Referendum debate: Address over-representation to cut government expenditure,” *Standard Media*, 22<sup>nd</sup> April 2019 available at <https://www.standardmedia.co.ke/ureport/article/2001322104/referendum-debate-address-over-representation-to-cut-government-expenditure> accessed on 26th September 2019

<sup>2</sup> Spencer, Leighann. "Kenya's history of political violence: colonialism, vigilantes and militias". *The Conversation*, available at <http://theconversation.com/kenyas-history-of-political-violence-colonialism-vigilantes-and-militias-83888> accessed on 25th September 2019

<sup>3</sup> See *Hon Kanini Kega v Okoa Kenya Movement & 6 others [2014] eKLR*; See also Agutu N, “We rejected incomplete Okoa Kenya entries, not signatures – IEBC,” *The Star* available at <https://www.the-star.co.ke/news/2016-03-28-we-rejected-incomplete-okoa-kenya-entries-not-signatures-iebc/> accessed on 26/9/2019

absolutely necessary that the Constitution is amended minimally in the relevant portions so that the foundation to be used in parliamentary legislation and judicial pronouncements is set.

## **CONCEPT & CONTEXT:**

### **Conceptual Basis**

The family is the basic unit that is tasked with the heavy responsibility of raising the next generation of citizens for this country. Fundamentally, it is forming the family unit that children are trained to become patriotic and useful members of the larger society where they must find their footing. It is, therefore, fundamental that this unit is protected by amending the clauses that threaten the family. With the proposed registration of NGOs advancing and propagating gay rights, we find ourselves in a slippery slope that will eventually lead to the radical alteration of what groups can be given the right to marry and how we should respond to them.<sup>4</sup> Whether the members of the public like it or not, that is the illogical end that this gravy train will lead us to.<sup>5</sup>

Importantly, our Penal Code criminalizes same sex conduct under Sections 162 & 165 of the Constitution. However, this did not the Supreme Court from interpreting the constitution in the manner it did effectively legislating rights that can be painstakingly squeezed out of the equivocal nature of the Bill of Rights on the question of family, same sex attraction and access to abortion and “sexual reproductive rights.” It follows that even if these amendments are not proposed, a different group is likely to point out the contradictions and request constitutional amendment further worsening the situation that currently obtains.

Further to the above, the amendments are premised on the understanding that the Constitution of Kenya 2010 is still relatively new. This being the case, it has not been fully implemented and ought to be amended where amendment is absolutely necessary.<sup>6</sup> These changes must surely address the concerns and tension that has been engendered by lack of succinct clarity on the place of international law, right to life vis a vis access termination of pregnancy and same sex liaisons.

---

<sup>4</sup> See Judith Stacy, M. T., 2009. New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States. *Politics and Society*, 37(2), pp. 167-202.

<sup>5</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. (2018)- A baker beign required to bake for a gay couple whether he likes it or not. See also the cases o **Washington V v Gluckberg 521 U.S. 702 (1997)**, **Vacco v Quill 521 U.S 703 (1997)**-Involved assisted suicide. The argument here was that legalizing assisted suicide had the potency of setting the country on a slippery slope.

<sup>6</sup> Nyakio Sarah, “Do We Need a Referendum?” ICJ-Kenya available <https://icj-kenya.org/news/latest-news/218-do-we-need-a-referendum> accessed on 26th September 2019.

**Contextualization: Contextual Basis**

There are many things that have happened since the Constitution was promulgated in 2010. However, on matters that directly touch on the issues of faith and family in the governance rubric, the following events stand out:

- a. A petition seeking the recognition of access to pregnancy termination medical services as part of the right to healthcare was filed in 2015 (Petition 266 of 2015: **Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR**)
- b. A Petition on the right to association for persons who fall under the LGBTIQ community was filed in 2015. (Petition no 440 of 2015: **EG v Non- Governmental Organizations Co-ordination Board & 4 others [2015] eKLR**) and determined by the Supreme Court on 24<sup>th</sup> February 2023 in **Petition No 16 of 2019**
- c. Two petitions seeking the striking down of Sections 162 and 165 of the Penal Code was filed in 2016 (Pet no 150 of 2016 which was consolidated with Petition no 234 of 2016: **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)**)
- d. The issues of intersex persons have also received judicial consideration and the liberal jurisprudence that is being borrowed from the global north and South Africa may mean that the assault against the family- one of the key pillars of KCPF.<sup>7</sup>
- e. All these have somehow arisen based on a need for constitutional interpretation and the import of international law and standards. Article 2(5) & 2(6) appear to make Kenya a monist as opposed to a dualist state in as far as international law and treaties re concerned.

The issues above help to contextualize the referendum bill herein proposed. It focuses purely on the need to protect the family amidst the assault on the foundational moral fabric that should be of interest to both the government and religious groups. The government relies on the religious groups and the family to instill a sense of moral obligation to the neighbor and subsequently the nation at large as a political unit.

It is based on the above that the Bill finds its name: **Linda Jamii (Constitution of Kenya) Amendment Bill**

---

<sup>7</sup> See J.R No 147 of 2013: **Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR**; see also J.R 308A of 2013: **Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR**

## **THE PROPOSED AMENDMENT THEMES, ARTICLES & JUSTIFICATION**

Having laid a conceptual basis for amendments and contextualized the rationale for this bill, this part sets out the areas of amendment that we would front for change.

### **1. THE PLACE OF INTERNATIONAL LAW**

#### **Question/Theme:**

**Whether Kenyans want international law to be expressly part of the law of Kenya and whether the same should be subject to our written laws.**

#### **Proposal:**

**Sub-ordination of international law to our own laws by amending Article 2 (5) to add that international law shall be part of our laws in as far as it is not inconsistent with our written laws.**

#### **Justification:**

- I. International law is a broad and general body of laws that encompasses treaties and soft law instruments (declarations) as well as customs that have become widely regarded as law by the relevant actors in public international law. That is states.
- II. Most of the so called “progressive jurisprudence,” are decisions from countries with different political and cultural backgrounds as well as constitutional histories and provisions. These have been used to introduce legal concepts which may not be part and parcel of our laws. At the same time, there is a process for domestication of treaties through ratification by authorized agents. These realities must, of necessity, be harmonized.
- III. Further to the above, we cannot assume the need to consider some of the principles that have emerged over time whose utility is beyond question. This being the case, it is necessary to amend the outlook of Articles 2 (5) & 2 (6) to incorporate internationally developed laws but limit them to our laws as we know them. This is why we propose the Amendment in Section 1 of the Bill.
- IV. Parliament should be the proper body to make laws and laws made elsewhere must be contextualized and rationalized to our lived realities. Otherwise, the situation as it obtains makes our laws fluid and prone to the changing whims of international politics and agenda.

## **2. Sexuality, Same Sex relationships and the traditional understanding of the family**

### **Question or theme:**

**Whether the constitution should be amended to expressly illegalize same sex attractions, liaisons and activities**

### **Proposals:**

Amendment of Article 24(1) (d) to provide that limitations will be lawful **where they protect communities and families** and not just individuals; Article 33 to outlaw publication of pornographic or lewd content; Introduction of Article 36 (2) (a) to expressly prohibit the right of association being extended to illegal groupings such as the gay coalitions; introducing Article 45(2) (b); and Article 260 to expressly define the terms gender, sex and provide for intersex persons.

### **Justification:**

- I. Already Article 19 recognizes that the liberal hyper individualistic approach to rights does not apply in Kenya. The rights must also consider the community context as far as interpretation is concerned hence the need to amend Article 24 as proposed.  
. It provides as follows:
  - (2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of **individuals and communities (emphasis added)**
- II. The Supreme Court recently granted gay associations the right to be registered by the NGO board. The court acknowledged that same sex activity in Kenya is outlawed under the penal code but still went ahead to create a lacuna by asking the NGO board to register a group that will advance and campaign for an illegality.
- III. It is through the liberal media that same sex behaviour as well as heterosexual misconduct conduct is promoted through movies, posters, news articles, plays and books. It is necessary that such brainwashing and engineering is outlawed by providing that the freedom of expression does not extend to publication.
- IV. It is necessary that the constitution expressly provides for illegalization of this conduct in order to help preserve and foment the provisions of the penal code already existing and to the provide a platform on which other laws and regulations in this regard can cascade from.
- V. In the event this is not done an argument can be easily made for the striking down of all other laws currently illegalizing same sex conduct following the decision by the Supreme Court to compel the NGO Board to register associations to promote the gay agenda.
- VI. It is clear that the interpretative framework of the constitution, also bearing in mind the place of international law as currently provided for by the constitution, is radically liberal



and it would only be proper to give the courts a framework that will limit judicial activism that amounts to amendment by judicial imperative or fiat.

**3. The right to life vis a vis the right to healthcare, sexual reproductive health rights and termination of pregnancy:**

**Question:**

**Whether Kenyans want to make it illegal to deliberately terminate a pregnancy on account of the free decision of the mother**

**Proposals:**

- a. Amendment of Article 10 to include “sanctity of human life” as one of the national values;
- b. Amending Article 26 (4) by deleting the term abortion and replacing it with “deliberate termination of pregnancy”;
- c. Amending Article 26 (4) by adding new words and phrases whose import is to have the opinion one that is by a medical professional, including the health of the unborn child in the matrix for determination of termination of pregnancy, and;
- d. adding the word “grave” before “danger” so that the medical professional also the unborn child
- e. Defining conception in Article 260 to mean the union between the gametes to form a human being and unborn child to be the individual person existing between conception and birth

**Justification:**

- I. There is need to clarify the fundamental aspects of the right to life. The constitution says life begins at conception. Moreover, this is also a scientific fact. Therefore, the definitions are needed to inform policy on whether or not the rights granted to a person by the constitution including the right not to be killed are availed to the unborn child. The definitions serve to bring clarity for policy and further legislative action.
- II. There is a confusion arising brought about by Article 43 on the right to healthcare. It is provided under Article 43(1) that the right to the highest attainable healthcare includes reproductive health rights. It is therefore necessary to clarify that the alleged sexual reproductive health care does not include the right to access termination of pregnancy services at will without necessarily amending Article 43
- III. If anything, Article 26 provision is already subject to contentious and attempts to amend the constitution through the backdoor are already ongoing. In *Federation of*

*Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae)* [2019] eKLR, the court held that abortion is still illegal in Kenya. However, there is still no consensus on the import of Article 26 (4) vis a vis Article 43. In effect, the inconsistencies existing before this Judgment still exist today.<sup>8</sup>

- IV. Invariably, the purpose of the proposed amendments is to remove the doubts that may be created by giving any health professional- including paramedics, untrained counsellors and psychologists- the power to determine whether the health of the mother is in danger. The effect of this is to open a loophole that will be no different- in effect- from making abortion available on demand legal. Further, the exceptions provided currently are vague and susceptible to irresponsible exploitation.
- V. Article 26 heavily borrows from Section 11 of the South African Constitution. This has been interpreted to allow abortion on demand hence quite different from our case with Article 26(4)<sup>9</sup>
- VI. It is still advisable to retain the clause but to limit its application to situations that are necessary yet still make it unlawful for any person to procure an abortion (or offer such services) on account of choice.

## CONCLUSION

In conclusion, the proposals are all focused on protecting the family as a fundamental unit for advancement of the society. The family is also key in preserving the moral code that holds society together through training and raising of children. This is a responsibility that the state must take seriously. The fundamental values must be seen to be preserved and not violated by the law as the law is made for the people. The converse cannot hold to be true. More importantly, this Amendment Bill only focuses on the key areas of concern which shall then guide policy and legislative action.

Dated the .....day of .....2023

---

<sup>8</sup> It may be argued that the judgment of the court recognized the issue of rape as a possible reason for procuring an abortion.

<sup>9</sup> *Christian Lawyers Association v Minister of Health* 1998 (11) BCLR 1434 (T), 1998 (4) SA 1113 (T)

.....  
Charles Kanjama SC, Chairperson  
*For and on Behalf of:*  
Kenya Christian Professionals  
Forum