‘WE, THE PEOPLE OF KENYA’ AS THE SOVEREIGN IN POST-2010 CONSTITUTIONAL AMENDMENTS: A COMPARATIVE APPROACH

by

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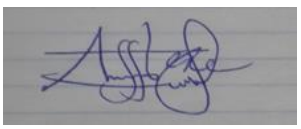

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An old *Swahili* adage says *Mungu hamuachi mja wake* (God does not desert His own). This adage correctly describes my academic journey at the University of South Africa (UNISA). First and foremost, I acknowledge Dr Ronnie N Sibanda for encouraging me to advance my studies after being impressed by my excellent legal research and writing skills and sponsoring me during the 2023 academic year. Dr Sibanda is more than a brother from another mother; I would not have reached this far without his generous hand. Secondly, I also recognise Prof. Willy Mutunga (Chief Justice & President of the Supreme Court of Kenya 2011-2016) for having reviewed my initial research proposal draft, made invaluable comments and insights, and was impressed with the novelty of the study and my excellent legal writing skills. Thirdly, I also owe a debt to Mr Walter Khobe (Legal Advisor, Office of the Chief Justice & President of the Supreme Court of Kenya), who reviewed my initial research proposal draft and was pleased with the study. Fourthly, I acknowledge my supervisor, Prof. Rita N Ozoemena, for her guidance and support throughout the difficult journey of researching and writing a dissertation that meets the highest academic standards. Prof. Ozoemena holds a special place in my research journey at UNISA. I also acknowledge UNISA for awarding me a bursary to cover my tuition fees and research activities in the 2024 academic year. When all seemed dark ahead, UNISA came to my rescue and awarded the bursary for me to complete my studies. I am always grateful and feel that one day, I must give back to the UNISA bursary kit to assist other needy students as I consider UNISA my home. Lastly, I give thanks to *Mulungu* (God) and my ancestors, *Koma tsi Mulungu dzulu* (Ancestors on the Earth and God in Heaven), my family members, classmates, colleagues, and friends who, in one way or another, assisted and supported me during my studies at UNISA. May God bless you abundantly!

DEDICATION

I dedicate this dissertation to the *Wanjiku* (A common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people) as individuals or organising as civil society groups. I believe this research is eye-opening to the people of Kenya, who are the supreme sovereign (all-powerful) when it comes to amending the Constitution of Kenya 2010.

TABARUKU

Ninaitabarukia tasnifu hii kwa Wanjiku (Hili ni jina la kawaida au maarufu au leksimu katika lugha ya kijamii, kiuchumi na kisiasa ya Kenya linayotumiwa kama kumbukumbu ya kawaida kwa watu wa kawaida wa Kenya) kama watu binafsi au kujiunga kama vikundi vya kiraia. Ninaamini kwamba utafiti huu unafungua macho kwa watu wa Kenya ambao ni huru (wenye nguvu zote) linapokuja suala la kurekebisha Katiba ya Kenya 2010.

SUMMARY

The Constitution of Kenya 2010 dedicates Chapter 16 to its amendments via parliamentary and popular initiative amendments. This research critically analyses the central role of the Kenyan people as the supreme sovereign in post-2010 constitutional amendments using a comparative study of jurisdictions such as India, South Africa and Lithuania. It discusses the constitutional principles: the sovereignty of the people, the supremacy of the Constitution, separation of powers and checks and balances, and transformative constitutionalism vis-à-vis constitutional amendments, the purposive constitutional interpretation of the amendment provisions, the Constitution-making history and its relevance to post-2010 constitutional amendments, the prerequisites in constitutional amendments such as public participation, the delimitation of parliamentary and popular initiative amendments, and the issues arising in post-2010 constitutional amendments such as the basic structure 'doctrine', nature of national referendum questions and whether State organs, offices and officers including the President can initiate popular initiative amendments. This critical analysis uses emerging jurisprudence from the superior courts, comparative jurisprudence, and scholarly literature to provide instructive lessons and best international practices in interpreting the amendment provisions. There is also 'reverse learning' as the Kenyan jurisprudence is good for foreign jurisdictions such as India, South Africa and Lithuania. The results of this study show that the ordinary Kenyan people are the central actors in constitutional amendments, and parliamentary and popular initiative amendments must comply with constitutional principles and the mandatory procedures set out under Chapter 16 of the 2010 Constitution. The study gives several recommendations, including political goodwill and good political leadership, enactment of the national referendum and public participation legislation, education awareness of the Kenyan people, full implementation of the 2010 Constitution, consistency in developing transformative jurisprudence by superior courts, public interest litigation, strengthening the Independent Electoral and Boundaries Commission, and the amendment to Article 255(1) of the 2010 Constitution to include the Preamble as one of the listed matters. It is firmly believed that the full implementation of these recommendations would go a long way in ensuring that the ordinary Kenyan people are the supreme sovereign as the central promoters of post-2010

constitutional amendments that improve democratic good governance and adjust to positive societal transformations.

KEY WORDS: Basic structure ‘doctrine’, constitutional amendments, constitutional interpretation, constitutional supremacy, Constitution-making history, Kenya, national referendum, parliamentary initiative, popular initiative, popular sovereignty, public participation, purposive interpretation, referendum questions, superior courts, transformative constitutionalism

ISIFINYEZO

Umthethosisekelo waseKenya 2010 unikezela iSahluko 16 ukubheka izichibiyelo zawo ngokusebenzisa izichibiyelo zephalamende nezinguquko ezithandwayo. Lolu cwaningo luhlaziya ngokujulile iqhaza elibalulekile labantu baseKenya abanjengabazimele ezichibiyelweni zomthethosisekelo zangemuva konyaka u-2010 kusetshenziswa ucwaningo oluqhathanisa izindawo ezifana ne-India neNingizimu Afrika. Lolu cwaningo ludingida imigomo yomthethosisekelo, ubukhosi babantu, ubukhulu boMthethosisekelo, ukwehlukaniswa kwamandla, ukubukezwa kanye nokulinganisa kanye nokuguqula umthethosisekelo ngokuchitshiyelwa komthethosisekelo, ukuhunyushwa okuyinhloso kwezihlinzeko zokuchitshiyelwa, umlando wokwenza uMthethosisekelo, kanye nokuhlobana kwayo nezichibiyelo zomthethosisekelo zangemva konyaka ka-2010, izimfuneko ezichibiyelweni zomthethosisekelo ezifana nokubamba iqhaza komphakathi, ukunqunywa kwemingcele yezichibiyelo zephalamende nezinhlelo ezithandwayo, kanye nezindaba eziqubuke ezichibiyelweni zomthethosisekelo zangemva kuka-2010 njenge'mfundiso' eyisakhiwo esiyisisekelo, uhlobo lwemibuzo yenhlolovo kanye nokuthi izinhlaka zoMbuso, amahhovisi kanye nezikhulu kubandakanya noMongameli bangakwazi yini ukusungula izichibiyelo ezithandwayo. Lokhu kuhlaziya okubalulekile kusebenzisa ulwazi lwezomthetho olusafufusa oluvela ezinkantolo eziphakeme, umthetho ongokomthetho wokuqhathanisa kanye nezincwadi zezazi ukuze kunikezwe izifundo ezifundisayo kanye nezinqubo ezinhle kakhulu zamazwe ngamazwe ekuchazeni izinhlinzeko zokuchitshiyelwa. Kukhona futhi 'ukufunda okuhlanekezelwe' njengoba umthetho waseKenya ulungele izindawo zangaphandle ezifana neNdiya neNingizimu Afrika. Imiphumela yalolu cwaningo ikhombisa ukuthi abantu baseKenya abajwayelekile yibona ababambe iqhaza elikhulu ekuchibiyelweni komthethosisekelo futhi izichibiyelo zePhalamende nezithandwayo kumele zihambisane nemigomo yomthethosisekelo kanye nezinqubo eziyimpoqo ezibekwe ngaphansi kweSahluko 16 soMthethosisekelo ka-2010. Lolu cwaningo lunikeza izincomo eziningana ezihlanganisa ukuthakazelelwa kwezombusazwe kanye nobuholi obuhle bezombusazwe, ukugunyazwa kwenhlolovo kazwelonke kanye nomthetho wokubamba iqhaza komphakathi, ukuqwashisa ngemfundo yabantu baseKenya, ukuqaliswa ngokugcwele koMthethosisekelo we-2010, ukungaguquguquki ekuthuthukiseni umthetho

oguqukayo wezinkantolo eziphakeme, ukumangalela izithakazelo zomphakathi, ukuqinisa amakhomishana omthethosisekelo kanye nezichibiyelo zeSigaba 255(1) soMthethosisekelo wezi-2010 ukuze kufake isandulela somthethosisekelo njengolunye lwezindaba ezisohlwini. Kuyathembakala ukuthi ukuqaliswa ngokugcwele izincomo kuzosiza ekuqinisikeni abantu base Kenya ukuthi ibona abangababusi abaphakeme bagqugquzele ukuchitshiyelwa komthethosisekelo wangemva konyaka wezi-2010 ozothuthukisa ukubusa okuhle kwentando yeningi, kanye nokulungisa izinguquko ezinhle emphakathini.

AMAGAMA ANGUKHIYE: ‘imfundiso’ eyisakhiwo esiyisisekelo, izichibiyelo zomthethosisekelo, ukutolika komthethosisekelo, ubukhulu bomthethosisekelo, umlando wokwenza umthethosisekelo, iKenya, inhlolovo kazwelonke, umkhankaso wephalamende, umkhankaso othandwayo, ubukhosi obudumile, ukubamba iqhaza komphakathi, ukutolika okunenjongo, imibuzo yenhlolovo, izinkantolo eziphakeme, ukuguquleka kwenkambiso yomthethosisekelo

IKISIRI

Katiba ya Kenya 2010 imetenga Sura ya 16 kwa marekebisho yake kupitia mpango wa Bunge na mpango maarufu wa wananchi. Utafiti huu unachambua kwa kina jukumu kuu la watu wa Kenya kama wenye mamlaka (nguvu zote) katika marekebisho ya Katiba baada ya 2010 kwa kutumia utafiti wa kulinganisha mamlaka kama vile India, Afrika Kusini na Lithuania. Utafiti huu unajadili kanuni za kikatiba: mamlaka ya wananchi, ukuu wa Katiba, mgawanyo wa madaraka na hundi na mizani, na mabadiliko yanayoletwa na Katiba, tafsiri ya Katiba ya Sura ya 16, historia ya kutengeneza Katiba na umuhimu wake kwa marekebisho ya Katiba baada ya 2010, mahitaji ya marekebisho ya Katiba kama vile ushiriki wa umma, marekebisho ya kupitia mpango wa Bunge na marekebisho ya mpango maarufu wa wananchi, na masuala yanayojitokeza katika marekebisho ya Katiba baada ya 2010 kama vile kanuni ya muundo msingi, asili ya maswali ya kura ya maoni na ikiwa vyombo vya serikali, ofisi na maafisa ikiwa ni pamoja na Rais wanaweza kuanzisha marekebisho ya mpango maarufu wa wananchi. Uchambuzi huu wa kina unatumia maamuzi yanayojitokeza kutoka kwa mahakama za juu, sheria za kulinganisha, na fasihi ya wasomi kutoa masomo ya kufundisha na mazoea bora ya kimataifa katika kutafsiri vifungu vya marekebisho ya Katiba. Pia kuna kujifunza kinyume kama sheria ya Kenya ni nzuri kwa mamlaka za kigeni kama vile India, Afrika Kusini na Lithuania. Matokeo ya utafiti huu yanaonyesha kuwa watu wa kawaida wa Kenya ndio wahusika wakuu katika marekebisho ya Katiba, na marekebisho ya mpango wa Bunge na marekebisho ya mpango maarufu wa wananchi lazima yazingatie kanuni za kikatiba na taratibu za lazima zilizowekwa chini ya Sura ya 16 ya Katiba ya 2010. Utafiti huu unatoa mapendekezo kadhaa ikiwa ni pamoja na nia njema ya kisiasa na uongozi mzuri wa kisiasa, kutungwa kwa sheria ya kura ya maoni na sheria ya ushiriki wa umma, ufahamu wa elimu kwa watu wa Kenya, utekelezaji kamili wa Katiba ya 2010, uthabiti katika kuendeleza maamuzi ya mabadiliko kutoka kwa mahakama za juu, madai ya maslahi ya umma, kuimarisha tume za kikatiba, na marekebisho ya Kifungu cha 255(1) cha Katiba ya 2010 kujumuisha Utangulizi kama moja ya mambo yaliyoorodheshwa. Inaaminika kabisa kwamba utekelezaji kamili wa mapendekezo haya utaenda mbali katika kuhakikisha kwamba watu wa kawaida wa Kenya ni wenye mamlaka kama wahamasishaji wakuu wa marekebisho

ya Katiba baada ya 2010 ambayo yanaboresha utawala bora wa kidemokrasia na kurekebisha mabadiliko mazuri ya kijamii.

MANENO MUHIMU: Kanuni ya muundo msingi, marekebisho ya Katiba, tafsiri ya Katiba, ukuu wa Katiba, historia ya kutengeneza Katiba, Kenya, kura ya maoni ya kitaifa, mpango wa Bunge, mpango maarufu wa wananchi, uhuru maarufu wa wananchi, ushiriki wa umma, tafsiri yenye malengo, maswali ya kura ya maoni, mahakama za juu, mabadiliko yanayoletwa na Katiba

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

BAT	British American Tobacco Kenya
BBI	Building Bridges Initiative
CCL	Constitutional Court of Lithuania
CECRL	Central Electoral Commission of the Republic of Lithuania
CEP	Committee of Eminent Persons
CIC	Commission for the Implementation of the Constitution
CIPEV	Commission of Inquiry on Post-Election Violence
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
CSOs	Civil Society Organisations
CUP	Cambridge University Press
DCJ	Deputy Chief Justice
HC	High Court
ICT	Information, Communication and Technology
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent and Electoral Commission
IREC	Independent Review Committee
J	Justice
JA	Justice of Appeal

JJ	Justices
JJA	Justices of Appeal
JTI	Judiciary Training Institute
KDF	Kenya Defence Forces
KeHC	High Court of Kenya
KESC	Supreme Court of Kenya
KHRC	Kenya Human Rights Commission
KLR	Kenya Law Reports
KNDR	Kenya National Dialogue and Reconciliation
LGBTIQA+	Lesbian, gay, bisexual, transgender, intersexual, queer, asexual, and categories of gender not closed people
MIT	Multi-inter-trans
MRC	Mombasa Republican Council
NA	National Assembly
NASA	National Super Alliance
NCOP	National Council of Provinces
NGOs	Non-Governmental Organisations
NLC	National Land Commission
ODM	Orange Democratic Movement Party of Kenya
P	President
PCRC	Peoples Constitution Review Commission
PNU	Party of National Unity

PWDs	Persons with Disabilities
SCI	Supreme Court of India
SCJ	Supreme Court Justice
SID	Society for International Development
TAK	Thirdway Alliance of Kenya
TWCG ‘K’	Technical Working Committee Group ‘K’
UN	United Nations
UNISA	University of South Africa
UoN	University of Nairobi
VP	Vice-President
ZACC	Constitutional Court of South Africa

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CHAPTER ONE

INTRODUCTION

1 Background

Kenya adopted a new Constitution in 2010 that has been described as a 'Transformative Charter'[1] because it is the most comprehensive rendering of the Kenyans' aspirations with far-reaching consequences on society's legal, historical, political, socio-economic, and cultural spheres.[2] The Kenyan Supreme Court (KESC) has had the opportunity to pronounce itself on the transformative nature of this Constitution, whose goal is to institute large-scale social change and reforms via a value-based approach to social justice, freedom, human rights, equality, equity, democracy, and the rule of law.[3] The first KESC Judges correctly acknowledged that the 2010 Constitution is transformative and progressive.[4] This transformative nature of the 2010 Constitution has the import of informing its interpretation that must be holistically[5] and unfavourable to formalistic or

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1 See generally, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR; *In the Matter of the Speaker of the Senate & another* [2013] eKLR [51]-[52] (hereinafter 'the *Speaker of the Senate* case'); Victoria Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions* (Bloomsbury 2021) 32-50.

2 *David Ndii & others v Attorney General & others* [2021] eKLR [396]; Heinz Klug, 'Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa' (2019) 67 Buff. L. Rev. 701-742; Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) SAJHR 146-188.

3 *Speaker of the Senate* case [51]-[52]; Willy Mutunga, 'People Power in the 2010 Constitution: A Reality or an Illusion?' (*The Elephant*, 6 March 2020) <www.theelephant.info/op-eds/2020/03/06/people-power-in-the-2010-constitution-a-reality-or-an-illusion/> accessed 16 May 2023, where there is a brief discussion on the role of Constitutions and the law in social transformation; Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' (2021) 8 THR 30, 31; Willy Mutunga, *In Search and Defence of Radical Legal Education: A Personal Footnote* (Kabarak Law School, Occasional Paper Series 2022 1(1)) 32, where Mutunga argues that a Constitution is an instrument of historical, legal, socio-economic, cultural and political transformation to either enhance the status *quo* or bring radical societal transformation. See also generally, Charles A Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan 1913); Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (Ashgate 2006); Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (OUP 2013); Cesar Rodriguez-Garavito and Diana Rodriguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in Global South* (CUP 2015).

4 Mutunga, *In Search and Defence of Radical Legal Education* 35-36.

5 *In the Matter of the Kenya National Commission on Human Rights* [2014] eKLR [26].

positivist approaches;[6] protect its values, objects and purposes;[7] and incorporate non-legal considerations to give its true meanings and values.[8]

Alive to the stability and predictability of fundamental rules for the respect, protection, and fulfilment of human rights and fundamental freedoms, and the effective exercise of state power, the 2010 Constitution can only be amended per its provisions. Thus, a constitutional change is necessary where there is a need to improve democratic good governance or adjust to positive legal, historical, political, socio-economic, and cultural transformations. The Constitution dedicates Chapter 16 (Articles 255, 256 and 257) to its amendments through parliamentary and popular initiatives.

The tenth *constitutionversary*[9] on 27 August 2020 was marked with a heated debate amongst Kenyans and the political and legal circles regarding the (un)constitutionality of the Constitution of Kenya (Amendment) Bill 2020. This constitutional Amendment Bill was termed as a 'device for political cease fire'[10] due to its background following the disputed 2017 regular presidential election in which the KESC annulled the incumbent President Uhuru Kenyatta's initial re-election victory.[11] This was followed by the boycotting of the re-run by the key challenger- Raila Odinga, and his subsequent mock swearing-in as the 'People's President' by the controversial lawyer Miguna Miguna, leading to protracted mass protests.[12] This Bill is one of the more than twenty-two unsuccessful attempts to amend the 2010 Constitution since its promulgation.

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6 *In the Matter of Interim Independent Election Commission* [2011] eKLR [86].

7 *Speaker of the Senate* case [155]-[157].

8 *Communications Commission of Kenya & 5 others v Royal Media & 5 others* [2014] eKLR [356]-[357].

9 *Constitutionversary* is my neologism. This term is coined from the two words: 'Constitution' and 'anniversary'. It is used to refer to the exact date on which the promulgation of the Constitution took place after 27 August 2010, and is celebrated on 27 August every year to commemorate the promulgation of the Constitution by good-governance-loving Kenyans. On this day, Kenyans reflect the gains the 2010 Constitution has brought and brainstorm on how they can rescue its weaknesses for a better Kenya.

10 Elizabeth A O'Loughlin and Walter Khobe, 'Kenya-Constitutional Amendments as a Device for Political Ceasefire' (2020) 1 Public Law 198-201.

11 See generally, *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

12 The repeat elections were held on 25 October 2017, and Raila Odinga boycotted the elections handing the victory to the incumbent President.

One of the notable attempts was through the parliamentary initiative in the form of a Constitution of Kenya (Amendment) Bill 2013, which was declared unconstitutional by the Kenyan High Court (KeHC),[13] and sought to amend Article 260 of the Constitution regarding the definition of 'State office'. Its principal objective was to amend Article 260 of the Constitution to remove the offices of the Members of Parliament (National Assembly and Senate), Members of County Assemblies, Judges and Magistrates from the list of designated State offices. Another attempt was through the popular initiative, *Okoa Kenya*,[14] whose major promoter was the Orange Democratic Party of Kenya (ODM), initiated in 2014.[15] *Okoa Kenya* died a natural death after it failed to garner the required 'at least one million' signatures of registered voters per Article 257(1) of the Constitution. Another notable attempt was the popular initiative dubbed *Punguza Mizigo*[16] whose promoter was the Thirdway Alliance of Kenya (TAK), initiated in 2019.[17] *Punguza Mizigo* went further by garnering the required 'at least one million' signatures of registered voters. However, it failed to get the approval of at least twenty-four County Assemblies per Article 257(5), (6) and (7) of the Constitution. Efforts to resurrect the *Punguza Mizigo* have proved futile.

As already stated, there have been more that twenty-two unsuccessful attempts to amend the 2010 Constitution since its promulgation. All the initiatives purporting to amend the Constitution that have been initiated since 2013 raised serious questions including the place of constitutional principles and the role of pre-2010 Constitution-making history in post-2010 constitutional amendments; the interpretation of the constitutional amendment provisions; the prerequisites in constitutional amendments; the constitutional remit of both the parliamentary and popular initiatives; and whether the basic structure 'doctrine'

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13 *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* [2013] eKLR.

14 This *Swahili* phrase that translates to 'Save Kenya'.

15 Constitution of Kenya (Amendment) Bill 2015.

16 This *Swahili* phrase translates to 'Reduce the Load', and its main objective was to amend the Constitution of Kenya 2010 to reduce the burden and cost of governance borne by Kenyan taxpayers.

17 *Punguza Mizigo* (Constitution of Kenya Amendment) Bill 2019. For a commentary on the same, see Leonard Mwakuni, 'The *Punguza Mizigo* Bill (Constitution of Kenya Amendment) 2019: Salient Features, Strengths and Weaknesses' (*GRIN Verlag*, 2019) <www.grin.com/document/593952> accessed 16 May 2023.

applies to Kenya. Of all the initiatives that have purported to amend the Constitution, the Constitution of Kenya (Amendment) Bill 2020 awakened the ghosts of the Constitution-making history and amendments. There were reasons for that. The purported 'popular' initiative was 'sponsored' by the President and gained the support of the major political parties and a majority of County Assemblies, with several opponents led by the Law Society of Kenya and a civil society campaign grouping dubbed *Linda Katiba*[18] against some of the constitutional amendments terming them unconstitutional. The KESC found the Constitution of Kenya (Amendment) Bill 2020 unconstitutional.[19]

This study critically analyses the central place of the Kenyan people in post-2010 constitutional amendments from a descriptive or prescriptive, analytical or argumentative and comparative approach. The practice, emerging jurisprudence from the superior courts,[20] comparative jurisprudence, and scholarly literature from foreign jurisdictions including South Africa, India and Lithuania provide instructive lessons for Kenya as far as constitutional amendments are concerned.

2 Problem statement

A golden thread that runs across all the Kenyan constitutional amendment initiatives so far, despite their failure, is the centrality of the people's supreme sovereign power when it comes to amending the 2010 Constitution. It is the nature of transformative constitutions to be rigid to amend by the prescription of mandatory procedures, such as those found under Chapter 16 (Articles 255, 256 and 257) of the 2010 Constitution. These mandatory procedures require the amendment of the Constitution through parliamentary and popular initiatives. The problem is that the several proposed constitutional amendments have

18 This *Swahili* phrase translates to 'protect, respect, uphold, and implement the current Constitution'. This grouping is about the development of a different, alternative, progressive, and radical or revolutionary political leadership in Kenya that implements the Constitution's strengths and audits or rescues its weaknesses and limitations for future amendments. See Mutunga, 'Transformative Constitutions' 55; Mutunga, *In Search and Defence of Radical Legal Education* 61-62.

19 *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent).

20 Constitution of Kenya 2010, Art. 162(1)-(3). The superior courts in Kenya are the KESC, Court of Appeal, and KeHC (including the Environment and Land Court and the Employment and Labour Relations Court).

failed to abide by the constitutional principles (such as the popular sovereignty and constitutional supremacy) and the mandatory procedures set by the Constitution. As a result, none of the amendment initiatives have been successful.

The 2010 Constitution has clearly defied the prophecy of Elkins, Ginsburg and Melton, who argue that African constitutions are replaced with government-friendly ones within their first ten years of existence, with the average lifespan of constitutions worldwide being seventeen years.[21] Despite the various proposals to amend the Constitution, none have been enacted or adopted. There is a dearth of scholarship that looks into this problem in depth. This study interrogates the research problem by interpreting the relevant constitutional provisions with the help of emerging jurisprudence from the superior courts, comparative jurisprudence and scholarly literature from foreign jurisdictions, including South Africa, India and Lithuania.

3 Research questions

Because of the problem raised above, the main question that this study raises and seeks to answer is what is the extent of the sovereignty of the Kenyan people in constitutional amendments as the central promoters under the 2010 Constitution? The study seeks to examine the central role of the Kenyan people in post-2010 constitutional amendments. This is done by asking the following sub-questions:

(a) What does the constitutional principles such as popular sovereignty and constitutional supremacy reveal in terms of their relationship to constitutional amendments? Given that Kenya has a rich history of pre-2010 Constitution-making process, can such history be a helpful tool for interpreting the amendment provisions? What approach can be adopted in interpreting a transformative Constitution that incorporates amendment provisions to give effect to such provisions?

[21] See generally, Zachary Elkins, Tom Ginsburg and James Melton, 'The Lifespan of Written Constitutions' (*Academia*, 21 January 2008) <www.academia.edu/3295349/The_Lifespan_of_Written_Constitutions> accessed 16 May 2023.

(b) The amendment of the Constitution is a process with clearly set out stages involving the Kenyan people, Parliament (National Assembly and Senate), the legislative structures at the county level (County Assemblies), the Independent Electoral and Boundaries Commission (IEBC),[22] and the President. The Constitution provides for its amendment under Chapter 16 (Articles 255, 256 and 257) through parliamentary and popular initiatives. Are there prerequisites that must be in place before initiating the amendment processes? What is the constitutional remit of the parliamentary and popular initiatives per the emerging jurisprudence from the superior courts, comparative jurisprudence and scholarly literature on this subject?

(c) The amendment of the Constitution is a matter of life and death with serious implications for the nation's legal, political, socio-economic, and cultural transformations. As Kenya is not different, what are the emerging issues concerning constitutional amendments and their solutions to give effect to the constitutional provisions? Can foreign jurisprudence and scholarly literature on the subject be used in giving solutions to similar issues even though there may be some differences in the constitutional amendment provisions?

4 Point of departure and scope of the study

This study's approach to the problem statement is by critically analysing the constitutional amendment provisions using the emerging jurisprudence from the superior courts, comparative jurisprudence and scholarly literature on the subject from foreign jurisdictions such as South Africa, India and Lithuania. This approach entails purposively interpreting the constitutional amendment provisions to give effect to such provisions. The research methodology adopted for this study is the qualitative research comprising of primary and secondary sources research and comparative legal study. These methodologies are chosen because legal research is based on literature study in most cases. Furthermore,

[22] The IEBC is established under Art. 88 of the 2010 Constitution and the Independent Electoral and Boundaries Commission Act 2011.

these methodologies are the most appropriate as they are not used in isolation but in complementarity with each other in answering the research questions.

As already stated, constitutional amendments are necessary to improve democratic good governance or adjust to positive legal, historical, political, socio-economic, and cultural transformations. It follows that the objective of any proposed constitutional amendment must be the improvement of democratic good governance and adjusting to positive societal transformations. This research proceeds on two assumptions. First and foremost, all the proposed constitutional amendments since 2013 have neither been based on improving democratic good governance nor adjusting to positive societal transformations. Instead, they have been based on politicians' and political parties' selfish and greedy partisan interests at the expense of the Kenyan people. Secondly, this research presumes that the Kenyan people are the supreme sovereign in constitutional amendments as the central promoters under the 2010 Constitution. This means that all constitutional reforms, amendment processes and Bills must be people-centred and highly participatory, similar to those leading to the promulgation of the 2010 Constitution.

This research is limited to critically analysing the extent of the sovereignty of the Kenyan people in constitutional reforms and amendments as the central promoters under the 2010 Constitution. It does not cover the constitutional reforms and amendments from the independence in 1963. However, Chapter two, part 4 looks at the pre-2010 Constitution-making history that led to the promulgation of the 2010 Constitution. It looks at where the country has come from and the implication of such history for future (post-2010) constitutional reforms and amendments. It is firmly believed that this history places the study into its context to understand the research questions' answers fully.

5 Aim and objectives

5.1 Aim

To critically analyse the extent of the sovereignty of the Kenyan people in constitutional amendments as the central promoters under the 2010 Constitution.

5.2 Objectives

(a) To determine the relationship between the constitutional principles (including popular sovereignty and constitutional supremacy) and constitutional amendments; to investigate, determine and evaluate whether Kenya's rich history of pre-2010 Constitution-making process can be a helpful tool for interpreting the amendment provisions; and to critically analyse the approach adopted in interpreting a transformative Constitution that incorporates amendment provisions to give effect to such provisions.

(b) To investigate and consider the prerequisites to be in place before initiating the constitutional amendment processes, and critically analyse the constitutional remits of the parliamentary and popular initiatives per the emerging jurisprudence from the superior courts, comparative jurisprudence and scholarly literature on this subject.

(c) To explore and explain the emerging issues concerning constitutional amendments and propose their solutions to give effect to the constitutional provisions.

6 Research methodology

The study answers the research questions by employing the following applicable research methodologies: qualitative research comprising of primary and secondary sources research; and comparative legal analysis. These methodologies are not used in isolation, as they complement each other to answer the research questions.

Primary sources research is used to determine the relevant legal provisions, emerging jurisprudence and critical interpretations from the superior courts. Available primary documents include the Constitution of Kenya 2010, other relevant legislation, regulations, rules, case law, and official reports concerning constitutional amendments. This method is essential to examine and review the existing scholarly literature and commentaries on constitutions, national legislation, regulations and case law to help critically analyse the Kenyan people's role in post-2010 constitutional amendments.

Secondary sources research involves critically examining and reviewing data obtained from secondary sources, including books, chapters in books, journal articles, theses and dissertations, internet sources, law commission reports, newspaper articles, conference papers, expert opinions, and academic commentaries on the popular sovereignty and constitutional amendments. The basis is a qualitative form of research relying heavily on library research and internet searches that are all desk-based. This method is vital as it helps understand various scholars' views and biases on popular sovereignty and constitutional amendments that assist in coming up with descriptive or prescriptive, analytical and argumentative standpoints.

The comparative constitutional legal analysis entails a study of both the similarities and differences by identifying or comparing laws and practices from different jurisdictions to help in finding best solutions for common issues.[23] This helps in improving and understanding the popular sovereignty and constitutional amendments by analysing how foreign jurisdictions have dealt with similar issues. The legal and institutional framework and jurisprudence on popular sovereignty and constitutional amendments from foreign jurisdictions, including South Africa, India and Lithuania, are useful for two reasons. One is to draw and learn instructive lessons and borrow best constitutional practices for Kenya. This is because the Kenyan jurisprudence is not insular but its vision is unique and can only borrow to fulfill its objectives which are historical, socio-economic, religious, philosophical, cultural, political, spiritual, technological and theological.[24] Secondly is to determine whether there is 'reverse learning'[25] where the Kenyan jurisprudence is also best for other countries. The primary sources and scholarly literature on popular sovereignty and constitutional amendments inform the comparative legal study analysis.

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23 Tom Ginsburg and Rosalind Dixon, 'Comparative Constitutional Law: Introduction' (2011) University of Chicago Public Law & Legal Theory Working Paper No. 362, 5-12 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1066&context=public_law_and_legal_theory> accessed 16 May 2023.

24 Mutunga, 'Transformative Constitutions' 50.

25 Cesar Rodriguez-Garavito, *Law and Society in Latin America: A New Map* (Routledge 2015) 8-9.

7 Literature review

Much has been written on Kenya's pre-2010 Constitution-making, history and amendments.[26] However, scholarly literature on this subject is scarce in the post-2010 era. Since the promulgation of the 2010 Constitution, limited scholarly literature has been written on this subject. Ghai and Ghai's commentary provides a brief overview of the 2010 Constitution as an instrument for change.[27] This commentary does not address the interpretation of the constitutional amendment provisions. In the second edition of the book,[28] Ghai and Ghai briefly discuss changing the 2010 Constitution and the current debates,[29] but does not address the research questions of this study. Mbondenyi and Ambani provide an understanding of the new constitutional order by discussing constitutional principles (including the popular sovereignty and constitutional supremacy), government, and the Bill of human rights.[30] This text does not discuss the people's role in the constitutional amendment processes. Lumumba and Franceschi's introductory commentary on the 2010 Constitution remains at this introductory level[31] and does not touch on the interpretation of the constitutional amendment provisions. Mutakha, in purposively interpreting the devolution provisions of the 2010 Constitution,[32] briefly points

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26 See for example, Githu Muigai, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution' (PhD thesis, UoN 2001); Muna Ndulo, 'Constitution-Making in Africa: Assessing Both the Process and the Content' (2002) Cornell Law Faculty Publications Paper 57 <http://scholarship.law.cornell.edu/facpub/57> accessed 16 May 2023; Yash Pal Ghai, 'The Role of Constituent Assemblies in Constitution-making' (*International IDEA*, 2006) <https://tinyurl.com/GhaiRoleCAs> accessed 16 May 2023; Yash Pal Ghai and Jill Cottrell Ghai, 'Constitution Making and Democratization in Kenya (2000-2005)' (2007) 14(1) Democratization 1-25; Ben Sihanya, 'The Presidency and Public Authority in Kenya's New Constitutional Order' (2011) Society for International Development (SID) Regional Office for East & Southern Africa Constitution Working Paper No. 2, 4-10 <https://sidint.net/docs/WP2.pdf> accessed 16 May 2023; Godwin R Murunga, Duncan Okello and Anders Sjogren, 'Towards a New Constitutional Order in Kenya: An Introduction' in Godwin R Murunga, Duncan Okello and Anders Sjogren (eds), *Kenya: The Struggle for a New Constitutional Order* (Bloomsbury 2014) 1-14; Willy Mutunga, *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (2nd edn, SUP 2020).

27 Yash Pal Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (KI 2011).

28 Yash Pal Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (2nd edn, KI 2021).

29 Ghai and Ghai, *Kenya's Constitution* (2nd edn) 24, 146-150.

30 Kiwinda Mbondenyi and Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica 2012).

31 PLO Lumumba and Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (SUP 2014).

32 John Kangu Mutakha, 'An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach' (LLD Thesis, UWC 2014).

out the functions and powers of County Assemblies and the Senate's legislative mandate in constitutional Amendment Bills.[33] While concentrating on the devolution provisions, a brief discussion on parliamentary and popular initiative amendments and amending entrenched provisions is made without going into details.

Muigai's treatise extensively delves into the history of constitutional reforms and changes right from the colonial era to 2022 and gives an overview of the key developments.[34] In discussing the extensive historical survey of constitutional developments in Kenya, Muigai correctly identifies the areas where efforts to review the 2010 Constitution could emerge, including devolution, gender representation, the Senate, and the structure of the national Executive. Other areas where constitutional review could arise are the jurisdiction of the Kadhi's Court; lesbian, gay, bisexual, transgender, intersexual, queer, asexual, and categories of gender-not-disclosed people (LGBTIQA+) rights;[35] and abortion. Muigai correctly argues that the 'rigid Constitutional amendment procedure, an active and vigilant citizenry, and the presence of activist Judges' are the anchorage to the Constitution's resilience. While Muigai's work provides a good context for this study with its extensive historical narrative of pre-2010 constitutional reforms and changes, it does not address in detail the research questions to be answered by this study. Muigai's book is both a political and legal treatise that delves more into history and the interplay of power, politics and the law of constitutional changes in Kenya.

Ngira gives some passing reflections on the constitutional amendment proposed by the Building Bridges Initiative (BBI)[36] by pointing out both negative and positive elements of the process, and stressing the need for constitutional changes to adhere to the constitutional principles and aspirations of the people. O'Loughlin and Khobe's brief

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33 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 394-398.

34 Githu Muigai, *Power, Politics and Law: Dynamics of Constitutional Change in Kenya, 1887- 2022* (KABU Press 2022).

35 *NGOs Co-ordination Board v EG & 4 others; Katiba Institute* (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (24 February 2023) (Judgment). This 3-2 majority decision of the KESC declared that failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice was unconstitutional. The decision has since elicited a heated debate amongst all circles of Kenyans on the recognition, legalisation or delegalisation of LGBTIQA+.

36 David Otieno Ngira, 'Some Passing Reflections on the Building Bridges Initiative' (2020) 5(1) KJLE 279-289.

survey[37] describes this constitutional amendment as a 'device for political ceasefire' due to its background of the disputed 2017 regular presidential election in which the KESC annulled the initial election victory of the incumbent, as already stated. Sihanya's Chapter tackles three questions on post-2017 constitutional amendments on the interests of the people and politicians, the ripeness of the amendments, and amendment processes involving popular participation.[38] The argument is for the ripeness of the amendment process to address issues including the concentration of Executive power in the Presidency, presidential election justice, inclusivity, integrity, social justice and good governance. Calls are made for people-centred and highly participatory constitutional reforms and amendment processes similar to those leading to adopting the 2010 Constitution.[39] While some of the specific proposals of post-2010 constitutional amendments are discussed, the discussion remains at the descriptive level and does not consider the research questions this study addresses. Lutta also briefly discusses the Constitution of Kenya (Amendment) Bill 2020 and critiques the basic structure 'doctrine'.[40] Bhatia, in his article, also discusses the basic structure 'doctrine' and the prohibition of the President to initiate popular initiative amendments in relation to the *BBI* cases.[41] However, these discussions and critiques do not address the research questions of this study, which is an in-depth analysis of the post-2010 constitutional amendments and the arising issues including the basic structure 'doctrine'.

Mutunga's inaugural lecture[42] stresses the importance of people-driven processes in Constitution-making and the need for public participation.[43] Mutunga correctly notes that the Constitution puts the Kenyan citizen at the core of its supremacy, sovereignty, and

37 O'Loughlin and Khobe, 'Kenya-Constitutional Amendments' 198-201.

38 Ben Sihanya, 'Amending the Constitution of Kenya 2010 Post 2017: Interests, Process and Outcomes' in Yash Pal Ghai, Emily Kinama and Jill Cottrell Ghai (eds), *Ten Years On***:** *Assessing the Achievements of the Constitution of Kenya 2010* (KI 2021) 277-292.

39 Sihanya, 'Amending the Constitution of Kenya 2010 Post 2017' 287-288.

40 Joseph Lutta, 'The Constitutional Amendments Bill, 2020: A Basic Structure Doctrine Critique' (2021) 17 LSKJ 37-49.

41 Gautam Bhatia, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya' (16 March 2023) SSRN 1-20 <http://dx.doi.org/10.2139/ssrn.4390358> accessed 18 July 2024.

42 Mutunga, *In Search and Defence of Radical Legal Education* 31.

43 See also Mutunga, *Constitution-making from the Middle*.

centrality in power and politics.[44] Several examples are given on the specific elements or pillars making the Constitution transformative and progressive, including the history of past struggles against colonialism and neo-colonialism; social class struggles in Constitution-making; sovereignty, supremacy and centrality of the Kenyan people; and setting its theory of interpretation.[45] The Kenyan people's sovereignty, supremacy and centrality reign supreme in amending the Constitution.[46] This study is an in-depth research and analysis of the people's supreme sovereign power in amendments in respect of the 2010 Constitution. Article 1 of the Constitution provides the sovereignty of the people to wit both direct sovereign power and delegated or representative sovereign power.

Comparative scholarly literature from South Africa and other foreign jurisdictions on the nature of transformative constitutions, jurisprudence and constitutionalism collectively capture the concept of positive and fundamental societal changes via the instrument of the constitution and law.[47] Mugambi-Githiru in her article[48] also discusses transformative constitutionalism, its challenges in the Kenyan context and the lessons from South Africa. There is a reasonable number of scholarly works on constitutional interpretation in Kenya generally[49] and on specific elements, including devolution,[50] human rights,[51] and equality

44 Mutunga, *In Search and Defence of Radical Legal Education* 39.

45 Mutunga, *In Search and Defence of Radical Legal Education* 40.

46 Mutunga, *In Search and Defence of Radical Legal Education* 41.

47 See for example, Klare, 'Legal Culture' 146-188; Pius Langa, 'Transformative constitutionalism' (2006) 17(3) Stell LR 351-360; Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 24-25; Klug, 'Transformative Constitutions' 701-742; Armin von Bogdandy and René Urueña, 'International Transformative Constitutionalism in Latin America' (2020) 114(3) AJIL 403, 405-408, 440-442. For the Kenyan case, see Yash Pal Ghai, 'Constitutions and Constitutionalism: The Fate of the 2010 Constitution' in Godwin R Murunga, Duncan Okello and Anders Sjorgren (eds), *Kenya: The Struggle for a New Constitutional Order* (Zed Books 2014) 117-143; Mutunga, 'Transformative Constitutions' 30-60; Mutunga, *In Search and Defence of Radical Legal Education* 35-40, 44-53.

48 Freda Mugambi-Githiru, 'Transformative Constitutionalism and its Challenges: Lessons from South Africa' (2019) 15(1) LSKJ 43-62.

49 See for example, Maxwell Miyawa, 'The Genesis of Mainstreaming the Theory of Interpreting the Constitution of Kenya, 2010: An analysis' (2016) 15 The Platform 36-46; Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from Supreme Court Decisions' (2015) 29(1) SPECUJU 1-21; Mutunga, *In Search and Defence of Radical Legal Education* 53-55.

50 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution'.

51 Cecil Yongo, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' (2019) 27(2) AJICL 203-224.

and non-discrimination.[52] Although these scholarly works do not cover the interpretation of constitutional amendment provisions under the 2010 Constitution, they provide a guide and useful insights into the approach to interpreting such provisions.

There is a dearth of scholarly literature on the extent of the central role of the Kenyan people in post-2010 constitutional amendments, which this study provides. A large body of scholarly literature on constitutional amendments from other jurisdictions, such as South Africa, India and Lithuania, provides useful insights in interpreting the Kenyan provisions. Although this comparative scholarly literature provides useful insights into this study, it does not comprehensively and specifically focus on the Kenyan constitutional amendment provisions. This study comprehensively interprets the Kenyan constitutional amendment provisions using the emerging jurisprudence from the superior courts, comparative jurisprudence and scholarly literature.

8 Significance of the study

It is firmly believed that this study is a significant scholarship to be used by the branches of government such as the Judiciary and tribunals, legislative structures at both the county and national levels of government, speakers of these legislative structures, executive structures at both the county and national levels, and independent commissions and offices, which have a mandate in constitutional amendments. Private persons (including advocates, scholars, academicians and law students), organisations, and the Kenyan people who have a central role in constitutional amendments will also find this work useful.

9 Framework of the dissertation

This study is organised and presented in five chapters, as summarised below.

[52] Miyandazi, *Equality in Kenya's 2010 Constitution* 32-50.

9.1 Chapter one: Introduction

The introductory Chapter covers the background, problem statement, research questions, point of departure and scope of the study, aim and objectives, research methodology, literature survey, significance of the study, and the framework of the dissertation.

9.2 Chapter two: Foundational elements of constitutional amendments

This Chapter discusses the conceptual framework, pre-2010 Constitution-making history and constitutional interpretation. It begins by defining and discussing the following concepts in relation to constitutional amendments: sovereignty of the people, supremacy of the Constitution, separation of powers (including checks and balances), and transformative constitutionalism. It also looks at the pre-2010 Constitution-making history that led to the promulgation of the 2010 Constitution. It looks at where the country has come from and the implication of such history for future (post-2010) constitutional reforms and amendments. This history places the study into its context for a complete understanding of the answers to the research questions. Lastly, the Chapter looks into the interpretation of a transformative Constitution that incorporates provisions on amendments. This is done by critically analysing the theory or approach of interpretation set by the Constitution using the emerging jurisprudence from the superior courts, comparative or foreign jurisprudence and scholarly literature. A purposive interpretation of the constitutional amendment provisions is adopted to give effect to such provisions.

9.3 Chapter three: Parliamentary and popular initiative amendments

Chapter three discusses the prerequisites to be met for post-2010 constitutional amendments. It looks at the prerequisites that must be in place before initiating the constitutional amendment processes. These prerequisites are essential because they determine the constitutionality or otherwise of the constitutional amendment processes. This Chapter also critically analyses the constitutional remits of both the parliamentary and popular initiative amendments. The 2010 Constitution provides for its amendment by both parliamentary and popular initiatives under Articles 255, 256 and 257. This Chapter critically analyses the constitutional remits of these initiatives per the emerging

jurisprudence from the superior courts, comparative jurisprudence and scholarly literature.

9.4 Chapter four: Issues arising in post-2010 constitutional amendments

Chapter four discusses the issues arising in post-2010 constitutional amendments. It discusses the emerging issues concerning constitutional amendments and their solutions to give effect to the constitutional provisions. Foreign jurisprudence and scholarly literature on the subject is useful in solving similar issues, even though there may be differences in the constitutional amendment provisions.

9.5 Chapter five: Conclusion and recommendations

This Chapter concludes the study and gives recommendations as far as constitutional amendments are concerned. The conclusion covers the foundational elements, the parliamentary and popular initiative amendments, and the emerging issues in post-2010 constitutional amendments. It also addresses the findings of the study, major argument, lessons, ‘reverse learning’ and gives the recommendations.

CHAPTER TWO

FOUNDATIONAL ELEMENTS OF CONSTITUTIONAL AMENDMENTS

1 Introduction

This Chapter discusses the conceptual framework and analysis, constitutional interpretation of the amendment provisions, and pre-2010 Constitution-making history. It begins by discussing the relevant concepts in relation to constitutional amendments. The Chapter also looks into interpreting a transformative Constitution that incorporates provisions on amendments. This is done by critically analysing the theory or approach of interpretation set by the Constitution using the emerging jurisprudence from the superior courts, comparative jurisprudence, and scholarly literature. A purposive interpretation of the constitutional amendment provisions is adopted to give effect to such provisions. Lastly, the Chapter looks at the pre-2010 Constitution-making history that led to the promulgation of the Kenya's 2010 Constitution. It looks at where the country has come from and the implication of such history on future (post-2010) constitutional amendments and reforms. This Chapter lays a foundation and provides a context for a complete understanding of the answers to the research questions.

2 Conceptual framework and analysis

The conceptual framework and analysis set out four constitutional principles: 'sovereignty of the people', 'supremacy of the Constitution', 'separation of powers' and 'checks and balances', and 'transformative constitutionalism'. These principles are discussed in light of their relationship with constitutional amendments in Kenya.

2.1 Sovereignty of the people

The location and status of the 'people' in the architectural design of the executive, legislative and judicial power matters greatly in any State. Kenya is not an exception. In a Republic such as Kenya,[1] the people usually play central roles in governance matters. This is largely because it is the people who emanate the authority which both the elective

[1] Constitution of Kenya 2010 (hereinafter 'the Kenyan Constitution'), Art. 4(1) states that 'Kenya is a sovereign Republic'.

and appointive leadership exercise on their behalf and for their welfare.[2] It follows that through its origin and nature, governance is republican and should always be based on republicanism.[3] Republicanism means the people are the governance system's central, sovereign, and supreme actors. Kenya's 2010 Constitution entrenches a Republic in which the people are the holders of all sovereign power exercisable only per the Constitution, either directly or via their democratically elected and appointed leaders.[4] The sovereign power is delegated to Parliament (National Assembly (NA) and the Senate), the forty-seven County Assemblies, the National Executive and the forty-seven County Executive Committees, and the Judiciary and independent commissions and offices.[5] The sovereign power is exercisable at both the national and county levels of government.[6] This is because Kenya adopted a devolved system of government commonly known as devolution.[7] Therefore, the nature and extent of the sovereign power is constitutionally delineated and can only be exercised per the 2010 Constitution.

As stated above, the people's sovereignty is an express constitutional item. In the pre-2010 era, the Kenyan High Court (KeHC) had already correctly found that the people's sovereign power is an inherent entitlement preceding the Constitution as it is the power that brings into being the Constitution, whether or not expressly recognised by the Constitution.[8] The people's sovereignty and constituent power, the power to (re)constitute their governmental framework, is primordial as it is the basis for creating the Constitution.[9]

The Kenyan Constitution provides the amendment provisions under Chapter 16 (Articles 255, 256 and 257) with the Kenyan people as the central promoters of the amendment processes. The most fundamental principle, that is, the sovereignty of the Kenyan

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2 Morris Kiwinda Mbondenyi and John Osogo Ambani*, The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa 2012) 19; John Mutakha Kangu, 'The Social Contractarian Conception of the Theory and Institution of Governance' (2007) 2 MULJ 1, 31.

3 Kangu, 'The Social Contractarian Conception' 31.

4 Kenyan Constitution, Art. 1(1) and (2); Preamble to the Constitution, para 7.

5 Kenyan Constitution, Art. 1(3).

6 Kenyan Constitution, Art. 1(4).

7 For a discussion on the Kenyan devolved government system, see generally John Kangu Mutakha, 'An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach' (LLD Thesis, UWC 2014).

8 *Njoya and 6 others v Attorney General and 3 others* (2008) 2 KLR 679-80 (Ringera J (Rtd)) (hereinafter 'the *Njoya 2* case').

9 *Njoya 2* case 679.

people[10] is the foundation of the Constitution. The KeHC has correctly observed that 'The golden thread running through the Constitution is one of sovereignty of the people of Kenya'.[11] The sovereignty of the people gives birth to the Constitution's supremacy that binds all persons and State organs at all levels of government.[12] The difference between these two principles is that the people's constituent power is the sovereign, while the Constitution's supremacy is the people's will.[13]

Two types of the people's sovereign power are direct and indirect, donated, delegated or representative. Direct sovereign power is directly exercised by the people, while delegated sovereign power is exercised by the State organs to which the power is donated and exercised per the Constitution. The Kenyan Constitution provides for absolute people's sovereignty in several provisions, including the Preamble and Article 1, as already discussed. The direct sovereign power trumps or is superior to the delegated sovereign power. A golden thread across the Kenyan Constitution reflects the superiority of the direct sovereign power over the delegated one.

In the context of constitutional amendments, Chapter 16 of the Kenyan Constitution assigns different roles to different State organs, offices and officers in the constitutional amendment processes. These organs and officers exercise the delegated sovereign power in debating and passing (County Assemblies, the NA and Senate) and assenting (the President) to the amendment Bills. In contrast, the people exercise direct sovereign power by initiating popular initiative amendments, public participation and involvement, and voting in the national referendum.

In exercising sovereign power, the people or their democratically elected representatives (Parliament) can amend the Constitution per the procedures provided under Chapter 16. Article 255(1) of the Constitution provides for a national referendum for the amendments

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10 It is not coincidental that the Preamble and Art. 1 of the 2010 Constitution declare that all sovereign power belongs to the Kenyan people.

11 *Commission for the Implementation of the Constitution v Parliament of Kenya and another* [2013] eKLR [71] (hereinafter 'the *CIC 2013* case').

12 Kenyan Constitution, Art. 2.

13 *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004) [26] (Kasango J), [29] (Ringera J (Rtd)) (hereinafter 'the *Njoya 1* case); *Patrick Ouma Onyango and others v Attorney General and others* [2005] eKLR [52].

of certain matters[14] including the sovereignty of the people and the provisions of Chapter 16 on amendment to the Constitution. A national referendum means the people exercise direct sovereign power via voting on whether or not to accept any proposed amendments to Article 1 and the provisions of Chapter 16. It is commendable that the drafters of the 2010 Constitution deemed it fit to refer any amendment to the people's sovereignty and amendment to the Constitution directly to the people to decide in a national referendum. This was to cure the problem experienced with the previous Constitution, which was amended several times by the parliamentarians without the involvement of the people for their selfish and partisan interests and those of the executive branch.

It is important to note that, while Article 1 of the Constitution is titled 'Sovereignty of the people', this most fundamental constitutional principle permeates throughout the constitutional provisions, including the Preamble, as already stated. Any proposed constitutional amendment that does not abide by this principle is unconstitutional, illegal, null and void *ab initio*. The KeHC can declare the proposed amendment unconstitutional under Article 163(d). In conclusion, any proposed constitutional amendment must abide by the principle of the sovereignty of the people.

2.2 Supremacy of the Constitution

As already stated, the supremacy of the Constitution is a subset of the people's sovereignty. The Kenyan Constitution explicitly or expressly provides for the supremacy of the Constitution.[15] This principle provides for a hierarchy of norms, and the Constitution is the most important law that ranks above all other laws in the Kenyan legal system.[16] Therefore, the Constitution always prevails if there is a conflict between itself and the

14 Art. 255(2) of the Constitution provides for the requirements for approving amendments in a national referendum: (a) at least twenty per cent of the registered voters in each of at least twenty-four counties vote in a national referendum; and (b) support by a simple majority of the voters in the national referendum. This mandatory requirement is a high threshold which buttresses the significance of the direct sovereign power of the people in amending the most fundamental principles of the Constitution.

15 Kenyan Constitution, Art. 2.

16 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 45.

other laws. In other words, all laws that contradict the Constitution are declared invalid or unconstitutional even when passed by the legislative structures.[17]

The various ingredients of the Constitution's supremacy are stipulated under Article 2, with the most central attribute providing that the 2010 Constitution is the 'supreme law' that 'binds all persons and all State organs' at both the county and national levels of government.[18] Secondly, the 2010 Constitution affirms its centrality as it is the only source that authorises the exercise or claim of State authority.[19] No person can point to any legitimate foundation for exercising State authority other than the 2010 Constitution. Thirdly, any challenge to the legality or validity of the 2010 Constitution cannot be brought before any court or other State organ.[20] This third attribute is curative as it serves to avoid challenges experienced when some provisions of the previous Constitution were questioned. A good example in the *Njoya 2* case was when Ringera J (Rtd) denounced certain constitutional amendments, including the changing of the entrenched majorities in Parliament that were required for constitutional amendments, thus making it easier to amend the previous Constitution, but failed to declare them invalid. The Judge's disapproval was as follows: the 'changes were not challenged in the courts and so they are now part of our Constitution'.[21] Again, in *Jesse Kamau and 25 others v Attorney General*,[22] a challenge to a constitutional provision was put forward, and the KeHC ruled that section 66 of the previous Constitution that established the Kadhi's courts was inconsistent with the State's secular nature as it did not advance its values. Mbondenyi and Ambani correctly describe this attempt to invalidate constitutional provisions as a 'theoretical absurdity'[23] which has now been cured by Article 2(3) of the 2010 Constitution. Fourthly, laws (with customary law included) inconsistent with the 2010 Constitution are void, and acts or omissions that contravene the Constitution are also invalid.[24] This is the foundation upon which laws inconsistent with the 2010 Constitution are declared invalid

17 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 19.
18 Kenyan Constitution, Art. 2(1). Emphasis added.
19 Kenyan Constitution, Art. 2(2).
20 Kenyan Constitution, Art. 2(3).
21 See generally the *Njoya 2* case.
22 (2010) eKLR.
23 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 47.
24 Kenyan Constitution, Art. 2(4).

or unconstitutional, a judicial power exercised by the superior courts. The KeHC exercises this power,[25] and the appeals lie with the Court of Appeal[26] and subsequently to the Supreme Court of Kenya (KESC).[27] Lastly, the general rules of international law and ratified treaties or conventions form part of the Kenyan laws under the 2010 Constitution.[28] The Judicature Act[29] is also acceptable as it contains an elaborate list of the valid laws that place the 2010 Constitution at the apex of the Kenyan legal system.

The supremacy of the Constitution can be traced to the celebrated US Supreme Court case of *Marbury v Madison*.[30] In this case, the Supreme Court found that the Constitution is the paramount source of law that prevails over other laws. The principle is a tradition of written constitutions that limit governmental powers, which is best served when all laws are subordinate to the Constitution.

The Constitution's supremacy has been recognised in Kenya's superior courts pre- and post-2010. In *Okunda v Republic*,[31] the KeHC concluded that the Constitution must override all other laws. The South African Constitution is also the supreme law since 1996.[32] As confirmed by the South African Constitutional Court (ZACC) in *Carmichele v Minister of Safety and Security*,[33] the Constitution in addition to regulating public power embodies an 'objective, normative value system'.[34] The normative value system usually influences constitutional and statutory interpretation.

Based on the preceding discussion, the 2010 Constitution is a supreme law, and everything else done in the name of the Constitution, including its amendment, has to follow its provisions strictly. This has been obtained in Kenya since independence, especially under the new dispensation. A supreme constitution cannot be changed easily;

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25 Kenyan Constitution, Art. 165(3)(d). The KeHC has jurisdiction to interpret the 2010 Constitution.
26 Kenyan Constitution, Art. 164(3).
27 Kenyan Constitution, Art. 163(4).
28 Kenyan Constitution, Art. 2(5) and (6).
29 Cap. 8 Laws of Kenya, s 3(1) and (2).
30 5 US (1 Cranch) 137 (1803) (hereinafter 'the *Marbury* case').
31 [1970] EA 453. The KeHC referred to s 3 of the previous Constitution.
32 Constitution of the Republic of South Africa, 1966, the Preamble and s 2.
33 (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) (hereinafter 'the *Carmichele* case').
34 *Carmichele* case [54].

it usually follows complex and mandatory procedures. Parliament is often restrained from amending the Constitution without involving the ordinary people. Constitutional amendments designed to improve the text should be compatible with the supreme law. It follows that proposed constitutional amendments must fit into the context of the rest of the 2010 Constitution in internal harmony, unbroken unity, and consistency and not be brought haphazardly and clandestinely.[35] For example, the Second Schedule to the Constitution of Kenya (Amendment) Bill 2020[36] was declared unconstitutional by the KESC because it introduced new timelines to Article 89 and directed the Independent Electoral and Boundaries Commission (IEBC) on delimitation, distribution, and review of boundaries of constituencies and wards without first amending the said Article. The proposed amendments must always be weighed against the existing express constitutional provisions.[37] This means that proposed amendments cannot bring disharmony with the supreme law, and all incompatible amendments should be declared unconstitutional, null and void *ab initio* by the superior courts.

Two plausible theories explain the Constitution's supremacy: the social contract theory and Kelsen's basic norm theory.

2.2.1 Social contract theory

This is a relevant theory in constitutional law theory, practice and jurisprudence that explains the supremacy of the Constitution. This theory is advanced by the ideas of

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35 *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) [533] (Mwilu DCJ & VP) (hereinafter 'the *BBI 3* case'). This is compatible with the definition of 'amendment' by Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP 2019) 79.

36 This Bill has a history of the 'Handshake' between Uhuru Kenyatta and Raila Odinga, who came together after the 2017 presidential rerun, which the latter boycotted. In a mockery ceremony, Odinga was sworn in as the 'People's President' by the controversial lawyer Miguna Miguna. Uhuru then formed a Taskforce to spearhead the Building Bridges Initiative (BBI) to promote national unity. The Taskforce later morphed into a Steering Committee whose functions included proposing constitutional amendments. The Committee drafted the Amendment Bill which is commonly referred as the BBI Amendment Bill. The constitutionality of the Bill was challenged in all three superior courts, KeHC, Court of Appeal and KESC, in what is commonly referred to as *BBI* cases.

37 *BBI 3* case [543] (Mwilu DCJ & VP).

Hobbes,[38] Locke,[39] Rousseau,[40] and Paine,[41] amongst other theorists. In *Leviathan*, Hobbes argues that, initially, there was a primitive society that operated without any common administration in which every man (woman) was on his (her) own. In this primitive society, men (women) used force to fight for scarce resources, which led to dispossessions or deprivations and loss of lives and liberty.[42] The modern governmental system comes about because of the excesses of this primitive society. The Hobbes' society was a condition of war of everyone against everyone as every man (woman) was governed by his (her) reason.[43] The state of nature was, therefore, a pathetic society of war where there was no common power, law, justice, private ownership of property, or human rights. This sad state of Hobbes' society gave rise to an organised government.

Under this new arrangement, the people surrender their part of power to a government in exchange for security and rights.[44] 'Part of power' because the people usually retain most of the power they can exercise directly; this is the direct sovereign power. The part of the surrendered power is the delegated, donated, representative or indirect sovereign power. The distinction between these two types of sovereign power has already been explained above. Therefore, the government is a compromise by the people, and the Constitution establishes it. Since the Constitution is a social contract or agreement, it is supreme and must be at the apex of the legal system.

2.2.2 Kelsen's basic norm theory

Kelsen is a major contributor to jurisprudence and legal positivism. As the author of the *Pure Theory of Law* and the *Basic Norm Theory*, Kelsen advances a legal system comprised of several norms existing in a hierarchy in which each norm derives its validity

38 Thomas Hobbes, *The Leviathan* (first published 1651, Penguin 1985).
39 John Locke, *Second Treatise on Civil Government* (1690).
40 Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* (1762).
41 Thom Paine, *The Common Sense* (1776).
42 'Leviathan, Of the natural condition of mankind as concerning their felicity and misery, Chapter XIII' as quoted in Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 53.
43 'Leviathan, Of the first and second laws, and of contracts, Chapter XIV' as quoted in Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 53.
44 The government should be representative, responsive, and answerable to the people, a significant component of the rule of law.

from the one immediately above it.[45] These norms usually form a system whose validity is traced back to a single norm, the 'ultimate basis of validity' and is referred to as the 'basic norm'. Therefore, all the norms in the system must conform to the basic norm, that is, the State Constitution, which is the source of their validity.[46]

In Kenya, the basic norm is the 2010 Constitution. This is because the eventual basic norm is always the current Constitution or sometimes the previous one.[47] The Constitution is the norm at the apex of the hierarchy from which all other norms are valid. Therefore, the Constitution is supreme, and all other sources of law must conform with it.

2.3 Separation of powers

Montesquieu is the father of separation of powers. He argued that the same person cannot execute public decisions, decide cases and make laws, as this would be the end of everything.[48] It has become a norm for the modern constitutions of democratic States to separate powers into three arms of government: the Judiciary, the Legislature, and the Executive. Montesquieu identifies three attributes of separation of powers: (a) The same persons should not serve in more than one arm, for example, that Cabinet Secretaries should not be Members of Parliament; (b) One arm should not interfere with another's functions, for example, judicial independence should be respected;[49] and (c) One arm should not exercise another's functions; for example, the Cabinet Secretaries should not make laws.[50] Separation of powers goes hand in hand with checks and balances to prevent abuse because any person with power is likely to abuse it and be an authoritarian.[51] Checks and balances are the hallmarks of constitutionalism. Therefore,

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45 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 51.

46 Hans Kelsen, *Introduction to the Problems of Legal Theory* (trans. by LB Paulson and LS Paulson, 1992) 57.

47 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 53.

48 Baron de Montesquieu, *The Spirit of the Laws* (Tomas Nugent tr, Hafner 1949) 152.

49 Constitution of Kenya, Arts. 159 and 160. Judicial independence under the Constitution is evidenced by the modes of appointing judges (Art. 166), security of tenure and removal of judges (Art. 167 and 168), and financial security or independence (Art. 173).

50 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 67.

51 De Montesquieu, *The Spirit of the Laws* 150. De Montesquieu's assertion is akin to Lord Acton's often-quoted assertion that 'power tends to corrupt and absolute power corrupts absolutely'. See also Robert Payne, *The Corrupt Society: From Ancient Greece to Present-day America* (Praeger 1975) 179.

separation of powers and checks and balances limit the exercise of government powers. This follows the presidential system of government where a clear separation of powers is adhered to, and the President is allowed executive powers.

The 2010 Constitution adheres to the separation of powers from Article 1(3), which delegates power to Parliament[52] and County Assemblies, National Executive and County Executive Committees, and the Judiciary and independent commissions and offices. The 2010 Constitution has also provided checks and balances amongst State organs at the national and county levels of government. The legislative authority is vested in the Parliament[53] and County Assemblies,[54] the executive authority is vested in the National Executive (President, the Deputy President and the Cabinet)[55] and County Executive Committees,[56] while the judicial authority is vested in the courts and tribunals.[57]

Constitutional amendments must respect the separation of powers and checks and balances. Such amendments should not threaten to reverse the presidential system of government against the intentions of the drafters of the 2010 Constitution and the Kenyan people. Separation of powers requires mutual respect amongst the branches of government. The superior courts should not take up unripe matters for determination, for example, deciding on constitutional Amendment Bills that are still under consideration in Parliament.[58] The Kenyan Court of Appeal's decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*[59] affirmed the principle of separation of powers and the need for the superior courts to defer matters to the relevant State organs, which the 2010 Constitution has given authority over such matters. Again, once Parliament has passed constitutional Amendment Bills by the parliamentary initiative, such Bills require

52 Kenyan Constitution, Art. 93(1). The Parliament of Kenya consist of the NA and the Senate.
53 Kenyan Constitution, Art. 94(1) and (5).
54 Kenyan Constitution, Art. 185(1).
55 Kenyan Constitution, Arts. 130(1) and (3), and 152(3).
56 Kenyan Constitution, Art. 179(1).
57 Kenyan Constitution, Arts. 159(1) and 160(1).
58 See generally *Pevans East Africa Limited and another v Chairman, Betting Control and Licensing Board and 7 others* (2018) eKLR.
59 [2013] eKLR (hereinafter 'the *Mumo Matemu* case').

the assent and publication of the President to become law.[60] This is a good example of checks and balances relevant to constitutional amendments.

The superior courts have powers to determine the constitutionality or otherwise of constitutional Amendment Bills. The BBI Amendment Bill sought to alter the Constitution by creating a hybrid presidential-parliamentary system, whereas Kenya has a pure presidential system of government. The Bill sought to domicile the Cabinet Secretaries in Parliament (Executive members were also to be Members of Parliament) and, therefore, interfere with the separation of powers, which was unconstitutional.[61]

Some institutions are independent and autonomous from the county and national governments. An example is the IEBC, an independent commission responsible for conducting national referenda and subject only to the Constitution and the law. No persons or State organs should interfere with the functioning of independent commissions. The 2010 Constitution suggests that the independent constitutional commissions have 'well amounted to additional full-blown organs of state, but, unlike the South African counterpart, it is shy to refer to them as organs of state'.[62] This notwithstanding, these commissions are independent with their autonomy and sufficient powers to challenge the traditional three State organs. The IEBC is discussed in detail in Chapter three, part 2.1. The South African Constitution, just like the Kenyan, does not expressly refer to the separation of powers. However, this is inferred from the effect, design, structure and architecture of the Constitution. Nonetheless, the ZACC correctly stressed in *South African Association of Personal Injury Lawyers v Heath and others*[63] that the separation of powers is implicit or implied in the 1996 Constitution. In conclusion, Members of Parliament and the promoters of constitutional amendments should be guided by the separation of powers and checks and balances.

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60 Constitution of Kenya, Art. 256(3) and (4).

61 *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others* (Amicus Curiae) [2021] eKLR [290] (Musinga P) (hereinafter 'the *BBI 2* case'). See also Joseph Lutta, 'The Constitutional Amendments Bill, 2020: A Basic Structure Doctrine Critique' (2021) 17 LSKJ 37, 42; Yash Pal Ghai and Jill Cottrell Ghai, ***Kenya's Constitution: An Instrument for Change*** (2nd edn, Katiba Institute 2021) 24, 146-150.

62 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 75.

63 (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000).

2.4 Transformative constitutionalism

The idea of the transformative constitutionalism originated in South Africa. Klare, a renowned South African scholar[64] and Langa, a former South African Chief Justice (CJ) have written about transformative constitutions and their attendant constitutionalism in the South African context.[65] With a profound understanding of historical and contemporary circumstances, transformative constitutionalism forms South African society's bedrock, grounded in 'democratic values, social justice, and fundamental human rights'.[66] The historical relation aspect of constitutionalism in South Africa is very divisive and contested as the country struggles to overcome many socio-economic problems that derive from its violent past under colonialism and apartheid. In past judgments, the ZACC and other courts regard the 1996 Constitution as transformative and aims to transform South African society. In *S v Makwanyane and Another*,[67] for example, the ZACC declared that the 1996 Constitution expressly aspires to provide a transition from the grossly past unacceptable features to a conspicuously contrasting future.[68] In another judgment, the ZACC described the Constitution as an instrument seeking to 'transform the *status quo ante* into a new order'.[69] Thus, as Klare describes above, transformative constitutionalism can be interpreted as an ongoing endeavour and project aimed at achieving large-scale change in society. However, what has transpired since the end of apartheid has been the subsequent governments' inability to eradicate colonialism, segregation, inequality, and apartheid.

The Kenyan Constitution refers to a history of struggle to bring freedom and justice and the people's aspirations for a value-based government of freedom, human rights, equality, rule of law, democracy, and social justice.[70] The 2010 Constitution aims to dismantle the

64 Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) SAJHR 146-188. Klare explains that transformative constitutionalism 'connotes an enterprise of inducing large-scale social change and through non-violent political processes grounded in law'.

65 Pius Langa, 'Transformative Constitutionalism' (2006) 17(3) Stell LR 351-360.

66 Preamble to the 1996 Constitution.

67 (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) (hereinafter 'the *Makwanyane* case').

68 *Makwanyane* case [262] (Mahomed J).

69 *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) [157].

70 Kenyan Constitution, Preamble.

negative *status quo* to bring positive fundamental changes or transformations to create a human rights State and society.[71] Superior courts and scholars across the global South have developed an approach to the interpretation of transformative constitutions[72] in which specific principles of constitutional interpretation have emerged. Collectively, these principles are referred to as a purposive interpretation.[73] These principles have been incorporated into the 2010 Constitution to keep up with comparative jurisprudence and scholarly literature. The 2010 Constitution prescribes a purposive, principled, and value-based approach to constitutional interpretation in providing for principles that guide the Judiciary in exercising its authority and construing the Constitution.[74] In applying and interpreting the Bill of Human Rights, courts are also obligated to adopt a value-based and purposive approach.[75] The 2010 Constitution has entrenched its amendment provisions. These amendment provisions must also be interpreted in a value-based and purposive manner. This part qualifies the 2010 Constitution as transformative, progressive, and visionary.

Transformative constitutions and their constitutionalism or jurisprudence capture the idea of positive fundamental societal changes or transformations via the instrument of the constitution and law.[76] The idea that underpins these constitutions[77] is that their superstructure is embedded in a theory that is an instrument for positive societal changes or transformations rather than a political, socio-economic and historical pact of preserving the *status quo*.[78] Mutunga correctly argues that transformative constitutions are

71 Willy Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' in Eunice N Sahle (ed), *Human Rights in Africa: Contemporary Debates and Struggles* (Palgrave Macmillan 2019) 19.

72 George E Devenish, 'The Theory and Methodology for Constitutional Interpretation in South Africa' (2006) 69 THRHR 238-257; Heinz Klug, 'South Africa: From Constitutional Promise to Social Transformation' in Jeff Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (OUP 2007) 266, 269; Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (2017) 29(1) SPECUJU 1-20; Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' (2021) 8 THR 30, 49-51.

73 Lourens du Plessis, 'Interpretation' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 36-37.

74 Kenyan Constitution, Arts. 159(2)(e) and 259(1) and (3).

75 Kenyan Constitution, Art. 20(3) and (4).

76 Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 24-25.

77 Transformative constitutions in the Global South include those of the following countries: Kenya, South Africa, India, Colombia, Bolivia, Venezuela, and Ecuador.

78 Mutunga, 'Transformative Constitutions' 31.

fundamentally dependent on good political and judicial leadership for implementation, thus the ideological, intellectual, socio-economic, cultural, political, theological and spiritual positions of such leaders are very important.[79] It follows that radical and transformative leaders can consolidate the values of such constitutions and rescue their weaknesses, while bad leaders usually subvert them.

Constitutional amendments are one of the ways of implementing transformative constitutions as a basis for a society that rescues the limitations of such constitutions. Constitutional amendments continue radical struggles and ordinary or 'small revolutions' towards a grand revolution that heralds better societies.[80] This is particularly important in countries such as Kenya, where there is a search for a paradigm to liberate the *Wanjiku*[81] from evil forces that continue to oppress, exploit, and dominate them, including tribalism, nepotism, favouritism, poor political leadership, and corruption menace. In the Kenyan context, identifiable pillars or elements in the 2010 Constitution make it transformative, visionary, and progressive. First and foremost, the Constitution has broad objectives and purposes, including devolution of power, a progressive Bill of Human Rights, and integrity in public leadership. The leadership, both appointive and elective, are not masters but servants of the Kenyan people. Secondly, there are also specific pillars that make the Constitution transformative. Some of these specific pillars are discussed below.

2.4.1 History of Kenya's past struggles

This is an important element, and the history spans from fighting colonialism by the British to continuing the struggles against imperial presidency and corruption, amongst other vices. These struggles continue today, that is, in implementing the 2010 Constitution for a better society in several areas, including public interest litigation (legal and constitutional struggles), new politics, youth and women, devolution, and leadership and integrity.[82] There were also evident social class struggles in the 2010 Constitution-making amongst elites, the middle class, and the working class, as each of these groups wanted their views

79 Mutunga, 'Transformative Constitutions' 31.
80 Mutunga, 'Transformative Constitutions' 31-32.
81 This is a common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people.
82 Mutunga, 'Transformative Constitutions' 56.

on political, socio-economic and cultural developments and democracy to be considered.[83] The 2010 Constitution resulted from the compromises amongst the social class struggles. There was also robust public participation in the processes leading to the promulgation of the Constitution, and the consultation process arrived at the consensus that the status *quo* was unacceptable.

2.4.2 Independent and strong institutions

The 2010 Constitution establishes independent, well-resourced, and strong institutions that promote good governance and constitutionalism (transformation) and prevent pre-2010 authoritarianism.[84] The independent commissions provide checks and balances, independence and interdependence between various State organs. For example, the IEBC[85] as a key player in constitutional amendments must be independent and well-resourced to perform its functions and exercise powers effectively. It was through constitutional amendments since independence that the imperial presidency became authoritarian. The previous Constitution was amended thirty-eight times, with the most significant ones including the abolitions of *Majimbo* or regionalism, bicameral Parliament, Judges' security of tenure, multiparty politics, and entrenched majorities for constitutional amendments. These abolitions have now been restored and reversed as the 2010 Constitution provides for devolution, bicameral Parliament, security of tenure for Judges, multiparty politics, and there are special procedures for amending the fundamental elements of the Constitution. Therefore, the IEBC has a critical role in ensuring that the state of the imperial presidency through amendments does not happen again in Kenya's post-2010 era.

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83 See generally Willy Mutunga, *Constitution Making from the Middle: Civil Society and Transitional Politics in Kenya, 1992-1997* (2nd edn, SUP 2020). See also the Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) (hereinafter 'the CKRC *Final Report*').

84 The Kenyan Constitution, chap 15, provides for constitutional commissions and independent offices.

85 The IEBC is established under Art. 88 of the Constitution and the Independent Electoral and Boundaries Commission Act 2011.

2.4.3 Supremacy, centrality and sovereignty of the Kenyan people

There is also the pillar of supremacy, centrality, and sovereignty of the Kenyan people in implementing the 2010 Constitution.[86] The Constitution has many provisions decreeing centrality or supremacy of the sovereign nationhood vision of the Kenyan people premised on core norms, including popular sovereignty.[87] The executive, legislative, and judicial authority is derived from the Kenyan people[88] and the national values and principles of good governance include public participation.[89] The Constitution also provides for the political participation of the people, as one of the basic requirements for political parties,[90] the derivation of legislative authority from the people to protect the Constitution and promote good democracy,[91] the derivation of executive authority from the people with the principles of service to the people for their well-being and benefit,[92] and the derivation of judicial authority from the people to promote and protect the Constitution's principles, values and purposes.[93] The KESC has correctly pronounced that the judicial authority derived from the people 'must be reflected in the decisions made by the Courts'.[94]

Chapter 15 of the Constitution provides for constitutional commissions and independent offices to promote the people's sovereignty. The IEBC is one of the constitutional commissions which is a key player in constitutional amendments; hence, it must promote and protect the sovereignty of the Kenyan people. Under Chapter 16 of the Constitution, the people's sovereignty reigns supreme in constitutional amendments.

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86 Kenyan Constitution, Preamble, Arts. 1, 3, 10, 22(1) and 258(1) (public interest litigation), 22(2) and 258(2) (locus standi).
87 Mutunga, 'Transformative Constitutions' 33.
88 Kenyan Constitution, Art. 1.
89 Kenyan Constitution, Art. 10(2)(a).
90 Kenyan Constitution, Art. 91.
91 Kenyan Constitution, Art. 94.
92 Kenyan Constitution, Art. 129.
93 Kenyan Constitution, Art. 159(1) and (2)(e).
94 *Interim Independent and Electoral Commission*, Constitutional Application No. 2 of 2011 (2011) eKLR [86] (hereinafter 'the *IIEC* case').

2.4.4 Rigid constitutional amendment procedures

The rigidity of the 2010 Constitution when it comes to amending it is enough evidence of its transformative nature. A rigid constitution requires a special method of amendment for its provisions.[95] Generally, rigid constitutions are changed by more complex procedures than flexible ones. However, this is not to say that, in practice, flexible constitutions are altered or amended easily and often, as this is only to state that the process of effecting amendments in such constitutions has less conditionality.[96] In countries with written constitutions, such as Kenya and South Africa, the contemporary trend makes it procedurally difficult to amend the provisions.[97] In Kenya, for instance, amending the most fundamental matters of the Constitution requires the approval of special majorities in legislative authorities and a national referendum. Two kinds of amendments, parliamentary and popular initiatives, require special majorities in national and county legislative authorities, respectively. First and foremost, Bills initiated by Parliament require a two-thirds majority in both houses, the NA and Senate to pass[98] and, secondly, popular initiative amendments must be supported by at least one million registered voters, approved by a majority of County Assemblies, and passed by Parliament.[99] Amendments that require approval in a national referendum include the constitutional supremacy, popular sovereignty, national values and principles of good governance, devolution, the Bill of Rights, judicial independence, and Chapter 16 on constitutional amendments.[100] The approval of a proposed amendment in a national referendum requires at least twenty per cent of the registered voters in each of at least twenty-four counties to vote in the national referendum, and a simple majority support the national referendum.[101] However rigid transformative constitutions might be, they can be amended if the constitutional principles and procedures are adhered to. Njoki Ndungu SCJ correctly alludes to:

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95 JN Pandey, *Constitutional Law of India* (Central Law Agency 1997) 26.

96 Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 14.

97 Ghai and Ghai, *Kenya's Constitution* (2nd edn) 24 observe that 'The Kenyan Constitution is now hard to change'. See also Mbondenyi and Ambani, *The New Constitutional Law of Kenya* 15.

98 Kenyan Constitution, Art. 256(1)(d).

99 Kenyan Constitution, Art. 257.

100 Kenyan Constitution, Art. 255(1).

101 Kenyan Constitution, Art. 255(2).

> An 'always speaking transformative charter' such as ours [Kenya's 2010 Constitution], must never be the enemy of democratic constitutional change. We must not, eternally, tie and impose our current ideals, values, morals, structures, commissions and organs on future generations who might not aspire to them or need them. Progressive constitutions must always acknowledge that change is inevitable.[102]

The parliamentary and popular initiative amendments are discussed in detail in Chapter three.

2.4.5 Setting a theory of constitutional interpretation

Article 259 of the 2010 Constitution develops a theory of constitutional interpretation that is purposive, principled, value-based, pro-people or people-centric, decolonised, de-imperialised, de-radicalised, de-ethnicised, gender-just, patriotic, robust (rich or generous), indigenous, contextual, transformative, visionary, and progressive. This theory is referred to as *Kenyanprudence*[103] and is cognisant of the people's political, socio-economic, cultural, and spiritual struggles that underpin the 2010 Constitution's text and spirit.[104] One of the fundamental values under the 2010 Constitution includes public participation and involvement, as observed in the KESC in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*.[105] The *David Ndii & others v Attorney General & others*,[106] the *BBI 2* case and the *BBI 3* case, as decided by the KeHC, Court of Appeal and the KESC, respectively, go further in clarifying the public participation and involvement as part of the people's direct sovereign power under the 2010 Constitution in matters of constitutional amendments.

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102 *BBI 3* case [1160] (Njoki Ndungu SCJ). See also the *BBI 3* case [1860] (Ouko SCJ), where he correctly notes that 'no generation should bind the course, aspirations, constitutional expectations, values, principles and objects of generations to come'. Koome CJ & P in the *BBI 3* case [209] also notes that the 'Constitution-making generation should not forever tether the future generations in what they may perceive as suitable for them during the constitution-making period'.

103 *Kenyanprudence* is my neologism. The term is coined from the words 'Kenyan' and 'jurisprudence'. It is used to refer to the development of Kenyan jurisprudence (homegrown and indigenous). It takes into account the peculiar circumstances of Kenyan society, including socio-economic, cultural, political, legal, constitutional, theological, and spiritual factors.

104 Mutunga, 'Transformative Constitutions' 56.

105 (2014) eKLR (hereinafter 'the *Communication Commission of Kenya* case').

106 [2021] eKLR (hereinafter 'the *BBI 1* case').

Mutunga correctly argues that it is unusual for the 2010 Constitution to set its theory of interpretation.[107] This theory rejects staunch legal positivism, is non-legal-centric, accepts Judge-made law, involves non-legal phenomena, and views the Judiciary as an 'institutional political actor'.[108] The theory also values the multi-inter-and-trans (MIT) disciplinary approaches to constitutional implementation[109] and uses foreign jurisprudence to fit Kenyan needs by determining the values, purposes, objectives and the Bill of Human Rights. Mugambi-Githiru correctly observes that transformative constitutionalism uses MIT disciplinary approaches, encourages innovation in interpretation by incorporating political and socio-economic factors, and does not favour the Judges' traditional conservative approach of looking for the intention of Parliament and applying it.[110] Section 3 of the Supreme Court Act 2011 calls upon Judges of the KESC to consider non-legal phenomena, including the historical, socio-economic, political, cultural, religious, theological, traditional, philosophical, technological, and spiritual contexts of Kenya in constitutional interpretation. This theory reflects judicial politics anchored on the centrality, supremacy and sovereignty of the people in positively transforming the Kenyan society.[111] Mutunga CJ & P (Rtd) correctly noted that the 2010 Constitution provides its interpretation theory to preserve and protect its purposes, objectives and values.[112] Therefore, it is safe to conclude that Kenya's 2010 Constitution is transformative, visionary, and progressive.

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107 Mutunga, 'Transformative Constitutions' 49. See generally also, Mutunga, 'The 2010 Constitution of Kenya'.

108 Upendra Baxi, 'Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies' (2014) 14 MqLJ 3, 10.

109 Karim Hirji, *Under-Education in Africa: From Colonialism to Neoliberalism* (Daraja Press 2019) 155.

110 Freda Mugambi-Githiru, 'Transformative Constitutionalism and its Challenges: Lessons from South Africa' (2019) 15(1) LSKJ 43, 57-62.

111 Mutunga, 'Transformative Constitutions' 50.

112 *Speaker of the Senate & Another v Attorney General & 4 Others* [2013] eKLR [155] (Mutunga CJ & P (Rtd)) (hereinafter 'the *Speaker of the Senate* case') stated that 'both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based'. See also *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR [233] (Mutunga CJ & P (Rtd)) (hereinafter 'the *Peter Munya* case').

3 Constitutional interpretation of the amendment provisions

There is a need to breathe life into the constitutional amendment provisions as dry letters of the supreme law to give their true meanings in implementing the Constitution. The KESC has had the opportunity to define what 'constitutional interpretation' is. In *Evans Kidero & 4 others v Ferdinand Ndungu Waititu & 4 Others*,[113] the KESC explained that 'constitutional interpretation' refers to 'revealing or clarifying the legal content or meaning of constitutional provisions, for purposes of resolving the dispute[sic]'.[114] Robbitt defines it as a study of and the process of construing the Constitution.[115] These definitions converge at the point that any principles of constitutional interpretation must provide the means of ascertaining the true meanings of the constitutional provisions and allowing the application of such provisions to the issues or circumstances in question to resolve the disputes amicably.[116]

Superior courts around the world have come up with theories of constitutional interpretation, including interpreting the Constitution as a living tree,[117] in a liberal and purposive manner,[118] or as an integral whole, with each provision sustaining and not destroying one another.[119] The Kenyan courts have been referring to these constitutional interpretation principles from foreign jurisdictions for a long time.[120] The 2010 Constitution ushered in a new constitutional dispensation and its attendant doctrines of interpretation for developing indigenous jurisprudence in Kenya.[121] The KESC has unanimously pronounced the theory or approach of interpreting the 2010 Constitution.[122] The approach

113 (2014) eKLR (hereinafter 'the *Evans Kidero* case').

114 *Evans Kidero* case [142].

115 Philip Bobbitt, 'Constitutional Interpretation' in Kermit L Hall and others (eds), *The Oxford Companion to the Supreme Court of the United States* (OUP 1992) 183.

116 Miyawa Maxwel, 'The Genesis of Mainstreaming the Theory of Interpreting the Constitution of Kenya, 2010: An Analysis' (2016) 15 The Platform 36.

117 *Edwards v Attorney-General for Canada* [1930] A.C. 124 (P.C.) 136; *Ndyanabo v Attorney General* [2001] 2 E.A. 485, 493; *Attorney General v Hislop* [2007] 1 S.C.R. 429, 2007 SCC 10 [96].

118 *Tuffuor v Attorney-General* [1980] GLR 63; *Njoroge & 6 others v AG &3 Others* 2 KLR E.P.

119 *Tinyefuza v Attorney-General* Const. Pet. No. 1 of 1996 [1997] UGCC 3 (hereinafter 'the *Tinyefuza* case'). See also *Olum v The Attorney-General of Uganda* [2002] E.A. 508.

120 For example, the Kenyan Court of Appeal in C*entre for Human Rights and Awareness v John Harun Mwau & 6 Others* [2012] eKLR quoted the harmonization principle in *the Tinyefuza* case with approval.

121 Kenyan Constitution, Arts. 20(3) and (4), 159(2)(e), 259(1) and (3); Supreme Court Act 2011, s 3.

122 For example, the *Communications Commission of Kenya* case [137]; *In Re National Land Commission* [2014] eKLR.

calls for a contextual and holistic constitutional interpretation founded on non-legal considerations (including historical, socio-economic, political, cultural, traditional, theological, technological, and spiritual) to promote its values, purposes, and principles.

On matters of constitutional amendments, all three superior courts: the KeHC,[123] the Court of Appeal[124] and the KESC[125] have had the opportunity to revisit the theory of constitutional interpretation, this time specifically in cases involving constitutional amendments as proposed by the BBI. Koome CJ & P correctly asserted that courtesy of the 2010 Constitution, superior courts' Judges have 'sufficient arsenals that include our own canons of interpretation which we must exhaust before borrowing from other jurisdictions[sic]'.[126] This part covers the theory or approach to adopt in interpreting constitutional amendment provisions incorporated in a transformative constitution to give effect to such provisions. It critically analyses the theory or approach of interpretation set by the 2010 Constitution using the emerging jurisprudence from the superior courts, comparative jurisprudence, and scholarly literature. This part adopts a purposive interpretation of the constitutional amendment provisions to give effect to such provisions. It looks into the role of the superior courts, pre-2010 constitutional interpretation, the purposive interpretation under the 2010 Constitution, and intra and extra-contextual interpretation of the 2010 Constitution.

3.1 Role of superior courts

The superior courts in Kenya are the KESC, Court of Appeal, and KeHC (including the Environment and Land Court and the Employment and Labour Relations Court).[127] These superior courts have the judicial power of constitutional interpretation and judicial review that can be used to strike down statutes, acts, or omissions inconsistent with the 2010 Constitution. Per Article 2(4) of the Constitution, laws inconsistent with the Constitution

123 *BBI 1* case.
124 *BBI 2* case.
125 *BBI 3* case.
126 *BBI 3* case [200] (Koome CJ & P).
127 Kenyan Constitution, Art. 162(1), (2), and (3). See also the Supreme Court Act 2011, Court of Appeal (Organization and Administration) Act 2015, High Court (Organization and Administration) Act 2015, Environment and Land Court Act 2011, and the Employment and Labour Relations Court Act 2011.

are void. Per Article 165(3)(d)(i) of the Constitution, the KeHC has jurisdiction to interpret the Constitution and determine the consistency or otherwise of any law, acts, or omissions with the Constitution. This borrows from the US Supreme Court finding that courts have a role to play in looking into the constitutionality of acts of Parliament and other State organs to declare them unconstitutional and invalid if inconsistent with the Constitution.[128] The KeHC has, on many occasions, acknowledged the role of superior courts under the 2010 Constitution. For instance, in *Trusted Society of Human Rights and others v Attorney-General and others*,[129] the KeHC correctly noted that the '[Superior] Courts have an interpretative role- including the last word in determining the constitutionality of all governmental action'.[130] The KESC has pronounced itself as the final arbiter of right or wrong when the prosecution of mandates of the different State organs raises constitutional conflicts.[131] In constitutional amendments, superior courts can determine the constitutionality of any law or Amendment Bill. Therefore, the court 'always reserves the constitutional obligation to intervene', especially where there are 'clear and unambiguous threats such as to the design and architecture of the Constitution'.[132] However, this jurisdiction of the superior courts must be exercised with restraint and caution. The warning of Mwilu DCJ & VP serves this right as follows:

> [J]urisdiction ought to be exercised very reservedly in the face of express provisions of the Constitution; very reservedly in the face of the constitutional exercise in sovereignty by the people; and very reservedly where the substantive import of any action is not what is in contention.[133]

The 'political questions' doctrine, which implies that superior courts must avoid legal issues that have political implications, does not apply in Kenya.[134] Superior courts in Kenya are permissive by adopting liberal interpretations of justiciability and assuming

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128 See generally the *Marbury* case.
129 (2012) eKLR (hereinafter 'the *Trusted Society* case').
130 *Trusted Society* case [64].
131 *Speaker of the Senate* case [64].
132 *BBI 3* case [421] (Mwilu DCJ & VP).
133 *BBI 3* case [443] (Mwilu DCJ & VP).
134 Walter O Khobe, 'A Rebel Without a Cause? Justice Njoki Ndungu's Legacy of Dissent and the Doctrine of Separation of Powers' (2019) The Platform <www.theplatform.co.ke/rebel-without-a-cause-justicenjoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/> accessed 21 May 2023, where the author correctly argues that the 'political questions' doctrine is inapplicable in Kenya.

jurisdiction in matters with political and policy issues or considerations. In the *Speaker of the Senate* case, the KESC adopted the view of the ZACC in the *Doctors for Life* case[135] where it was stated that courts have a 'responsibility of being the ultimate guardian of the Constitution' with a duty to 'adjudicate finally in respect of issues which would inevitably have important political consequences'.[136] It should be noted that the constitutional interpretation in South Africa since 1994 has been accompanied by an awareness of the courts' unavoidable political involvement.[137] This was a change from the apartheid era, where Judges professed abstention from policy issues and considerations to avoid the legal system and courts from becoming entangled with or 'tainted' by politics. In *Judicial Service Commission v Speaker of the National Assembly and another*,[138] the KeHC made various policy issues and recommendations regarding what should or should not be legislated. Courts under Kenya's Constitution also have a broad and special responsibility for enforcing rights.[139] There is no doubt that Judges do politics. There is a blurred line between politics and law. As a result, Judges' rulings and judgments usually draw from the socio-economic and political contexts.

Judges of the superior courts have a vital role in constitutional interpretation, which entails more than the literal reading of the constitutional text. However, these Judges have a fettered discretion because they are subject to the Constitution just like other State organs.[140] Even though Judges are masters of the Constitution, they are not free to choose an interpretation, making them bound to interpretation rules. Thus, they can be branded as 'slaves' of the Constitution.[141] This slavery of superior courts' Judges to the Constitution has the import of ensuring that they strictly follow the constitutional rules of interpretation and exercise judicial restraint where necessary. The KeHC has acknowledged that the courts' express duty to interpret the 2010 Constitution is a limited

135 *Doctors for Life v Speaker of the National Assembly and others* 2006 (12) BCLR 1399 (CC).
136 *Speaker of the Senate* case [201] (Rawal DCJ & VP (Rtd)).
137 Du Plessis, 'Interpretation' 47.
138 [2014] eKLR [268].
139 *Jasbir Singh Rai v Tarlochan Singh Rai and others* [2013] eKLR [96] (hereinafter 'the *Jasbir Rai* case').
140 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 44.
141 Dominique Rousseau, 'The Constitutional Judge: Master or Slave of the Constitution' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (DUP 1994) 263.

power.[142] It follows that a transformative Constitution must be interpreted differently. This does not imply the denial that the words in the 2010 Constitution have natural meanings in English or other languages, and the Judges have to give effect to such meanings. Instead, it means that superior courts should look beyond the natural meaning of words to avoid absurdity and vitiating constitutional principles and values.[143] Mutunga CJ & P (Rtd) correctly noted that the purposive approach should promote the aspirations and dreams of people in a manner that does not stray from the constitutional text.[144] The starting point in constitutional interpretation is looking at the text. The 2010 Constitution has incorporated the developed purposive interpretation to provide guidance and judicial restraint.

3.2 Pre-2010 constitutional interpretation

Section 3 of the previous Constitution of Kenya 1963 provided for constitutional supremacy. This meant that the idea of construing a supreme Constitution differently from an ordinary statute was evident even before the promulgation of the 2010 Constitution. Despite the previous Constitution's explicit provision favouring a different interpretation approach, Kenyan courts kept intermixing both the ideas of constitutional supremacy and parliamentary sovereignty, leading to a contradiction in the suitable principles of constitutional interpretation. Thiankolu correctly observed that before the constitutional review cases and a few isolated cases, such as *Githunguri v Republic*,[145] Kenyan courts adopted an 'unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation'.[146]

The preceding interpretation was based on a colonial legacy in which the previous Constitution was enacted as a subsidiary legislation of the British. Its interpretation was based on parliamentary sovereignty in which the common law system had evolved a

142 *Federation of Women Lawyers (FIDA-K) and others v Attorney General and others* [2011] 2 KLR 4.
143 *Njoya 1* case [29].
144 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR [8.6] (Mutunga CJ & P (Rtd)) (hereinafter 'the *Gender Representation* case').
145 (1985) KLR 91.
146 Muthomi Thiankolu, 'Landmarks for El Mann to the Saitoti Ruling: Searching a Philosophy of Constitutional Interpretation in Kenya' (2007) 1 KLR 188, 189.

statutory interpretation based on the intention of Parliament, however absurd the results may be.[147] However, subsequent cases moderated this approach. It was only when a statutory provision was ambiguous that courts looked for other sources of law to give meaning to such statutes.[148] This approach took the literal meaning view without having regard to historical and contemporary contexts.

In *Crispus Karanja Njogu v Attorney General*,[149] the KeHC took a new turn and stated that a supreme Constitution must be interpreted differently from ordinary legislation. As such, where an ordinary statute is inconsistent with the Constitution, such a statute is void. A Constitution must be interpreted liberally and broadly as it embodies the people's values, principles, dreams, and aspirations.[150] The *Crispus Njogu* case inspired the reasoning in the *Njoya 1* case. Ringera J (Rtd) affirmed that a Constitution is a living instrument embodying values and principles and must be interpreted liberally, broadly, and purposely to give effect to such principles and values.[151] This clearly shows that when the 2010 Constitution was promulgated, Kenyan courts had already recognised and applied an approach to constitutional interpretation different from ordinary statutes.

3.3 Purposive interpretation under the 2010 Constitution

The 2010 Constitution has incorporated the purposive approach to constitutional interpretation. Mutunga CJ & P (Rtd) correctly noted that the KESC does not have to come up with other approaches to interpretation 'other than those that are within the Constitution itself'.[152] Article 259(1), (2) and (3) of the Constitution provide as follows:

> (1) This Constitution shall be interpreted in a manner that—
> (a) promotes its purposes, values and principles;
> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
> (c) permits the development of the law; and
> (d) contributes to good governance.

147 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 47.
148 TRS Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' (2004) 63(3) CLJ 685, 685.
149 HC Cr. Appl. No. 39 of 2000 (unreported) (hereinafter 'the *Crispus Njogu* case').
150 See generally the *Crispus Njogu* case.
151 *Njoya 1* case [29].
152 *Gender Representation* case [8.2].

> (2) If there is a conflict between different language versions of this Constitution, the English language version prevails.
> (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…

In Article 259(1)(a), the term 'promotes' requires a constitutional interpretation that supports, actively encourages, or furthers its principles, values, and purposes. The term 'advances' in Article 259(1)(b) requires a constitutional interpretation that improves, develops, or progresses the rule of law, human rights, and fundamental freedoms. The term 'permits' requires a constitutional interpretation that allows or enables the development of the law. It is the role of the superior courts, through constitutional interpretation and judicial review, to develop the law. Lastly, the term 'contributes' requires a constitutional interpretation that leads to or brings about good democratic governance.

Article 159(2)(e) of the Constitution explicitly requires the courts and tribunals to exercise judicial authority purposively to promote and protect its purposes, values, and principles. It follows that the 2010 Constitution must be interpreted in a manner that defends, supports, actively encourages, and furthers its purposes, values, and principles. Article 20(4) of the Constitution provides for the application of the Bill of Rights in a purposive manner as follows:

> (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
> (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
> (b) the spirit, purport and objects of the Bill of Rights.

Article 10(2) of the Constitution also provides for the national values and principles of good governance as follows:

> (2) The national values and principles of governance include—
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
> (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
> (c) good governance, integrity, transparency and accountability; and
> (d) sustainable development.

The national values and principles of good governance bind all the State organs, public officers, State officers, and all persons who apply or interpret the Constitution; enact,

apply, or interpret any law; or make or implement public policy decisions, per Article 10(1) of the Constitution. Mutunga CJ & P (Rtd) examined the preceding provisions and correctly concluded that they set out a theory of purposive interpretation that the KESC, other courts and tribunals must follow.[153] Mutunga CJ & P (Rtd) reiterated this theory in the *Jasbir Rai* case.[154] The question that follows is: what is this theory's meaning, clear methodology, and guiding rules? Justice to this question is done below.

Purposive constitutional interpretation takes into account the grammatical (words and phrases), systemic (constitutional totality), teleological (purposes, goals, and aspirations of the constitutional language), and historical (the original intent of the framers and values they intended to constitutionalise) methods of analysing the constitutional text.[155] Mutunga CJ & P (Rtd) correctly noted that a purposive constitutional interpretation must seek to promote 'the dreams and aspirations of the Kenyan people'.[156] In other words, purposive interpretation entails identifying the purposes, principles, and values of the 2010 Constitution and giving effect to them. When it comes to constitutional amendment provisions, the superior courts must identify the purposes, values, principles, and objectives of the particular provisions and give effect to such provisions. Notably, the purposes, values, objectives, and aspirations to be identified and effected in a purposive interpretation are sometimes clear and can contradict each other. The KESC, in the *Speaker of the Senate* case, held that the superior courts have a role to resolve 'Constitution-making contradictions; clarify draftsmanship-gaps; and settle constitutional disputes' arising from compromises that often attend the Constitution-making processes.[157] The KESC stated that 'Constitution-making does not end with its promulgation; it continues with its interpretation' and the superior courts must 'illuminate legal penumbras that constitutions borne out of long drawn compromises' tend to create.[158]

153 *Gender Representation* case [8.6], [8.8].
154 *Jasbir Rai* case [89].
155 DP Komers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 48-49.
156 *Gender Representation* case [8.6]; *Jasbir Rai* case [89], [94].
157 *Speaker of the Senate* case [156].
158 *Speaker of the Senate* case [156].

The starting point in interpreting a constitutional provision is looking at the language and structure of the text. Wanjala SCJ correctly notes that there can be:

> [N]o higher or superior coordinate from which a court of law, may launch its examination of the meaning, tenor, or import of a constitutional provision, than the text. Only after it has immersed itself in the contents of a constitutional text, only after it has accorded such words their natural and ordinary meaning, can a court venture into other phenomena, should the nature of the dispute before it so warrants.[159]

However, looking at the constitutional text may not be conclusive in determining the constitutional provisions' true meaning, purposes, principles, values, and objectives. Such purposes can only be obtained from reading the provisions in their context, such as reading the provisions wholesomely (by looking at the Preamble, national values and principles of good governance, and schedules); looking at the preparatory drafting materials, general principles of international law and ratified treaties; foreign laws, jurisprudence, and scholarly literature; the historical background of the provisions; and the political, socio-economic, and cultural contexts. Context is categorized into two: intra-textual and extra-textual. Intra-textual context looks at the literal meaning of the provision in the context of other provisions (wholesome constitution interpretation). Under intra-textual context, the literal meaning rule and wholesome constitutional interpretation (Preamble and national values and principles of good governance) are discussed. On the other hand, the extra-textual context, which goes beyond the constitutional text, looks into preparatory drafting materials; general principles of international law and ratified treaties; foreign laws and decisions; non-legal sources and phenomena, that is, the history, political, socio-economic, and cultural context of the constitutional provisions, and scholarly sources. Both intra-textual and extra-textual constitutional interpretation are discussed below.

3.4 Intra-textual contextualisation

This approach involves looking at the natural meaning of words of the provisions from the text and language together with other constitutional provisions. It is an approach that goes beyond the relevant constitutional provisions being interpreted to the other provisions but

159 *BBI 3* case [1014] (Wanjala SCJ).

does not look beyond the Constitution. This is commonly referred to as the wholesome interpretation of the Constitution.

3.4.1 Literal meaning rule

This rule posits that the meaning of constitutional provisions can be found in the literal words of such provisions. This involves looking at words' clear and ordinary English meaning and the standard grammatical and natural language of the words and phrases used. However, the natural language of the constitutional provisions is only sometimes clear. This is because constitutions are written in broad language to serve the present and future unpredictable scenarios.[160] It follows that to obtain the words' literal and ordinary meaning, they must be looked at within the context of other constitutional provisions. Superior courts in Kenya and South Africa have rejected textual interpretation only when construing the Constitution. In the *Peter Munya* case, the KESC quoted with approval Lord Griffiths in *Pepper v Hart*[161] who favoured the purposive approach over the literal meaning of the language. Ngcobo J in *Matatiele Municipality and others v President of the Republic of South Africa & others*[162] rejected the literal interpretation only by stating that the proper approach combines the textual and structural approach to provide the context in construing the constitutional provisions.[163] It is now settled that more than literal interpretation is needed to deduce the purpose of the provisions; hence, there is a need to look for purposive meaning from other constitutional provisions.

3.4.2 Wholesome interpretation of the Constitution

Wholesome interpretation of the Constitution requires the interpretation of the constitutional provisions as an integral whole, including the Preamble, national values and principles of good governance, and the Schedules. The Constitution must be interpreted holistically to reveal the purposes of the individual provisions. The KESC has explained that a holistic interpretation of the Constitution means the contextual interpretation and analysis of the provisions, that is, reading such provisions together with

160 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 55.
161 [1992] 3 WLR.
162 2007 (1) BCLR 47 (CC) (hereinafter 'the *Matatiele* case').
163 *Matatiele* case [37].

other provisions to maintain a 'rational explication' of the meaning of the provisions according to history, disputed issues, and prevailing circumstances.[164]

In the *BBI 1* case, the KeHC emphasized that the structural holistic interpretation breathes life into the Constitution as was intended by the drafters.[165] It follows that the superior courts must adopt purposive and liberal interpretations and that the constitutional provisions must be read as an integrated whole without destroying each other.[166] The ZACC has also advocated for the holistic interpretation of the South African Constitution, which avoids interpreting individual provisions in isolation from each other, which could lead to conflicts among each other.[167] In *Gopalan v State of Madras*,[168] Kania CJ of the Supreme Court of India also emphasised the wholesome interpretation of the Constitution, which considers all the provisions integral to ascertain the true meaning and purpose. In closer Kenya, as held in the Ugandan *Tinyefuza* case, the entire Constitution should be read as an integrated whole with the provisions not destroying but sustaining each other in harmony, completeness, exhaustiveness, and paramountcy. Conflicting constitutional provisions must be harmonized when interpreting them.[169] The KESC has already asserted that 'a Constitution does not subvert itself'.[170]

In the interpretation of the amendment provisions, the wholesome constitutional interpretation is essential because other relevant provisions to the amendment provisions

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164 *In the Matter of the Kenya National Commission on Human Rights* [2014] eKLR [26] (hereinafter 'the *KNCHR* case').

165 *BBI 1* case [399].

166 See generally *Council of Governors v Attorney General & another* [2017] eKLR; *KNCHR* case.

167 *Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) [37], [38]. In *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017) (hereinafter 'the *United Democratic Movement* case'), the ZACC opined that the constitutional provisions are 'inseparably interconnected' hence must be purposively and consistently construed entirely.

168 (1950) SCR 88, 109. See also the *Matatiele* case [36] (Ngcobo J), where the wholesome, systematic, or contextual constitutional interpretation was emphasised in the context of the South African Constitution.

169 Two principles guide the harmonisation of conflicting constitutional provisions. (a) General provisions usually yield to specific provisions in a conflict, as general provisions cannot prevail against unambiguous specific provisions. (b) Conflict can be resolved by favouring human rights, constitutional values, and purposes. See also Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 64-66.

170 *Speaker of the Senate* case [185]. See also the *BBI 3* case [416], [439] (Mwilu DCJ & VP).

can be found in other provisions of the Constitution. The amendment provisions must be interpreted together with other relevant provisions such as the Preamble, popular sovereignty,[171] constitutional supremacy,[172] national values and principles of good governance,[173] construing the Constitution,[174] the role of Parliament (NA and Senate),[175] the role of County Assemblies,[176] and the role of the IEBC.[177] The KeHC in the *BBI 1* case stated that constitutional interpretation must be holistic with the amendment provisions read with other provisions as a whole.[178] In the *BBI 3* case, Koome CJ & P correctly stated that purposive and value-based interpretation:

> [B]egins from and remains rooted in the text of the Constitution whilst interpreting it holistically, giving effect to its values and principles, and never losing sight of the historical context and the backdrop of the provisions being interpreted.[179]

Therefore, a purposive interpretation of the amendment provisions must be informed by a wholesome interpretation that considers other constitutional provisions relating to amendments. There must be unity when interpreting all the constitutional provisions.

3.4.2.1 Preamble

The Preamble of the 2010 Constitution is a vital source of authority, constitutional values, and principles. Notably, the Preamble is separate from the 264 Articles and six Schedules of the Constitution. However, it has a probate value in interpreting the 2010 Constitution. The Preamble can be regarded as a statement of purpose, just as with the long legislation title. The KeHC in *Rose Wangui Mambo v Limuru Country Club*[180] correctly affirmed the

171 Art. 1.
172 Art. 2.
173 Art. 10(2).
174 Art. 259.
175 Arts. 94, 95, and 96.
176 Art. 185.
177 Art. 88.
178 *BBI 1* case [496]. See also the *BBI 3* case [416] (Mwilu DCJ & VP), where it was stated that the 'Constitution has to be interpreted cumulatively and not on clause by clause basis' and that it is a 'peremptory rule of Constitutional construction that no provision of the Constitution is to be segregated from the others'.
179 *BBI 3* case [188] (Koome CJ & P).
180 (2013) eKLR (hereinafter 'the *Rose Mambo* case').

values, purposes, and principles of the 2010 Constitution mentioned by Article 159(1)(a) that must inform interpretation and include the values recognised by the Preamble.[181]

The Preamble sets out several values of good governance relevant to constitutional amendments. First and foremost, the Preamble starts with 'We, the people of Kenya'[182] which shows that the people are sovereign and the Constitution is their will. The people's voice is very active in the Preamble, which reveals the Kenyan people's centrality, supremacy, and sovereignty in good governance matters. Secondly, the Kenyan people honour those who 'heroically struggled to bring freedom and justice to our land'[183] which can be interpreted to mean the history of struggle from colonialism, post-colonial impunity, and the struggle to come up with the 2010 Constitution by the drafters and the people as a visionary, progressive, and transformative charter.

Thirdly, the people recognise the aspirations and dreams of all Kenyans for a value-based government based on freedom, human rights, democracy, the rule of law, equality, and social justice.[184] The people are making a clear statement that they recognise and respect the aspirations and dreams of all Kenyans for value-based governance and a human rights State. In the *United Democratic Movement* case, the ZACC opined that the Preamble to the South African Constitution is a concise statement that records where the people have come from, where they are going, their aspirations and dreams, and ways of realising them. Fourthly, the people exercise their sovereign right to determine the governance system and acknowledge their full participation in Constitution-making. This right relates to popular sovereignty and the affirmation that the people were actively involved in Constitution-making. This is important in constitutional amendments as popular participation is crucial and mandatory, and it is a principle provided for under the Preamble. Lastly, the people confirm the adoption, enactment, and giving of the 2010 Constitution to themselves and future generations. The Constitution serves present and

181 *Rose Mambo* case [56].
182 Preamble, Heading.
183 Preamble, para 2.
184 Preamble, para 6.

future generations, and constitutional amendments serve the same purposes once lawfully enacted.

The meaning of the substantive constitutional provisions must be arrived at after they have been read together with the Preamble as an integrated whole.[185] In *Olum & Another v Attorney General*,[186] the Court stated that the constitutional preambular should, where reasonably possible, be given effect without losing the words' meaning. The ZACC in *S v Mhlungu*[187] correctly explained that the Preamble's value is to help establish and indicate the basic constitutional design, architecture, and fundamental purposes.[188] In the *Jasbir Rai* case, Mutunga CJ & P (Rtd) held that the aspirations found in the Preamble are relevant in constitutional interpretation.[189] In the *BBI 2* case, Kiage JA correctly noted that the Preamble provides the 'context and setting, the background and canvas, against which an analysis or interpretation of the Constitution must be undertaken'.[190] The Preamble must, therefore, always act as a reference point when interpreting the constitutional amendment provisions.

3.4.2.2 National values and principles of good governance

The 2010 Constitution provides for national values and principles of good governance that identify the people's aspirations.[191] Therefore, the spirit of the Constitution must permeate the processes of constitutional interpretation that enforce constitutional values.[192] Ringera J (Rtd) correctly stated that there are constitutional principles and values that courts must always fix their eyes on in constitutional interpretation.[193] As already stated, Article 10 of the 2010 Constitution provides for the national values and

185 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 60.
186 (2) [1995-1998] 1 EA 258.
187 1995 (7) BCLR 793 (CC) (hereinafter 'the *Mhlungu* case').
188 *Mhlungu* case [112].
189 *Jasbir Rai* case [94].
190 *BBI 2* case 35 (Kiage JA).
191 Art. 10(2) of the 2010 Constitution lists good governance's national values and principles, including the rule of law, good governance, democracy, and public participation. The Preamble also lists several values, such as freedom, human rights, democracy, equality, rule of law, and social justice, as already stated.
192 See generally the *IIEC* case. See also Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 46.
193 *Njoya 1* case 277.

principles of good governance that bind all persons and government institutions. Also, as already stated, Articles 159 and 259 require constitutional interpretation to promote and protect constitutional values, purposes, and principles.[194] The 2010 Constitution is rich in values, objects, and principles, and Mutakha correctly describes it as a 'value-laden'[195] Constitution. In the *Speaker of the Senate* case, the KESC thus concluded that in constitutional interpretation, the Court must consider the purposes, values, principles, vision, and ideals enshrined in the 2010 Constitution.[196] In the same case, Mutunga CJ & P (Rtd) also concluded that the constitutional interpretation must advance, give effect to, and illuminate the Constitution's purposes, intention, and contents.[197]

In interpreting constitutional amendment provisions, the national values and principles of good governance found in the Constitution must be taken into consideration. In the *BBI 1* case, the KeHC correctly observed that the principles must be infused at every stage of the amendment process, including collecting one million signatures in popular initiative amendments.[198] For example, collecting signatures before informing the people of the contents of the proposed Amendment Bill is a violation of Article 10 of the 2010 Constitution, especially public participation. The KeHC also noted that the Court promotes constitutional principles, values, and purposes in constitutional interpretation.[199] The learned Judges associated themselves with the position adopted in the *United Democratic Movement* case, where the ZACC opined that the context, purposes, and values must always guide constitutional interpretation. Closer Kenya, in the *Ndyanabo* case, the Tanzania Court of Appeal held that the Constitution is a living instrument with fundamental objectives, principles, and purposes to guide constitutional interpretation as framed by the drafters.[200] The interpretation of constitutional amendment provisions must be done to promote and protect the values, objects, and principles of the 2010 Constitution. National values and principles of good governance are so important that

194 See part 3.3 above of this Chapter.
195 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 61, 62, 65.
196 *Speaker of the Senate* case [41].
197 *Speaker of the Senate* case [156].
198 *BBI 1* case [606].
199 *BBI 1* case [607].
200 *Ndyanabo* case 493.

their amendment requires holding a national referendum in terms of Article 255(1)(d) and (2) of the 2010 Constitution.

3.5 Extra-textual contextualisation

Extra-textual contextualisation involves the use of other sources in constitutional interpretation, such as preparatory drafting materials, general principles of international law and ratified treaties, foreign laws and decisions (including constitutions, legislation, and court precedents of other countries)[201] and scholarly works such as books, chapters in books and journal articles. Because constitutions borrow from other countries' constitutions and international law instruments, it is prudent to consider other sources when interpreting constitutions. This part looks into the preparatory drafting materials, general principles of international law and ratified treaties, foreign laws and decisions, scholarly works, and the historical, political, socio-economic, and cultural contexts as part of the extra-textual contextualisation.

3.5.1 Preparatory drafting materials

One of the most essential sources of extra-textual context is the historical or background drafting documents, records, and materials used to make a Constitution. These materials have value in interpretation and must be distinguished from statements made by politicians or participants during the Constitution-making processes that are of no value.[202] Kenya's Constitution-making process was fairly consultative and participatory. The process lasted over ten years, with Kenyans voting in the 2005 and 2010 national referenda. Numerous draft constitutions, official reports, accords, and other documents formed part of the country's Constitution-making history. A study of these documents reveals the drafters' intentions and Kenyans' aspirations regarding constitutional amendments. Sihanya correctly observed that the intention of the 2010 Constitution can be obtained from reviewing the history and practice, including the preparatory materials or records of the final drafting and adoption proceedings under the guidance of the

201 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 66.

202 I Currie and J De Waal, *The New Constitutional and Administrative Law: Volume 1 Constitutional Law* (Juta 2001) 154.

Committee of Experts (CoE) and earlier CKRC works.[203] In the *BBI* cases, the superior courts used preparatory drafting materials such as the Final Reports of the CKRC and CoE, which were recognised as essential sources in interpreting the constitutional amendment provisions.[204]

3.5.2 General principles of international law and ratified treaties

The 2010 Constitution recognises 'general rules of international law' and 'Any treaty or convention ratified by Kenya' as laws in the Kenyan legal system.[205] No doubt, courts must consider the general rules of international law and ratified treaties or conventions when interpreting the Constitution and other laws. The general principles of international law and ratified treaties give rise to international law obligations which bind a country. Constitutions also borrow from international law instruments, which must be considered in constitutional interpretation. The express recognition of the general principles of international law and ratified treaties in the Constitution is a monistic approach to international law where they can be applied directly by the Kenyan courts.[206] Constitutional provisions must be interpreted harmoniously with Kenya's international law obligations and principles.

3.5.3 Foreign laws and judicial decisions

Foreign laws and judicial decisions are also critical extra-textual sources, as constitutions are not original per se and usually borrow heavily from the constitutions of other countries.

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203 Ben Sihanya, 'Amending the Constitution of Kenya 2010 Post 2017: Interests, Process and Outcomes' in Yash Pal Ghai, Emily Kinama and Jill Cottrell Ghai (eds), *Ten Years On***:** *Assessing the Achievements of the Constitution of Kenya 2010* (Katiba Institute 2021) 278.

204 See for example, *BBI 1* case [409], [426], [477]; *BBI 2* case [327] (Musinga P); *BBI 3* case [188], [190], [219], [237] (Koome CJ & P), [733], [758], [759], [763], [765], [773], [785] - [788] (Ibrahim SCJ), [1414] – [1417], [1448], [1530], [1531], [1699] (Lenaola SCJ), [1783], [1802], [1832], [1895], [1896] (Ouko SCJ). See also the Technical Working Committee Group 'K', *Final Report of Technical Working Committee Group 'K' on Constitutional Commissions and Amendments to the Constitution* (2005).

205 Art. 2(5) and (6).

206 Nisuke Ando, 'National Implementation and Interpretation' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 702. Ando states that the monism approach is where international law and domestic laws form part of a single universal legal system; that is, there is automatic or general acceptance (also known as the French formula) of the treaty provisions upon ratification, allowing them to be invoked directly before domestic courts. Kenya arguable follows this monism modality.

The 2010 Constitution borrows from the experiences of other countries such as South Africa. The interpretation of the 2010 Constitution must benefit from comparative foreign laws and judicial decisions on similar or related matters or issues. Mutunga CJ & P (Rtd) noted that Commonwealth and international jurisprudence must play a pivotal role in developing Kenyan jurisprudence.[207]

While foreign laws and judicial decisions are important, care must be taken while using them. In *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*,[208] the Court correctly stated that applying foreign jurisprudence in Kenya was improper without questioning. Using these comparative methods requires knowledge of the foreign laws, judicial decisions, and the respective countries' political, socio-economic, and cultural contexts.[209] Borrowing from foreign jurisprudence without consideration of its context is dangerous because different countries adopt constitutional texts that suit their unique contexts and needs. In the *Peter Munya* case, Mutunga CJ & P (Rtd) correctly stated that references to foreign jurisprudence must consider the 'peculiar Kenyan needs and context'.[210] While Kenyan jurisprudence can benefit from the strength of comparative jurisprudence, it must avoid its weaknesses to enrich the Kenyan jurisprudence.[211] Interpreters of the Constitution should refrain from borrowing unthinkingly from comparative jurisprudence. They must always keep in mind that they are interpreting the Kenyan Constitution (not the foreign constitution), which has set out its theory of interpretation. In *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others*,[212] the Court of Appeal stated that while reliance on foreign jurisprudence is valuable; foreign aspirations, values, and experiences should rarely be invoked as progressive Kenyan needs differ from those of other jurisdictions. The KESC, in the *Mitu-Bell* case, emphasized that any foreign jurisprudence must be construed within Article 2(5) of the 2010 Constitution and only applied as a fall-back if internal recourse to the

207 *Jasbir Rai* case [100].
208 [2014] eKLR.
209 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 69.
210 *Peter Munya* case [232] (Mutunga CJ & P (Rtd)).
211 *Jasbir Rai* case [101].
212 [2016] eKLR [124].

disputes is not available.[213] Moreover, for foreign principles to be accepted, they must meet the muster of Article 2(4) to the extent that they must be consistent with and not in contravention of the Constitution.

This study pays attention to the comparative jurisprudence from jurisdictions such as South Africa, India and Lithuania. The Kenyan Constitution borrows heavily from its South African counterpart, especially on the transformative constitutionalism[214] and the high threshold majorities in Parliament before amending specific constitutional provisions. While the Kenyan and South African contexts and texts of the Constitutions may be different, some similarities can be identified. For example, South Africa had an apartheid system in which the Constitution and other laws were amended and enacted quickly to serve the apartheid masters. On the other hand, Kenya had a dictatorial or imperial presidency (with the Parliament being its appendage), which resulted in numerous constitutional amendments to serve the greedy and selfish ambitions of the political elites at the expense of ordinary Kenyans. Both countries, therefore, required a Constitution with rigid amendment procedures and the active involvement of the people before amending the constitutional provisions. Therefore, Kenyan jurisprudence can benefit from the strengths of the South African jurisprudence. The Kenyan experience has also raised questions on whether the Indian basic structure 'doctrine' is applicable in Kenya.[215] Kenya can also benefit from the strengths of Indian jurisprudence regarding the basic structure 'doctrine'. There can also be 'reverse learning' in which the Kenyan progressive jurisprudence on constitutional amendments can benefit South Africa, India and Lithuania.

3.5.4 Political, socio-economic, and cultural context

The extra-textual approach also looks at the political, socio-economic, and cultural contexts that inform the circumstances leading to the adoption of the Constitution. The

213 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) [132].

214 This is explained in detail in part 2.4 of this Chapter.

215 The Indian basic structure 'doctrine' and its relation to constitutional amendments is discussed in detail in Chapter four of this study.

KESC has acknowledged that these contexts are significant in interpreting constitutional provisions.[216] A transformative Constitution is interpreted differently from a mere statute, does not favour formalistic or positivist approaches to its interpretation,[217] incorporates non-legal considerations and reflects the political, socio-economic, and cultural contexts that are relevant in developing an indigenous jurisprudence in Kenya.[218]

In interpreting the constitutional provisions, non-legal phenomena are essential to give their true meaning, principles, and values. The KESC has expounded on incorporating the non-legal phenomena and their significance in constitutional interpretation.[219] Mutunga CJ & P (Rtd) in the *Peter Munya* case stated that the theory of constitutional interpretation introduces non-legal phenomena whose overall objective according to the Supreme Court Act 2011 is to facilitate Kenya's political and socio-economic growth.[220] These contexts occur in three dimensions: historical, contemporary, and future.

On the historical dimension of the context, the purpose of a constitutional provision can be discerned by looking at the mischief that such provision sought to cure. Once that mischief is found, interpreting that provision must always be done, considering the suppression of the mischief and serving the intended purpose. The inclusion of the amendment provisions in the 2010 Constitution was meant to address the problem of abuse of such provisions and 'hyper-amendments' that bewildered the previous Constitution. The authoritarian or imperial presidency, with the Parliament as its appendage, amended the previous Constitution many times without involving the ordinary people. The 2010 Constitution has rigid constitutional amendment procedures via parliamentary and popular initiatives in which the people must be actively involved. The amendment provisions were included in the 2010 Constitution to remedy the problem of 'hyper-amendments', and through history, the purpose of these provisions can be discerned. The superior courts' judicial decisions must consider the history of amendments and Constitution-making. Such decisions must move the country to a future

216 *Communications Commission of Kenya* case [356].
217 *BBI 1* case [399].
218 *IIEC* case [86]. In *the Gender Representation* case, the KESC considered the agonised history of Kenya's constitutional reform. See also the *KNCHR* case [26].
219 *Communications Commission of Kenya* case [356].
220 *Peter Munya* case [233].

where constitutional amendment processes are highly participatory and people-centred. Kiage JA correctly asserted that 'Any court interpreting the Constitution must perforce be alive to the historical background if it is to do justice to the text of the Constitution'.[221]

Regarding the pre-2010 Constitution-making history, the *BBI 1* case examined and narrated the history leading to the promulgation of the 2010 Constitution.[222] However, the KeHC improperly construed the historical context in the Constitution-making and downplayed the role of political settlement and compromises made by the various players. This history illustrates why the 2010 Constitution entrenched the rigid constitutional amendment procedures that are highly participatory and people-centred. Wanjala SCJ correctly warns against under-estimating the role played by the political elites in the making of the 2010 Constitution because the democratic polity comprises a complex mix of the *Wanjiku*, the political elites, and the philosophers, which are all entitled to participate in the constitutional amendment processes meaningfully.[223] As it was correctly observed by Koome CJ & P, courts must bear in mind that historical narratives are 'interpretive and normative hence often informed by value judgments', thus making such narratives 'subjective depending on the discretion of the interpreter'.[224] It follows that courts should strive to extract exhaustive and complete accounts of the history of the constitutional provisions being interpreted to illuminate the true meanings and purposes of such provisions.[225] Failure to do so could result in the danger of not capturing the real desires of Kenyans and losing sight of all the problems or mischiefs that the constitutional provisions sought to remedy.[226]

The contemporary dimension of the context looks into the current political, socio-economic, and cultural circumstances in which the 2010 Constitution operates.[227] It

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221 *BBI 2* case 36 (Kiage JA).

222 This history is narrated in part 4 of this Chapter below.

223 *BBI 3* case [1043] (Wanjala SCJ).

224 *BBI 3* case [220] (Koome CJ & P). See also Renáta Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (CEUP 2005) 53.

225 *BBI 3* case [221], [222] (Koome CJ & P).

226 See, for example, the *BBI 1* case and *BBI 2* case (6-1 majority decision), where the Judges focused only on the Kenyans' desire to end the culture of hyper-amendments instead of also the need for a balance between rigidity and flexibility as achieved through the multiple 'tiered' design of the chap 16 on constitutional amendment provisions.

227 Mutakha, 'An Interpretation of the Constitutional Framework for Devolution' 75.

involves applying and interpreting the constitutional provisions to resolve societal problems. In interpreting the amendment provisions, the superior courts must draw from history to develop solutions to the current problems. The future dimension of the context looks into the aspirations and dreams of Kenyans. It interprets the Constitution to respond to future promises and new challenges that the drafters might not have captured. The 2010 Constitution must be interpreted forward-looking based on past experiences. As the Constitution is interpreted to solve societal problems, past experiences must be linked with future aspirations or new ideas. The Constitution is drafted in a broad language with room for development and growth to serve present and future generations. The Preamble states that the people, as the present generation, enacted the Constitution to themselves and the future generations.[228] Therefore, the 2010 Constitution must also be interpreted as a living instrument per the 'doctrine of interpretation that the law is always speaking'.[229] This means that the context constantly changes, and the Constitution always speaks to and serves the present and future generations. Kenyan superior courts must breathe life into all constitutional provisions while consistently promoting the dreams and aspirations of the Kenyans with the Constitution. As such, superior courts are entrusted with the growth and development of the Constitution through a value-based and purposive interpretation of its provisions.[230]

3.5.5 Scholarly works

Scholarly works include books, chapters in books and journal articles. These works are persuasive and act as a guide to assist superior court Judges in analysing issues before them and making reasonable decisions. Superior courts have admitted legal scholars and academicians as *amici curiae* (the Court limits friends of the Court and their participation), such as professors, scholars, academicians, and legal researchers who possess a wealth of knowledge to assist the Court in reaching reasonable conclusions. These scholars and academicians make submissions on the issues framed by the Court as non-partisan and neutral actors. In the *BBI* cases, all the Judges of the three superior courts referenced

228 Preamble, para 8.
229 Art. 259(3).
230 *Pharmaceutical Manufacturers Association of SA and others; In re: Ex parte Application of President of the RSA and others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) [44].

several scholars' works on constitutional law theory and practice.[231] Superior courts usually seek guidance from these works as they add value to constitutional provision interpretation.[232]

The Supreme Court Rules, 2020, Rule 3 allows the admission of *amici curiae* as the Court's friend. Rule 54(1) and (2) sets factors such as expertise, independence, and impartiality of the person and public interest. According to the KESC, *amici curiae* and their briefs should be limited to legal arguments, bound by principles of neutrality and fidelity to the law, address points of law not already addressed by the suit parties, and the Court should ensure that they remain non-partisan throughout the proceedings.[233]

For example, in the *BBI 1* case, four Law Professors: Linda Musumba, Duncan Ojwang, Jack Mwimali, and John Ambani, were admitted as *amici curiae* based on their expertise in Constitutional Law as they offered to assist in adjudicating on the issues before the Court. The KeHC agreed with their description of the culture of hyper-amendments of the previous Constitution.[234] The Court of Appeal agreed with the KeHC that the *amici curiae* were correctly admitted and that helpful briefs were filed in the Court.[235] In the *BBI 2* case, the Court of Appeal also admitted two more Law Professors: Migai Aketch and Charles Fombad, as *amici curiae* who filed briefs on the historical context of the 2010 Constitution and the basic structure 'doctrine', respectively.[236] In addition to the *amici curiae* admitted in the KeHC and Court of Appeal, the KESC also admitted Law Professors and Doctors: Richard Albert, Gautam Bhatia, Rosalind Dixon, Yaniv Roznai, David Landau, and Adem Abebe in the *BBI 3* case. The superior courts admitted these *amici curiae* because their

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231 See, for example, the superior courts in the *BBI* cases made good use of the writings of Yaniv Roznai, Richard Albert, HWO Okoth-Ogendo, David Landau, Rosalind Dixon, Yash Pal Ghai, Jill Cottrell Ghai, John M Kangu, Charles M Fombad, and BO Nwabueze.

232 See the *BBI 3* case [1891] (Ouko SCJ), where it is appreciated that where the Constitution or legislation does not define phrases and words, the proper approach is to turn to scholarly writings such as books and journals. See also the *BBI 2* case 69 (Kiage JA).

233 See *Mumo Matemu* case; *Justice Philip K. Tunoi & another v Judicial Service Commission & 2 others* [2014] eKLR. See also the ZACC decisions: *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* (CCT 69/12) [2012] (as friends of the Court, *amici curiae* assist the courts to promote and protect the constitutional rights); *Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign & Others* (CCT8/02) [2002] ZACC 13 (*amici curiae* must remain impartial and owe fidelity only to the Court).

234 *BBI 1* case [406].

235 *BBI 2* case [494] (Musinga P).

236 *BBI 2* case [493] (Musinga P).

scholarly works were heavily quoted and relied on by the parties to the *BBI* cases. Mwilu DCJ & VP correctly noted that the superior court Judges should greatly benefit from their exposition, right 'from the horse's mouth' because their scholarly works were quoted by the parties.[237] It was, therefore, important for the *amici* to directly express their views, in case they were misquoted or quoted out of context.[238]

4 Pre-2010 Constitution-making history

As identified in part 2 above, history is one of the extra-textual sources in purposively interpreting the transformative 2010 Constitution. This part looks briefly into the Constitution-making history of the 2010 Constitution and its relevance to the post-2010 constitutional amendments. This history is believed to provide an essential historical context for interpreting constitutional amendment provisions. The making of the 2010 Constitution can be described as a 'model' of 'participatory constitution building processes'.[239] The KeHC has observed that participatory Constitution-building processes involve the direct and meaningful participation of the people in Constitution-making as opposed to the pre- to mid-20th Century when experts wrote constitutions.[240] The background of Kenya's constitutional history points to the need for public participation.[241] The twenty-six constitutional amendments to the 1963 Independence Constitution (between 1964 and 1991) and thirty-eight up to 2004[242] stripped most of its initial good democratic governance and social justice systems[243] including separation of powers, devolution, and multiparty democracy that ensured checks and balances of excessive executive power.[244] Indeed, it is amendments that substantially defaced the previous Constitution in the process of establishing an authoritarian State in Kenya that lasted for

237 *BBI 3* case [388] (Mwilu DCJ & VP).
238 *BBI 3* case [388] (Mwilu DCJ & VP).
239 Vivien Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in Laurel E Miller and Louis Aucoin (eds), *Framing The State in Times of Transition: Case Studies in Constitution Making* (USIPP 2010) 2.
240 *BBI 1* case [403].
241 See generally, Robert M Maxon, *Kenya's Independence Constitution: Constitution-Making and End of Empire* (FDUP 2011).
242 *Njoya 1* case (Ringera J (Rtd)).
243 See generally, Yash Pal Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970).
244 CoE*, Final Report*.

decades. The result was Kenya becoming an authoritarian State characterized by detention without trial, extra-judicial executions, enforced disappearances, massive violations of human rights and fundamental freedoms, abuse of legal processes, massive corruption, police brutality, executive interference with judicial independence, and marginalisation of many communities.[245] This is what has been described as a 'culture of hyper-amendments' in which Parliament amended the previous Constitution to the extent that it could not reflect the genuine aspirations of the *Wanjiku*.[246]

Against this background, constitutional reforms began in the 1980s. These reforms led to Kenya reverting to a multiparty state in December 1991.[247] In sum, participatory and people-centred processes have been at the heart of constitutional reforms since the mid-1990s, pointing to people-driven, solid constitutional review processes. Indeed, the theme of Kenya's constitutional history was establishing a constitutional regime based on the ideals and values of democracy, human rights, the rule of law, social justice, equality, and good governance. The three main stages of the brief history and their relevance to post-2010 constitutional amendments are discussed below.

4.1 Constitution of Kenya Review Act 1997

Notably, even before the late former dictator President Daniel Moi set up a formal constitutional review process in early 2000, there was already a civil society process in place: the People's Commission.[248] The Constitution of Kenya Review Act[249] is the starting point for formally demonstrating the participatory nature of the 2010 Constitution-

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245 *Council of Governors & 47 others v Attorney General & 3 others; Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR [107], [110]. See also Ghai and McAuslan, *Public Law*; Makua Mutua, *Kenya's Quest for Democracy: Taming the Leviathan* (LRP 2008); James T Gathii, 'Kenya's Legislative Culture and the Evolution of the Kenya Constitution' in Yashwant Rai Vyas et al (eds), *Law and Development in The Third World* (UoN 1994).

246 *BBI 1* case [406], [407].

247 James T Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya' (2008) William and Mary Law Review 1116; Willy Mutunga, *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo 1999).

248 The Ufungamano Initiative's Peoples Constitution Review Commission (PCRC), led by the late Oki Ooko-Ombaka, advocated for more grassroots popular participation in Constitution-making. When the PCRC started collecting views in then Kenya's eight provinces, the late former dictator President Moi kick-started the official constitutional review process and appointed Prof. Yash Pal Ghai as the Chair of CKRC. Ghai insisted that these two bodies, PCRC and CKRC, must be merged before serious official work on a new Constitution could begin.

249 1997 (Cap 3A) Laws of Kenya (hereinafter 'the CKR Act').

making. This Act was enacted to 'facilitate the comprehensive review of the Constitution by the people of Kenya' and establish the Constitution of Kenya Review Commission (CKRC), the District Constitutional Forums, and the National Consultative Forum.[250] The CKRC derived its membership from including those nominated by political parties, religious and women's political organisations, civil society, persons with disabilities (PWDs), the youth, women, professional associations, and regional representatives.[251] The CKRC functions included civic education to trigger public discussions and awareness, collecting the peoples' views on the desirable constitutional changes, including the form and organs of government, and research and evaluations on the Constitution.[252] The District Forums comprised elected and religious representatives, PWDs, and Members of Parliament and every local authority. On the other hand, the National Constitutional Consultative Forum comprised the civil society, all Members of Parliament, and the CKRC as *ex-officio*, representatives from each district, representatives from political parties, religious and women's organisations, civil society, and other members representing special interests.[253] Doubtless, the design and architecture of the Constitution-making process under the CKR Act was a 'home-grown' process that laid a framework for consultation with *Wanjiku*, extensive deliberation amongst the drafters, and emphasised broad popular participation at all stages.[254] The CKR Act also required the CKRC to ensure the people gave consideration and made recommendations on various issues, such as the form and organs of the State, human rights, public finance, and citizenship.[255] The CKRC prepared civic education materials in both English and Kiswahili and widely distributed them among the Kenyan people for an active, free, and meaningful civic education. While the CKRC commissioners travelled all over Kenya to collect and document views of Kenyans, its report and subsequent CKRC Draft Constitution did not see the light of the day as then President Moi dissolved

250 Preamble of the CKR Act. Emphasis added.
251 CKR Act, s 3(2) and (3).
252 CKR Act, s 16.
253 CKR Act, s 12A.
254 *BBI 1* case [420]. See also Alicia L Banon, 'Designing a Constitution-Building Process: Lessons from Kenya' (2007) 116 YLJ 1824, 1832-1833.
255 CKR Act, s 17(d).

Parliament just before the 2002 general elections, thus scuttling the constitutional review process.[256]

4.2 Bomas Draft 2004 and the failed Wako Draft 2005

After the 2002 general elections, the newly elected government under the leadership of President Mwai Kibaki continued with the constitutional review process. Beginning in April 2003, the Bomas Conference[257] started debating the CKRC Draft Constitution and report and delivered the Constitution Draft in 2004 (Bomas Draft). This Conference considered the public participation of women and marginalised groups, including ethnic minorities such as the Goans, Ogieks, Nubians, and Somalis, who gave their views as the CKRC provided sign language interpretation to accommodate the needs of PWDs.[258] The Bomas Draft was neither approved by Parliament nor presented to the people in a national referendum.

The then President Mwai Kibaki effected a revision of the Bomas Draft by the political elites, resulting in amendments enacted via a parliamentary initiative: the Wako Draft.[259] This Draft was named after the then Attorney-General, Amos Wako. The Bomas Draft was challenged, and the KeHC in the *Njoya 1* case held that any new Constitution must be ratified via a national referendum. This is a fundamental right of the people to exercise their constituent power and derives from the people's sovereignty as the basis for the Constitution's creation.[260] Consequently, Parliament amended the CKR Act to provide for a national referendum and parliamentary approval of the Draft. In 2005, the Wako Draft

256 Banon, 'Designing a Constitution-Building Process' 1833-1834.

257 The National Constitutional (Bomas) Conference was an assembly composed of over 600 members, including all 223 members of Parliament; 210 district representatives; twenty-nine CKRC members; political parties, religious, professional, youth, PWDs, and women's groups' representatives; trade unions; and non-governmental organisations.

258 See generally Jill Cottrell Ghai and Yash Pal Ghai, 'The Role of Constitution-Building Processes in Democratization' (*International IDEA*, 2006) <https://tinyurl.com/GhaiRoleCAs> accessed 16 May 2023.

259 Eric Kramon and Daniel Posner, 'Kenya's New Constitution' (2011) 22(2) JD 89, 92. The Wako Draft resulted from tinkering with the Bomas Draft by the Kibaki administration, especially on executive power, via a series of Kilifi and Naivasha retreats the opposition led by Raila Odinga boycotted.

260 See the *Njoya 1* case (Ringera J (Rtd)).

was submitted to a national referendum. The Draft was rejected by the people in a national referendum with a fifty-eight per cent vote against forty-two per cent.[261]

4.3 Constitution of Kenya Review Act 2008

Another constitutional reform was catalysed by enacting the CKR Act 2008 to facilitate the completion of the review of Kenya's Constitution.[262] This CKR Act has a history in the 2007 presidential elections that led to post-election violence in the country. The former UN Secretary-General, Kofi Annan, resolved this crisis through a peace agreement between the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) under the mediation of the Kenya National Dialogue and Reconciliation (KNDR).[263] Through the KNDR, ODM and PNU formed a coalition government and undertook far-reaching legal reforms to achieve stability, peace, and social justice through respect for human rights and the rule of law.[264] Later, the parties formed two commissions: the Independent Review Committee on the General Elections (IREC) or the Kriegler Commission, and the Commission of Inquiry on Post-Election Violence (CIPEV) or the Waki Commission, to investigate and report on the problematic issues in the 2007-2008 post-election crisis. The KNDR Team identified the lack of constitutional reforms as among the long-term issues that caused conflict in the country. Kibaki and Odinga agreed to institute legal and political reforms to address the issues effectively. Generally, both IREC and CIPEV also recommended constitutional reforms as a solution to the problematic issues. These commissions specifically recommended constitutional, legal, and institutional reforms; land reforms; combating inequality, poverty, regional

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261 Kramon and Posner, 'Kenya's New Constitution' 92; Banon, 'Designing a Constitution-Building Process' 1830; Gathii, 'Popular Authorship and Constitution Making' 1119-1120. The Wako Draft changed the executive structure found in the Bomas Draft by weakening the powers and functions of the Prime Minister against the President, providing for limited devolution and an unspecified number of party-list seats.

262 See the long title of the CKR Act (Cap 3A) 2008.

263 See generally Jeremy Horowitz, *Power-sharing in Kenya: Power-sharing Agreements, Negotiations and Peace Processes* (Centre for the Study of Civil War 2008). In the 2007 presidential elections, ODM rightly claimed that the then-President Kibaki-led PNU had rigged the election. The KNDR brought together representatives from the ODM and PNU to mediate the conflict. The National Accord and Reconciliation Act 2008 embedded the KNDR agreement.

264 See generally Kenya National Dialogue and Reconciliation, *Monitoring Project Draft Review Report* (2011).

development disparities, youth unemployment, and impunity; and addressing national unity, transparency, and accountability in governance.[265]

The preceding recommendations led to the enactment of the CKR Act 2008, which provided for a constitutional review process to promote public participation, good governance, democratic, free, and fair elections, devolution, and the peaceful resolution of disputes.[266] The Act set up the CoE as one of the organs for the constitutional review to study the existing Draft constitutions, reports, and accords and prepare a report to identify contentious and non-contentious issues.[267] The CoE worked by building the work of the CKRC and considered the following documents: The CKRC Draft Constitution, the Bomas Draft, the Wako Draft, the Kilifi Report of June 2005, the Naivasha Accord of November 2004, the Kiplagat Report,[268] the Referendum Debates; the Kriegler Report;[269] and the Waki Report.[270] The CoE boasts of collating 26,451 memoranda and presentations from the public, including organised groups (women's groups and civil society organisations), political parties, the private sector, religious organisations, and statutory bodies.[271] The CoE conducted and attended regional hearings with more than 1,917 presentations and various stakeholders' consultations.[272]

Despite the above highly participatory and people-centred processes, the Kenya Human Rights Commission (KHRC) concluded that the CoE needed to conduct effective civic education because time, bureaucratic, and financial constraints limited it.[273] As a result, the CoE was unable to produce enough copies of the proposed Constitution in Kiswahili, and civic education was unsustainable because, in areas like Samburu, Turkana, Kuria,

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265 *BBI 1* case [440].
266 CKR Act 2008, s 4.
267 CKR Act 2008, s 30.
268 Committee of Eminent Persons, *Report of the Committee of Eminent Persons on the Constitution Review Process* (2006). This Committee was chaired by Amb. Bethuel A Kiplagat presented to Mwai Kibaki in 2006.
269 Independent Review Commission, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (17 September 2008).
270 Commission of Inquiry on Post-Election Violence, *Final Report* (16 October 2008).
271 Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review* (October 2010).
272 CoE, *Final Report*.
273 Kenya Human Rights Commission, *Wanjiku's Journey: Tracing Kenya's Quest for New Constitution and Reporting on the 2010 National Referendum* (November 2010).

and Marakwet, no meaningful engagement was done due to low literacy levels of both Kiswahili and English.[274] Doubtless, this criticism shows that Kenyans took the highly participatory and people-centred nature of the Constitution-making processes seriously.[275]

Towards the promulgation of the 2010 Constitution, the CoE completed the Constitution-review process as required under the 2008 Act, which included giving the public thirty days within which to give their views on the Draft Constitution and preliminary report,[276] incorporation of the public views,[277] the publication of the question for determination by a national referendum and the conduction of civic education by the CoE for thirty days.[278] This Constitution review process culminated with the national referendum, where sixty-eighty and fifty-five hundredths per cent of Kenyans voted for the Draft officially promulgated as Kenya's Constitution on 27 August 2010.

4.4 Relevance of the history on future constitutional amendments

The above brief history points to highly participatory and people-driven constitutional review processes. Ghai and Ghai correctly point out that the emphasis on the history of Kenya's Constitution by the judgment in the *BBI 1* case must not be overlooked, as the processes leading to the promulgation of the 2010 Constitution were 'extremely participatory'.[279] Looking at the Constitution-making history, the people must play a pivotal role in post-2010 constitutional amendments, thus showing the relevance of the history on future constitutional amendments in the country. The history of amendments to the previous Constitution between 1963 and 2010 and the history of attempted unsuccessful more than twenty-two amendments to the 2010 Constitution since its promulgation (2013-2023) prove that the people must actively be involved in all post-2010 amendments

274 KHRC, *Wanjiku's Journey*.
275 *BBI 1* case [447].
276 CKR Act 2008, s 32(a).
277 CKR Act 2008, s 32(c).
278 See the CKR Act 2008, s 35 and 37(1).
279 Jill Cottrell Ghai and Yash Pal Ghai, 'BBI Court's Emphasis on History of Kenya's Constitution Must Not be Overlooked' *The Star* (Nairobi, 21 May 2021) <www.the-star.co.ke/siasa/2021-05-21-bbi-courts-emphasis-on-history-of-kenyas-constitution-must-not-be-overlooked/> accessed 13 September 2023.

processes. Mwilu DCJ & VP correctly stresses that the Constitution-making processes indicate that *Wanjiku* took centre stage in debating and designing the 2010 Constitution.[280] Therefore, popular participation is necessary to protect the values, objectives, and principles of the 2010 Constitution and to enact constitutional amendments.

5 Concluding remarks

This Chapter has discussed the three foundational elements of Kenya's post-2010 constitutional amendments: conceptual framework and analysis, constitutional interpretation, and the pre-2010 Constitution-making history. A critical analysis of the conceptual framework reveals that constitutional amendment processes and Bills must abide by the constitutional principles. Constitutional amendment processes and Bills that fail to abide by the principles can be declared unconstitutional, illegal, null and void *ab initio* by the superior courts. In interpreting constitutional amendment provisions, the purposive interpretation must be used to determine and identify the purposes of such provisions and give effect to them. The starting point in constitutional interpretation is looking at the text, followed by the contextual approach, which is intra and extra-textual contexts. The people-empowering constitutional amendment provisions must be interpreted generously, broadly, and liberally in favour of the people to give effect to their supreme sovereignty in constitutional amendments. The pre-2010 Constitution-making history reveals highly participatory and people-centred processes in which *Wanjiku* were actively involved in Constitution-making. It follows that any post-2010 constitutional amendment processes must also be highly participatory and people-centred, with *Wanjiku* playing active roles in promoting and effecting changes that promote democratic good governance and advance positive societal transformations. This Chapter has laid a foundation for the study. The next Chapter delves into the pre-requisites of constitutional amendments and delimits both parliamentary and popular initiative amendments.

280 *BBI 3* case [470] (Mwilu DCJ & VP).

CHAPTER THREE

PARLIAMENTARY AND POPULAR INITIATIVE AMENDMENTS

'The voice of the people is a voice that cannot be ignored when it comes to the amendment of the 2010 Constitution'.[1]

[1] *Priscilla Ndululu Kivuitu & another (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Muttu (Deceased)) & 22 others v Attorney General & 2 others* [2015] eKLR [160].

1 Introduction

This Chapter critically analyses the constitutional remits of parliamentary and popular initiative amendments. It is divided into four major parts besides this introduction and the conclusion. The first part discusses the pre-requisites that should be in place or observed before initiating constitutional amendments. The two pre-requisites discussed in detail are: (a) the composition and quorum of the Independent Electoral and Boundaries Commission (IEBC) to verify popular initiative amendments and conduct national referenda; and (b) public or popular participation in constitutional amendments. The second and third parts critically analyse the constitutional remits of the parliamentary and popular initiative amendments under the 2010 Constitution, respectively. The fourth part examines matters under Article 255(1), the national referendum, and the unrelated matters. Article 255(1) lists certain matters (such as popular sovereignty and constitutional supremacy) that can only be amended through a national referendum. The Parliament cannot amend such matters without involving the people voting in a national referendum. This Chapter critically analyses Articles 255, 256 and 257 of the 2010 Constitution, which are 'explicit on amendment of the Constitution [and] the extent of which can only be subject to interpretation on a case to case basis'.[2]

2 Pre-requisites in constitutional amendments

There are two pre-requisites that should be in place or observed before initiating constitutional amendments. These are (a) the composition and quorum of the IEBC to verify popular initiative amendments and conduct national referenda; and (b) the mandatory requirement of public participation in constitutional amendments. These pre-requisites are discussed below.

[2] *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) [426] (Mwilu DCJ & VP) (hereinafter 'the *BBI 3* case').

2.1 Composition and quorum of the IEBC

Article 88 of the 2010 Constitution establishes the IEBC and provides its mandate.[3] Article 250(1) provides for the composition of commissions and independent offices. Article 248(2)(c) lists the IEBC as one of the commissions,[4] thus, making Article 250(1) the operating provision regulating its composition. Article 250(1) states: 'Each commission shall consist of at least three, but not more than nine, members'.[5] Section 5(1) of the IEBC Act[6] provides for the IEBC's composition as follows: 'The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act'.[7] Furthermore, Paragraph 5 of the Second Schedule of the IEBC Act provides for IEBC's quorum as at least five members.[8] A reading of Article 250(1), section 5(1) of the IEBC Act, and Paragraphs 5 and 7 of the Second Schedule of the IEBC Act impose different requirements on the composition and quorum of the IEBC. This is addressed in the paragraphs that follow.

The question that follows is whether the IEBC composed of three commissioners would be constitutional to carry out its mandate including its role at verification stage of a popular initiative (Article 257(4))[9] and conduct of national referendum for constitutional

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3 The IEBC, as an independent commission, is established to conduct or supervise national referendum and elections under the Constitution and legislation (such as the Elections Act 2011), including continuous voter registration and voter (civic) education.

4 Art. 249(1) of the 2010 Constitution states the objectives of the commissions to include protecting the popular sovereignty, securing the observance of democratic values and principles by State organs, and promoting constitutionalism. See *In the Matter of the National Land Commission*, Reference No. 2 of 2014; [2015] eKLR [172]. Art. 249(2) of the 2010 Constitution provides that commissions and independent offices' holders are subject only to the Constitution and the law, and are independent and not subject to direction or control by any person or authority.

5 Emphasis added.

6 2011 (hereinafter 'the IEBC Act').

7 Emphasis added.

8 Emphasis added. The IEBC (Amendment) Act 2024, s 10 provides for Paragraph 5 of the Second Schedule as follows: 'The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission'. The Act also provides for Paragraph 7 as follows: 'Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by the concurrence of a majority of all the members of the Commission'. These paragraphs as far as they introduce requirements against the constitutional minimum of three commissioners, are unconstitutional, illegal, null and void *ab initio*.

9 The verification stage of popular initiative amendments is discussed in detail under part 4.2.2 of this Chapter below.

amendment purposes.[10] This question arose in the *BBI* cases.[11] The issue of verifying signatures and the constitutional threshold under Article 257(1) and (4) is a constitutional question.[12] This issue can be determined unanimously by the minimum number of three IEBC commissioners per the 2010 Constitution and does not require the quorum of five commissioners to conduct business at a meeting of the IEBC. After all, the verification of signatures of registered voters is a matter of evidence on meeting the required at least one million registered voters that support the popular initiative. It is not a matter that is left to the discretion of the quorum of commissioners, as it is a constitutional threshold that, once it is met, the commissioners cannot vote against or depart from it. Therefore, the KeHC, the Court of Appeal (6-1 majority), and Ibrahim SCJ were wrong in finding that the IEBC did not have the requisite composition and quorum of five or four commissioners to conduct the verification of signatures of at least one million registered voters per Article 257(4).[13] In the *BBI 3* case, Koome CJ & P was correct to find as follows:

> Section 5(1) of the IEBC Act should be read in a manner that conforms to Article 250(1) of the Constitution. The reason being that Article 2, which expresses the supremacy of the Constitution, demands that no legal norm, including legislation, should have an effect contrary to that expressed in the Constitution.[14]

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10 The national referendum is discussed under parts 3.5 (for purposes of parliamentary initiative amendments), 4.2.6 (for purposes of popular initiative amendments), and 5.2 (under Article 255(1) matters, the national referendum under Article 255(2), and the matters unrelated to Article 255(1) under Article 255(3)) of this Chapter below.

11 The Constitution of Kenya (Amendment) Bill 2020 has a history of the 'Handshake' between Uhuru Kenyatta and Raila Odinga, who came together after the 2017 presidential re-run, which the latter boycotted. In a mockery ceremony, Odinga was sworn in as the 'People's President' by the controversial lawyer Miguna Miguna. Uhuru then formed a Taskforce to spearhead the Building Bridges Initiative (BBI) to promote national unity. The Taskforce later morphed into a Steering Committee whose functions included proposing constitutional amendments. The Steering Committee drafted the Constitution of Kenya (Amendment) Bill 2020. The constitutionality of the Bill was challenged in all three superior courts: the Kenyan High Court (KeHC), the Court of Appeal and the Supreme Court of Kenya (KESC) in what is commonly referred to as the *BBI* cases.

12 Art. 257(1) of the 2010 Constitution states that at least one million registered voters must sign a popular initiative amendment, while Art. 257(4) provides that the promoters must deliver such an initiative (the draft Bill and the supporting signatures) to the IEBC for verification purposes.

13 *David Ndii & others v Attorney General & others* [2021] eKLR [716]-[719] (hereinafter 'the *BBI 1* case); *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others* (Amicus Curiae) [2021] eKLR [495A. ix.] (Musinga P) (hereinafter 'the *BBI 2* case'); *BBI 3* case [918] (Ibrahim SCJ).

14 *BB1 3* case [325] (Koome CJ & P).

The provisions of legislation or statute cannot override and trump the normative command of the supreme 2010 Constitution in the Kenyan legal system.[15] The KESC recognised the Constitution-conform approach to statutory interpretation in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*[16] as follows:

> The provisions of the Constitution are superior to any legislation…when interpreting the provisions of an Act of Parliament, the Court must always ensure that the same conform to the Constitution and not vice versa.[17]

This approach to constitutional and statutory interpretation obligates all courts and tribunals to promote the normativity (normative standards) of the 2010 Constitution which promotes constitutionalism. Therefore, Constitution-consistency interpretation must always be given to statutes because the Constitution is the supreme law. This approach is also supported by the Constitutional Court of South Africa (ZACC). In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,[18] the ZACC held that judicial officers must read legislation to give effect to constitutional fundamental values as they are obliged to examine and read the objects and provisions of legislation in conformity with the Constitution.[19] It follows that where there is legislation with two interpretations, compatible and incompatible with the Constitution, courts must always adopt the interpretation compatible with the 2010 Constitution. It is a peremptory principle of constitutional supremacy under Article 2(4) that any law inconsistent with the 2010 Constitution is void. Koome CJ & P was, therefore, correct to conclude that the IEBC is 'legally constituted when composed of the minimum number of three Commissioners stipulated in Article 250(1) of the Constitution' and was 'constitutionally and legally composed when it undertook the verification process under Article 257(4) relating to the

15 See part 2.2 of Chapter two, where the constitutional principle of the supremacy of the 2010 Constitution in relation to constitutional amendments is discussed in detail.
16 SC Petition 10 of 2013; [2014] eKLR (hereinafter 'the *Hassan Joho* case').
17 *Hassan Joho* case [85]. See also generally *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, SC Civil Application No. 29 of 2014; [2014] eKLR.
18 2001(1) SA 545 (CC) (hereinafter 'the *Hyundai Motor* case').
19 *Hyundai Motor* case [22].

[BBI] Amendment Bill'.[20] Wanjala SCJ also correctly observed that the 'IEBC remained validly constituted as per Article 250(1) of the Constitution'.[21]

The *Black's Law Dictionary* defines quorum as the 'minimum number of members (usually a majority of all members) who must be present for a deliberative assembly to legally transact business'.[22] The 2010 Constitution makes no express provision for the quorum of the IEBC and only provides for its minimum and maximum membership. The quorum matters are regulated by legislation. Section 8 of the IEBC Act states: 'The conduct and regulation of the business and affairs of the Commission shall be as provided for in the Second Schedule but subject thereto, the Commission may regulate its own procedure'. Paragraph 5 of the Second Schedule of the IEBC Act provides for the quorum for conducting business at a meeting of the IEBC as <u>at least five members</u>, as already stated.[23] This paragraph 5 is drafted on the premise that the IEBC will be composed of a maximum of nine commissioners on all occasions. This shows that Parliament did not take into account the terms of Article 250(1) and section 5(1) of the IEBC Act in prescribing the quorum. Paragraph 7 of the Second Schedule of the IEBC Act provides that where a unanimous decision is not reached, decisions on all matters before the IEBC shall be by <u>agreement of the majority of all commissioners</u>.[24] The majority of all the IEBC commissioners are four members. Since Article 250(1) provides that the minimum number of commissioners is three, paragraphs 5 and 7 of the Second Schedule of the IEBC Act are unconstitutional, illegal, null and void *ab initio* as they offend Articles 250(1) and 248(2) of the 2010 Constitution.

The solution to this scenario is reading down the statutory provision to ensure it conforms with the 2010 Constitution. Reading down is an approach to statutory interpretations in situations where there are two possible interpretations: one leading to consistency and another to inconsistency with the Constitution.[25] Superior courts must choose the

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20 *BBI 3* case [328] (Koome CJ & P).
21 *BBI 3* case [1113] (Wanjala SCJ).
22 Bryan A Garner, *Black's Law Dictionary* (9th edn, West 2009) 1370.
23 Emphasis added.
24 Emphasis added.
25 Michael Bishop, 'Remedies' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2011) 87.

approach that avoids inconsistency and thereby avoiding a declaration of invalidity of a legislation or conduct, which should only be declared where it cannot be avoided.[26] The persuasive finding of Koome CJ & P in the *BBI 3* case is correct.

> Since Article 250(1) envisages that an IEBC composed of three (3) Commissioners is competent to discharge its constitutional mandate, an interpretation of Paragraph 5 of the Second Schedule of the IEBC Act that leads to a contrary result will be an affront to the supremacy of the Constitution. In such a context, a court is required to "read down" the statute to ensure conformity with the normative demands of the Constitution.[27]

Mwilu DCJ & VP also correctly concludes that 'as long as IEBC had three commissioners, that met the minimum threshold set out under Article 250… [the] IEBC Act cannot override the Constitution'.[28] Mwilu DCJ & VP also affirms that the:

> IEBC, in so far as it had three commissioners including the chairperson, and further that it took unanimous decisions with all the three commissioners present and voting in the deliberations, had quorum. The provisions of the IEBC Act cannot supersede the Constitution as that is the springboard on which laws are launched.[29]

The issue of the quorum of IEBC must be interpreted in a manner that reflects the constitutional provision that it can effectively discharge its mandate with three commissioners.[30] Therefore, the IEBC had the required quorum of three commissioners when it undertook the verification stage of the BBI Amendment Bill.[31]

In conclusion, the IEBC is always a constitutional composite and quorate when it is composed of a minimum of three commissioners for purposes of carrying out its mandate

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26 John Kangu Mutakha, 'An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach' (LLD Thesis, UWC 2014) 80-81. See also the *Hyundai Motor* case [23].

27 *BBI 3* case [337] (Koome CJ & P). See also the *BBI 3* case [1678] (Lenaola SCJ) who correctly found that to 'subjugate Article 250(1) to the Legislation created by dint of Article 88(5) is to read the Constitution in a skewed manner'.

28 *BBI 3* case [660] (Mwilu DCJ & VP).

29 *BBI 3* case [662] (Mwilu DCJ & VP).

30 See *Isaiah Biwott Kangowny v Independent Electoral Boundaries Commission & Attorney General*, Constitutional Petition No. 212 of 2018; [2018] eKLR [44] where Okwany J held that the IEBC is quorate when it is composed by the constitutional minimum membership of three commissioners, as the matter of quorum is both a matter of statute and common sense depending on the total number of commissioners at any given time.

31 *BBI 3* case [338], [346] (Koome CJ & P). See also the *BBI 3* case [1677] (Lenaola SCJ) where the learned Judge correctly notes that 'quorum should be examined against the constitutional composition stated at Article 250(1) where the Commission had three members at the time of verification of the signatures is correct'.

under the 2010 Constitution, including conducting or supervising elections and national referenda and verification of signatures of registered voters under Article 257(4). The IEBC is always quorate with three commissioners to conduct its mandate since Article 250(1) provides that each commission shall comprise a minimum of three and a maximum of nine commissioners.

2.2 Public participation in constitutional amendments

Public participation refers to the process by which the public or people get involved in something. Public participation ensures the legitimacy of the law enacted or policy made. The starting point in discussing public participation is Article 10(2)(a) of the 2010 Constitution, where 'participation of the people' is provided as one of the national values and principles of good governance. This principle binds all persons and State organs applying or interpreting the Constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions, including the National Executive, Parliament (National Assembly and Senate), Judiciary and tribunals, independent commissions and offices, and county governments (County Executive Committees and the County Assemblies). The superior courts have pronounced themselves on public participation, especially in legislative processes.

The case of *Robert N. Gakuru & Another v Governor of Kiambu County & 3 Others*[32] saw the initial attempt of defining public participation. The KeHC was explicit in that, to pass muster, public participation must be 'real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates' and the State organs must 'ensure that the spirit of public participation is attained both quantitatively and qualitatively'.[33] The KeHC further correctly observed that:

> Public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.[34]

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32 [2014] eKLR (hereinafter 'the *Robert Gakuru 1* case').
33 *Robert Gakuru 1* case [75].
34 *Robert Gakuru 1* case [49].

The Court of Appeal, in the same case, adopted most findings of the KeHC and concluded that the 'bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation'.[35] The ZACC, in rejecting the argument that the constitutional amendments should only be considered by the elected representatives correctly concluded that public participation and involvement under the 1996 Constitution is at the heart of legislative functions as the peoples' voice in legislative processes is through elected representatives and public participation.[36] Again, the ZACC in *Poverty Alleviation Network and Others v President of the Republic of South Africa & 19 Others*,[37] underscores the significance of public participation and engagement as a very essential element in which the public are informed of the expectations, expresses their concerns and makes demands to legitimise the informed decision.[38]

In *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*,[39] the Court of Appeal concluded that 'Article 10(2)… is justiciable and enforceable immediately' and the 'values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable'.[40] In *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)*,[41] the KESC emphasised that 'public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the

35 *Kiambu County Government & 3 others v Robert N. Gakuru & others* [2017] eKLR [22].

36 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC) (18 August 2006) [60].

37 (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010) (hereinafter 'the *Poverty Alleviation Network* case').

38 *Poverty Alleviation Network* case [33]. See also *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (10) BCLR 969 (CC); 2008 (5) SA 171 (CC) [44] where Van der Westhuizen J notes that 'Public participation strengthens the legitimacy of legislation in the eyes of the people' as it is an 'important counterweight to secret lobbying and influence-peddling'.

39 Civil Appeal No. 224 of 2017; [2017] eKLR (hereinafter 'the *NASA Kenya* case').

40 *NASA Kenya* case [80].

41 Sup Ct. Pet. 5 of 2017; [2019] eKLR (hereinafter 'the *BAT* case').

people'.[42] The *BAT* case sets the constitutional threshold for assessing adequate public participation. In line with its mandate under Section 3 of the Supreme Court Act,[43] the KESC formulated the following nine guiding principles for public participation:[44]

(a) Public participation applies to all aspects of good governance.

(b) Public officers and entities ensure and facilitate public participation.

(c) The lack of a public participation legislation is not an excuse; public entities' onus is to effect public participation using reasonable means.

(d) Public participation must be actual with both quantitative and qualitative components.

(e) Public participation is not abstract; it must be purposive and meaningful.

(f) Public participation must be accompanied by reasonable notice and opportunity determined on a case-to-case basis. Such notice and opportunity must be afforded to the public for generating views and deliberating on the issues.

(g) Public participation is a process consisting of both oral hearings and written submissions. That someone was not heard is not enough to annul the process.

(h) Alleged lack of public participation does not automatically vitiate the process and must be considered on a case-to-case basis: the mode, degree, scope and extent of public participation.[45]

(i) Components of meaningful public participation include:

    (i) clarity of the subject matter;

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42 *BAT* case [96].

43 2011 (hereinafter 'the Supreme Court Act').

44 *BAT* case [96].

45 On the measure or yardstick of 'adequate' or 'meaningful' public participation, see for example, *Minister for Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005) [630] where Sachs J correctly observes that there is an infinite variation in the appropriate degrees of public participation in legislative processes, however, the public and all interested initiatives must be given a reasonable opportunity to understand and have an adequate say on the issues depending on a case-to-case basis.

(ii) structures and processes (medium of engagement) of participation must be clear and simple;

(iii) opportunity for balanced influence from the public in general;

(iv) commitment to the process;

(v) inclusive and effective representation;

(vi) integrity and transparency of the process, and

(vii) capacity of the public to engage, including sensitisation of the public on the subject matter.

In the *BBI 3* case, Wanjala SCJ correctly observed as follows:

> The Constitution places the people at the centre of any policy, administrative, legal or constitutional decision that may be made from time to time by those whose responsibility it is to govern or serve. The principle of public participation ensures, that the people have a say in the manner in which they are governed.[46]

While public participation is identified as one of national values and principles of good governance under Article 10(2), it is even more crucial in constitutional amendment processes. Constitutional amendments under Articles 255, 256 and 257 of the 2010 Constitution are also amenable to public participation as this applies to all aspects of good governance. Public participation must be infused in all stages. Public participation must be a continuum of the entire constitutional amendment process.[47] This is so since the people's acceptance and ownership grant democratic legitimacy and authority to a supreme Constitution. The constitutional amendment process should be inclusive with deepened public participation. Public participation considerations in the constitutional amendment process must be geared towards maximising public involvement and ensuring that people understand their options and choices.[48] Njoki Ndungu SCJ correctly notes that:

> [I]n case of a proposal to amend the Constitution, a person alleging the lack of public participation ***must specify the stage of the amendment process*** he or she feels there was lack of public participation.[49]

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46 *BBI 3* case [1085] (Wanjala SCJ).

47 See for example, the *BBI 3* case [1629] (Lenaola SCJ).

48 *BBI 3* case [302] (Koome CJ & P).

49 *BBI 3* case [1298] (Njoki Ndungu SCJ). Emphasis in the original.

The nine guiding principles in the *BAT* case are the standards upon which any allegations of the lack of public participation should be assessed. On the burden of proof, Okwengu and Tuiyott JJA rightly held that per section 112 of the Evidence Act,[50] if there is an allegation of lack of public participation, the burden shifts to the person charged with performing the same to establish adequate public participation.[51] Under Article 256(2) of the 2010 Constitution, Parliament must publicise and facilitate public discussion of a constitutional amendment Bill as part of public participation. Under Articles 118 and 196, Parliament and the County Assemblies, respectively, must conduct public participation in the legislative processes, including matters of constitutional amendments. Article 257 on popular initiative amendments demonstrates the place of public participation as a continuum from the initiation stage to the national referendum.

For constitutional amendment processes, the KeHC has held that the constitutional requirement per Article 10 is to supply the voters with adequate information to make informed decisions as an integral part of public participation.[52] The promoters of popular initiative amendments must ensure that the information reaches the people. In the *BBI 2* case, Kiage JA correctly observed that public participation is a 'Constitutional command that it must be infused or integrated into the amendment process under Chapter 16 of the Constitution'.[53] In the *BBI 2* case, the Judges unanimously held that the popular initiative amendment under Article 257 is continuous with several stages; hence, public participation should be understood from this perspective.[54] In the *BBI 2* case, Kiage JA correctly held that:

> [P]ublic participation is a principle of good governance and a constitutional right that must be observed at every stage of the constitutional amendment process… [and the] …ability to make political decisions is not limited to voting alone but extends to the decision to or to not append signatures in support of the Amendment Bill [in case of popular initiative amendments].[55]

50 Cap 80, Laws of Kenya.
51 *BBI 2* case [127] (Okwengu JA); [216] (Tuiyott JA).
52 *BBI 1* case [566].
53 *BBI 2* case 87 (Kiage JA).
54 See for example the *BBI 2* case 123 (Kiage JA), [160], [176], [204], [210] (Tuiyott JA).
55 *BBI 2* case 128 (Kiage JA). See also the *BBI 2* case [124] (Okwengu JA).

Koome CJ & P agrees with this view that 'given that a constitutional amendment process takes place in a series of stages' and when the process is looked at as a 'series of stages, a number of avenues open up to encourage public participation in various ways at different points of the process'.[56] Therefore, public participation cannot wait the debate in the County Assemblies and Parliament in case of popular initiative amendments. Still, it must begin at the initiation stage of the popular initiative amendments because the people, as the supreme sovereign, must know contents of the initiative before they support it.[57]

While the KESC has provided the above nine guiding principles on public participation, there is no clarity on what exactly constitutes adequate public participation as the test is unclear and subjective depending on the inclination of the Judges.[58] The result is that the test can be used to approve collective decision-making processes that are not sufficiently participatory or frustrate those that are participatory, thus superior courts can 'inappropriately approve or decline specific collective decision-making initiatives'.[59] For example, in the *BBI* cases, nineteen Judges of the KeHC, Court of Appeal and the KESC could not agree on whether there had been adequate or sufficient public participation, what it exactly entailed, or when superior courts should interfere with processes that are said to lack public participation. Superior courts' decisions may be influenced by powerful governmental actors so that such courts can declare inadequate public participation to have passed the constitutional muster, in a clear abuse of executive and judicial powers.[60] The KESC uses terms such as 'deep', 'meaningful', 'real', 'sensitisation' and 'engagement' to describe adequate public participation, without explaining how these standards mean and can be measured. As a result, there is a need to review the nine guiding principles in the *BAT* case to come up with clear indicators or parameters of public

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56 *BBI 3* case [304] (Koome CJ & P).

57 *BBI 3* case [855] (Ibrahim SCJ); [2018] (Ouko SCJ). See also the *BBI 2* case [122] (Okwengu JA).

58 Migai Akech, *Taming the Tyranny of the Barons: Administrative Law and the Regulation of Power: An Inaugural Lecture* (Faculty of Law UoN 2024) 56-57.

59 Akech, *Taming the Tyranny of the Barons* 57. See also Gautam Bhatia, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya' (16 March 2023) SSRN 16 <http://dx.doi.org/10.2139/ssrn.4390358> accessed 18 July 2024.

60 See for example, Gautam Bhatia, 'The Hydra and the Sword' 16 where it is noted that '"Participation" turns into a hollow hope, while in reality citizens are reduced to passive endorsement (or, in some cases, rejection) in a process that is conceptualised, driven, and dominated by those institutionally powerful actors'.

participation that factor power dynamics between the people and those mandated with ensuring effective public participation.

In conclusion, public participation must be observed in both parliamentary and popular initiative amendments. Ouko SCJ correctly notes that the 'involvement of the people in the constitution-making or amendment process is a constitutional principle'.[61] It must be infused in all stages, and all the actors in the various stages or phases must comply with the mandatory public participation requirements, albeit to varying extents, on a case-to-case basis. This mandatory public participation requirement goes to the core legitimacy of the constitutional amendments, as the people are the supreme sovereign in all matters of good governance.

3 Delimiting parliamentary initiative amendments

Under the previous Constitution of Kenya 1963, Article 47 exclusively reserved the amendment power to Parliament. This reservation of powers to Parliament led to the culture of hyper-amendments. Parliament was an appendage of the Executive and could amend the Constitution at will at the expense of the Kenyan people.[62] However, there was wide acceptance that Parliament did not have the power to fundamentally alter the Constitution as proposed by the review process without the primary constituent power.[63] This view was endorsed by the High Court decisions in *Timothy Njoya and others v Attorney General and others*[64] and *Patrick Ouma Onyango and others v Attorney General and others*,[65] in the pre-2010 era. This led to the promulgation of the 2010 Constitution, which was people-centred and highly participatory. Ouko SCJ correctly describes the situation that was obtained under the previous Constitution and the need for the people to initiate constitutional amendments directly, as follows:

61 *BBI 3* case [1847] (Ouko SCJ).

62 *BBI 3* case [422] (Mwilu DCJ & VP) correctly observes that the Kenyan history had been awash with various attempts to dilute the people's role in favour of those in authority when dealing with constitutional amendments.

63 Preston Chitere and others, *Kenya Constitutional Documents: A Comparative Analysis* (Chr. Michelsen Institute, CMI Report R 2006: 5) 52-53.

64 (2004) AHRLR 157 (KeHC 2004).

65 [2005] eKLR.

> Under Section 47 of the former Constitution, the Legislature had the sole power to amend, modify, re-enact, suspend or repeal any provision of the Constitution, without reference or recourse to the public, and yet the Legislature made far-reaching alterations that had direct impact on the ordinary citizen, the donee of Parliament's legislative power. It was as a result of this experience and in response to citizens' frustrations that popular initiative started to gain root, as a mechanism for the people to exercise direct authority in the amendment of the Constitution.[66]

While the parliamentary constitutional power has been retained under the 2010 Constitution, such power is largely limited. There is a high threshold for passing amendments to the 2010 Constitution. The idea ensures that Parliament does not abuse the amendment powers as seen with the previous Constitution. The 2010 Constitution is protected from destruction via gradual amendments initiated from within the National Executive.[67] The role that Parliament is left with is to initiate amendments, with an onerous threshold that requires the amendment Bill to be passed by each House of Parliament in its second and third readings by not less than two-thirds of all the members of Parliament.[68] Parliamentary initiative amendments are conducted by Parliament and stems from Article 1 on the popular sovereignty as the people exercise their supreme sovereign power via their representatives.

The Parliament (National Assembly and Senate) is established under Chapter eight of the Constitution, which consists of the National Assembly and Senate. Membership of the National Assembly per Article 97 consist of 290 members representing constituencies; forty-seven women representing counties; twelve nominated members representing political parties per Article 90, to represent special interests including workers, the youth and persons with disabilities; and the Speaker as ex-officio. All in all, the National Assembly has 349 members and a Speaker. The two-thirds members required to pass any Amendment Bill is at least 233 members in the first and second readings.

The Senate consists of forty-seven members representing counties; sixteen women members nominated by political parties per Article 90(a); a man and woman (representing the youth); a man and woman (representing persons with disabilities); and the Speaker, as ex-officio. The Senate represents and protects the interests of counties and their

66 *BBI 3* case [1894] (Ouko SCJ).
67 *BBI 3* case [471] (Mwilu DCJ & VP).
68 Art. 256(1)(d) of the 2010 Constitution.

governments.[69] All in all, the Senate has sixty-seven members and the Speaker. The two-thirds of the members required to pass any Amendment Bill are at least forty-five in the first and second readings.

Article 94(3) of the 2010 Constitution provides: 'Parliament may consider and pass amendments to this Constitution'.[70] Article 256 provides for parliamentary initiative amendments. This initiative incorporates public participation in all the stages per Article 10(2).

The parliamentary initiative, as provided for under Article 256 as read with Article 255 of the 2010 Constitution, can be discussed in five stages as follows: (a) Introduction stage; (b) 2nd and 3rd readings stage; (c) Publication and public discussion stage; (d) Assent and publication stage; and (e) Referendum stage. These stages are illustrated in the flow chart diagram below.

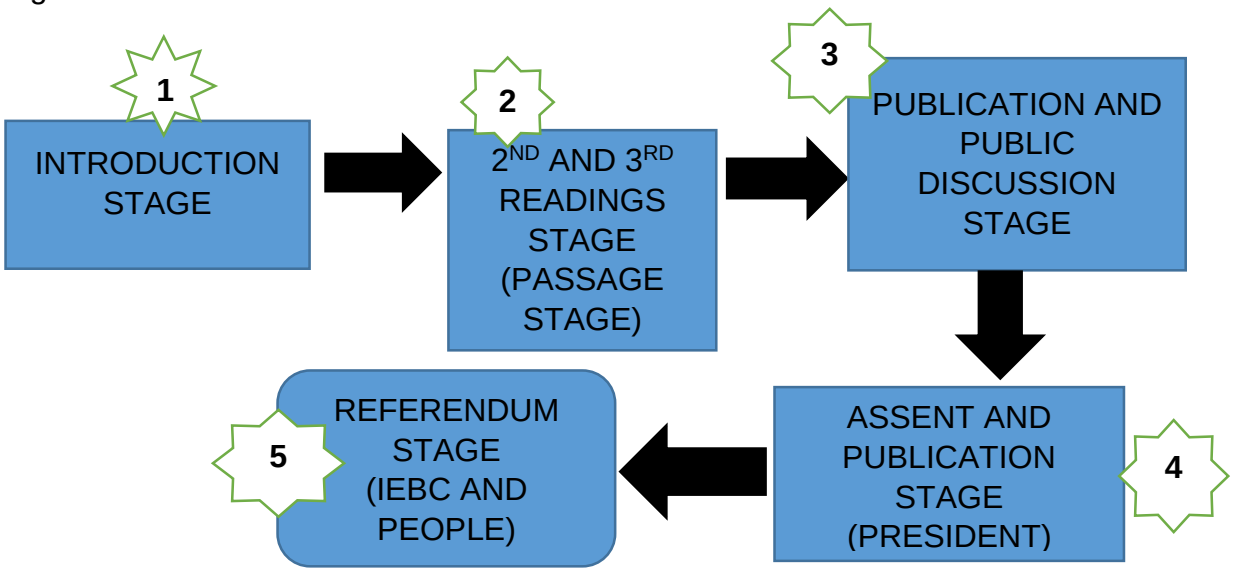

Figure 1: Flow chart diagram showing the five stages of a parliamentary initiative amendment.

SOURCE: Author.

69 Art. 96(1) of the 2010 Constitution.
70 Emphasis added.

3.1 Introduction stage

The Amendment Bill must be introduced in both Houses of Parliament per Article 256(1)(a). Such a Bill should 'not address any other matter apart from consequential amendments to legislation arising from the Bill' per Article 256(1)(b).

3.2 Second and third readings stage

This stage is also known as the passage stage. The Bill 'shall not be called for a second reading in either House within ninety days after the first reading of the Bill in that House' per Article 256(1)(c). This ninety-days period allows the Members of Parliament to read and understand the contents of the Bill and have an informed debate in the Houses.

The Bill is passed when each House has passed the Bill, in both its second and third readings, by 'not less than two-thirds of all the members' of that House per Article 256(1)(d).[71] Given that the National Assembly has 349 members, the two-thirds members required to pass any Amendment Bill is at least 233 members in the first and second readings, as already stated. On the other hand, given that the Senate has sixty-seven members, two-thirds of the members required to pass any Amendment Bill is at least forty-five members in the first and second readings, as already stated.

3.3 Publication and public discussion stage

Parliament is obliged to publicise and facilitate public discussion on the Bill per Articles 118 and 256(2). Parliament, by its nature, exercises indirect, representative, delegated, and donated supreme sovereign power on behalf of the people per Article 1(2) and (3)(a). Therefore, Parliament has an obligation to report to Kenyans, facilitate public discussion, and factor in valuable proposals from public participation before enacting the Amendment Bill.[72]

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71 Emphasis added.

72 *BBI 3* case [595] (Mwilu DCJ & VP).

3.4 Assent and publication stage

Once Parliament passes an Amendment Bill, the Speakers of Parliament must jointly submit the Bill to the President for assent and publication, together with a certificate that Parliament has passed the Bill per Article 256(3). The President then assents to the Bill and causes it to be published within thirty days after it is enacted by Parliament per Article 256(4). Under this initiative, the President has no role before the Speakers present an enacted Bill to him for assent since this initiative originates from Parliament. However, in appreciation that the President may have the significant control and support of the majority of the Members in both Houses of Parliament, there is nothing wrong in the Kenyan constitutional democracy if the President uses his influencing effect to propose a constitutional amendment through Article 256.[73]

3.5 Referendum stage

The parliamentary initiative takes into account Article 255(1) matters which can only be amended in a national referendum. The President must submit the Bill to IEBC (before assenting it) to conduct a national referendum within ninety days per Article 256(5)(a) if the Bill relates to Article 255(1) matters. When the Bill is subjected to a national referendum per Article 255(2), it is only passed if at least twenty per cent of the registered voters in each of at least half of the counties (twenty-four counties) vote in the national referendum and a simple majority of the voters support the proposed amendments.

Article 88(4)(g) of the 2010 Constitution imposes an obligation of voter (civic) education on IEBC. Within thirty days after the Chair of the IEBC certifies to the President that the

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[73] This can be done if the President as a party leader invokes that capacity to influence policy and legislative agenda informally (this can only be undertaken outside of the official parliamentary business via parliamentary group meetings) or even through his State of the nation address to Parliament or petitions to Parliament to initiate amendments through the parliamentary initiative route. See the *BBI 3* case [457], [486], [487] (Mwilu DCJ & VP), where she correctly concludes that the President does not 'directly control the parliamentary processes' in Parliament. See also the *BBI 3* case [1537], [1544] (Lenaola SCJ) where it is observed that 'as Party Leader, the President has other political mechanisms through Parliament to do what he considers best, without encroaching on the sacred people-centric process under Article 257' and can use the 'parliamentary party muscle in Parliament to initiate amendments under Article 256 of the Constitution if he so wishes'. See also the *BBI 2* case [347], [349] (Musinga P), [152] (Okwengu JA).

Bill has been approved per Article 255(2), the President shall assent and publish it. There must be evidence of continuous voter registration or nationwide voter registration exercise that should be done before the national referendum.[74]

4 Delimiting popular initiative amendments

In delimiting the popular initiative amendments, this part delves into the history, meaning, purpose and constitutional remit of popular initiative amendments per Article 257 as read with Article 255 of the 2010 Constitution.

4.1 History of the introduction of popular initiative amendments

It is important to note that popular initiative amendments were an unavailable route under the previous Constitution of Kenya 1963. Parliament had wide discretion regarding the amendment of the previous Constitution, as the people were excluded from participating in such processes. This is arguably one of the reasons that bred the culture of hyper-amendments and imperial Presidency.[75] During the Constitution-making process, Kenyans knew they had no say in the amendments made to the previous Constitution. They desired to introduce a new route where the people could initiate constitutional amendments in addition to the Parliament. To find out who may initiate popular initiative amendments, one must consider the purpose of introducing this amendment route. This is referred to as the purposive constitutional interpretation under Article 259(1) of the 2010 Constitution, discussed in Chapter two, part 3.3 of this study.

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74 *BBI 2* case 173 (Kiage JA). The learned Judge correctly observes that the absence of continuous nationwide voter registration violates the political rights of young adults entitled to but are yet to be registered as voters if the IEBC proceeds with any proposed national referendum. The IEBC is required to carry out nationwide voter registration drives in anticipation of general elections, by-elections and national referendum. See also the *BBI 2* case [395] (Musinga P).

75 See the *BBI 3* case [1045], [1046] (Wanjala SCJ). The learned Judge describes the painful history of the 2010 Constitution that illustrates the need to actively involve the ordinary people in constitutional amendments, free from the pervasive influence of Parliament and the imperial Executive (read the Presidency). The imperial Presidency consolidated the executive power and mutilated the previous Constitution via 'unchecked amendments' to the extent that Kenya lost the ideals of good governance, democracy, rule of law, equality, equity, human rights, and social justice. See also HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya Since Independence, 1963-69' (1972) 71 African Affairs 1, 9; Akech, *Taming the Tyranny of the Barons* 41-42.

The starting point of popular initiative amendments is the preparatory drafting documents during the Constitution-making process. The origin of the popular initiative Article in the 2010 Constitution can be traced to the Constitution of Kenya Review Commission (CKRC) *Final Report*.[76] The CKRC noted that the amendment process must not be left to Parliament only, but the people must also participate. The CKRC recommended that the 'citizen and the civil society may initiate Constitutional amendments through a process called "popular initiative"'.[77] This recommendation was captured in the Zero Draft under Article 346(1)[78] and was retained in the Bomas Draft 2004 under Article 304(1) as follows: 'An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters'. The same Article was also retained in the Naivasha Accord of November 2004 and the Kilifi Accord of June 2005. The rejected Wako Draft of 2005 also had the provision under Article 283(1) as follows: 'An amendment to this Constitution may be proposed by a popular initiative supported by the signatures of at least one million registered voters'. The Revised Harmonised Draft of the Constitution[79] also has a similar provision under Article 238(1) as follows: 'An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters'. The *Final Report* of the Technical Working Committee Group 'K' (TWCG 'K') also noted that:

> The committee introduced a novel idea called popular initiative. This is an innovation where the citizens can on their own motion initiate amendment to the Constitution by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. The committee explained that their intention was a starting point towards curbing dictatorship by Parliament.[80]

The 'curbing [of] dictatorship by Parliament' is premised on the realisation that Parliament could be partial and hindered by selfish interests and the Executive or partisan political

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76 Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) (hereinafter 'the CKRC *Final Report*').

77 CKRC *Final Report* 449.

78 Revised Zero Draft of a Bill to Alter the Constitution 2004.

79 Committee of Experts, Revised Harmonized Draft of the Constitution 2010.

80 Technical Working Committee Group 'K', *Final Report of Technical Working Committee Group 'K' on Constitutional Commissions and Amendments to the Constitution* (2005) 4. The Working Group was mandated to discuss, amend, recommend, and propose additions regarding the independence and efficiency of constitutional commissions and constitutional amendments.

party politics. In recognition of these eventualities, the ordinary people are 'not helpless but reserved unto themselves the residual power to undertake [the] legislative process in initiating amendments to the Constitution'.[81] Koome CJ & P correctly observed that this history demonstrated that the popular initiative is a 'tool curved out exclusively as a route for constitutional amendments by the [ordinary] citizens'.[82] The popular initiative amendments were intended to be a citizen-driven and people-centred processes. This initiative is a means for exercising direct supreme sovereign power, distinguished from a parliamentary initiative, which is the exercise of derived, donated, indirect or delegated sovereign power.[83]

The KeHC has correctly observed that the above history reveals that the popular initiative amendments were among the non-contentious issues because they featured substantively unaltered in the constitutional drafts.[84] The KeHC also observed that the popular initiative as included in the 2010 Constitution gives meaning to the 'principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests'.[85] Notably, the drafters of the popular initiative provision intended that it be invoked by registered voters as opposed to State actors. In all the constitutional drafts, the registered voters were retained as the originators, thereby maintaining the original intention.

It follows that the *Wanjiku*[86] must initiate a popular initiative as opposed to elected and appointed representatives. This is because the popular initiative is intended to give the *Wanjiku* acting outside State organs a route to trigger the exercise of their supreme sovereign power directly. The centrality of the people in initiating the popular initiative is seen as a means of triggering the exercise of constituent power against State organs to

81 *BBI 3* case [491] (Mwilu DCJ & VP).

82 *BBI 3* case [238] (Koome CJ & P). See also the *BBI 2* case [346] (Musinga P); *BBI 1* case [496].

83 The constitutional principle of popular sovereignty vis-à-vis constitutional amendments is explained in detail under Chapter two, part 2.1. See also the *BBI 3* case [491] (Mwilu DCJ & VP) who correctly observes that given the 'paramount nature that the sovereignty of the people is afforded under the Constitution, the role of the people in exercising their direct sovereign power in amending the Constitution was so critical that it had to be specifically secured'.

84 *BBI 1* case [481].

85 *BBI 1* case [497].

86 This is a common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people.

control State power.[87] It also cures the refusal of State actors to bring positive and progressive constitutional changes. Fombad describes this solution as follows:

> The Burkina Faso, Kenya, and DR Congo constitutional provisions provide (sic) an important way of dealing with one of the major obstacles to constitutional change; a refusal by the government to bring a request for change before the legislature, which in constitutional theory, represent the sovereign will. Allowing petitions by a specified number of citizens is certainly good for ensuring that governments do not have the absolute discretion to determine whether or not a proposed constitutional amendment should go before the legislature.[88]

Ouko SCJ correctly describes the introduction of the constitutional popular initiative in the 2010 Constitution as a means of giving to the:

> [P]eople a more complete control over the review of the Constitution than they have had in the past. In the past, all the review initiatives were tied to parliamentary monopoly, without an avenue for the public to participate.[89]

Under the 2010 Constitution, the people are actively involved both at the end of the process in a national referendum and at the initiation of popular initiative amendments. The brief history above shows that a popular initiative is an exercise of direct supreme sovereign power and excludes representative, donated, indirect or delegated sovereign power of State actors such as the Parliament, County Assemblies, the National Executive and Presidency, County Executive Committees, and the Judiciary, tribunals and independent commissions and offices. These State actors only exercise donated, derived, indirect or delegated sovereign power per Articles 1(2) and (3) of the 2010 Constitution. A popular initiative amendment is a means of direct democracy that can only be exercised by the ordinary people and not their elected or appointed representatives.[90] State actors have no standing to exercise the direct supreme sovereign power of the people to initiate popular initiative amendments. Therefore, Koome CJ & P was correct to conclude that a popular initiative amendment is a 'preserve of the citizens, '*the Wanjiku*',

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87 Joel Colón-Ríos, *Constituent Power and the Law* (OUP 2020) 150-151.

88 Charles Fombad, 'Some Perspectives on Durability and Change under Modern African Constitutions' (2013) 11(2) IJCL 382, 403.

89 *BBI 3* case [1919] (Ouko SCJ).

90 *BBI 2* case [111], [112] (Okwengu JA).

in Kenyan popular lexicon'.[91] The history of popular initiative amendments shows that this initiative was 'deliberately crafted as a tool of amendment by citizens – the common man and civil society as opposed to Parliament'.[92] Ouko SCJ correctly concludes that:

> With that history there cannot be any debate as to the target of Article 257 – the People. It must equally be remembered that popular initiative clause was not one of the contentious issues and consistently featured unaltered in all the drafts of the Constitution.[93]

The power to amend the 2010 Constitution using the popular initiative route is reserved for private citizens who are registered voters.[94] Therefore, there is no doubt that the owners of the popular initiative amendments are ordinary Kenyan people, whether as individual registered voters or organised as civil societies.

4.2 Remit of popular initiative amendments

As already stated, the amendment of the 2010 Constitution through popular initiative is expressly provided for under Article 257, as read with Articles 255 and 256. This part concentrates on Article 257, as Article 255 is discussed in detail under part 5 of this Chapter below, while Article 256 has already been discussed in part 3 above. Although the 2010 Constitution does not expressly define what a 'popular initiative' is, the process of popular initiative amendments is aptly described under Article 257. This Article reveals that several actors are involved in the popular initiative amendments as the process is multi-staged and continuous with public participation, which is central to be considered at every step.[95] Ouko SCJ correctly notes that:

> [P]ublic participation in respect of a proposed constitutional amendment should be seen as a continuum, from collection of signatures all the way to the referendum, it is equally true that public participation must be conducted at each stage where it

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91 *BBI 3* case [241] (Koome CJ & P). See also the *BBI 2* case [98], [101] (Nambuye JA), where it is correctly observed that the popular initiative amendments are reserved for *Wanjiku* and not the President, State organs, State offices or officers.

92 *BBI 3* case [1532] (Lenaola SCJ).

93 *BBI 3* case [1898] (Ouko SCJ). See also the *BBI 1* case [481].

94 *BBI 1* case [491], [499], [783 viii.]. See also the *BBI 3* case [806] (Ibrahim SCJ) who correctly found that the 'path of popular initiative pursuant to Article 257 of the Constitution is strictly reserved only for the ordinary Kenyan[s]'.

95 *BBI 3* case [604], [678(v)] (Mwilu DCJ & VP).

> is required; … it is illogical to wait until the process is concluded to ascertain whether it was effective or done according to the law.[96]

The specific processes and actors involved in the six stages of popular initiative amendments are: (a) Initiation stage by the promoters; (b) Verification stage by the IEBC; (c) Approval by the County Assemblies; (d) Passage by Parliament; (e) Assent or referral stage by the President; and lastly, (f) the people voting in a national referendum.

This can be illustrated in the flow chart diagram below.

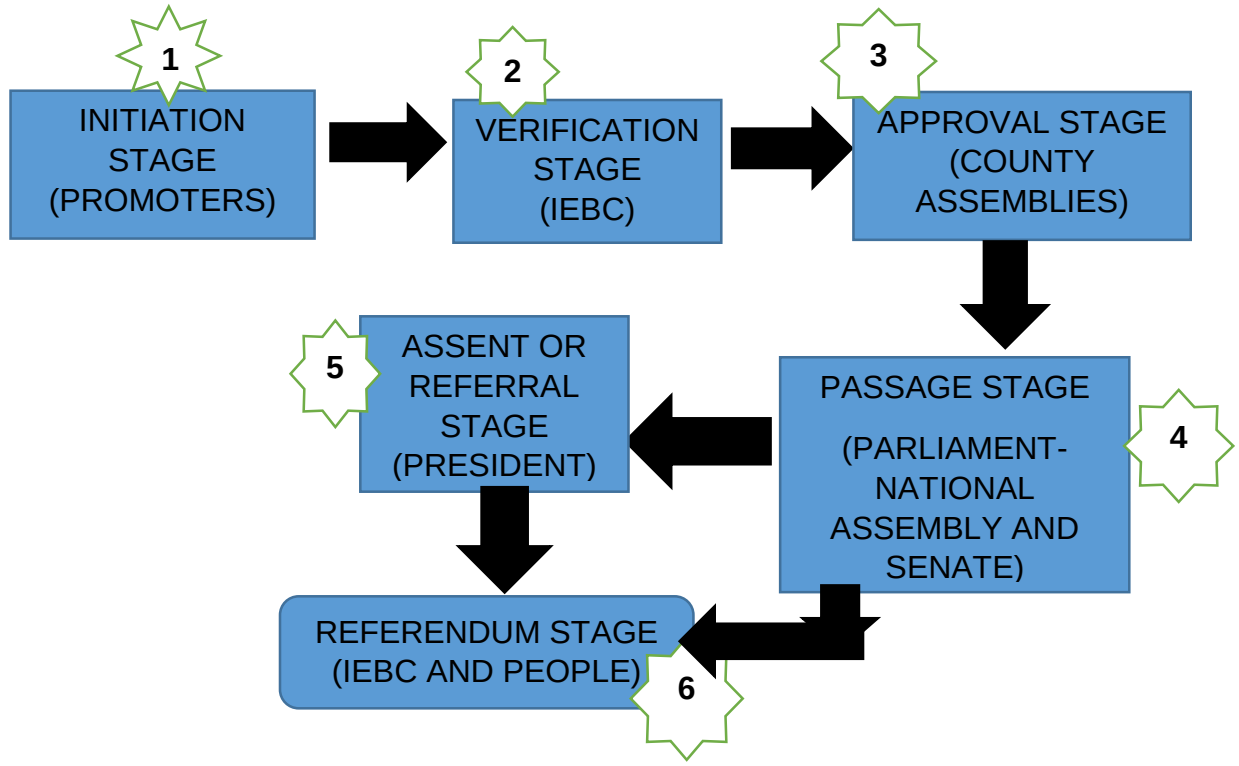

Figure 2: Flow chart diagram showing the actors and six stages of a popular initiative amendment.

SOURCE: Author.

The role of these actors and the stages are discussed below.

4.2.1 Initiation stage

The first stage is initiation, and the role players are the promoters. A popular initiative starts with an initial decision that activates the process. This decision is made by the

96 *BBI 3* case [2012] (Ouko SCJ).

promoters who set the referendum agenda. The terms 'initiative' and 'promoters' are not defined by the 2010 Constitution. A purposive interpretation reveals that the 'initiative' speaks to how the process starts or the person(s) who begin that process, and 'promoters' relate to the persons who support the initiative, whether through popularising it or other support such as financial and collection of signatures of registered voters. In the *BBI 3* case, Ouko SCJ correctly described the term 'promoters' as 'apparently a term of art in the context of amendment to the Constitution, describing persons, not in the company law or colloquial sense, but those who initiate or champion constitutional change'.[97]

The popular initiative can be a general suggestion or a formulated draft Bill per Article 257(2). If the initiative is a general suggestion, it must be formulated into a draft Bill per Article 257(3). The promoters must collect at least one million signatures of registered voters per Article 257(1). The promoters must deliver the formulated draft Bill and at least one million signatures of registered voters in support to the IEBC for verification per Article 257(4).

A popular initiative is identifiable at the 'decisive time', the 'conceptualisation of the intent'.[98] A promoter has to conceptualise the proposed amendment either as a general suggestion or a draft Bill before getting the support of at least one million registered voters. It is on this basis that the BBI Amendment Bill was correctly declared unconstitutional by the KESC because the President had:

> [P]layed a dominant role in so far he published by way of Kenya Gazette the establishment of the BBI Taskforce and later the BBI Steering Committee with the task of inter alia suggesting constitutional reforms.[99]

The BBI Amendment Bill was the original idea of the President, who cannot directly initiate parliamentary or popular amendments to the 2010 Constitution. Therefore, the argument of Lenaola SCJ that the popular initiative begins with the 'collection of a million signatures and prior to, or simultaneously with the general suggestion or a formulated draft Bill'[100] does not hold any water. The correct approach is to look at the original intention of the

97 *BBI 3* case [1893] (Ouko SCJ).
98 *BBI 3* case [514] (Mwilu DCJ & VP).
99 *BBI 3* case [520] (Mwilu DCJ & VP).
100 *BBI 3* case [1541] (Lenaola SCJ).

promoters, and if the same is diluted by State actors, the purpose of such popular initiative amendments is lost. Such an initiative would not be popular in the proper sense. The argument of Njoki Ndungu SCJ that a popular initiative amendment is only about the numbers (at least one million signatures of registered voters) and not about who the promoter is[101] is wrong because both the promoters and the numbers count in such an initiative. Therefore, the argument of Njoki Ndungu SCJ fails to consider the history, nature and purposes of the introduction of popular initiative amendments.

Should this stage be preceded by supplying adequate information to the people on the proposed constitutional amendments even though Article 257 is silent? The correct answer is in the affirmative. The right to make political decisions extends beyond simply voting for options, such as appending signatures to support the constitutional amendments. It depends on the information availed to people to enable them to make informed political decisions.[102] The majority decision in the case of *President of the Republic of South Africa & Others v M & G Media Ltd*[103] correctly stated that the right to vote is dependent on the right to access information so as not to undermine the citizen's ability to make informed political decisions and meaningfully participate in public life.[104]

The public participation to be conducted by the promoters at this stage is limited to bringing to attention and explaining the contents of the general suggestion or formulated draft Bill to the registered voters before collecting the signatures. Mwilu DCJ & VP correctly described this role in the following terms:

> The role of the promoters … is limited to getting one million signatures in order to meet the constitutional threshold. This involves explaining and/or popularising the general suggestion or draft amendment Bill to the citizenry with a view to obtaining the at least one million voters in support.[105]

The promoters are not obligated to conduct country-wide public participation before collecting signatures and presenting the Amendment Bill as what is required is to collect

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101 *BBI 3* case [1185] (Njoki Ndungu SCJ).
102 *BBI 1* case [570]; *BBI 2* case [125] (Okwengu JA).
103 (CCT 03/11) [2011] ZACC 32 (Ngcobo CJ, writing for the majority) (hereinafter 'the *M & G Media Ltd* case').
104 *M & G Media Ltd* case [10] (Ngcobo CJ).
105 *BBI 3* case [516] (Mwilu DCJ & VP).

at least one million signatures in support.[106] Kiage, Kairu and Tuiyott JJA observed that that it would be too expensive and onerous to expect the promoters to engage and involve the voters in the extensive public participation.[107] In the *BBI 3* case, Ibrahim SCJ correctly observed that:

> [F]ull blown civic education and public participation exercise at the time of signature collection from a truly citizen driven process, is to place a burdensome financial and logistical hurdle which would be antagonistic to the very essence of the process … at this initial stage, public participation can be limited to the potential supporters from whom the promoters hope to collect signatures.[108]

The promoters must prove the explanation of the contents of the Bill to the registered voters and that the signatures were appended by the voters voluntarily. Tuiyott JA is of the view that this burden can only shift to the promoters if there is evidence that a person(s) who appended their signature(s) was not aware of such a Bill.[109] The appending of signatures proves that the voters understood the contents of the draft Bill and consented to support the initiative unless evidence to the contrary is provided or the voters raise complaints.[110] Koome CJ & P correctly notes that the 'onerous requirement that a promoter conducts public participation before presenting the signatures for verification at this stage would be unreasonable because the whole process may be rejected by IEBC'.[111] This is the same fate that reached the two popular initiative amendments dubbed *Okoa Kenya* and *Punguza Mizigo* that failed to garner the required at least one million signatures and support of at least twenty-four County Assemblies and were rejected by the IEBC and County Assemblies, respectively. Moreover, citizens or a group of citizens bear the cost of public participation in this stage. Therefore, the public participation requirement during the period preceding collecting signatures should not

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106 *BBI 3* case [604], [678(v)] (Mwilu DCJ & VP), [1275] (Njoki Ndungu SCJ). See also the *BBI 3* case [1628] (Lenaola SCJ), who correctly adds that the 'Constitution has not placed any burden on IEBC to ensure that the promoters of a Bill have met the requirements of public participation. To hold otherwise would be an error on the part of any Court'.

107 *BBI 2* case 131 (Kiage JA), [88] (Kairu JA), [219] (Tuiyott JA).

108 *BBI 3* case [863], [864] (Ibrahim SCJ). See also the *BBI 3* case [1277] (Njoki Ndungu SCJ); [2030] (Ouko SCJ); *BBI 2* case [208] (Tuiyott JA).

109 *BBI 2* case [216] (Tuiyott JA).

110 See for example, the *BBI 3* case [1636] (Lenaola SCJ) who supports this argument. See also *Republic v County Assembly of Kirinyaga & Another Ex-Parte Kenda Muriuki & Another*, HC JR Application No. 271 of 2019; [2019] eKLR [56].

111 *BBI 3* case [305] (Koome CJ & P).

impose onerous requirements on the promoters.[112] The promoters' role ends with submitting the draft Bill and supporting signatures to the IEBC. However, the promoters may lobby the County Assemblies and Parliament to pass the Bill. They can also engage in public participation to sensitise the people and vote in the national referendum.[113]

4.2.2 Verification stage

The second stage is the verification, and the role player is the IEBC. The IEBC receives the formulated draft Bill and signatures of at least one million registered voters in support from the promoters per Article 257(4). The IEBC's mandate is limited to verifying that the initiative is reduced into a draft Bill, supported by at least one million registered voters, and determining the authenticity of the signatures.[114]

The IEBC has three constitutional obligations under Articles 257(4) and (5). The first obligation is verifying that the popular initiative has been reduced into a draft Bill. This is a straightforward requirement that the promoters are expected to meet. The IEBC has every right to decline to proceed with its duties under Articles 257(4) and (5) until this requirement is met. Promoters who may not be experts in legislative drafting can engage experts to assist them in formulating the general suggestion into a draft Bill. The IEBC is not obligated to reduce the general suggestion into a draft Bill under the 2010 Constitution. The IEBC can rightly decline to receive an initiative that is not reduced into a draft Bill per Article 257(2) and (3). The IEBC can require the promoters of such an initiative to comply with Article 257(2) and (3) before accepting to receive the initiative.

The second obligation concerns the verification that at least one million registered voters support the initiative. The IEBC does not have a direct obligation to ascertain that promoters have conducted public participation during the collection of signatures[115] before transmittal to the County Assemblies. The IEBC cannot interrogate the events

112 *BBI 3* case [306] (Koome CJ & P).
113 *BBI 3* case [1867] (Ouko SCJ).
114 *BBI 3* case [1086] (Wanjala SCJ); *BBI 2* case [108] (Kairu JA).
115 See the finding of Koome CJ & P in the *BBI 3* case [301]. See also the *BBI 3* case [2016] (Ouko SCJ) who observes that the IEBC has no obligation under Article 257 to go behind the Amendment Bill and list of registered voters to enquire if the promoters conducted public participation prior to collecting signatures.

preceding the presentation of the Bill and at least one million signatures, and conduct public participation.[116] Therefore, the holding of the KeHC that the IEBC was obligated to ensure the promoters conducted public participation per Article 10(1)[117] is without any basis. The reasoning of Gatembu JA that the IEBC was obligated to carry out voter education and sensitisation on the draft Bill to empower the people with information to engage meaningfully with the County Assemblies[118] is a misinterpretation of the IEBC's role under Article 257(4) and (5). The IEBC can only discharge mandates explicitly vested on it by law as it is a creature of the 2010 Constitution and legislation, per the rule of law under Article 10(2)(a). Therefore, Koome CJ & P was right to observe that the IEBC:

> [C]annot by craft of innovation or interpretation extend its powers to include ascertaining whether a promoter of a popular initiative has complied with the public participation requirements under the Constitution where the law does not explicitly grant it that mandate. The power granted to IEBC under Article 257(4) is limited to ***"verifying that the initiative is supported by at least one million registered voters."***[119]

Wanjala SCJ correctly observed that Article 257(4) or any other related constitutional provisions do not place extra obligations on the IEBC to look past the list of registered voters and signatures appended in support of the Amendment Bill.[120] Ouko SCJ correctly concluded that the 2010 Constitution does not vest any power in IEBC to conduct public participation or to ensure that the same is done by the promoters.[121] As already explained above, the nature of public participation by the promoters is limited to bringing to attention and explaining the contents of the draft Bill to the voters. The IEBC must publish the signatures and request the voters whose signatures were appended without their consent to raise complaints. The IEBC must act on those complaints within a reasonable time and remove all those signatures whose appendation was without the voters' consent. At this point, voters who wish to withdraw their signatures can also be allowed. The IEBC must notify the public of the opportunity to confirm their signatures and allow at least one million signatories or the public at large via non-restrictive mediums, such as their website,

116 *BBI 3* case [2017] (Ouko SCJ).
117 *BBI 1* case [577].
118 *BBI 2* case [90] (Gatembu JA).
119 *BBI 3* case [298] (Koome CJ & P). Emphasis in the original.
120 *BBI 3* case [1089] (Wanjala SCJ).
121 *BBI 3* case [2041] (Ouko SCJ).

emails, telephone, and newspapers of nationwide circulation. This is the meaningful public participation in the verification of signatures by the IEBC based on the circumstances of its role under Article 257(4).

The third obligation is to submit the draft Bill to all the forty-seven County Assemblies for consideration if it meets the requirement of a draft Bill and supported by at least one million registered voters.

There is a gap in this stage as the 2010 Constitution is silent on the timelines the IEBC should take to verify the signatures. This lacuna can be addressed via legislation. However, until such legislation is enacted, the IEBC should take a reasonable time to verify the signatures, for example, within sixty days from the day the promoters submit the draft Bill and the supporting signatures of the registered voters.

Is a legislative framework required to regulate the verification of signatures? Generally, Article 257 is self-executing, meaning that no further legislation is necessary to implement the constitutional provisions, including the verification, efficaciously.[122] However, the importance of such legislation cannot be overemphasised, and the absence of the same cannot prevent the IEBC from carrying out its mandate under Article 257(4) and (5).[123] Do sections 49 to 55 of the Elections Act and the IEBC Act provide a sufficient legislative framework? Does the IEBC's role include verifying signatures, or does the role only end at the proverbial bean-counting? The IEBC has, via its Administrative Procedures, provided for the verification of the required at least one million registered voters.[124] In 2016, the IEBC acknowledged its role under Article 257(1) and (4) as follows:

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122 *BBI 1* case [731].

123 *BBI 1* case [732].

124 IEBC, Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum (first approved on 15 April 2019 and revised in 2020) (hereinafter 'the IEBC, Administrative Procedures for the Verification of Signatures'). These Procedures were developed by the IEBC, and they were declared unconstitutional, illegal, invalid, null and void by the KeHC and the Court of Appeal (6-1 majority) due to lack of public participation, development without quorum, lack of legal authority, violation of Art. 94 of the Constitution and ss 5, 6 and 11 of the Statutory Instruments Act 2013 for want of parliamentary approval and publication. See also the *BBI 1* case [763], [784 xvii.]; *BBI 2* case [495 xiii.] (Musinga P). Sichale JA (minority in the *BBI 2* case 108-109) was correct to hold that such Procedures were sufficient for the purposes of carrying out a national referendum and that there was a legal framework to govern the collection, presentation and verification of signatures and the conduct of national referenda. This issue was not pursued on appeal and the KESC did not address this issue. However, in the *BBI 3* case [663]

> The operative phrase as far as the mandate of the Commission under Article 257(4) is concerned is to 'verify that the initiative is supported by at least one million signatures of registered voters'. The questions the Commission posed were what is to verify? How do you verify that a person is a registered voter? How do you go about the entire verification process?[125]

The IEBC *Verification Report* found that to verify 'is not to casually look at [the] information presented to you but to take steps that will allow one to affirm even under oath the correctness, accuracy, truthfulness or exactness of the information',[126] and further stated the view that:

> [T]he verification entails confirming that the initiative is supported by registered voters as evidenced by their signatures. After reviewing practices in other jurisdictions… it was clear that a person mandated to verify signatures must satisfy herself or himself that the said signatures belong to the persons whose names appear against them.[127]

The IEBC is required to verify both the signatures and the fact that supporters are registered voters. The IEBC *Verification Report* determined that the proper sequence was a two-step process: to firstly ascertain that the supporters are 'at least one million' registered voters; and secondly to authenticate that the signatures appended are valid signatures of the registered voters.[128] If the initiative fails to meet the first step, carrying on with the next step is unnecessary.[129] Section 6A of the Elections Act and Rules 27A and B of the Elections (Registration of Voters) Regulations 2012 provide a reliable comparative analysis of what the IEBC is required to do in case of a voter verification for

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(Mwilu DCJ & VP) was correct to observe that the Administrative Procedures could not be invalidated on lack of quorum as there was no evidence that such Procedures were made and approved by less than three IEBC Commissioners.

125 See IEBC, *The Findings of the Commission on the Process of the Verification of Signatures for the Proposed Amendment to the Constitution of Kenya 2010 Through a Popular Initiative (Okoa Kenya Initiative)* (22 March 2016) para 8 (hereinafter 'the IEBC *Verification Report'*) as cited in the *BBI 1* case [735]; *BBI 2* case [379] (Musinga P). This was the report of the then-Chairperson (Ahmed Issack Hassan) of the IEBC on the verification process concerning the constitutional amendment initiative known as the *Okoa Kenya Initiative* in 2016. Emphasis added.

126 IEBC *Verification Report* as cited in the *BBI 1* case [736]; *BBI 2* case [379] (Musinga P).

127 IEBC *Verification Report* as cited in the *BBI 1* case [737]; *BBI 2* case [379] (Musinga P), 160-161 (Kiage JA).

128 *BBI 1 case* [741], [751]; *BBI 2* case [91] (Sichale JA) where the learned Judge observed that the verification of signatures does not envisage a forensic examination of the authenticity of the signatures given that the IEBC does not have a repository of signatures. See also the IEBC *Verification Report* para 13 as cited in the *BBI 1* case [739]; *BBI 2* case [379] (Musinga P), 161 (Kiage JA), [151] (Tuiyott JA); *BBI 3* case [867], [868] (Ibrahim SCJ).

129 IEBC, Administrative Procedures for the Verification of Signatures. See also the *BBI 1* case [741].

elections.[130] The IEBC has acknowledged that there are no 'statutory procedures or timelines for the verification of supporters of constitutional amendment drives through [the] popular initiative'[131] and developed Administrative Procedures, as already stated.

A call is made to develop a legislative framework for the ascertainment of the registered voters and authentication of the signatures of registered voters. However, in the absence of such legislation on the verification of signatures and national referendum, such processes can be carried out in accordance with the constitutional principles under Article 10 of the Constitution.[132] The IEBC must allow the voters to verify their signatures. It can release an interim verified list of supporters of any proposed constitutional change and ask those whose signatures have been captured without their consent to report to it within a reasonable time.

4.2.3 Approval stage

The third stage is the approval by the County Assemblies. Once the draft Bill has been submitted to all forty-seven County Assemblies, it must be considered within three months after the IEBC submits it per Article 257(5). The passage through the County Assemblies stage gives an opportunity for more public participation because this is an obligation in legislative affairs per Article 196. The three months' timeline for consideration of the draft Bill per Article 257(5) and (6) is meant for the Assemblies to solicit public input.[133] However, County Assemblies do not have any role in improving, altering or modifying the contents of any Amendment Bill.[134] The County Assemblies must consider and either approve or reject the draft Bill as a whole because any attempts to alter it goes against the spirit of a popular initiative and is unconstitutional, illegal, invalid, null and void *ab initio*.[135] After approval of the draft Bill, the Speakers of the County Assemblies deliver a

130 *BBI 1* case [749].

131 The IEBC noted this concerning the *Punguza Mizigo* initiative. See the *BBI 1* case [754].

132 *BBI 1* case [606], [783xv].

133 *BBI 3* case [307] (Koome CJ & P). See generally also *Abe Semi Buere v County Assembly of Tana River & Another; Speaker of The National Assembly & Another (Interested Parties)*, HC Petition No. E001 of 2021; [2021] eKLR where Nyakundi J established that the County Assembly of Tana River County passed a Resolution of Tuesday, 23 February 2021, which approved the BBI Amendment Bill without any public participation, and this was correctly declared unconstitutional.

134 *BBI 3* case [876] (Ibrahim SCJ). See also the *BBI 2* case 137 (Kiage JA).

135 *BBI 2* case [128] (Okwengu JA).

copy jointly to the Speakers of the National Assembly and Senate, with a certificate of approval from the respective County Assembly.

Article 257(5) and (7) uses the terms 'consideration' and 'approved' in relation to the Amendment Bills by the County Assemblies. The question is whether this allows County Assemblies and Parliament to alter the Bill's contents to incorporate views expressed during public participation. The correct answer is in the negative. A popular initiative is an initiative of the Kenyan people. This does not allow the County Assemblies and Parliament to alter any Amendment Bill to incorporate views gathered through public participation. To do so would defeat the constitutional principles and values[136] such as popular sovereignty per Article 1(1). County Assemblies and Parliament cannot hijack the process, take over Amendment Bills under Article 257 or amend the Bills presented to them.[137] If they do so, the meaning of a popular initiative would be lost as this would be akin to turning the popular initiative into a parliamentary initiative via the backdoor.[138] The KeHC was of the view that the consideration of a Bill means to properly understand such Bill and the views from public participation should inform the County Assemblies to either approve or reject the Bill wholly.[139] Therefore, any failure to incorporate views of public participation does not violate public participation.

4.2.4 Passage stage

The fourth stage is the passage, and the role player is Parliament (National Assembly and Senate). Once a Bill is approved by a majority of the County Assemblies (at least twenty-four County Assemblies), the Bill is introduced in Parliament without any delay as per Article 257(7). The Amendment Bill is introduced in both Houses of Parliament. This stage is another crucial stage for public participation.

Article 256(2) provides that 'Parliament shall publicise <u>any Bill</u> to amend this Constitution, and facilitate public discussion about the Bill'.[140] A structural reading of this provision

136 Art. 259(1)(a) of the Constitution enjoins Courts to interpret the Constitution in a manner that promotes its purposes, values and principles.
137 *BBI 1* case [783 xvi].
138 *BBI 1* case [609].
139 *BBI 1* case [610].
140 Emphasis added.

implies that Parliament must publicise any Amendment Bill and facilitate public discussion, and this also applies to a Bill that goes to Parliament under a popular initiative.[141] There is also a general obligation on Parliament to facilitate public participation in the legislative processes under Article 118. The Bill is passed if it is supported by a majority of the Members of each House per Article 257(8).

4.2.5 Assent and referral stage

The fifth stage is the assent and referral by the President. If Parliament passes the Bill, it is submitted to the President for assent per Article 256(4) and (5). The President assents to the Amendment Bill and publishes the same within thirty days after the enactment by Parliament. If the Bill relates to Article 255(1) matters, the President, before assenting the Bill, must request the IEBC to conduct a national referendum for the approval of the Bill. In the *BBI 1* case, the Judges wrongly held that the President has powers to determine whether or not a national referendum is to be held.[142] Per the purposive interpretation of Article 257(9), as read with Article 256(4) and (5), the President has no power to determine whether or not an Amendment Bill has to be referred to a national referendum. Article 256(5) uses the word 'shall' to mean that the President has no option but to request the IEBC to conduct the national referendum once the Amendment Bill reaches him. The President can only assent and publish the amendment Bill within thirty days (if such Bill contains matters unrelated to Article 255(1)). If the President does not assent and publish the Amendment Bill within thirty days, such Bill must stand assented to and published according to the operation of the law. If the Bill contains Article 255(1) matters, the President must (within thirty days) request the IEBC to conduct a national referendum within ninety days. Again, if the President fails to request the IEBC within thirty days; at the lapse of this period, the IEBC can proceed with the national referendum within thirty days. This legal principle is set out under Article 115(6) where, regarding an ordinary Bill, the same is 'deemed assented upon expiry of the period within which the President is supposed to take such action and/or fails to do so'.[143] The reasoning of Mwilu DCJ & VP

141 *BBI 3* case [308] (Koome CJ & P).

142 *BBI 1* case [492]. See also the *BBI 3* case [791] (Ibrahim SCJ) who wrongly observes that under Art. 257 the President is assigned the 'power to decide whether or not to hold a referendum'.

143 *BBI 3* case [459] (Mwilu DCJ & VP).

is correct that the role of the President is ceremonial, a mere formality, is not discretionary functions, and is mandatory and time-bound in the Kenyan democracy, and the roles all persons are only subject to the 2010 Constitution.[144] Articles 255, 256 and 257 do not assign any power to the President to determine whether a national referendum is to be held or not.

4.2.6 Referendum stage

The last stage is the referendum, in which the people vote for or against the Bill in a national referendum. If either the National Assembly or Senate fails to pass the Bill or if the Bill relates to Article 255(1) matters, the proposed amendment must be submitted to the people in a national referendum.[145] The national referendum is discussed in detail in part 5.2 of this Chapter below.

This stage serves as a national deliberative moment, therefore, the IEBC, must facilitate a broad participatory process[146] including voter education under Article 88(4)(g). Section 40 of the Elections Act on voter education operationalises Article 88(4)(g) and provides as follows:

> (1) The Commission shall, in performing its duties under Article 88(4)(g) of the Constitution establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.
> (2) The mechanisms under subsection (1) shall include provision for partnership with other agencies and non-state actors in the provision of voter education.

Public participation includes civic education to provide objective education on the Bill to be presented to the national referendum. The mode, extent, scope, degree, stages, extent and proof of public participation should be determined on a case-to-case basis. As already stated, public participation must be a meaningful engagement with the Kenyan people and not an illusion.[147]

The IEBC's obligation for voter education is activated once there is a context to conduct a national referendum. This is because per Article 88(4), voter education is linked to

144 *BBI 3* case [459] (Mwilu DCJ & VP).
145 Art. 257(10) of the 2010 Constitution.
146 *BBI 3* case [309] (Koome CJ & P).
147 *BAT* case [96].

IEBC's role in 'conducting or supervising referenda and elections'. Therefore, the IEBC's obligation of voter education is activated after Article 257(10), where the President issues a notice to hold a national referendum for approval of the Bill.[148] There is no need to undertake voter education and sensitisation on the Amendment Bill, as this is only carried out before the national referendum after Parliament approves or rejects the Bill and if the Bill contains Article 255(1) matters.

5 Article 255(1) matters, national referendum and unrelated matters

This part discusses Article 255 of the 2010 Constitution, in particular the Article 255(1) matters, the national referendum under Article 255(2), and the matters unrelated to Article 255(1) under Article 255(3).

5.1 Article 255(1) matters

History reveals that the amendments of the previous Constitution were controversial.[149] The amendment provisions were divided into two categories: ordinary and specially entrenched provisions. On the one hand, the ordinary provisions could only be amended by three-quarters of all the members of both Houses of Parliament.[150] On the other hand, the specially entrenched provisions required three-quarters of all the members in the House of Representatives and nine-tenths of all Senators to amend[151] and was subject to a national referendum with the support of two-thirds of the voters.[152] The specially entrenched provisions included citizenship, human rights, and the Judiciary.[153] In practice, however, it proved easy to amend the previous Constitution. For example, in 1965, the government (read Executive) had enough support in Parliament to amend the previous Constitution and remove the distinction between the specially and ordinary entrenched provisions.[154] The difference between the entrenched and non-entrenched or

148 *BBI 3* case [300] (Koome CJ & P).
149 *BBI 3* case [1151] (Njoki Ndungu SCJ).
150 Section 71(2) of the 1963 Independence Constitution (Repealed).
151 Section 71(6) of the 1963 Independence Constitution (Repealed).
152 Section 71(3), (4) and (5) of the 1963 Independence Constitution (Repealed).
153 Schedule 4 of the 1963 Independence Constitution (Repealed).
154 *BBI 3* case [189] (Koome CJ & P).

ordinary provisions is that the former requires stringent mechanisms to be put in place for their amendments.

Article 255(1) of the 2010 Constitution can be traced to the preparatory drafting documents in the Constitution-making process. During this process, the CKRC *Final Report* captured the sentiments of the people's voice, that was as follows:

(a) The people should be involved in changing certain constitutional provisions via national referenda and,
(b) A distinction should be made between the non-entrenched and entrenched constitutional provisions with stringent mechanisms for amending the entrenched provisions, including the constitutional supremacy, the Bill of Rights, the Judiciary, public finance, public security, and the government system.[155]

The CKRC recommended that:

(a) The new Constitution should have entrenched provisions, such as human rights.
(b) The entrenched provisions should include the amendment procedures, popular sovereignty, the constitutional supremacy, the Bill of Rights, the separation of powers, and the provisions on independent commissions and bodies.[156]

The CKRC *Final Report* captured this recommendation and concluded as follows:

> The amendments to the Constitution relating to the supremacy of the Constitution, territory of Kenya, sovereignty of the people; principles, values and goals of the Republic; the Bill of Rights, term of office of the President; the independence of the Judiciary and Constitutional Commissions and Offices; functions of Parliament, values and principles of devolution; and the Chapter on Amendments to the Constitution should be approved by the people in a Referendum.[157]

Barber opines that entrenchment is a tool that makes constitutional amendments more difficult.[158] Hein correctly observes that contemporary constitutions entrench clauses that are either more difficult than expected or even impossible to amend.[159] These entrenched provisions are controversial in democracies, where they are seen as both maintaining the

155 CKRC *Final Report* 75.
156 CKRC *Final Report* 76.
157 CKRC *Final Report* 449.
158 See generally Nicholas W Barber, 'Why Entrench?' (2016) 14(2) IJCL 325-350.
159 See generally Michael Hein, 'Impeding Constitutional Amendment: Why are Entrenchment Clauses Codified in Contemporary Constitutions?' (2019) 54 Acta Politica 196-224.

stability of rules and unnecessary hurdles to exercising popular sovereignty. This is similar to Kenya!

Some of the recommendations and conclusions of the CKRC *Final Report* found their way under Article 255(1) of the 2010 Constitution, which came with almost similar provisions. Doubtless, the constitutional amendment process under Chapter 16 aligns with the sentiments, recommendations and conclusions made by the people and CKRC during the constitutional review process. Article 255(1) provides for the constitutional amendment of ten matters that require a national referendum, that is:

(a) Constitutional supremacy;
(b) Kenya's territory;
(c) Popular sovereignty;
(d) National values and principles of good governance;
(e) Bill of Human Rights;
(f) President's term of office;
(g) Independence of the Judiciary, commissions and independent offices;
(h) Parliament's functions;
(i) Devolution; and
(j) Chapter 16 on constitutional amendment provisions.

Njoki Ndungu SCJ is of the view that 'entrenched provisions act as a vital safeguard of sacrosanct constitutional tenets'.[160] The framers of the 2010 Constitution created a distinction between 'non-entrenched' and 'entrenched' provisions. This resulted in the enactment of Article 255(1) to contain the entrenched and the other constitutional provisions to contain the non-entrenched. Lenaola SCJ observed that the 2010 Constitution is amendable by processes provided by it, that is, by the parliamentary and popular initiatives for the non-entrenched and entrenched provisions, respectively.[161] The entrenched clauses are those provisions whose amendment requires ratification by the people in a national referendum.

160 *BBI 3* case [1154] (Njoki Ndungu SCJ).
161 *BBI 3* case [1449] (Lenaola SCJ).

Article 255(1) relates to the entrenched provisions that form the basic structure of the 2010 Constitution. This basic structure can only be amended by the people exercising their direct supreme sovereign power in a national referendum. Okwengu JA correctly observed that the drafters identified Article 255(1) thematic areas which are the Kenyan basic structure or pillars as the 2010 Constitution is explicit and self-sufficient concerning amendments, safeguards public participation and national referendum.[162] The basic structure of a Constitution is further discussed in detail in Chapter four of this study.

5.2 National referendum

The approval of constitutional amendments through a referendum under Article 255(2) of the 2010 Constitution must meet two conditions. First, at least twenty per cent of the registered voters in each of at least half of the counties (twenty-four counties) must vote in the national referendum. Secondly, the amendments must be supported by a simple majority of the citizens voting in the national referendum. Lutta correctly observes that:

> The overriding objective of this futuristic provision is to prevent myopic, pernicious and political amendments by engraving the principle of consultation, negotiations and deliberation between the people and the various arms and layers of government.[163]

On the one hand, the amendment of the entrenched provisions under Article 255(1) via the popular initiative requires various stages. First, there must be public participation in all the stages of the constitutional amendment process per Article 10(2)(a). Secondly, the formulation of an Amendment Bill and collecting signatures of one million registered voters must be verified by the IEBC per Article 257(1) and (4). Thirdly, support for the initiative is achieved via the approval of the Amendment Bill by a majority of the County Assemblies (twenty-four) per Article 257(7). Fourthly, the Bill is considered by Parliament per Article 257(8). Fifthly, the Bill should be subjected to a national referendum in Article 255(2), in which the two conditions explained above must be met. Sixthly, in the County Assemblies and Parliament, the amendment Bill must be subjected to a further public

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162 *BBI 2* case [82] (Okwengu JA).

163 Joseph Lutta, 'The Constitutional Amendments Bill, 2020: A Basic Structure Doctrine Critique' (2021) 17 LSKJ 37, 40.

participation per Articles 196 and 118, respectively. Lastly, Article 88(4)(g) imposes an obligation on the IEBC to conduct voter education before the national referendum.

On the other hand, parliamentary initiative amendments can also be used to amend the entrenched provisions per various stages. Firstly, per Article 10(2), public participation must inform all stages of the amendment process. Secondly, the Amendment Bill goes to Parliament per Article 256. Thirdly, the Bill shall not be called for a second reading in either House of Parliament within ninety days after its first reading, per Article 256(1)(c). Fourthly, the Bill is passed by Parliament if in both its second and third readings, it is supported by not less than two-thirds of all the members of that House per Article 256(1)(d). Fifthly, Parliament must publicise the Bill and facilitate public discussion under Articles 118 and 256(2). The President must submit the Bill to IEBC to conduct a national referendum within ninety days, per Article 256(5). Seventhly, the Bill must be subjected to a national referendum in Article 255(2), in which the two conditions explained above should be met. Lastly, Article 88(4)(g) imposes an obligation on the IEBC to conduct voter education. Under section 40 of the Elections Act, the IEBC is responsible for continuous voter education and curriculum.

The multi-tiered amendment process per Article 255 delineates the entrenched provisions. Article 255(1) matters can be amended via a parliamentary and popular initiative amendments per Articles 256 or 257, respectively. In both initiatives, there is a higher threshold for amending the entrenched provisions including public participation and a national referendum. Therefore, the amendment of the entrenched provisions is a multi-institutional, multi-staged and time-consuming process that ensures that the process is inclusive, transparent, engenders the public participation, and a national referendum.[164] Under the multi-tiered amendment process, unlike the process under section 47 of the previous Constitution, the people exercise their supreme sovereignty via a national referendum.

[164] *BBI 3* case [208] (Koome CJ & P).

5.3 Matters unrelated to Article 255(1)

Article 255(3) of the 2010 Constitution provides that constitutional amendments that are unrelated to the ten matters under Article 255(1) are enacted by Parliament or the people and Parliament per Articles 256 and 257, respectively. This provision should be interpreted to mean that any other constitutional amendments that do not relate to the ten matters under Article 255(1) can be made by Parliament only or by the people and Parliament per Articles 256 and 257, respectively.

On the one hand, for a popular amendment having been passed by Parliament, all those amendments unrelated to Article 255(1) matters stand passed. What goes to the national referendum is, the referendum questions of the Article 255(1) matters, depending on the contents of the Amendment Bill. On the other hand, for a popular amendment not passed by Parliament, all those amendments in the Amendment Bill are presented to the people in a national referendum. In addition to the ten matters under Article 255(1), such an amendment should contain other questions framed per the 'unity of content' principle from the Preamble, eighteen Chapters and six Schedules of the Constitution. For example, matters of land and environment, citizenship, leadership and integrity, public service, public finance, and national security can each have a referendum question formulated. The 'unity of content' principle is discussed in detail in Chapter four of this study. All the amendments unrelated to Article 255(1) matters stand enacted for a parliamentary initiative after having been passed by Parliament. What goes to the national referendum is, the referendum questions of Article 255(1) matters, depending on the contents of the Amendment Bill.

6 Concluding remarks

This Chapter has critically analysed the pre-requisites in constitutional amendments, the constitutional remits of parliamentary and popular initiative amendments, and Article 255(1) matters, national referendum and unrelated matters. Two pre-requisites in constitutional amendments were discussed: public participation and the composition and quorum of the IEBC. Public participation should be incorporated in all the stages of the constitutional amendment processes, albeit to varying degrees and extents, depending

on the nature of the specific stages. The IEBC is always constitutionally composed and quorate if it has the minimum prescribed three commissioners to verify popular initiative amendments and conduct national referenda to perfect constitutional amendments. Both the parliamentary and popular initiative amendments are multi-staged, and the legality of any proposed constitutional amendments should be assessed using the multi-staged approach. All actors and players should strictly follow all the stages of the initiative amendments. Article 255(1) matters are ring-fenced as they require a national referendum to be passed. The people are the 'last rubberstamp' in constitutional amendments on matters listed under Article 255(1). Parliament only or the people and Parliament can amend the matters unrelated to Article 255(1). In popular initiative amendments, matters unrelated to Article 255(1) can also go to a national referendum if not passed by Parliament. Doubtless, all initiatives to amend the 2010 Constitution converge at the national referendum. The threshold for the national referendum is relatively high, and together with the multi-tiered approach, it effectively cures the culture of hyper-amendments that bewildered the previous Constitution. The next Chapter examines the issues arising from Kenya's post-2010 constitutional amendments.

CHAPTER FOUR

ISSUES ARISING IN POST-2010 CONSTITUTIONAL AMENDMENTS

1 Introduction

The Kenyan experience in post-2010 constitutional amendments shows that there are arising issues, including (a) whether the basic structure 'doctrine' applies to the Kenyan context, (b) whether there should be separate and distinct national referendum questions, and (c) whether State actors can initiate popular initiative amendments. This Chapter critically analyses these issues and suggests solutions using a comparative approach of jurisdictions such as South Africa, India, and Lithuania. South Africa is chosen because Kenya's Constitution borrows heavily from the South African counterpart. The application of the Indian basic structure 'doctrine' in Kenya has been determined by superior courts thus making it an interesting comparative study. Lithuanian constitutional jurisprudence on the 'unity of content' principle in national referenda is relevant to Kenya.

2 Basic structure 'doctrine'

The application of the basic structure 'doctrine' in the Kenyan context under the 2010 Constitution has been a subject of debate since the Building Bridges Initiative (BBI).[1] This part defines the basic structure of a Constitution, discusses the basic structure 'doctrine' in India and South Africa and the Kenyan basic structure under the 2010 Constitution, and the inapplicability of the basic structure 'doctrine' in Kenya.

2.1 Defining the basic structure of a Constitution

The basic structure of a Constitution can be defined as its basic elements or framework, fundamental and essential features and the design and architecture.[2] While some Constitutions have explicitly provided for the basic structure, the basic structure in other

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1 The Building Bridges Initiative (BBI) has a history of the 'Handshake' between Uhuru Kenyatta and Raila Odinga, who came together after the 2017 presidential rerun, which the latter boycotted. In a mockery ceremony, Odinga was sworn in as the 'People's President' by the controversial lawyer Miguna Miguna. Uhuru then formed a Taskforce to spearhead the BBI and promote national unity. The Taskforce later morphed into a Steering Committee whose functions included proposing constitutional amendments. The Committee drafted the Constitution of Kenya (Amendment) Bill 2020, commonly referred to the BBI Amendment Bill. The constitutionality of the Bill was challenged in all three superior courts, the Kenyan High Court (KeHC), the Court of Appeal, and the Supreme Court of Kenya (KESC), in what is commonly referred to as the *BBI* cases.

2 *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) [726] (Ibrahim SCJ) (hereinafter 'the *BBI 3* case').

Constitutions can only be found impliedly. While it is easy to point out the basic structure in Constitutions where it is expressly provided for, there is no consensus on the contents of the basic structure where it is implied. In the case of transformative Constitutions,[3] the basic structure can be expressly or impliedly identified. Notably, amending the basic structure requires more stringent and complex procedures than provisions that do not form part of it. Kenya and South Africa are good examples. Ultimately, amending the basic structure involves the people in a national referendum in some countries, such as Kenya.

The Constitution of the Republic of South Africa, 1996, and Kenya's 2010 Constitution are good examples of Constitutions that have expressly provided for their basic structure. For example, section 1 of the 1996 Constitution provides founding values that are arguably the basic structure of the South African Constitution, such as human rights, human dignity, equality, non-racialism and non-sexism, constitutional supremacy, rule of law, and multi-party democracy. Under section 74 of the South African Constitution, the amendment of the founding values requires a high threshold and special majorities in Parliament.[4] Kenya's 2010 Constitution also expressly provides for popular sovereignty and constitutional supremacy under Articles 1 and 2, respectively. Under Article 255(1) of the 2010 Constitution, ten matters are listed as requiring a national referendum for their amendment: popular sovereignty; constitutional supremacy; human rights; Kenya's territory; independence of the Judiciary, commissions, and offices; national values and principles of good governance; the President's term of office; devolution; Parliament's functions; and the amendment provisions.[5] Arguably, these ten listed thematic matters form part of the basic structure of Kenya's 2010 Constitution.

While it is relatively easy to identify the basic structure of the South African Constitution and Kenya's 2010 Constitution, the same cannot be said of the Indian Constitution. The Indian Constitution 1949 (as amended) does not expressly provide for the basic structure. However, the Supreme Court of India (SCI) and other Indian courts have judicially crafted

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3 Transformative constitutions in the Global South include those of the following countries: Kenya, South Africa, India, Colombia, Ecuador, Venezuela, and Bolivia.

4 The basic structure 'doctrine' in South Africa, as discussed in part 2.3 of this Chapter below, also explains the amendment procedures for the South African Constitution.

5 See the basic structure of the 2010 Constitution and the inapplicability of the basic structure 'doctrine' in Kenya as discussed under parts 2.4 and 2.5 of this Chapter, respectively.

what constitutes the basic structure under the Indian context. For example, in *Kesavananda Bharati v State of Kerala & Another*,[6] the SCI via Sikri CJ explained that the basic structure includes the constitutional supremacy, constitutional secular and federal character, separation of powers, and human dignity and freedom. In the same case, per Shelat and Grover JJ, building a welfare State and the nation's unity and integrity also form part of the basic structure. Hegde and Mukherjea JJ added that India's sovereignty is a basic structure. Reddy J stated that the basic structure is found in the constitutional preambular elements, including the sovereign democratic Republic, the parliamentary democracy, and the three State organs (Legislature, Executive, and Judiciary). Per Khanna J, the basic structure is the democratic government, the State's secular character, and judicial review. Ray J identified the following as the basic structure: the constitutional supremacy, the Republican and democratic government, India's sovereignty, the constitutional secular and federal character, the separation of powers between the three State organs, human rights, human dignity, a welfare State, and India's unity and integrity. In *Minerva Mills Ltd v Union of India*,[7] Bhagwati, J (concurring) noted two basic elements: 'the limited amending power of the Parliament and the power of judicial review'.[8] In *Indira Gandhi v Rajnarain*,[9] the SCI added democracy, the constitutional preambular, equality, and the rule of law as the basic structure. This shows that the Judges in the *Kesavananda* case and subsequent cases have had different views of the Indian basic structure, and the list is not exhaustive. Okwengu JA correctly acknowledges the problems with the contents of the Indian basic structure in the following terms: 'Although the judges were agreed that the Indian Constitution has a basic structure, they were not agreed on what exactly the basic structure is. Each judges identified a different aspect'.[10]

While it is undeniable that all transformative Constitutions have a basic structure, it is a good practice for such structure to be expressly provided. The South African Constitution

6 (1973) 4 SCC 225; AIR 1973 SC 1461 (hereinafter 'the *Kesavananda* case').
7 (1980) 3 SCC 625; AIR 1980 SC 1789 (hereinafter 'the *Minerva Mills* case').
8 *Minerva Mills* case [3] (Bhagwati J).
9 AIR 1975 AC 2299.
10 *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others* (Amicus Curiae) [2021] eKLR [66] (Okwengu JA) (hereinafter 'the *BBI 2* case').

and Kenya's 2010 Constitution have expressly provided such structure and went ahead to provide more stringent procedures and a high threshold for their amendment to maintain constitutional stability. Kenya even goes a step further in requiring the approval of the amendments to the basic structure through a national referendum. As such, the founding values and basic structure amendment procedures are more stringent than amending other provisions. The Indian Constitution is silent on what constitutes basic structure, bringing about problems, and there is disagreement on what constitutes the basic structure, as Judges have different perspectives.

2.2 Indian basic structure 'doctrine'

The *Black's Law Dictionary* defines a 'doctrine' as a 'principle, especially a legal principle, that is widely adhered to' while a legal principle is defined as 'a background concept that may influence a court's decision despite not being outcome-determinative'.[11] Legal 'doctrines' usually set the guidelines for future settlement of disputes, take fact-dependent forms, and are limited in breadth.[12] Therefore, 'doctrines' are widely accepted as legal principles of long usage. Wanjala SCJ correctly explains that the term 'doctrine' is a 'statement of legal principle, rooted in long usage and wide acceptance as to be easily identifiable in the cosmos of law'.[13] Roznai defines the basic structure 'doctrine' as a:

> [J]udicial principle according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basic structure or identity.[14]

Although it is not settled that the basic structure 'doctrine' is a 'doctrine' per se,[15] it is generally accepted that it has attained the status of a 'doctrine' in the jurisdictions where it is used, such as India.

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11 Bryan A Garner, *Black's Law Dictionary* (9th edn, West 2009) 553.

12 See generally Emerson H Tiller and Frank B Cross, 'What is Legal Doctrine?' (2006) 100(1) NULR 517-533.

13 *BBI 3* case [972] (Wanjala SCJ).

14 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Power* (OUP 2017) 42-43.

15 For example, the *BBI 3* case [1000] (Wanjala SCJ) believes the basic structure 'doctrine' is 'no doctrine, but a notion, a reasoning, a school of thought, or at best, a heuristic device'. See also the *BBI 3* case [1458] (Lenaola SCJ) who argues that the basic structure 'doctrine' cannot be qualified

The first foothold of the basic structure 'doctrine' in the Indian courts was in 1967 in the case of *Golaknath v State of Punjab*,[16] where the SCI stated that there was no room for implied limitations on the Parliament's constitutional amendment power. MK Nambiar, a member of the Indian Bar, advanced the argument for implied constitutional limitations on the amending power. Nambiar owed this argument to the scholarly works of a German professor and jurist, Dietrich Conrad, who was conversant with Indian law and history.[17] Prof. Conrad, in February 1965, while visiting India, delivered a lecture titled 'Implied Limitations of the Amending Power' on implied limits to the constitutional amendment power at the Law Faculty, Banaras Hindu University.[18] Prof. Conrad sent a paper on the same subject to Prof. TS Rama Rao in Madras for his comments, which attracted Nambiar's interest.[19] The SCI acknowledged this connection of the basic structure 'doctrine' to Germany in the case of *M. Nagaraj & Others v Union of India & Others*[20] where it was stated that: 'The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution'.[21] Therefore, it is safe to conclude that Prof. Conrad imported the basic structure 'doctrine' to India.

It is not difficult to see why Prof. Conrad, would advance implied limits to the constitutional amendment power. The Basic Law of Germany 1949, Article 79(3) expressly prohibits constitutional amendments to the federal structure and basic principles under Articles 1

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as rule or principle of law widely applied and incorporated in various jurisdictions, and cannot be recognised as such.

16 AIR 1967 SC 1643.

17 Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) The Indian Year Book of International Affairs 375-430; Setu Gupta, 'Vicissitudes and Limitations of the Doctrine of Basic Structure' (2016) ILI Law Review 110, 111; Martin van Staden, 'Property Rights and the Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill' (2020) 14(2) PSLR 169, 176.

18 Prof. Conrad was formerly the Law Department's Head at the South Asia Institute of the University of Heidelberg. See Gupta, 'Vicissitudes and Limitations of the Doctrine of Basic Structure' 111; Van Staden, 'Property Rights and the Basic Structure of the Constitution' 175; Monika Polzin, 'The Basic-structure Doctrine and its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting' (2021) 5(1) ILR 45, 54.

19 Gupta, 'Vicissitudes and Limitations of the Doctrine of Basic Structure' 111.

20 (2006) 8 SCC 212 (hereinafter 'the *Nagaraj* case').

21 *Nagaraj* case 243.

and 20 on social democracy and human rights.[22] The framers of the Basic Law intended to create a Constitution to guard against the emergence of the Weimar Republic's multi-party democracy or the Third Reich's authoritarianism, as the Germans healed from the Nazi era.[23] Article 79(3) on the amendment of the Basic Law provides as follows:

> Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

The history and evolution of the basic structure 'doctrine' can be traced from India, where it first received judicial recognition in the *Kesavananda* case. This case concerned the State of Kerala's use of land legislation to acquire private land to fulfil her socio-economic obligations. Subsequently, Parliament passed the 24th, 25th, and 29th Constitutional Amendments, which shielded Kerala's land legislation from being challenged in Court. These Amendments had a relationship-altering effect between the Judiciary and Legislature. The petitioners argued for basic elements meant to be permanent under the Indian Constitution, such as human rights, India's sovereignty and integrity, voting rights, judicial independence, and the implied limitations of the Parliament's constitutional amendment power. The respondents were against the Constitution's basic elements and theory of implied limitations. They argued for unlimited amendment power on the part of the Parliament, as the Constitution could be amended by addition, variation, or repeal as long as no vacuum was left in the country's governance.[24] In this context, the SCI addressed whether there were limits to Parliament's constitutional amendment power under Article 368 of the Indian Constitution. Article 368(2) provides that:

> An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to

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22 This eternity clause contains express constitutional limits on amendment and is partly interpreted via the lens of Carl Schmitt's theoretical works on implied constitutional amendments. See Polzin, 'The Basic-structure Doctrine and its German and French Origins' 45.

23 *BBI 3* case [691] (Ibrahim SCJ).

24 A Lakshminath, *Basic Structure and Constitutional Amendments: Limitations and Justiciability* (Deep & Deep 2002) 134-135.

> the Bill, the Constitution shall stand amended in accordance with the terms of the Bill…

The SCI (7-6 majority) held that the Constitutional Amendments were unconstitutional as they destroyed the basic structure. The majority supported the inherent limitations and held that the Parliament's constitutional amendment power could not be used to amend the basic structure and human rights. Hedge and Mukherjea JJ further stated that:

> Our Constitution is not mere political document. It is essentially a social document. It is based on social philosophy and every social philosophy like every religion has two features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. (. . .) The personality of the Constitution must remain unchanged.[25]

The minority believed that the amending power under Article 368 was unlimited and could be used to amend any basic structure, including human rights. The basic structure 'doctrine' limits the amending power by placing the basic structure beyond the Parliament's constitutional amendment power. The judicial emergence and development of the 'doctrine' was a response to Prime Minister Gandhi's far-reaching constitutional amendment attempts. Per this 'doctrine', Parliament's constitutional amendment power is limited.

The *Kesavananda* case has been criticised for failing to identify the basic structure that is unamendable. The *Kesavananda* case did not provide a precise list of the basic structure, thus creating a common law 'doctrine' that develops on a case-by-case basis: a 'Constitutional quicksand'.[26] However, the list of basic structure has no binding authority, as the Judges made it in *obiter*, and it was not among the issues to be addressed by the SCI. The list is only persuasive and merely illustrates what entails the basic structure.

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25 *Kesavananda* case [690] (Hedge and Mukherjea JJ).

26 Yaniv Roznai, 'Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers' (PhD thesis, LSE 2014) 56.

The SCI also endorsed the idea of declaring constitutional amendments unconstitutional based on substantive grounds. This clearly shows that the constitutional amendment processes in India are exclusively vested in Parliament. As a result, such constitutional amendment processes fall under the flexible model in the flexible-rigid dichotomy of categorising the nature of constitutional amendment powers.[27] In India, where Parliament has the final word on amendments, the basic structure 'doctrine' prohibits constitutional amendments that destroy the basic structure.

The basic structure 'doctrine' was further elaborated in the *Minerva Mills* case. In this case, there was a challenge to the 42nd Constitutional Amendment via which Parliament sought to bar judicial review of constitutional amendments. The SCI struck down the constitutional amendment and found that the Indian Constitution had conferred a limited Parliament's constitutional amending power (one of the basic features). Therefore, Parliament could not expand that very limited power into an absolute power to destroy the basic structure. The SCI held as follows:

> Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage, therefore, you cannot destroy its identity.[28]

Therefore, the basic structure 'doctrine' as applied in India protects the basic elements from amendment by Parliament without recalling the direct supreme sovereign power of the Indian people.

2.3 Basic structure 'doctrine' in South Africa

The Constitution of South Africa, 1996, section 74 is relevant in constitutional amendments. The process of amending the 1996 Constitution must comply with ordinary procedures, such as public participation, as set out under section 74. This part discusses

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27 Zachary Elkins and others, *The Endurance of National Constitutions* (CUP 2009) 81; Morris Kiwinda Mbondenyi and John Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa 2012) 14-15; Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 95.

28 *Minerva Mills* case [21] (Chandrachud CJ).

the amendment procedures under section 74 and examines whether the basic structure 'doctrine' applies in the South African context.

2.3.1 Amending the South African Constitution

Section 74 of the 1996 Constitution deals with constitutional amendment Bills. Section 74(1) provides that sections 1 and 74 of the 1996 Constitution may be amended by a Bill passed by at least 75% of the members of the National Assembly (NA) and at least six votes of the National Council of Provinces (NCOP). Section 74(2) provides that the Bill of Rights can be amended by a two-thirds majority of the NA members and at least six votes of the NCOP. Section 74(3), which relates to amending all other provisions, also requires a two-thirds majority of the members of the NA and at least six votes of the NCOP.[29] Therefore, section 74(1), (2), and (3) provide for different thresholds for amending the founding values under section 1 and amendment provisions under section 74, the Bill of Rights, and the other constitutional provisions.

At the time of writing (October 2024), the 1996 Constitution had been amended eighteen times. None of these constitutional amendments have been to section 1, section 74, and the Bill of Rights. This means that the 1996 Constitution has thus far only been amended per section 74(3). Per section 74(3), the NA can solely amend the 1996 Constitution if the amendment Bill does not relate to sections 1 and 74, the Bill of Rights, and section 74(3)(b) matters. Abebe correctly observed that the amendments to the 1996 Constitution are more merely on technical issues and uncontroversial with insignificant substantive or political effects, and none have radically altered the essential constitutional aspects.[30] This means that constitutional amendments that substantially alter the basic elements of the 1996 Constitution are yet to be seen.

Under section 74(4), constitutional amendment Bills may not include provisions other than amendments and connected matters. In terms of section 74(5), any money Bills and Bills

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29 Under section 74(3)(b), the NCOP must support an amendment by at least six votes if it affects the NCOP, alters the boundaries, powers, functions, and provincial institutions, or amends provisions dealing with provincial matters.

30 Adem Kassie Abebe, 'The Substantive Validity of Constitutional Amendments in South Africa' (2014) 131 SALJ 656, 661.

relating to equitable shares and allocations of revenue must at least thirty days before introduction by the person or Committee, be published for public comments, submitted to provincial legislatures for their views, and NCOP for public debate if the NCOP's passage of such Bills is not required. These requirements allow for public participation concerning the proposed amendments. Bills concerning a specific province or provinces are only passed if the respective province(s) have passed such Bills under section 74(8). Lastly, Bills passed by the NA and NCOP are presented to the President for assent before they become law.

Unlike in Kenya, section 74 does not require a national referendum to amend the constitutional provisions. Only a higher threshold of at least 75% of the NA members and six votes of the NCOP is required to amend sections 1 and 74, and two-thirds of the NA members and six votes of the NCOP are required to amend the Bill of Human Rights. The constitutional amendment processes must be accompanied by mandatory public participation, considering the people's views.

2.3.2 Inapplicability of the basic structure 'doctrine'

The superior courts have not adopted the basic structure 'doctrine' in South African jurisprudence. In passing, the South African Constitutional Court (ZACC) recognised that the 'doctrine' could be applicable in South Africa as shown in the cases below. However, it declined to decide the issue as it was beyond the issues for determination. In *Premier of KwaZulu-Natal, and Others v President of the Republic of South Africa and Others*,[31] it was in *obiter* remarked that:

> There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an "amendment" at all.[32]

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31 (CCT36/95) [1995] ZACC 10; 1995 (12) BCLR 1561; 1996 (1) SA 769 (29 November 1995) (hereinafter 'the *Premier of KwaZulu-Natal* case'). The Judge had the idea of constitutional dismemberment, which is different from constitutional amendment, but this is beyond the scope of this study.

32 *Premier of KwaZulu-Natal* case [47] (Mahomed DP).

In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*,[33] Sachs J stated that:

> There are certain fundamental features of parliamentary democracy, which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life — the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.[34]

Again, in *United Democratic Movement v President of the RSA and Others*,[35] the ZACC took note of the 'doctrine' but appears to move away from it. The ZACC 'assumed, for the sake of argument, the application of the basic structure doctrine, but then found that no basic feature was violated'.[36] In *S v Mhlungu*,[37] Sachs J hinted at the idea that the 1996 Constitution does have a basic structure but did not refer to the basic structure 'doctrine'. Sachs J explained that:

> The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.[38]

The Preamble of the 1996 Constitution is rich in founding values, including democracy, human rights, and social justice. The above pronouncements from the ZACC show that the Judges agreed that there is a basic structure of the 1996 Constitution. However, while

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33 1995 (10) BCLR 1289 (CC) (hereinafter 'the *EC Western Cape Legislature* case').

34 *EC Western Cape Legislature* case [204] (Sachs J). It seems the Judge had the idea of the Indian basic structure 'doctrine' in mind but was shy about referring to it. The reference to certain fundamental features of the Constitution that cannot be amended even if Parliament follows the amendment procedures is akin to what happens in India.

35 (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No. 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002) [15]-[17].

36 Roznai, *Unconstitutional Constitutional Amendments* 67.

37 1995 3 SA 867 (CC) (hereinafter 'the *Mhlungu* case').

38 *Mhlungu* case [112].

the superior courts recognise the existence of the basic structure ‘doctrine’, they are yet to determine its applicability in barring amendments to the South African Constitution.

Like Kenya, the South African Constitution has basic elements under sections 1 and 2, such as one sovereign democratic State, constitutional supremacy, rule of law, human rights, non-racialism and non-sexism, and multi-party democratic government. The 1996 Constitution has provided for explicit amendment provisions under section 74. The question is whether the basic structure ‘doctrine’ is applicable in South Africa? The correct answer is debatable. As discussed below, the ‘doctrine’ may not apply in South Africa.

The basic structure ‘doctrine’ serves in India to protect the basic constitutional elements from being destroyed by Parliament without involving the people. It also serves to engage the people actively and directly in amending the basic constitutional elements. The courts also have the role of judicial review, in which all proposed amendments can be reviewed to pass the constitutional muster. Section 368 of the Indian Constitution exclusively grants the amendment power to Parliament. However, public participation is a must. There are contextual and textual differences between India and South Africa. Van Schalkwyk correctly argues that:

> Since India does not have an equivalent of Article 1 in its Constitution and amendments there are much easier to do, the doctrine [basic structure ‘doctrine’] may be justifiable, because the basic structure of its Constitution is more defenseless than the South African equivalent.[39]

The South African Constitution has a much higher procedural threshold than its Indian counterpart, which a simple majority can amend; hence, it is more vulnerable to abuse by the Indian Parliament.

A recap of the Indian situation has been done to reflect whether the same situation exists in South Africa. Section 74 of the 1996 Constitution explicitly states that all provisions are amendable. Section 1, which contains the fundamental constitutional principles (founding values), is akin to the basic structure and has elevated constitutional protection against amendments by requiring a high threshold of at least 75% of all the NA members and at

[39] Cecile van Schalkwyk, ‘The Basic-Structure Doctrine: A Basis for Application in South Africa, or a Violation of the Separation of Powers?’ (2015) 12(2) LitNet Academic 347, 356.

least six votes of the NCOP. It is safe to argue that sections 1 and 74 are the most entrenched provisions of the 1996 Constitution that require a very high threshold to amend. Doubtless, the framers of the 1996 Constitution foresaw the amendments to sections 1 and 74 (that is why the framers made these provisions the most entrenched), and the ZACC has already accepted this fact.[40] This means that the framers never intended an absolute entrenchment of sections 1 and 74, constituting the Constitution's basic structure.[41] Therefore, all the provisions of the 1996 Constitution, including sections 1 and 74 and the Bill of Rights (Chapter 2), can be amended if the procedures set out under section 74 are strictly followed, including public participation, and the ZACC gives the go-ahead.

The ZACC is not above and must operate within the law, in terms of the rule of law. It draws its power from the 1996 Constitution and legislation, and it must respect fundamental constitutional principles, including separation of powers and checks and balances. Section 165(2) of the 1996 Constitution puts it beyond doubt that the courts are 'subject only to the Constitution and the law'. Van Schalkwyk argues that because of the separation of powers, the ZACC takes a conservative approach in reviewing decisions on constitutional amendments and is unlikely to adopt the basic structure 'doctrine'.[42] The question that follows is: What if there is a threat to constitutional democracy by a proposed constitutional amendment? Can the ZACC abandon its conservatism and apply the basic structure 'doctrine'? Van Schalkwyk answers this question in the affirmative.[43]

It is submitted that in case of a threat to constitutional democracy, the ZACC need not apply the basic structure 'doctrine'. Firstly, this is because the framers of the 1996 Constitution did not contemplate applying the 'doctrine', as it was available to choose from when the Constitution was drafted.[44] If the ZACC applies the 'doctrine', it would be akin to rewriting a new Constitution, which powers the Court does not have, a negation of the intention of the drafters, and a violation of the separation of powers. Secondly, section 74

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40 See generally *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC).

41 Van Schalkwyk, 'The Basic-Structure Doctrine' 349.

42 Van Schalkwyk, 'The Basic-Structure Doctrine' 357.

43 Van Schalkwyk, 'The Basic-Structure Doctrine' 359.

44 This argument is also supported by Van Schalkwyk, 'The Basic-Structure Doctrine' 356.

provides for amendment of all the constitutional provisions, including sections 1, 74, the Bill of Rights (Chapter 2), and other provisions using different thresholds. Lastly, the ZACC has powers to judicially review proposed constitutional amendments that go against constitutional democracy and can declare such amendments as unconstitutional, illegal, null and void *ab initio*. For these reasons, it is not advisable for the ZACC to import the Indian basic structure 'doctrine' as that would be ruinous judicial activism and overreach not contemplated by the drafters of the 1996 Constitution.

In summary, while the basic structure applies in the South African context, the basic structure 'doctrine' does not apply. Section 167(4)(d) of the 1996 Constitution provides that 'only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution'. This power that has been given to the ZACC is the safeguard against abusive constitutional amendments by Parliament. Such judicial power can be used to strike down proposed constitutional amendments that go against the procedural requirements under section 74 and constitutional values and principles found in the Preamble, sections 1 and 2, the Bill of Rights (Chapter 2), and elsewhere in the 1996 Constitution including democracy, transformative constitutionalism, separation of powers and checks and balances, constitutional supremacy, popular sovereignty, social justice, equality and non-discrimination, non-racialism and non-sexism, judicial review, human rights, and rule of law. This means the ZACC can declare proposed constitutional amendments unconstitutional, illegal, null and void *ab initio* without referring to the basic structure 'doctrine'. As a result, there is no need to import the Indian basic structure 'doctrine' in South African constitutional law theory and practice.

2.4 Kenyan basic structure under the 2010 Constitution

The 2010 Constitution does not refer to the terms basic structure and basic structure 'doctrine'. Article 255(1) relates to the entrenched constitutional provisions and forms the basic structure.[45] The ten thematic matters under Article 255(1) are:

(a) Constitutional supremacy;
(b) Kenya's territory;

[45] *BBI 2* case [184] (Okwengu JA).

(c) Popular sovereignty;

(d) National values and principles of good governance, including public participation;

(e) Bill of Rights;

(f) President's term of office;

(g) Judicial independence, commissions and independent offices;

(h) Parliament's functions;

(i) Devolved government: its structure, objects and principles; and

(j) Constitutional amendment provisions under Chapter 16.

The ten thematic matters can be amended, per the procedures under Articles 255(2) and (3), 256 and 257 (parliamentary and popular initiative amendments), by observing the constitutional principles, including public participation and the national referendum. The KESC Judges have correctly held that the 2010 Constitution has a basic structure that is different from the basic structure of 'doctrine'.[46] The 2010 Constitution has cherry-picked its most important substratum, which is the basic structure under Article 255(1), and provided for special stringent procedures for amending it. Article 255(1) matters form the design and architecture of the 2010 Constitution. Ibrahim SCJ correctly noted that the 'provision of Article 255 forms part of our Constitution's basic structure' and 'Articles 255 and 257 provide that amendment to the same requires approval by [a national] referendum'.[47] Lenaola SCJ also correctly identifies Article 255(1) as the basic structure and that 'every Constitution has pillars and building blocks without which it cannot stand'.[48] Ouko SCJ in the *BBI 3* case also noted that:

> There are sufficient safeguards to ensure that those provisions ring-fenced in Article 255(1) are secured against unwarranted amendments… Call them basic structure, fundamental structure, essential features, basic elements, basic frame-work, basic features, constitutional pillars, foundational values, essential features, salient features, constitutional fabric and other like variations, the structure in Article 255(1) is so sacred that it can only be amended in a particular way or

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46 *BBI 3* case [389] (Mwilu DCJ & VP). See also the *BBI 3* case [444] (Mwilu DCJ & VP) where she correctly found that the 'Constitution of Kenya 2010 does indeed have a basic structure', however, the basic structure 'doctrine' 'does not apply in the Kenyan constitutional context'. See also Gautam Bhatia, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya' (16 March 2023) SSRN 8 <http://dx.doi.org/10.2139/ssrn.4390358> accessed 18 July 2024.

47 *BBI 3* case [752] (Ibrahim SCJ).

48 *BBI 3* case [1470] (Lenaola SCJ).

> manner…Article 255(1) embodies the basic structure of the Constitution of Kenya.[49]

Lenaola J (as he then was) in *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others*,[50] disallowed the Constitution of Kenya (Amendment) Bill 2013 and stated that:

> [T]he basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the Judiciary is tasked with the responsibility of ensuring constitutional integrity ... The basic structure of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency, deriving from certain unalterable constitutional values and principles… where the basic structure or design and architecture of our Constitution are under threat, this Court [High Court] can genuinely intervene and protect the Constitution.[51]

In *Priscilla Ndululu Kivuitu & Another (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 Others v Attorney General & 2 Others*,[52] KeHC held that constitutional amendments under Article 255(1) or Article 257(1) can only be made with the citizens' involvement through a national referendum as follows: '[A]n amendment that upsets the basic structure of the Constitution could not be effected by Parliament without involving the people'.[53]

In *Attorney General & Another v Randu Nzai Ruwa & 2 Others*,[54] the Court of Appeal held that the 'respondents have a constitutional right to demand secession, but that can only be done within the confines of the Constitution as stipulated under Articles 255, 256 and 257 of the Constitution'[55] that requires a national referendum. In *Senate & 48 others v*

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49 *BBI 3* case [1807] (Ouko SCJ). Emphasis added. See also the *BBI 3* case [1864] (Ouko SCJ), where it is held that the 'Constitution has a basic structural posture ring-fenced in Chapter Sixteen'.

50 HC Petition No. 496 of 2013; [2013] eKLR (hereinafter 'the *CIC 2013* case'). This case concerned the determination of the constitutionality of a proposed amendment to the definition of a 'State officer' to exclude Members of Parliament, Members of the County Assembly, Judges, and Magistrates from the designated offices via the Bill that sought to amend Article 260 in respect of the definition of 'State office'. The principal objective of the Bill was to amend Article 260 to remove the above offices from the list of designated State offices.

51 *CIC 2013* case [62]. Emphasis added.

52 HC Petition 689 of 2008; [2015] eKLR (Korir, Mumbi Ngugi & Odunga JJ) (hereinafter 'the *Priscilla Ndululu* case').

53 *Priscilla Ndululu* case [158]. Emphasis added.

54 Civil Appeal No. 275 of 2012; [2016] eKLR (hereinafter 'the *Randu Ruwa* case'). In this case, there was a challenge to the prohibition of the Mombasa Republican Council (MRC), which advocated for secession of Coast Province of Kenya.

55 *Randu Ruwa* case [58].

Council of County Governors & 54 Others,[56] the Court of Appeal held that the alteration of the devolved government was unconstitutional as no national referendum was conducted before the enactment of the Amendment Act.[57] The amendment sought to alter the devolved government's structure, and the alteration was unprocedural, contrary to Article 255(1)(i) of the 2010 Constitution. In *Thirdway Alliance Kenya & Another v Head of Public Service- Joseph Kinyua & 2 Others; Martin Kimani & 15 Others (Interested Parties)*,[58] the KeHC noted that:

> Call it by any name, basic structure or whatever, but Article 259 provides the manner in which the Constitution is to be interpreted to maintain its fabric which cannot be dismantled by any authority created by the Constitution.[59]

In summary, the superior courts above have held that the constitutional amendment provisions under Chapter 16 are applicable without implied limitations, thus recognising the basic structure, but disregarding the basic structure 'doctrine'. As it emerged under Chapter three, part 5 of this study, Article 255(1) matters require special stringent means to amend. In other words, a national referendum can only amend the basic structure. The basic structure is different from the 'doctrine'. Recognising the basic structure does not necessarily lead to enforcing judicially crafted implied limitations in its amendment. Such a basic structure can be amended if the stringent procedures and the constitutional principles are followed. The basic structure of a constitution is not synonymous with adopting the 'doctrine'. Ouko SCJ correctly concluded that:

> [T]he holistic construction of the Kenyan Constitution, paying due regard to values espoused in it and the nation's history, yield the conclusion that the basic structure, not doctrine, domiciles in Article 255(1) of the Constitution.[60]

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56 Civil Appeal No. 200 of 2015; [2019] eKLR (hereinafter 'the *Senate* case'). Section 91A of the Amendment Act 13 of 2014 sought to amend the County Governments Act 2012 to establish an entity (County Development Boards) where Members of Parliament were to perform executive functions.

57 *Senate* case [50].

58 Constitutional Petition 451 of 2018; [2020] eKLR (hereinafter 'the *TAK* case').

59 *TAK* case [149]. Emphasis added.

60 *BBI 3* case [1809] (Ouko SCJ).

2.5 Inapplicability of the basic structure 'doctrine' in Kenya

As stated above, the basic structure differs from the 'doctrine'. The (in)applicability of the basic structure 'doctrine' in Kenya is discussed below under the pre-2010 era and post-2010 dispensation.

2.5.1 Under the pre-2010 era

The basic structure 'doctrine' in Kenya was adopted through *Timothy Njoya & 6 Others v Attorney General & 3 Others*,[61] followed by *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others*.[62] However, the 'doctrine' was applied under the previous Constitution in these cases. Under section 47 of the previous Constitution, the amendment power exclusively resided in Parliament. The previous Constitution provided for alteration under section 47(1) and (2) as follows:

> (1) Subject to this section, Parliament may alter this Constitution.
> (2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five percent of all the members of the Assembly (excluding the ex officio members).

Interestingly, subsection 6(b) made no distinction between alterations, amendments, modifications and re-enactments. What is clear from these provisions is that the constitutional amendment power was solely vested in Parliament which could alter it without the public participation.[63]

However, during the constitutional review process, there were several challenges to its validity, legitimacy and outcome. In the *Njoya 1* case, the petitioners sought a declaration that the Constitution of Kenya Review Act[64] violated the people's primary constituent power. This is the power to promulgate a new Constitution. The KeHC agreed with the petitioners and held that a new Constitution must be ratified via a national referendum, a fundamental right of the Kenyan people. Ringera J (Rtd) (among the majority) agreed with

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61 HC Misc. Civil Appl. No 82 of 2004 (OS); [2004] eKLR (hereinafter 'the *Njoya 1* case').
62 Misc. App. No. 677 of 2005 [2008] 3 KLR (EP) 84 (hereinafter 'the *Patrick Onyango* case').
63 For example, in the *Njoya 1* case (Kubo J) (Dissenting),
64 1997 (Cap 3A) Laws of Kenya.

the *Kesavananda* case that Parliament did not have the amendment power to alter, change, or abrogate the basic structure and enact a new Constitution.

The *Njoya 1* case was decided under the previous Constitution and does not apply in the post-2010 circumstances. Under the previous Constitution, there was no mechanism for its overhaul, including a national referendum. Therefore, it was justified for the KeHC to rely on the *Kesavananda* case in interpreting section 47. This section was similar to Article 368 of the Indian Constitution because the constitutional amendment power was only vested in Parliament. There was no provision for popular initiative amendments or for Parliament to incorporate public participation.[65]

In the *Patrick Onyango* case, the issues for determination included whether Parliament had the power to amend the Bomas Draft Constitution of 2005, a product of people's views. It was also questioned whether such amendment would elevate the Members of Parliament above the Kenyan people, who are the supreme sovereign. The KeHC held that the process of enacting the proposals as a Constitution is done by the people in the national referendum.

The *Njoya 1* case and *Patrick Onyango* case were decided under the previous Constitution, which provided exclusively for constitutional amendment by Parliament. The basic structure 'doctrine', applied to the previous Constitution. The 'doctrine' protected the Kenyan people's primary constituent power in making a new Constitution. This power resides in the people, and the Parliament could only make a new Constitution by actively involving the people in public participation and voting in a national referendum.

2.5.2 Under the post-2010 dispensation

As already stated, the issue of Parliament's constitutional amendment power resurfaced again under the 2010 Constitution in the *CIC 2013* case. Lenaola J (as he then was) found that such power was limited and the basic structure applied to the Kenyan context. In determining whether the basic structure 'doctrine' applies to the Kenyan context, superior courts must consider the purposive interpretation discussed in Chapter two, part

65 *BBI 3* case [1779] (Ouko SCJ).

3.3. This part addresses the applicability or otherwise of the ‘doctrine’ in the post-2010 dispensation.

2.5.2.1 Balancing flexibility and rigidity in the amendment provisions

The starting point in contextualising whether the 2010 Constitution provides for the basic structure ‘doctrine’ is to look at the rationale of its Chapter 16 as found in the preparatory documents during the Constitution-making process.[66] The previous Constitution endured a culture of hyper-amendments. It was fairly flexible, thus giving Parliament wide power and discretion in its amendment. As a result, Parliament undertook several constitutional amendments, losing its original character and identity. The most important amendments were the abolition of the Senate, devolution, and alteration of the entrenched parliamentary majorities for constitutional amendments, the abolition of the Judges’ security of tenure, and the 1982 conversion from a multi-party democracy to a *de jure* one-party State.

During the Constitution-making process, Kenyans were aware of the culture of hyper-amendments that bewildered the previous Constitution. They wanted a stable constitutional system to prevent politicians from abusing constitutional amendment power. The Constitution of Kenya Review Commission’s *Final Report* records that Kenyans expressed the need to protect the Constitution from indiscriminate amendments and struck a balance between rigidity and flexibility in the constitutional amendment procedures.[67] This was believed to increase the public confidence and prevent revolutionary means of bringing change instead of using the constitutional procedures. Doubtless, Kenyans wanted to actively participate in amending the basic structure via a national referendum and an inclusive, highly participatory, and people-centred process, as provided under Articles 255, 256, and 257 of the Constitution. Ouko SCJ correctly observed that:

> This balance was achieved by clear, unambiguous, and distinct ‘tiered’ design model codified in Chapter Sixteen. It is generally accepted that one of the ways to address the problem of abusive constitutional amendments is the constitutional

66 *BBI 3* case [188] (Koome CJ & P).

67 Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) 74.

> design, which would include the 'tiered' amendment procedure. This design combines the values of rigidity and flexibility, applying different procedures of amendment for different provisions of the Constitution.[68]

Therefore, the historical account reveals two things. First is the strong concern for Kenya to adopt amendment provisions that can protect the constitutional order from abusive amendments. Secondly, constitutional flexibility was recognised to adjust to political, socio-economic, technological, cultural, theological, spiritual, and other polity changes. As a result, the 'overarching imperative that informed the drafting of Chapter Sixteen was the need to find a proper balance between rigidity and flexibility'.[69] The need for a fair balance between flexibility and rigidity is apparent in the 'tiered' model of constitutional amendment under Chapter 16 as follows: (a) Article 256 provides for parliamentary initiative amendments; (b) Article 257 provides for popular initiative amendments; and (c) Article 255 relates to the entrenched constitutional provisions (basic structure) that require a national referendum for their amendment.

A careful consideration of Chapter 16 shows that Kenyans desired good democratic self-government and opted for a fair balance of flexibility and rigidity. Chapter 16 provides the people with an inclusive, people-centred and highly participatory process to democratically reformulate the social contract's core aspects. The Chapter enables the people to exercise both their direct and representative sovereign power to update constitutional norms. This also ensures conformity to the people's supreme sovereign will and responds to changing socio-economic, political, cultural, spiritual, and technological needs, interests, and circumstances. Constitutional amendments reflect the desires of

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68 *BBI 3* case [1803] (Ouko SCJ). See also generally Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86(2) Geo. Wash. L. Rev. 438-512.

69 *BBI 3* case [192] (Koome CJ & P). See also the *BBI 3* case [1784] (Ouko SCJ) who correctly observes that with 'Chapter Sixteen, the people sought to strike a balance; to have a Constitution that is flexible enough for posterity and unforeseen needs but rigid enough to prevent the abuse hyper-amendments experienced in the past'. In the *BBI 3* case [1860] (Ouko SCJ) further observes that a 'Constitution as a charter, made to endure for ages to come, cannot be lightly altered for temporary political, cosmetic and other expediencies. The less rigid the procedure for its amendment the more the temptation to alter it. The converse is equally true; that a Constitution which is unduly rigid might invite its own overthrowal by revolutionary means when a genuine need for change has arisen but cannot be affected constitutionally because of its rigidity'. See also the *BBI 2* case 49 (Sichale JA).

each generation and not those of the past generations, even if well-intentioned. Koome CJ & P correctly observes that:

> The Constitution-making generation should not forever tether the future generations in what they may perceive as suitable for them during the Constitution-making period… this would be tantamount to silencing some Articles against the canon of interpretation that the Constitution is speaking.[70]

Chapter 16 clearly shows that the Kenyan people were alive to the historical culture of hyper-amendments in the pre-2010 era. Therefore, they sought to tame any post-2010 amendment power abuses. Article 255(1) and (2) of the 2010 Constitution demonstrates that, in the context of hyper-amendments, the Kenyans entrenched the basic structure, whose amendment processes require deepened public participation and a national referendum. The reason for entrenching the basic structure (ten thematic matters) under Article 255(1) is that constitutional amendments to the fundamental elements must be via a deeply participatory process and ratified by the people as the supreme sovereign in a national referendum.[71]

Contemporary democracies' constitutions have adopted the 'tiered' model of amendment procedures via balancing flexibility and rigidity in constitutional amendments.[72] Per the 'tiered' model, constitutional amendment procedures vary, with the basic structure being placed on a higher tier and is more difficult to amend compared to other provisions.[73] Chapter 16 of the 2010 Constitution has adopted this 'tiered' model, that combines elements of both flexibility and rigidity by providing different amendment procedures for different provisions. The basic structure has been granted a very high level of entrenchment to ensure constitutional stability.[74] Kenyans were conscious of the basic structure and wanted it to be protected from abusive amendments via the entrenched provisions under Article 255(1). At the time of drafting the 2010 Constitution, the drafters were aware of the basic structure 'doctrine'. However, they chose to ring-fence the basic

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70 *BBI 3* case [209] (Koome CJ & P). See also the *BBI 3* case [1025] (Wanjala SCJ).
71 *BBI 3* case [194] (Koome CJ & P).
72 For example, Richard Albert, 'Constitutional Handcuffs' (2010) 42 AZSLJ 663, 709; Dixon and Landau, 'Tiered Constitutional Design' 441.
73 For example, Bhatia, 'The Hydra and the Sword' 2.
74 *BBI 3* case [196] (Koome CJ & P).

elements from flexible amendments, and if they intended to provide for eternity clauses or the 'doctrine', they would have expressly done so.[75]

Chapter 16 opted for a fair balance between flexibility and rigidity by making the amendment processes highly participatory and people-centred. The present generation must not tie future generations as each generation's desires, values, and political principles differ.[76] The holding of Koome CJ & P is correct that where the constitutional amendment processes encompass a 'tiered' model, and the basic structure can only be amended via an onerous process, superior courts ought not to import the judicially-crafted basic structure 'doctrine'.[77] In the *BBI 2* case, Sichale JA was correct to conclude that the:

> [C]lear text and language of Chapter 16 is that there are explicit provisions in the 2010 Constitution providing for amendment and there is no reason to look outside the Constitution and import the Basic Structure Doctrine on the basis that the Constitution has the unspoken language and/or implicit provisions.[78]

Therefore, the 2010 Constitution correctly responds to:

(a) The culture of hyper amendments by Parliament and the National Executive, and curbs the same;
(b) Balances between rigidity and flexibility in constitutional amendments as the people are also wary of overly rigid amendment procedures;
(c) Supreme sovereignty, centrality, and people-centredness in constitutional amendments; and
(d) All constitutional provisions are amendable through parliamentary and popular initiatives as long as the Chapter 16 stringent procedures and constitutional principles such as public participation are strictly observed.

Koome CJ & P correctly notes the most important consideration that constitutional drafters should take into account as follows:

> [T]o have constitutional amendment provisions that are 'deeply participatory, deliberative and inclusive' as done in Chapter Sixteen of the 2010 Constitution. This ensures that the Constitution always remains the 'people's Constitution', not

75 *BBI 3* case [196] (Koome CJ & P).
76 *BBI 2* case 42-43 (Sichale JA).
77 *BBI 3* case [210] (Koome CJ & P).
78 *BBI 2* case 42-43 (Sichale JA).

> a constitution for political elites, legal elites, or judicial elites. The point is that the ultimate fate of the Constitution must always lie with citizens.[79]

As Koome CJ & P stated, Chapter 16 of the 2010 Constitution has considered this most important consideration. The Constitution fairly achieved the desired balance between flexibility and rigidity by providing for the parliamentary and popular initiative amendments as provided under Chapter 16. This innovative 'tiered' design of the amendment procedures is also available in South Africa and Lithuania but is absent in India.

2.5.2.2 Inessentiality of the adoption of the basic structure 'doctrine'

Applying the basic structure 'doctrine' in the Kenyan context was one of the issues for determination in the *BBI* cases. The question is, was it necessary for *David Ndii & others v Attorney General & others*,[80] the *BBI 2* case (6-1 majority) and Ibrahim SCJ in the *BBI 3* case to adopt the basic structure 'doctrine', which is clearly outside the parliamentary and popular initiative amendments as provided for under Chapter 16 of the 2010 Constitution? The following paragraphs discuss the inessentiality of adopting the basic structure 'doctrine' in the Kenyan context.

2.5.2.2.1 Culture of hyper-amendments

The *BBI 1* case, the *BBI 2* case (6-1 majority), and Ibrahim SCJ's reasons for adopting the basic structure 'doctrine' were entirely based on the culture of hyper-amendments of the previous Constitution and the need to heighten procedures beyond Chapter 16 which makes it more difficult to amend the 2010 Constitution. Notably, the Judges failed to give a detailed analysis of Chapter 16 and identify its shortcomings and inadequacies, given the failure of at least twenty-one unsuccessful amendments since 2013,[81] and the need

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79 Martha Koome, 'Keynote Address by Hon. Justice Martha Koome, EGH, Chief Justice and President of the Supreme Court of Kenya, During the Launch of Attorney General Emeritus, Prof Githu Muigai's book, 15th July 2022: Book title: *Power, Politics & Law: Dynamics of Constitutional Change in Kenya, 1887-2022*' (2022) 6 KJLE 223, 224.

80 [2021] eKLR (hereinafter 'the *BBI 1* case').

81 The appetite to change the 2010 Constitution came three years into its promulgation: nineteen attempts were through a parliamentary initiative, while two (*Okoa* Kenya in 2016 and *Punguza Mizigo* in 2019) were through a popular initiative. Both failed. The BBI Amendment Bill was the 22nd attempt to amend the Constitution through a purported 'popular initiative' that was shot down by the KeHC, Court of Appeal, and KESC in the *BBI* cases.

to import the basic structure 'doctrine',[82] as compared to the thirty-three amendments to the previous Constitution between 1963 and 2010. As already stated, a reading of Chapter 16 is clear that Kenyans sought to curb the culture of hyper-amendments and achieve a fair balance between flexibility and rigidity in the constitutional amendments.[83] *Wanjiku*[84] did not want to shift from hyper-amendments to ultra-rigidity in the amendment processes. Instead, they desired a fair balance between flexibility and rigidity, as reflected in the 'tiered' model under Chapter 16. In this process, the basic structure has been accorded heightened protection. However, it is open to constitutional amendment via the enhanced inclusive, highly participatory, and people-centred process that ends with the people exercising their direct supreme sovereign power in a national referendum.[85]

The *BBI 1* case and the *BBI 2* case (6-1 majority) failed to appreciate that the 'tiered' model is one of the constitutional designs available for dealing with the practice of abusive amendments, just like other design options that limit amendability such as the basic structure 'doctrine' and eternity clauses.[86] It follows that Kenyans opted for the 'tiered' model as their response to the culture of hyper-amendments, instead of the basic structure 'doctrine' and eternity clauses. In the Kenyan context, the 'tiered' model is adequate to discourage the culture of hyper-amendments and tame abusive amendments.[87] Koome CJ & P correctly pointed out that there is no justification of a lacuna in the 2010 Constitution, to call in the basic structure 'doctrine' as an enhancement of the existing interpretation tools.[88] Therefore, it is wrong to base the adoption of the 'doctrine' entirely on the need to prevent a culture of hyper-amendments. Instead,

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82 *BBI 3* case [198], [199], [217] (Koome CJ & P).

83 See the *BBI 3* case [1418] (Lenaola SCJ) where it is correctly observed that through the Chapter 16 provisions of the 2010 Constitution, Kenyans 'attained the right balance between constitutional flexibility and rigidity and provided sufficient and strong safeguards against the culture of hyper-amendability that characterized the independence Constitution'.

84 This is a common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people.

85 *BBI 3* case [199] (Koome CJ & P).

86 *BBI 3* case [200] (Koome CJ & P).

87 *BBI 3* case [210] (Koome CJ & P).

88 *BBI 3* case [200] (Koome CJ & P). See also the *BBI 3* case [438] (Mwilu DCJ & VP), who correctly states that the 'mechanism expressly imported into the Constitution 2010 to protect it from hyper-amendment, dismemberment, or alteration, is in the process of amendment, and not in the implicit reliance on the basic structure doctrine, theories of constitutional entrenchment clauses, unamendable constitutional provisions, and eternity clauses. I must state here that a reading of the Constitution reveals that all of its provisions are entrenched provisions'.

Chapter 16 has already provided a mechanism for curbing this culture and effectively balanced rigidity and flexibility in the constitutional amendment procedures. Hence, the basic structure of the 'doctrine' has no applicability in Kenya's constitutional architecture and design.

2.5.2.2.2 Transformative constitutionalism

There is no need for superior courts to look beyond the 2010 Constitution through judicially crafted doctrines. The Kenyan transformative constitutionalism is inclusive, people-centred, and highly participatory, and the democracy respects the doctrine of separation of powers and checks and balances by vesting legislative power in the Legislature. Therefore, relying on the basic structure 'doctrine' and eternity clauses questions the public participation and the place of the Legislature in constitutional amendments. The superior courts should exercise judicial restraint. Judges should be vigilant to avoid usurping the supreme sovereign power of the people (both direct and delegated) by 'introducing a constitutional amendment through judicial fiat'.[89] The 'tiered' model under Chapter 16 is a design option for dealing with abusive amendments and obviates the need for judicially crafted limits to constitutional amendment power, such as the basic structure 'doctrine' and eternity clauses. Dixon and Landau correctly note that the unconstitutional constitutional amendments doctrine is one of the ways of responding to abusive constitutional amendments, and the other ways include dealing with it at the constitutional architecture and design level through the use of the 'tiered' model.[90] The tiered amendment system introduces different amendment rules for different constitutional provisions. Specific constitutional provisions require the people's approval in a national referendum as an exercise of direct supreme sovereign power.

The 2010 Constitution opted for the 'tiered' model as a solution to the culture of hyper amendments that bewildered the previous Constitution. The 2010 Constitution also provides for the approval of the Kenyan people for the basic structure in a national referendum. These features act as a guardian against abusing amendment power that

89 *BBI 3* case [201] (Koome CJ & P).

90 Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) IJCL 606, 613.

can result in dangerous constitutional changes. It follows that the 'tiered' model entrenched under the 2010 Constitution is superior to any judicially crafted basic structure 'doctrine' and eternity clauses.[91] These judicially drafted doctrines pose risks to democracy, transformative constitutionalism, and the rule of law. The framers of the 2010 Constitution intended it to be transformative, visionary, progressive, and amendable. Otherwise, nothing would have prevented them from drafting specific clauses on the basic structure 'doctrine' and eternity clauses.[92] In limiting constitutional amendments under Article 257, the superior courts in the *BBI 1* case and the *BBI 2* case, and Ibrahim SCJ placed impermissible constraints on the direct supreme sovereign power of the Kenyan people. The 'tiered' model under the 2010 Constitution 'meets the set criteria as to when judicially-created basic structure doctrine is inappropriate and undesirable'.[93] Therefore, the superior courts cannot import the basic structure 'doctrine' because it is against the explicit provisions of the 2010 Constitution and transformative constitutionalism.

2.5.2.2.3 Substantial and contextual differences

The applicability of the basic structure 'doctrine' depends on substantial and contextual differences. Kenya has progressed beyond the *Njoya 1* case by enacting the 2010 Constitution, which is self-executing with no shortcomings requiring applying a foreign basic structure 'doctrine' predicated on different circumstances not obtained in Kenya. The most significant contextual consideration is the balance between rigidity and flexibility of the constitutional amendment process; the more difficult the process is, the less need for a 'doctrine' of implied limits to the amendment power. Roznai correctly points out that the unamendability theory calls for Judiciary restraint when adjudicating constitutional amendments disputes, especially when there are demanding amendment procedures that are highly participatory, people-centred, inclusive, multi-staged, deliberative, and time-consuming.[94] Where the constitutional amendment procedures involve multiple institutions, engender high public participation, are 'tiered', multi-staged, time-consuming,

91 *BBI 3* case [203] (Koome CJ & P).
92 *BBI 3* case [1811] (Ouko SCJ).
93 *BBI 3* case [208] (Koome CJ & P).
94 Yaniv Roznai, 'Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 45.

inclusive, people-centred, and end with a national referendum, there is no need for judicially crafted implied limitations to the amendment power via the basic structure 'doctrine' without exhausting home-grown mechanisms.[95] Superior courts must maintain fidelity to the 2010 Constitution because it is to a large extent described as clear, comprehensive, unambiguous, multi-staged, distinct 'tiered' design model, 'self-sufficient transformative document',[96] exhaustive, self-contained, self-sustaining both internally and in its architectural design, deepened, specific, and in-built public participation, self-executing with in-built mechanisms and safeguards with complex and elaborate procedures, and self-regulating in dealing with the culture hyper-amendments and contemplates its amendments via parliamentary and popular initiatives.[97] In this context, the superior courts should always focus on strategies to enhance and give effect to the constitutional amendment procedures other than limiting amendments via 'doctrines' not contemplated by the 2010 Constitution.

The basic structure 'doctrine' is applied in countries with constitutions that easily amend the basic structure and exclusively grant the amendment power to Parliament without involving the people. A good example is India, where it is easy for Parliament to amend the Constitution with minimal public participation. The context is different in Kenya, where it is difficult to amend the basic structure, and the people must be actively involved in amending the basic structure in a national referendum. The Indians, unlike Kenyans, delegated the entire constitutional amendment power to the Legislature without retaining any power. In Kenya, the constitutional amendment power of Parliament is expressly limited per Chapter 16. This Chapter obviates the need for any judicially crafted implied limitations to the amendment power. As a result, any attempts by the superior courts to come up with judicially crafted implied limitations amount to double-limitation that is unconstitutional, illegal, null, and void *ab initio*.

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95 *BBI 3* case [205] (Koome CJ & P). See also the *BBI 3* case [1807] (Ouko SCJ), where it is correctly observed that 'In view of the explicit, long, complex and in most cases unpredictable process of amending the Constitution, it can be said that there are no implied constitutional limitations by which the Constitution should not be amended in any way'.

96 *BBI 3* case [478] (Mwilu DCJ & VP).

97 *BBI 3* case [216] (Koome CJ & P), [406], [411] (Mwilu DCJ & VP), [767] (Ibrahim SCJ), [992] (Wanjala SCJ), [1161] (Njoki Ndungu SCJ), [1484] (Lenaola SCJ), [1773], [1803], [1804], [1887] (Ouko SCJ). See also the *BBI 2* case 58 (Sichale JA); *BBI 1* case [731].

The Indian basic structure 'doctrine' is inapplicable in Kenya because of the circumstantial differences. The *Kesavananda* case was determined in 1973 under radically different circumstances from those existing in Kenya today. Unlike India, the amendment power under the 2010 Constitution does not entirely reside in Parliament as the people also participate in a national referendum. Njoki Ndungu SCJ correctly observes that:

> [T]he process of amendment of the Indian Constitution is quite different from the process of amendment of the [2010] Constitution… [and] …there is no law that is common to the two countries to enable the Kesavananda Case to be applied in Kenya.[98]

The historical context of the *Kesavananda* case differs from Kenya's because of the different circumstances. While India's Parliament had the sole discretion of constitutional amendments, in Kenya, the constitutional amendments are done by both the Parliament and the people. Therefore, the basic structure 'doctrine' was introduced in India in response to the exclusivity of Parliament's role in constitutional amendments. The observation of Bhatia serves this right. The basic structure 'doctrine' deals with the following:

> [V]ery specific problem: abusive constitutional amendments by representative organs (such as Parliament). Constitutional amendment provisions such as Article 368 of the Indian Constitution shut out the People from the process of constitutional change, and allowed Parliament – through transient supermajorities, either the result of majoritarianism or of elite political pacts – to subvert constitutional identity. The only possible safeguard within this kind of a constitutional scheme, thus, was for the judiciary to intervene and put a stop to abusive amendments by invalidating them on the touchstone of the basic structure.[99]

A look at the global dynamics in the 1970s, such as the Cold War, when the *Kesavananda* case was decided, reveals very different dynamics from the current ones.[100] Again, juxtaposing the constitutional architecture and design reveals a discrepancy between the Kenyan and Indian Constitutions. Furthermore, the democracy and politics of the two countries remain largely distinguishable. There were substantial contextual and textual differences between the Indian and Kenyan Constitutions when the SCI developed the basic structure 'doctrine'. Examples include the fact that under the Indian Constitution,

98 *BBI 3* case [1147] (Njoki Ndungu SCJ).
99 Bhatia, 'The Hydra and the Sword' 8-9. Emphasis added.
100 *BBI 3* case [401] (Mwilu DCJ & VP).

the Legislature has exclusive and final amendment power, no national referendum, and popular initiative amendments are not provided.[101]

2.5.2.2.4 Contradictions in the findings and conclusion

The Judge's findings and conclusions in justifying the applicability of the basic structure 'doctrine' in Kenya were marred by many contradictions. The KeHC in the *BBI 1* case contradicted itself in that, on the one hand, it found that all the provisions of the 2010 Constitution were amendable, and on the other hand, the basic structure that was to be found by a 'fact-extensive determination' was not amendable.[102] Should promoters of constitutional amendments or Parliament always go to the superior courts to determine what is unamendable? The Judges overstretched their mandate, showing they were drunk with judicial power! Sichale JA and the KESC (6-1 majority) agree that this finding is poorly thought out and contradictory. Sichale JA was, therefore, correct in questioning the Judges' viability to interpret the amendability of constitutional provisions on a 'case by case' basis.[103] Sichale JA notes that the *BBI 1* case finding poses challenging questions, such as 'Who is to carry out the fact-intensive determination?' and 'at what stage in the process of Constitutional Change?'[104] Sichale JA's questions are relevant as the Kenyan people have no locus *standi* to seek an advisory opinion from the KESC per Article 163(3) of the Constitution as this route is a preserve of the national government, State organs, and county governments. This leaves people with the problem of having an issue that can be subjected to a 'fact-intensive determination'. Judges should not assume the power to (in)validate constitutional amendments because of judicially crafted doctrines from their preferred constitutional reading.[105] Judges should not be elevated to demigods because it is possible to have a rogue and distrustful Judiciary, just as it is common with Parliament, but more so as the Judges are not elected as the people's representatives.[106] What is amendable or not should not be a matter of judicial interpretation. Judges, like

101 *BBI 3* case [402] (Mwilu DCJ & VP).
102 *BBI 1* case [473], [474 g)].
103 *BBI 2* case 50 (Sichale JA).
104 *BBI 2* case 50-51 (Sichale JA).
105 See generally Abebe, 'The Substantive Validity of Constitutional Amendments' 656-694; Po Jen Yap, 'The Conundrum of Unconstitutional Constitutional Amendments' (2015) Global Constitutionalism 114-136.
106 *BBI 2* case 54 (Sichale JA).

Parliamentarians, cannot assume supremacy over all others as the Kenyan people are the supreme sovereign. The 2010 Constitution has explicitly provided for its amendment provisions. Article 1(1) of the Constitution provides that 'all' the supreme sovereign power belongs to the people, and the Judiciary cannot usurp their direct supreme sovereign power.

The KESC also found the findings and conclusions of the *BBI 1* case and *BBI 2* case (6-1 majority) problematic. Lenaola SCJ observes that the finding in the *BBI 1* case is confusing and puzzling, as it seems to suggest that the entire Constitution is unamendable with eternity clauses, which is a fallacy.[107] The Judges did not specifically identify any provisions of the Constitution that are unamendable and eternity clauses. Wanjala SCJ views the reasoning of the KeHC as attended by 'internal-contradiction and general imprecision' as the Judges viewed 'basic structure' as comprising of the Preamble, the 18 Chapters, and the six Schedules, that is, the basic structure is the entire Constitution.[108] Njoki Ndungu SCJ adds that it is absurd for the Judges to acknowledge that no clause in the Constitution bars amendment; however, they proceeded to consider outside factors to create unamendable and eternity clauses.[109] The contradictions exposed the KeHC, Court of Appeal (6-1 majority), and Ibrahim SCJ, as their findings and conclusions were without basis. They also showed how difficult it is to forcefully apply judicially crafted 'doctrines' that have not been contemplated by the 2010 Constitution.

The *BBI 1* case and the *BBI 2* case (6-1 majority) wrongly concluded that there is a basic structure in the 18 Chapters of the Constitution that is only amendable by first determining on a case-by-case basis whether the proposed amendments are part of it. It was also wrong for the Judges to find that any amendment to those provisions identified as the basic structure should follow four sequential processes: civic education, public participation, constituent assembly, and a national referendum and that specific provisions are beyond the reach of amendment powers under Chapter 16. The considered opinion of Njoki Ndungu SCJ is persuasive as follows:

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107 *BBI 3* case [1362], [1469] (Lenaola SCJ).
108 *BBI 3* case [1020] (Wanjala SCJ).
109 *BBI 3* case [1159] (Njoki Ndungu SCJ).

> [I]t was the intention of the drafters of the Constitution to protect or entrench the specified ten matters in Article 255(1) of the Constitution by stipulating their specific amendment procedures in Article 255(2) of the Constitution. If the drafters of the Constitution intended to entrench or protect any other provisions, or deem them eternal or unamendable, they would have expressly done so.[110]

2.5.2.2.5 Entrenched provisions

The 2010 Constitution has provided for entrenched provisions under Article 255(1) with heightened amendment procedures, as compared to the other constitutional provisions. Therefore, importing the basic structure 'doctrine' is unnecessary as the Constitution has already protected the entrenched provisions from abusive amendments. The amendment of the entrenched constitutional provisions, that is, Article 255(1) matters via both the parliamentary and popular initiative routes, requires the following: First, there must be public participation throughout the amendment process per Article 10(2)(a) of the Constitution. Secondly, the parliamentary and popular initiative routes must strictly follow Articles 256 and 257 provisions and end with a national referendum as provided under Article 255(2). In the County Assemblies and Parliament, the amendment Bills are also subject to further public participation per Articles 196 and 118, respectively, and Article 88(4)(g) imposes an obligation on the Independent Electoral and Boundaries Commission (IEBC) on voter education. From these routes of amending Article 255(1) matters, it is correct to conclude that amending the basic structure is a heightened onerous, multi-staged, multi-institutional, and time-consuming process that is inclusive, transparent, people-centred, and engenders public participation.[111]

The finding in the *BBI 1* case, the *BBI 2* case (6-1 majority), and Ibrahim SCJ in the *BBI 3* case that the basic structure is only amended via the primary constituent power is not supported by the 2010 Constitution. This 'doctrine', if used, can overthrow the 2010

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110 *BBI 3* case [1158] (Njoki Ndungu SCJ). See also the *BBI 3* case [1419] (Lenaola SCJ) finding that '[T]he people did not intend to immunize the provisions of the 2010 Constitution; … they envisaged that they could amend the provisions of the Constitution by exercising their secondary constituent power provided that the amendment procedure under Chapter Sixteen is strictly observed. If the people wanted to entrench provisions other than those set out under Article 255(1) or to immunize any of the provisions of the Constitution from amendment, they would have done so expressly… Courts should not by judicial craft or innovation impose hurdles to prevent the people from amending the Constitution provided that the procedural requirements under Chapter Sixteen are complied with'. See also the *BBI 3* case [1861] (Ouko SCJ).

111 *BBI 3* case [208] (Koome CJ & P).

Constitution and usurp the direct supreme sovereign power of the people. As already stated, the 2010 Constitution has its in-built limitation on Parliament's amendment power on the basic structure under Article 255(1). Chapter 16 is an indication that all constitutional provisions are amendable and the 'only distinction is on the specific provision sought to be amended as against the process being used'.[112] Since promulgating the 2010 Constitution, the superior courts have consistently and unanimously held that all constitutional provisions are amendable if the procedures are followed.[113] The two-tiered amendment process has arguably identified a 'basic structure' and provided a way of altering it.[114]

When the drafters of the 2010 Constitution conceptualised Chapter 16, the 'doctrine' was available, and if they intended to make certain provisions unamendable under Article 255(1), nothing would have prevented them from expressly stating so.[115] Applying the 'doctrine' in Kenya would go against the people's wishes for constitutional amendments to achieve a fair balance between flexibility and rigidity to address arising needs and prevent abuses, as already stated. Importing the 'doctrine' would be dangerous as it would make amendments overly rigid, and the superior courts would usurp both the direct supreme sovereign power of the people and the delegated power of the legislature structures (County Assemblies and Parliament). This would make it difficult for future generations to amend the Constitution despite their unique needs. Ouko SCJ acknowledges that Article 255(1) contains the basic structure, which can only be amended through special procedures, public participation and a national referendum.[116] Chapter 16 envisages the participation of both the people and the legislative structures

112 *BBI 3* case [419] (Mwilu DCJ & VP).

113 See, for example, the *Randu Ruwa* case, where the Court of Appeal held that the people may amend the 2010 Constitution by a national referendum to alter Kenya's territory; the *Senate* case, where the Court of Appeal again held to the effect that an amendment to alter the structure of the devolution can only be by way of a national referendum; *In the Matter of the Speaker of the Senate & Another* [2013] eKLR, the KESC explained that the only other way for the Senate to expand its mandate, is to initiate an amendment of the 2010 Constitution through a national referendum under Article 255(1). See also, *Non-Governmental Organizations Co Ordination Board v EG & 5 Others* [2019] eKLR; *Titus Alila & 2 Others suing on their own behalf and as the Registered Officials of the Sumawe Youth Group v Attorney General & Another* [2019] eKLR; *Martha Kerubo Moracha v University of Nairobi* [2016] eKLR.

114 Bhatia, 'The Hydra and the Sword' 12.

115 *BBI 3* case [1811] (Ouko SCJ). See also the *BBI 2* case 56-57 (Sichale JA).

116 *BBI 3* case [1824] (Ouko SCJ).

(County Assemblies and Parliament). Therefore, it is not appropriate, unlike India, for the application of the 'doctrine' as a judicial veto on constitutional amendments that destroy the basic structure. Therefore, the:

> [T]wo-tiered amendment mechanism was materially different from amendment provisions founded on parliamentary super-majorities, and therefore, required a materially different response… [and] …did provide a role for the People when it came to the amendment of entrenched provisions.[117]

The role of the Judiciary must necessarily be procedural and limited. The superior courts cannot develop 'doctrines' that are not provided for under the 2010 Constitution.

2.5.2.2.6 Constitutional stability

The unsuccessful attempts to amend the 2010 Constitution during its first fourteen years of implementation prove that the 'tiered' model has ensured constitutional stability. Notably, over twenty-two failed attempts have been proposed to amend the Constitution since 2013. At least nineteen were through the parliamentary initiative, and three were through the popular initiative. The BBI Amendment Bill was the one that went the furthest in the amendment process: approval by the majority of County Assemblies, and it was declared unconstitutional by the KESC. This can be compared with the previous Constitution, which had undergone twelve significant amendments by its tenth birthday. The 2010 Constitution has shown resilience in its first decade, and this is enough 'proof that Kenyans attained the goal of balancing flexibility with rigidity in designing the amendment power' per Chapter 16.[118] Therefore, applying the judicially crafted basic structure 'doctrine' in Kenyan constitutional architecture and design is unnecessary, especially when determining the constitutionality of amendment Bills and processes. This 'doctrine' is outside the text and spirit of the 2010 Constitution. The constitutional amendment power under Chapter 16 is not amenable to limitation, including via the basic structure 'doctrine'.[119] Applying the 'doctrine' would make amending the 2010 Constitution cumbersome and nearly impossible, which is against the express Chapter 16 provisions. This may lead to unnecessary conflict, political uncertainty, constitutional instability and

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117 Bhatia, 'The Hydra and the Sword' 10.
118 *BBI 3* case [212] (Koome CJ & P).
119 *BBI 3* case [441] (Mwilu DCJ & VP).

stagnation, and revolutionary changes seeking to amend or overthrow the Constitution via extra-constitutional means.

2.5.2.2.7 Procedural and substantive tests

All proposed constitutional amendments must pass both the procedural and substantive tests. The reasoning of Wanjala SCJ that the 'constitutional equilibrium against which any proposed constitutional amendment must be measured' is Article 259(1) and (3) is persuasive.[120] According to the learned Judge, the issue is whether an amendment can pass the above constitutional muster and not whether the Constitution is amendable. Gatembu and Okwengu JJA base their substantive test not on constitutional equilibrium but on the basic structure under Article 255(1) and the Preamble, respectively.[121] Wanjala SCJ adds that all constitutional provisions are amendable per Articles 255, 256, 257, and 259 and the transformative and enduring nature of the Constitution.[122] All these arguments are persuasive, and the amendments should comply with the procedurals (under Chapter 16) and the substantive tenets in the form of constitutional principles and values[123] found elsewhere in the Constitution, including the Preamble. These constitutional principles include constitutional supremacy, popular sovereignty, separation of powers and checks and balances, transformative constitutionalism, public participation, and the purposive interpretation of the amendment provisions. Okwengu JA came closer to this reasoning and conclusion but struggled to justify her limitation of the amendment powers using the 'spirit and purport' found in the Preamble of the Constitution.[124] The procedurals and constitutional principles do not include the four sequential processes (civic education, public participation, constituent assembly, and a national referendum) and judicially crafted 'doctrines' such as the basic structure 'doctrine'.

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120 *BBI 3* case [1025], [1026] (Wanjala SCJ).

121 *BBI 3* case [1026] (Wanjala SCJ); *BBI 2* case [57], [58], [59] (Gatembu JA), [101], [102], [103] (Okwengu JA).

122 *BBI 3* case [1061] (Wanjala SCJ).

123 *BBI* 3 case [1856] (Ouko SCJ) also agrees with this reasoning. See Joseph Lutta, 'The Constitutional Amendments Bill, 2020: A Basic Structure Doctrine Critique' (2021) 17 LSKJ 37, 38.

124 *BBI 2* case [101], [103], [184] (Okwengu JA).

2.5.2.2.8 The ‘doctrine’ is not an international law principle

The basic structure ‘doctrine’ is acceptable only in some States such as India. The ‘doctrine’ is not a general principle of international law.[125] Article 2(5) of the 2010 Constitution[126] cannot be the basis for the applicability of the ‘doctrine’ in Kenya. Foreign legal ‘doctrines’ must be construed within Article 2(5) and only applied as a fallback when there is no internal recourse.[127] Accepting such ‘doctrines’ by implication must meet the muster of Article 2(4) to the extent that they must not be inconsistent with or contravening the 2010 Constitution.

2.6 Conclusion

From the above discussion on the basic structure ‘doctrine’, the superior court’s application of implied limitations to amendment power should take into consideration the following factors:

(a) Flexibility and rigidity of the constitutional amendment processes: the more rigid the processes are, the less need for implied limitation to amendment power, and vice versa;
(b) Whether the Constitution provides for multi-tiered amendment procedures;
(c) Whether the Parliament and Executive control the amendment processes, or both the people and Parliament are involved, and
(d) The role of superior courts: whether the apex court is activist or exercises judicial restraint on political questions.

Due to the unique- political, socio-economic, legal, cultural, and historically developed constitutional norms and national identity limitations on applying comparative jurisprudence based on constitutional borrowing and transplantation, the basic structure ‘doctrine’ is irrelevant to Kenya. Kenya can only borrow foreign constitutional norms

125 *BBI 3* case [1143] (Njoki Ndungu SCJ). See also the *BBI 3* case [405] (Mwilu DCJ & VP).
126 This Article provides that the ‘general rules of international law shall form part of the law of Kenya’. It is generally accepted that these ‘general rules’ are what is known as the customary international law.
127 See also *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others* [2016] eKLR; *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

compatible with its needs, interests and circumstances. The 2010 Constitution has no express eternity and unamendable constitutional clauses[128] as in jurisdictions where they are found, they are expressly provided, and the basic structure 'doctrine' does not apply to Kenya.[129] The 2010 Constitution does not provide for its replacement or enactment, and no provision provides for the promulgation of a new Constitution. This means that the power to enact a new Constitution is a preserve of the people and can only be exercised by the people outside the constitutional framework by exercising the primary constituent power.

The above critical analysis demonstrates that the basic structure 'doctrine' is not a universal norm of constitutionalism. The 'doctrine' is applied in jurisdictions with constitutions that exclusively vest the constitutional amendment power in Parliament. A good example is the Indian *Kesavananda* case, where the 'doctrine' was applied to temper Article 368, which exclusively vests the constitutional amendment power to Parliament. This contrasts sharply with the South African and Kenyan contexts, where the 1996 and 2010 Constitutions unambiguously create different levels and processes for constitutional amendment.

Albert, Nakashidze and Olcay correctly appreciate that the basic structure 'doctrine' cannot be appropriate in all constitutional democracies, and its incorporation depends on a country's localised governance norms or traditions, socio-economic contexts, and juridical history.[130] This 'doctrine' is yet to mature into a global constitutionalism or general application norm. It is also yet to be found to be unqualifiedly acceptable in jurisdictions including Kenya and South Africa. Superior courts have, therefore, 'adopted the approach of evaluating its 'fit' within their constitutional systems before accepting its applicability in the various jurisdictions where it has been considered'.[131] This is the correct position to

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128 See, for example, the *BBI 2* case [65], [219(1)] (Nambuye JA), [184] (Okwengu JA). See also Charles Fombad, 'Some Perspectives on Durability and Change under Modern African Constitutions' (2013) 11(2) IJCL 382-413, wherein reviewing African constitutions, it was observed that unlike the Constitution of Namibia, Senegal, Madagascar, and Equatorial Guinea which have unamendable provisions, the Constitution of Kenya, 2010 does not have any unamendable clauses.

129 *BBI 2* case [96] (Okwengu JA), 59 (Sichale JA).

130 See generally Richard Albert, Malkhaz Nakashidze and Tarik Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70(3) HLJ 639-670.

131 *BBI 3* case [185] (Koome CJ & P).

adopt, as each country has unique conditions, needs and circumstances. The correct approach in adoption by superior courts of any foreign laws and judicial decisions has already been explained in Chapter two, parts 2.4.5 and 3.5.3. The Kenyan Constitution's history, text, spirit, architecture, design and structure lead to the conclusion that Kenyans did not intend to import the basic structure 'doctrine' and its various corollary doctrines to apply to their Constitution. The safeguards under Chapter 16 of the Constitution are enough protection, and the role of superior courts is enough to prevent any proposed unconstitutional constitutional amendments. There are no implied limitations on constitutional amendments. Chapter 16 of the Constitution has expressly provided for the limits of constitutional amendments by requiring the amendment of the basic structure by a national referendum.

3 Nature and scope of the national referendum questions

In the *BBI* cases, the issue of whether there should be separate and distinct national referendum questions arose. The IEBC is mandated to frame the national referendum question(s),[132] but the 2010 Constitution and the Elections Act do not define the nature and scope of such questions. While the KeHC and Court of Appeal (6-1 majority) addressed this issue, the KESC Judges unanimously held that the issue was unripe for determination. It is trite law that only justiciable issues are ripe for adjudication.

In the *BBI 3* case, Koome CJ & P correctly observed that at the time of filing the *BBI* petitions in the KeHC, the BBI Amendment Bill was yet to be submitted to the County Assemblies, and the IEBC was yet to be invited to determine the form and manner of the national referendum question(s).[133] The IEBC's obligation under Article 257(10) was yet to arise. Tuiyott JA correctly found that there was no live controversy before the KeHC, which should have declined to decide on this question.[134] Koome CJ & P correctly noted that the issue of the nature and scope of the national referendum questions under Article 257(10) is 'deeply fundamental' and cannot be dwelt upon in an 'anticipatory manner'.[135]

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132 Elections Act 2011 (hereinafter 'the Elections Act'), s 49 places the obligation of framing national referendum question(s) on the IEBC.

133 *BBI 3* case [351] (Koome CJ & P).

134 *BBI 2* case [251] (Tuiyott JA).

135 *BBI 3* case [356] (Koome CJ & P).

Therefore, Koome CJ & P was correct in finding that this issue was unripe for determination.[136]

However, as discussed below, some KESC Judges determined the issue despite stating that it was unripe for determination. This was a clear abuse of judicial power because Judges are not demigods and must exercise such judicial power within the 2010 Constitution and the law. Once Judges find that a matter is unripe for determination, they must down their tools. This issue is likely to arise again in future. Therefore, this part addresses this issue using comparative jurisprudence from Lithuania.

3.1 Solutions from conventional wisdom

In a multi-subject constitutional amendment proposal, how can the IEBC submit such an amendment Bill to the voters in a national referendum? Conventional wisdom offers three solutions to this question. First is Hobson's choice, named after an English businessman, Thomas Hobson, who was in horse rental business in Cambridge, England.[137] Hobson's customers, mainly students from the Cambridge University, had only one option: hiring the horse nearest the stable door. The choice that the customers were given was 'this or none'. This was not their choice but Hobson's choice. Per this option, the voters must either reject or approve the entire Amendment Bill or Omnibus Bill. The voters have only two choices to vote for or against the Amendment Bill: a 'Yes' or 'No'. The second solution is where the voters have the choice to separately reject or approve each and every single individual constitutional proposed amendment in the Omnibus Bill.[138]

The third solution for a multi-subject amendment referendum is for the sufficiently and 'closely related' amendment proposals to be grouped in the Amendment Bill.[139] In this last solution, the voters are spared from Hobson's choice of voting to reject or approve all proposed changes in the Omnibus Amendment Bill. The voters are also spared from the impracticality of voting to approve or reject each of the single individual proposed amendments despite their number. The third option is highly recommended as the

136 *BBI 3* case [358] (Koome CJ & P).
137 *BBI 3* case [2099] (Ouko SCJ).
138 *BBI 3* case [2099] (Ouko SCJ).
139 *BBI 3* case [2099] (Ouko SCJ).

‘subject-matter relatedness’ rule. The amendment proposals are grouped based on ‘subject matter’ per the ‘unity of content’ principle of constitutional amendment. This third approach is the most applicable to Kenya, which the IEBC should adopt. Packaging multiple constitutional amendments into an Omnibus Bill violates Articles 38(3) and 257(10) of the 2010 Constitution and the political right of voters to weigh each and every amendment on its own merit. The Omnibus Amendment Bills undermine accountability and democracy as they prevent voters from voting for or against specific matters. Articles 10, 82(1)(d), and (2) requires that the national referendum must be conducted under a transparent system. Therefore, constitutional amendments to any provision of the 2010 Constitution should not be lumped with other amendments. This prevents the danger of such amendments not being considered by the voters. The drafters of the constitutional Amendment Bills usually propose several amendments; of which only some may be supported by the voters. The Omnibus Bill as a vehicle for submitting the whole Bill is not permissible under the Kenyan constitutional design and architecture. This is because such a scenario denies the voters the freedom of choice.

Under Article 257(10) of the 2010 Constitution, the IEBC is constitutionally required to submit to the people the proposed amendment in a national referendum. This means that each proposed amendment per Article 255(1) or the unrelated matters per the ‘unity of content’ principle must be submitted to the voters in a national referendum. This enables the voters to exercise their freedom of choice and free will to approve or reject proposed amendments as opposed to approving or rejecting the entire Amendment Bill. In the architecture and design of the 2010 Constitution, where an Amendment Bill proposes several amendments, the IEBC is obligated to formulate several referendum questions per section 49 in the Elections Act for the voters to choose the proposed amendments that they would vote for or against.

The ‘unity of content’ principle prevents the use of Omnibus Amendment Bills. This principle requires the formulation of multiple referendum questions where an Amendment Bill contains several proposed amendments to Article 255(1) matters and the unrelated matters of the Preamble, the 18 Chapters, and the six Schedules. The purpose of any national referendum is to give effect to the people’s actual will. Therefore, putting several

proposed amendments to the 2010 Constitution to a vote in a national referendum as a single issue denies the determination of the people's actual will. If an Amendment Bill consists of several matters, the IEBC should put the different proposed amendments to voters as separate national referendum questions. Thereafter, the voters should approve or reject the various proposal amendments instead of requiring such voters to reject the entire Omnibus Bill.

In some jurisdictions with similar provisions,[140] the national referendum questions are subjected to vote separately. Such questions are posed through multi-option referendums (more than two options available) instead of binary referendums (only two options available). The majority of the world's national referendums submit to the voters only two options: the change and status *quo* options, and this is sometimes problematic especially where there are disagreements by the supporters of change on the changes they would like to see.[141] This is because binary choices make it difficult for voters to express their actual will, and such choices encourage polarisation (political and societal divisions), rather than shared goals and promote adversarial rather than deliberative approaches to debate.[142] For example, the Swedish multi-option national referendum shows that the debate is less divisive than a binary national referendum, as opinions are less polarised. A purposive interpretation of Article 255(1) of the 2010 Constitution reveals that each proposed amendment (read matter) should be considered on its own merit.

3.2 Relevance of the 'unity of content' principle to Kenya

The 'unity of content' principle applies to Kenya. The IEBC's role is to formulate the national referendum questions, as already stated. The IEBC has the discretion to frame the national referendum questions per the contents or scope of the constitutional Amendment Bill. Ouko SCJ correctly observes that it is in the 'discretion of the IEBC to decide on the most suitable, practical and efficacious option in the circumstances of each proposed amendments'.[143] The IEBC should employ the 'unity of content' principle to

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140 A good example is Lithuania, discussed under part 3.4 below as a comparative legal analysis.

141 Constitution Unit, School of Public Policy at University College London, *Final Report of the Independent Commission on Referendums* (July 2018) 107.

142 *BBI 1* case [612].

143 *BBI 3* case [2100] (Ouko SCJ).

group the proposed amendments that are related together and then frame a 'Yes' or 'No' question. For example, an amendment that provides for a matter such as devolution, a 'No' or 'Yes' answer can do. More matters should be grouped per the 'unity of content' principle per Article 255(1) matters, the Preamble, 18 Chapters, and six Schedules of the 2010 Constitution.

Article 257(10) of the 2010 Constitution provides that it is the 'proposed amendment' that is submitted to the voters in a national referendum. Notably, it is a Bill that is used as the primary document for debate and discussion at the County Assemblies and Parliament per Article 257. This clearly shows that the framers of the 2010 Constitution intended to use Bills at the County Assemblies and Parliament, however, they intended to use the proposed amendment(s) at the national referendum.[144] The terms used under Article 257 changes from 'Bill' to 'proposed amendment' under Article 257(10). This informed Parliament to actualise Article 257(10) by enacting in Part V of the Elections Act, sections 49 and 50. Section 49(1) of the Elections Act provides that the President refers an issue(s) to IEBC for the national referendum, and not Bills. Therefore, what is presented to the voters is the national referendum question(s) depending on the circumstances and not the Amendment Bill.[145]

In the *BBI 1* case, the KeHC held that Article 257(10) requires all the specific proposed amendments to be submitted to the voters as separate and distinct referendum questions.[146] This is a wrong finding as it is impractical for the voters to vote on each of the 'specific proposed amendments' in the Amendment Bill. This is a wrong conclusion as it suggests that 'each of the proposed amendment clauses'[147] and 'all the specific proposed amendments' are to be submitted to the voters as separate and distinct referendum questions. This is the second option of the solutions from conventional wisdom, as explained above. The Court of Appeal Judges (Nambuye, Okwengu and Kiage JJA) support this wrong finding.[148] Gatembu JA added a qualifier 'subject to the

144 *BBI 3* case [932] (Ibrahim SCJ).
145 *BBI 3* case [933] (Ibrahim SCJ).
146 *BBI 1* case [619], [783 xvii.], [784 xviii.]. Emphasis added.
147 *BBI 1* case [615]. Emphasis added.
148 *BBI 2* case [495] (Musinga P).

nature of proposed amendment' to the KeHC's finding.[149] Musinga P disagreed with the KeHC and held that it is the Amendment Bill that is to be subjected to the national referendum for the people to vote for or against.[150] Tuiyott JA correctly held that the matter was unripe for determination because the IEBC had not yet been seized with its responsibility of framing the question(s) on the BBI Amendment Bill.[151]

It is also important to look at whether, during the collection of signatures (for popular initiative amendments), the people should support the general suggestion or draft Amendment Bill wholesomely if such suggestion or Bill contains several different subject matters. For example, the *Okoa Kenya* initiative prepared a booklet listing several issues, including the increasing revenue and budget allocation to county governments and strengthening devolution, strengthening the role of the National Land Commission (NLC), and the role of and benefits for communities in natural resources, and strengthening of public institutions and constitutional commissions. A long Amendment Bill was drafted based on these issues, and anyone who signed the *Okoa Kenya* petition supported the general propositions. Ghai and Ghai observe that:

> We think that this cannot have been what the Committee of Experts had in mind. The Constitution speaks of this method for "an amendment". We believe this means a single change in the Constitution, not a long Bill with 20 or more.[152]

Ghai and Ghai's observation suggests that a Bill to amend the 2010 Constitution should contain a single change of the Constitution. However, Ghai and Ghai do not define what a single change of the 2010 Constitution entails. This could not have been the intention of the drafters of the 2010 Constitution. In practice, a general suggestion or an Amendment Bill can contain more than a single change, which is why the 'unity of content' principle is important in such cases per Article 255(1) and unrelated matters. In Kenya, the 2010 Constitution does not provide for the general suggestion or draft Amendment Bill to contain a single change. It only provides that the Amendment Bill can be introduced in Parliament or submitted to the IEBC with one million signatures of registered voters

149 *BBI 2* case [197] (Gatembu JA).
150 *BBI 2* case [398] (Musinga P).
151 *BBI 2* case [251] (Tuiyott JA).
152 Yash Pal Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (2nd edn, KI 2021) 147. Emphasis added.

(for popular initiative amendments).[153] The promoters can collect the signatures using the general suggestion for popular initiative amendments, but they must submit a draft Amendment Bill with the signatures to the IEBC. Therefore, when the registered voters support the general suggestion, they also support the draft Amendment Bill. The observation by Ghai and Ghai that an amendment Bill should contain a single change of the Constitution is a fear that the voters may support a general suggestion or a Bill that contains several different amendments that do not reflect the people's actual will. While the fear is well founded, Chapter 16 of the 2010 Constitution does not require the different matters found in the general suggestion or draft amendment Bill to be endorsed separately by different lists of signatures of registered voters (for popular initiative amendments). This can be cured by amending the Constitution or enacting a referendum legislation to the same effect. As discussed below, Lithuania's comparative constitutional law theory and practice provide instructive lessons for Kenya.

As per Article 255(1) and (3), as read with Article 256(5) and 257(10) of the 2010 Constitution, a purposive interpretation reveals that the 'unity of content' principle is the most relevant for the Kenyan constitutional design and architecture. What is to be subjected to the national referendum is the question(s) as opposed to the Omnibus Amendment Bill. Section 49(2) of the Elections Act states that the issue of the national referendum shall be framed by the IEBC, which shall determine the question(s) to be determined during the national referendum. The national referendum question(s) should be presented separately and distinctively depending on (a) Article 255(1) matters and unrelated matters and (b) whether the amendment falls under parliamentary or popular initiative. For an amendment that is popular and has been passed by Parliament, all those amendments unrelated to Article 255(1) matters stand passed. What goes to the national referendum is, at most, ten referenda questions of the 255(1) matters, depending on the contents of the Amendment Bill. On the other hand, an amendment that is popular and not passed by Parliament, all those amendments in the Amendment Bill are presented to the people in a national referendum. In addition to the ten matters under Article 255(1), such an amendment Bill should contain other questions framed per the 'unity of content'

153 Arts. 256(1)(a) and 257(2), (3) and (4) of the 2010 Constitution.

principle from the Preamble, 18 Chapters, and six Schedules of the 2010 Constitution. For example, land and environment, citizenship, leadership and integrity, public finance, public service, and national security can each have a referendum question formulated. All the amendments unrelated to Article 255(1) matters stand enacted for a parliamentary initiative amendment after having been passed by Parliament. What goes to the national referendum is, at most, ten referenda questions of the 255(1) matters, depending on the contents of the Amendment Bill.

3.3 Judicial overreach and ruinous activism of the KESC

As already stated, the KESC in the *BBI 3* case correctly held that the issue of whether the national referendum questions should be presented to the voters as separate and distinct was unripe for determination. However, reviewing their judgements reveals a worrying trend, as some Judges determined this issue.

The Judges correctly pointed out an apparent confusion between Chapter 16 of the 2010 Constitution and the provisions of the Elections Act. Lenaola SCJ correctly views that a reading of Chapter 16 on amendments to the 2010 Constitution shows that a Bill to amend the Constitution is the 'medium of amendment'.[154] On the one hand, Chapter 16 uses the words: 'a general suggestion', 'A Bill', 'any Bill', 'the Bill', 'a Bill', 'draft Bill', 'a proposed amendment', 'the proposed amendment', 'the amendment', and 'an amendment'. Specifically, Article 257(10) uses the words the '<u>proposed amendment</u> shall be submitted to the people in a referendum' if Parliament fails to pass <u>the Bill</u> or relates to <u>Article 255(1) matters</u>.[155] On the other hand, section 49 of the Elections Act speaks of an 'issue' and 'referendum question or questions'. Therefore, Lenaola SCJ's observation that section 49 is 'inelegantly drafted' is correct.[156] Per section 49, it is the 'issue' that is to go to the national referendum, while under Article 257(10), it is the 'proposed amendment'. This creates confusion, and the correct approach is to read down section 49 to avoid the inconsistency with the 2010 Constitution, which is the supreme law. A purposive interpretation of Article 257(10) reveals that what is presented to the people in a national

154 *BBI 3* case [1696] (Lenaola SCJ).
155 Emphasis added.
156 *BBI 3* case [1702] (Lenaola SCJ).

referendum is the proposed amendment depending on Article 255(1) matters or the failure of Parliament to pass the Amendment Bill.

While the above confusion is clear, it is important to call out the KESC Judges who went ahead to determine the nature of the national referendum questions despite acknowledging that the matter was unripe for determination. Lenaola SCJ, while identifying the confusion brought by section 49 of the Elections Act, wrongly opined that 'a Bill in the singular is what is ultimately presented in a referendum'[157] and 'Articles 256 and 257 consistently refers to a 'Bill' and not 'Bills''.[158] The correct approach is that an Amendment Bill can contain several proposed amendments that should be presented in the national referendum per the 'unity of content' principle, Article 255(1) matters, and unrelated matters. Lenaola SCJ should be called out for exercising judicial overreach and activism by proceeding to determine the issue of separate and distinct referendum questions[159] despite correctly finding and holding that the issue was not ripe for determination.[160] Lenaola SCJ wrongly misquoted the recommendations of the CKRC *Final Report* by stating that the report recommended for entrenched constitutional provisions whose amendment would be through a Bill.[161] The CKRC *Final Report* recommendations referred to the need for the amendment procedure to make a distinction for a Bill seeking to amend the entrenched and other provisions of the Constitution.[162] Ouko SCJ should also be called out for determining the question of separate and distinct referenda questions as follows: the 'language of Chapter Sixteen is that it is the draft Bill that is to be presented to the people in a referendum'[163] despite having found that the issue was unripe for determination.

Similarly, Njoki Ndungu SCJ should also be called out for judicial overreach and activism for finding and holding that section 49 of the Elections Act is unconstitutional (an issue that was not available for determination by the KESC) despite correctly finding and

157 *BBI 3* case [1698] (Lenaola SCJ).
158 *BBI 3* case [1699] (Lenaola SCJ).
159 *BBI 3* case [1699] (Lenaola SCJ).
160 *BBI 3* case [1712] (Lenaola SCJ).
161 *BBI 3* case [1699] (Lenaola SCJ).
162 *CKRC Final Report* 76.
163 *BBI 3* case [2110] (Ouko SCJ).

holding that the issue of separate and distinct referenda questions was unripe for determination.[164] Njoki Ndungu SCJ, while observing that the issue of separate and distinct referendum questions was unripe for determination,[165] she went ahead and stated that the question met the fitness and hardship test against the ripeness doctrine[166] to warrant the KESC to exercise its mind. According to Njoki Ndungu SCJ, Article 257 of the 2010 Constitution 'refers to a Bill, and therefore, what ought to have been referred to under Section 49(1), (2) and (3) is a Bill and not an 'issue' or a 'question''.[167] Njoki Ndungu SCJ agreed with Musinga P's finding that what is to be submitted to the voters is a Bill and not a question(s).[168] She also agrees with Gatembu JA's finding that the Bill containing the amendment proposals is submitted to the voters in a national referendum.[169] Njoki Ndungu SCJ found that the IEBC ought to submit to the voters only a constitutional Amendment Bill with a 'Yes' or 'No' question.[170] Njoki Ndungu SCJ also addressed the constitutionality of section 49 of the Elections Act, which departs from the provisions of the 2010 Constitution and confers the IEBC with a non-existent role in drafting the national referendum questions.[171] Njoki Ndungu SCJ declared that 'Section 49 of the Elections Act, to the extent it departs from the provisions or wording of the Constitution in Articles 256 and 257, unconstitutional'[172] and found as follows:

> The question of referendum questions is not ripe, but invoking an exception to determine the issue, amendments to the Constitution be submitted as one referendum question, and Section 49 of the Elections Act, in as far as it departs from the provisions or wording of the Constitution is unconstitutional.[173]

These decisions of the KESC Judges show that they are serious political actors in matters of constitutional amendments by overstretching their mandate and deciding issues that are unripe for determination. This should be discouraged because the KESC is the apex

164 *BBI 3* case [1345] (Njoki Ndungu SCJ).
165 *BBI 3* case [1333] (Njoki Ndungu SCJ).
166 *BBI 3* case [1336] (Njoki Ndungu SCJ).
167 *BBI 3* case [1341] (Njoki Ndungu SCJ).
168 *BBI 3* case [1342] (Njoki Ndungu SCJ).
169 *BBI 2* case [158], [159] (Gatembu JA).
170 *BBI 3* case [1342] (Njoki Ndungu SCJ).
171 *BBI 3* case [1343] (Njoki Ndungu SCJ).
172 *BBI 3* case [1345] (Njoki Ndungu SCJ).
173 *BBI 3* case [1346(vii)] (Njoki Ndungu SCJ).

court. Judges should only decide matters ripe for determination and allow other State actors to exercise their constitutional mandates.

3.4 Comparative study on referendum questions: Lithuania

A comparative legal analysis of Lithuania's constitutional law theory and practice is relevant. The 1992 Lithuanian Constitution (as amended), Article 9, paragraph 1 provides that a national referendum must decide the 'most significant issues'[174] of the State's life and Nation (People). Such a referendum is announced by the *Seimas* (Parliament) or if requested by at least 300,000 citizens with electoral rights or voters. Procedures for the annunciation and execution of the referendum are established by law. Under Article 67, the *Seimas* considers and adopts constitutional amendments and resolutions on referendums.

Chapter 14 of the Constitution provides for its alteration, supplementation, or amendment. As per Article 147, the motion to amend can be submitted to *Seimas* by ¼ of all its members (that is, at least 36 of 141) or not less than 300,000 voters.[175] Therefore, both the members of the *Seimas* and the people have the right to initiate constitutional amendments. Article 148 provides for the tiered amendment process.[176] First and foremost, Article 1 (the 'State of Lithuania shall be an independent democratic republic') can only be altered by a national referendum if not less than ¾ of the Lithuanians with the

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174 These issues include constitutional supremacy, popular sovereignty, the Lithuania's independence, territorial integrity and constitutional order, the rule of law, responsible governance, and the direct participation of citizens in the governance.

175 Art. 147 § 1 of the Lithuanian Constitution.

176 The 2020 doctrine of limitations on constitutional alteration has emerged in recent jurisprudence from the Constitutional Court. See the Constitutional Court's ruling of 30 July 2020. TAR, No. 2021-14847. Per the ruling, the Lithuania's fundamental constitutional acts cannot be repealed or altered. See also Egidijus Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania: On the Structure of the Constitution, the Non-Amendability of Constitutional Provisions, and the Legal Force of 'Pre-Constitutional' Acts' (2023) 48 RCEEL 95, 126-127 who observes that the 2020 ruling has 'overhauled– the system of sources of Lithuanian constitutional law by dividing them into two tiers' namely: (a) Non amendable 'fundamental acts' as 'primary', 'supra-constitutional sources'. This is some 'supra-constitutional law' enshrined in the four historical acts as its sources. (b) The 1992 Constitution (with its constituent part) and official constitutional doctrine (based on it are sources of constitutional law) where constitutional provisions are construed. See also Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania' 131 who further correctly observes that the doctrinal novelty of the notion of 'supra constitutionality' was an ill-considered experimentation as 1992 is supreme, and it raises serious questions, including adjusting the doctrine per the legal construction canons.

electoral rights vote in favour- a 'factual impossibility'.[177] Secondly, the First Chapter (the State of Lithuania)[178] and the Fourteenth Chapter (Alteration of the Constitution) can only be altered by a national referendum.[179] Thirdly, amendments to other Chapters must be considered and voted on at the *Seimas* twice, with a break of three months in between such votes. Such amendments are deemed adopted if not less than two-thirds of all *Seimas* members (at least 94) vote in favour in both votes. The President has an unconditional duty to promulgate constitutional amendments with no veto power over them.[180] All amendments not adopted can only be 'submitted to the *Seimas* for reconsideration not earlier than after one year'.[181] These amendment provisions create a two-tiered amendment process. The amendment of Chapters one and 14 require a more rigorous threshold via a national referendum of ¾ Lithuanians voting in favour. The other Chapters require a less rigorous threshold of only two-thirds of all the *Seimas* members without requiring ratification in a national referendum.

The Constitutional Court of Lithuania (CCL) has had the opportunity to address the nature and content of the referendum questions under the Lithuanian Constitution. In Case No. 16/2014-29/2014,[182] the CCL addressed the question of organising and calling referendums. The CCL was seized to decide whether Lithuania's Law on Referendums[183] violated Article 6, paragraph 1[184] and Article 7, paragraph 1[185] and the rule of law. The CCL was called upon to investigate the constitutionality of the Law on Referendums that does not provide for roles of the Central Electoral Commission of the Republic of Lithuania (CECRL) and the *Seimas* to assess the draft law's constitutional compliance and give the right to decide on calling a referendum on draft laws that may not be in line with constitutional requirements, respectively. The CCL held that the Law on Referendums,

177 Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania' 106.

178 This Chapter provides for matters including national sovereignty, independence, territorial integrity, constitutional supremacy, the rule of law, referenda, citizenship, and State language.

179 Art. 148 § 2 of the Lithuanian Constitution. The turnout and adoption thresholds are not specified; they must be set in a statute.

180 Art. 149 § 1 of the Lithuanian Constitution.

181 Art. 148 § 4 of the Lithuanian Constitution.

182 See the Constitutional Court's ruling No. KT36-N10/2014 of 11 July 2014 (Case No. 16/2014-29/2014) on organising and calling referendums (hereinafter 'the CC's ruling of 11 July 2014').

183 (Official Gazette *Valstybės žinios*, 2002, No. 64-2570) 4 June 2002 No IX-929.

184 This paragraph states: 'The Constitution shall be an integral and directly applicable act'.

185 This paragraph states: 'Any law or other act, which is contrary to the Constitution, shall be invalid'.

Law on the Central Electoral Commission[186] and the Law on the Fundamentals of Lawmaking do not contain the legislative omission as alleged by the petitioner as they implicitly empower the CECRL to assess the draft law's constitutional compliance, including reviewing the content and form of the draft constitutional Amendment Bill.[187] The CCL ruled that the Law on Referendums conflicted with Articles 6 paragraph 1, 7 paragraph 1, and 9 paragraphs 1 and 3 of the Constitution and the rule of law because:

> [I]t does not establish the requirement that several issues unrelated by their content and nature, or several unrelated amendments to the Constitution..., or several unrelated provisions of laws may not be submitted as a single issue in a decision proposed to be put to a referendum… [and] the *Seimas* … is obliged to adopt a resolution on calling a referendum where the decision proposed to be put to the referendum may not be in line with the [constitutional] requirements.[188]

The CCL has pointed out that citizens' direct participation in State governance is a 'very important expression of their supreme sovereign power; therefore, a referendum must be a testimony to the actual will of the nation [people]'.[189] In its 11 July 2014 ruling, the CCL noted that when the most significant issues concerning the State's life and Nation are put to a national referendum, 'they must be such issues regarding which it would be possible to determine the actual will of the nation: inter alia, they must be formulated in a clear and not misleading manner'.[190] The CCL construed Articles 2, 4, and 9, paragraph 1, conjunctively and correctly observed that they give rise to the imperative that preconditions must be created to determine the Nation's actual will in a national referendum.[191] The CCL then held that:

> Consequently, under the Constitution, several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws may not be put to a vote in a referendum as a single issue. Acting otherwise would deny the possibility of determining the actual will of the nation separately regarding each most significant issue concerning the life of the State and the nation…. the approval of citizens for calling a referendum must be expressed separately regarding each issue being put to the referendum, i.e., a single signature may not be given in support of an initiative to call a referendum on

186 20 June 2002 No. IX-985 (as amended).
187 CC's ruling of 11 July 2014, 38-39, 43-44, 53.
188 CC's ruling of 11 July 2014, 53-54.
189 Constitutional Court's ruling of 22 July 1994. TAR, No. 0941000NUTARG940214. Emphasis added.
190 CC's ruling of 11 July 2014, 18.
191 CC's ruling of 11 July 2014, 19.

> several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws.[192]

Therefore, the issues should be separately addressed during the collection of voters' signatures so that people can endorse their signatures separately against such issues.[193] The same applies during the national referendum voting as such issues should be put separately to the people in the national voting. This is the only way to afford the people the opportunity to decide their support for each initiative separately, and it would be possible to determine whether the people indeed support each of the issues (unrelated by their nature and content). The Law on Referendums must capture the above sentiments to the extent that several issues unrelated by their nature and content may not be put to a national referendum as a single issue.[194] Where the constitutional amendment relates to several different issues, several separate questions must be presented to the people in the national referendum.

The CCL also referred to the *Guidelines for Constitutional Referendums at National Level*[195] as adopted by the European Commission for Democracy through Law (Venice Commission) at its 47th Plenary Session on 6-7 July 2001. These *Guidelines* under Section II provide that a text submitted to a national referendum must be regulated at the constitutional level and comply with the procedural and substantive requirements. The substantive requirement is that the constitutional amendments must comply with constitutional principles such as democracy, human rights, the rule of law, and international law norms and principles. The procedural requirements are in the constitutional amendment; the question(s) put to a national referendum must have an intrinsic (substantive) connection between the text parts. To guarantee free suffrage for the voters, the people must not be called to refuse or accept as whole provisions without

192 CC's ruling of 11 July 2014, 19, 48.
193 CC's ruling of 11 July 2014, 48.
194 CC's ruling of 11 July 2014, 21-22.
195 These *Guidelines* set out minimum rules for constitutional referendums (on a partial or total revision), and are designed to ensure that they are used in all European countries per the democratic and the rule of law principles. See also the *Code of Good Practice on Referendums*, comprising the Guidelines on the Holding of Referendums and the Explanatory Memorandum, as adopted by the Venice Commission at its 70th Plenary Session on 16-17 March 2007. This *Code* is analogous to the *Guidelines* on the procedural and substantive requirements such as the 'unity of content' principle.

a unity of content. Only those texts that comply with substantive and procedural requirements must be put to a popular vote in a national referendum.[196] The CCL summarised these requirements as follows:

> Compliance with substantive requirements means compliance with, among other things, essential constitutional principles (democracy, protection of human rights, and the rule of law) as well as with the universally recognized principles and norms of international law. Procedural requirements, inter alia, include the unity of the content of the text—amendments to the Constitution put to the single vote must be related to one another, i.e., the text of some proposed amendments to the provisions of the Constitution must not be put to the single vote if it combines amendments that are, in substance, of a different content.[197]

Consequently, the Law on Referendums was amended to reflect the CCL's ruling. Therefore, it is safe to conclude that, in Lithuania, where the constitutional amendment relates to several different aspects, several separate questions must be presented to the people in a national referendum. In addition, all unlawful national referenda (either procedurally or substantively invalid Amendment Bills) must not be presented to a national referendum.

Lithuania's constitutional law theory and practice on referendum questions is relevant to Kenya and marries with the 'unity of content' principle. The Lithuanian Constitution, the Law on Referendums, and the jurisprudence of the CCL support the principle of the 'unity of content' in the content and form of the referendum questions. Under this principle, several unrelated constitutional amendments, several unrelated issues or several unrelated provisions of laws must each have separate national referendum questions. This marries well with Article 255 of the Kenyan Constitution, which provides for a national referendum on the ten matters and other unrelated matters not passed by Parliament. To determine the actual will of the Kenyan people during the constitutional amendment processes and the national referendum, the 'unity of content' principle must apply during the collection of signatures of the registered voters (in the case of popular initiative amendments) and the national referendum. While applying the 'unity of content' principle during signatures collection is not provided by the 2010 Constitution, it can be provided by amending it or enacting a referendum legislation. Such an amendment or legislation

196 Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania' 125.
197 CC's ruling of 11 July 2014, 31.

should allow the people to append their signatures to each matter or issue separately framed during the signatures' collection. Also, during the national referendum, the people must vote separately on the questions or issues framed per the 'unity of content' principle per Article 255(1) matters in addition to other questions or issues framed from the Preamble, 18 Chapters and six Schedules of the 2010 Constitution if not passed by Parliament. In conclusion, the constitutional jurisprudence from Lithuania offers instructive lessons for Kenya regarding the framing of the issues or questions concerned during the collection of signatures and national referendum.

4 Whether State actors can initiate popular initiative amendments

This issue arose in the *BBI* cases and will likely arise again in future constitutional amendments. It is discussed under the following subheadings: (a) Meaning of State actors, and (b) State actors cannot initiate popular initiative amendments.

4.1 Meaning of State actors

State actors is a collective term used that refers to the State organs, offices and officers, and judicial officers. Article 260 of the 2010 Constitution that provides for interpretation defines the terms: 'State organ', 'State office', 'State officer' and 'judicial officer'. A 'judicial officer' means 'a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under Article 169(1)(d)'. Article 169(1)(d) provides for subordinate courts, including 'any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2)'. A good example of presiding officers of a court established by national legislation are the adjudicators of the Small Claims Court under the Small Claims Court Act 2016. The courts established under Article 162(2) are the Employment and Labour Relations Court and the Environment and Land Court, which have the status of the High Court of Kenya.

'State office' means any of the following offices:

(a) President, Deputy President, Cabinet Secretaries, Principal Secretaries, Secretary to the Cabinet, Attorney-General, Director of Public Prosecutions, Chief of the Kenya Defence Forces (KDF), commanders of services of the KDF, Director-

General of the National Intelligence Service, Inspector-General and the Deputy Inspectors-General of the National Police Service, Governors or Deputy Governors, and Members of the County Executive Committees.

(b) Members of Parliament (National Assembly and Senate) and Members of County Assemblies.

(c) Judges and Magistrates.

(d) Members of independent commissions and holders of independent offices under Chapter 15 of the 2010 Constitution.

(e) Offices established and designated as State offices by national legislation.

A 'State officer' means a 'person holding a State office' while a 'State organ' means a 'commission, office, agency or other body established' under the 2010 Constitution. The above State actors possess the State powers (legislative, executive and judicial) in Kenya's constitutional democracy. Given their powers, they cannot initiate popular initiative amendments reserved for the *Wanjiku*, as discussed below.

4.2 State actors cannot initiate popular initiative amendments

As discussed in Chapter three, part 4 on delimiting popular initiative amendments, popular initiative amendments are initiated by the drafting of an Amendment Bill and the collection of at least one million signatures of registered voters per Article 257(1), (2) and (3) of the 2010 Constitution. The question that follows is whether State actors can initiate popular initiative amendments. This question arose in the *BBI* cases with specific reference to the President, and the correct answer is in the negative for the reasons explained below.

4.2.1 State actors only exercise representative sovereign power

As explained in Chapter two, part 2.1, the supreme sovereign power of the people is exercised either directly by the people or via democratically elected and appointed representatives such as the President, Governors, and Members of Parliament. Representative sovereign power is limited and can only be exercised per the 2010 Constitution and the law. Any purported exercise of representative sovereign power outside the 2010 Constitution and the law is unconstitutional, illegal, null, and void *ab initio*.

The *BBI 1* and *BBI 2* cases correctly found that the President initiated the amendment process through several antecedent acts, and the 'State was the real force behind the amendment process',[198] including using State resources to support the process. There was evidence that the National Executive and President took specific actions not as private citizens, thus portraying the President's role in initiating and promoting constitutional amendments. This was by signing off the initial Communiqué of 9 March 2018 in an official capacity with the Republic's Coat of Arms and the President's seal,[199] the BBI Taskforce and Steering Committee appointed via official gazette notices,[200] and the President received the official reports as part of the State functions. The Steering Committee's terms of reference included proposing constitutional changes, which was the premise for which it drafted the BBI Amendment Bill to implement the President's directive as the appointing authority. The President could not be delinked with the BBI Amendment Bill, which resulted from implementing a task assigned by him. The actions were taken by the Presidency (Office) as a State organ and could not be attributed to any person holding the office in his personal capacity.[201]

The 2010 Constitution provides explicit and limited presidential powers under Chapter nine and other provisions. In the *BBI 2* case, Okwengu JA correctly noted that the President's role in the:

> [A]mendment of the Constitution is at the tail end of the process, as provided under Articles 256(5) and 257(9) of the Constitution, … in his capacity as President, to assent to an Amendment Bill once passed by Parliament or the people through a [national] referendum.[202]

The President has the option of engaging his political party to pursue constitutional changes via the parliamentary initiative because he has no authority to promote popular initiative amendments.[203] Constitutional amendments can only be pursued via

198 As correctly observed by Koome CJ & P in the *BBI 3* case [252].
199 Uhuru Kenyatta and Raila Odinga, 'The Joint Communique of Building Bridges to a New Kenyan Nation' (9 March 2018).
200 Gazette Notice No. 5154 dated 24 May 2018 'Establishment of Taskforce on Building Bridges to Unity Advisory'; Gazette Notice No. 264 dated 3 January 2020, Vol. CXXII- No. 7 'The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force Report'.
201 *BBI 3* case [255] (Koome CJ & P).
202 *BBI 2* case [152] (Okwengu JA).
203 *BBI 2* case [158] (Okwengu JA).

parliamentary and popular initiatives under Articles 256 and 257, respectively. Under Article 257(9) and section 49(1) of the Elections Act, the President's role in popular initiative amendments is limited to assenting Amendment Bills and referring such Bills to the IEBC to conduct national referenda. Allowing the President to initiate popular initiative amendments goes against the principle of separation of powers, checks and balances. The President cannot be a promoter of popular initiative amendments as this infringes Article 10 which usurps the people's supreme sovereign power and voids the social contract between the State and people. Article 257 impliedly limits the President's participation in initiating constitutional amendments via popular initiatives. This is because if Article 257 allows the President to initiate constitutional amendments, it would upset the balance between direct and representative democracy which is the provision's characteristic. An interpretation that balances direct and representative democracy should always prevail over one that undermines it. The President's political rights under Article 257 are always curtailed during his term in office.

Article 131(2) of the 2010 Constitution states that the President must safeguard the popular sovereignty. Article 38 cannot be used by State actors to capture popular sovereignty because once a Kenya citizen becomes a President, they cease being an ordinary citizen;[204] and are precluded from playing both participatory and representative democratic roles.

Can a President claim that his political rights under Article 38 are under threat if not allowed to initiate popular initiative amendments? No. The right to propose constitutional amendments is a democratic cause that is protected under the umbrella of political rights. However, Article 20(2) of the 2010 Constitution requires persons to enjoy the Bill of Rights to the 'greatest extent consistent with the nature' of the rights. It follows that an interrogation must be done to determine whether any person claiming violation of his rights is a beneficiary of those rights in the first place. Notably, Article 38(1) guarantees that 'Every citizen is free to make political choices', which limits the enjoyment of this right to 'citizens'. Koome CJ & P was correct to conclude that 'for one to be a beneficiary of the

[204] *BBI 3* case [453] (Mwilu DCJ & VP).

freedom to make political choices they must fall within the category of a citizen'[205] as such freedom is a 'right that does not accrue to State organs or institutions' as they 'cannot be citizens because under Chapter Three of the Constitution, citizenship is limited to living human beings excluding State organs and institutions'.[206] The right to make political choices under Article 38 does not accrue to the Presidency (a State organ) and other State organs who are not citizens. Koome CJ & P was correct to conclude that the:

> [E]xclusion of the institution of the Presidency and other State institutions from initiation of a process to amend the Constitution through the popular initiative route does not violate political rights protected under Article 38(1) of the Constitution.[207]

The Kenyan constitutional history points to the curbing of the legacy of dominance of the governance system by the imperial Presidency in the pre-2010 era. Chapter nine details the President's powers and authority, and the exercise of such powers. Therefore, there is no need to expand, imply and extend the presidential powers, which is against the text, spirit, architecture and design of the 2010 Constitution. Koome CJ & P correctly found that:

> In its architecture and design, the Constitution strives to provide explicit powers to the institution of the Presidency and, at the same time, limit the exercise of that power. This approach of explicit and limited powers can be understood in light of the legacy of domination of the constitutional system by imperial Presidents in the pre-2010 dispensation. As a result, Chapter Nine of the Constitution lays out in great detail the powers and authority of the President and how such power is to be exercised. In light of the concerns over the concentration of powers in an imperial President that animate the Constitution, I find that implying and extending the reach of the powers of the President where they are not explicitly granted would be contrary to the overall tenor and ideology of the Constitution and its purposes.[208]

Since Article 257 does not explicitly preclude the President from initiating popular initiative amendments, such silence must be read in the specific written text of who can promote

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205 *BBI 3* case [249] (Koome CJ & P).

206 *BBI 3* case [250] (Koome CJ & P); *Famy Care Limited v Public Procurement Administrative Review Board & Another*, HC Petition No. 43 of 2012; [2013] (Majanja J) where it was it was legally correctly found that the 'definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution'. See also Mumbi Ngugi J in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others*, HC Petition No. 278 of 2011; [2013] eKLR.

207 *BBI 3* case [251] (Koome CJ & P).

208 *BBI 3* case [243] (Koome CJ & P). Emphasis added.

such amendments.[209] Kenya's history should also be considered as defined by the culture of hyper-amendments promoted by the Parliament, which was an appendage of the Executive branch. Ouko SCJ correctly observed that:

> The framers' intention, guided by that background, was to provide a check against a future imperial presidency, by deliberately limiting presidential power in the process…; to give consent to the Bill and to request the IEBC to conduct a national referendum.[210]

This role is ceremonial, as even if the President does not request the IEBC to conduct the national referendum, the IEBC can proceed with it upon the expiry of thirty days.

The President's role with respect to Article 255(1) matters, as read with Articles 256(5) and 257(10), is one of guardianship of the constitutional amendment processes. The President is obligated to review the Amendment Bills when presented for assent and refer the same to the IEBC for a national referendum to be held if such Bills contain Article 255(1) matters. This President's role cannot be taken by a player and umpire in the same process.[211]

Therefore, State actors cannot originate Amendment Bills through popular initiative and then sponsor a citizen to collect signatures and draft such Bills. The true intention of popular initiative amendments must be guarded against abuse by looking beyond the promoter to identify the hands behind such sponsorship.[212]

4.2.2 Popular initiative amendments are reserved for the Wanjiku

Popular initiative amendments are a preserve of the *Wanjiku* in their exercise of direct supreme sovereign power in the Kenya's constitutional democracy. In the *BBI 2* case, Okwengu JA correctly found that popular amendments are initiatives of the ordinary citizenry instead of law-making bodies.[213] Under Article 257, State actors cannot initiate an amendment via a popular initiative. Ouko SCJ also correctly observed that Article 257 envisages amendments originating outside of the government's legislative, executive and

209 *BBI 3* case [1917] (Ouko SCJ).
210 *BBI 3* case [1917] (Ouko SCJ).
211 *BBI 3* case [245] (Koome CJ & P).
212 *BBI 2* case [60] (Tuiyott JA).
213 *BBI 2* case [112] (Okwengu JA).

judicial structures.[214] The legislative, executive and judicial structures cannot be considered as 'the people' envisioned under the 2010 Constitution.

Per the social contract theory, the private citizens (the people) own the constituent power and not the representatives. Gerber explains that citizens (voters) can constrain elected representatives' behaviour in America by proposing, voting and enacting policies directly independent of the legislative structures.[215] Galligan further explains that a 'popular initiative' is a direct action that empowers the people to initiate, abrogate, or introduce laws and a national referendum on constitutional and non-constitutional matters.[216] Setala also explains a 'popular initiative' as a petition by several citizens to call for a national referendum on legislative changes as an alternative to the representative structures.[217] Numata observes that governments usually adopt popular referendums, allowing citizens to vote on specific laws directly.[218] Direct legislation by the people, such as popular initiatives and national referenda, provides education and empowers the people to check the policies of elected representatives.[219] The golden thread from the above scholarship is that popular initiatives are exercises of the direct supreme sovereign power by the people, as opposed to elected and appointed representatives. In the *BBI 3* case, Ouko SCJ correctly described a popular initiative as an 'initiative by the general public; in common parlance, simply, the people'.[220]

Article 255(3)(b) of the 2010 Constitution provides that the people and Parliament, per Article 257, can amend matters unrelated to Article 255(1). Bhatia correctly observes that:

> [T]he scheme of Articles 255-257 reflected a carefully crafted balance between representative (Article 256) and direct democracy (Article 257). Indeed, given that, since Article 255(3) specifically mentioned the people and Parliament, it clearly viewed "the People" as an entity distinct from representative bodies. Allowing the President to be involved in initiating an Article 257 process, therefore, would

214 *BBI 3* case [1909] (Ouko SCJ).
215 Elisabeth Gerber, 'Legislative Response to the Threat of Popular Initiatives' (1996) 40(1) AJPS 99-128.
216 Denis Galligan, 'The Sovereignty Deficit of Modern Constitutions' (2013) 33(4) OJLS 703-732.
217 Maija Setala, 'On the Problems of Responsibility and Accountability in Referendums' (2006) 45(4) EJPR 699-721.
218 Chieko Numata, 'Checking the Center: Popular Referenda in Japan' (2006) 9(1) SSJJ 19-31.
219 See generally, Numata, 'Checking the Center'.
220 *BBI 3* case [1892] (Ouko SCJ).

> amount to bringing in representative bodies through the back door, after the front door had been firmly closed by the overall amendment scheme.[221]

Therefore, State organs such as the Presidency and Members of Parliament that do not fall within the 'people' as provided under the 2010 Constitution cannot initiate popular initiative amendments in their capacities as democratically elected representatives.[222] Wanjala SCJ correctly and firmly believes that a popular initiative amendment is a 'people-centered process… [that] excludes any other constitutional entity or institution'.[223] While the President has rights as a Kenyan citizen, some are constitutionally limited; hence, he cannot initiate popular initiative amendments and awaits the same Bills under Article 257(9) and assent to them.[224] This would be an absurdity that could not have been the framers' intention for the President under Article 256(5)(a) and (b) to request the IEBC to conduct a national referendum within ninety days for approval and also assent the same Bill. The President has specific roles in popular initiative amendments, and those roles exclude initiating such initiatives.[225]

The President has no powers to determine whether a national referendum should be held, but instead the President must request the IEBC to hold such a national referendum if the amendment relates to matters referred to under Article 255(1) of the 2010 Constitution or if Parliament fails to pass an Amendment Bill from a popular initiative. The KeHC was, therefore, right in finding that the popular initiative under Article 257 as read with Article 255 is a reserve of the Kenyan people in exercise of their supreme sovereign power directly and the President or other State actors cannot utilise these Articles to amend the Constitution.[226] The KeHC correctly concluded that it was:

> [N]ot within the President's power to initiate proposals to amend the Constitution, ostensibly as a Popular Initiative, under the pretext of promoting and enhancing the unity of the Nation. The Constitution can only be amended as prescribed in Articles 255, 256 and 257 of the Constitution.[227]

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221 Bhatia, 'The Hydra and the Sword' 15.
222 *BBI 3* case [481] (Mwilu DCJ & VP), [1535] (Lenaola SCJ).
223 *BBI 3* case [1042] (Wanjala SCJ), [1535] (Lenaola SCJ).
224 *BBI 3* case [1535] (Lenaola SCJ).
225 *BBI 3* case [1536] (Lenaola SCJ).
226 *BBI 1* case [499].
227 *BBI 1* case [588].

The KeHC correctly held that:

> [A] Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment independent of the law making power of the governing body … cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests.[228]

Therefore, it is safe to conclude that State actors, including the President, cannot initiate popular initiative amendments as this is a preserve of the *Wanjiku* as individuals or organised as civil society groups.

4.2.3 Legislative authority lies with the Parliament

The national government's legislative authority resides with Parliament per Article 94(1) of the 2010 Constitution. State actors can only propose to Parliament or the people and cannot initiate amendments under Articles 256 and 257 or officially promote such processes. Any suggestion that State actors can promote popular initiative amendments is untenable under the 2010 Constitution without petitioning Parliament. The KeHC was right in the *BBI 1* case where it was held that:

> Under the Constitution, the President is not a Member of Parliament and therefore cannot directly, purport to initiate a constitutional amendment pursuant to Article 256 of the Constitution. This is because, under Article 94(1) of the Constitution, the legislative authority of the Republic at the national level, is vested in and exercised by Parliament. It follows that the President has no power under the Constitution, as President, to initiate changes to the Constitution under Article 256 of the Constitution since Parliament is the only State organ granted authority by or under the Constitution to consider and effect constitutional changes. The President, if he so desires, can however, through the Office of the Attorney General, use the Parliamentary initiative to propose amendments to the Constitution.[229]

State actors including the Presidency can initiate constitutional amendments by petitioning the Parliament to amend the 2010 Constitution via the parliamentary initiative. Therefore, the *BBI 1* case, *BBI 2* case and *BBI 3* case (6-1 majority) decisions were correct to declare the BBI Amendment Bill as an initiative of the President who cannot

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228 *BBI 1* case [497]. Emphasis added.

229 *BBI 1* case [490].

initiate popular initiative amendments, hence it was unconstitutional, illegal, null and void *ab initio*. State actors cannot initiate popular initiative amendments. They can petition Parliament to initiate amendments via the parliamentary initiative. The President cannot initiate popular amendments. A sitting President can also petition Parliament to initiate parliamentary amendments.

5 Concluding remarks

This Chapter has discussed three arising issues in Kenya's post-2010 constitutional amendments: (a) the basic structure 'doctrine'; (b) the nature and scope of national referendum questions; and (c) whether the State actors can initiate popular initiative amendments. The basic structure 'doctrine' does not apply to Kenya because the 2010 Constitution has provided multi-tiered amendment procedures to effectively cure the culture of hyper-amendments and achieve the desired fair balance between rigidity and flexibility in constitutional design and architecture. The national referendum questions should be presented separately and distinct depending on (a) Article 255(1) matters and unrelated matters and (b) whether the amendment falls under the parliamentary or popular initiative, per the 'unity of content' principle. On the one hand, for popular and parliamentary initiative amendments passed by Parliament, all those amendments unrelated to Article 255(1) matters stand passed. What goes to the national referendum is, at most, ten national referendum questions of the 255(1) matters, depending on the scope of the Amendment Bill. On the other hand, for a popular initiative amendment not passed by Parliament, all those amendments in the Bill are presented to the people in a national referendum. In addition to the ten matters under Article 255(1), such a Bill should contain other questions framed per the 'unity of content' principle from the Preamble, 18 Chapters and six Schedules of the 2010 Constitution. State actors cannot initiate popular initiative amendments. They can petition Parliament to initiate amendments via the parliamentary initiative. The President cannot initiate popular initiative amendments. A sitting President can also petition Parliament to initiate amendments through the parliamentary initiative. The next Chapter is the last and covers the conclusion and recommendations of the study.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

1 Introduction

This is the last Chapter of the study. It draws conclusions and answers the research questions. It outlines the findings, major argument, lessons from and 'reverse learning' for the comparative jurisdictions: South Africa, India, and Lithuania. It also gives recommendations regarding Kenya's post-2010 constitutional amendments.

2 Findings of the study

Constitutional amendment processes and Bills must abide by the constitutional principles: popular sovereignty, constitutional supremacy, separation of powers and checks and balances, and transformative constitutionalism. The constitutional amendment processes and Bills that fail to abide by these principles can be declared unconstitutional, illegal, null, and void *ab initio* by the superior courts. In interpreting constitutional amendment provisions, the purposive interpretation must be used to determine and identify the purposes of such provisions and give effect to them. The starting point in constitutional interpretation is looking at the text, followed by the contextual approach, that is, intra and extra-textual contexts. The people-empowering constitutional amendment provisions must be interpreted liberally, broadly, and generously in favour of the people to give effect to their supreme sovereignty in amendments. The pre-2010 Constitution-making history reveals highly participatory and people-centred processes in which the ordinary people were actively involved in making the Constitution. Any post-2010 constitutional amendment process must also be highly participatory and people-centred, with ordinary Kenyans actively promoting and effecting changes that promote democratic good governance and advance positive societal transformations.

The pre-requisites in constitutional amendments are the composition of the Independent Electoral and Boundaries Commission (IEBC), which is always quorate with three commissioners, and public participation that is infused in all stages of the amendment processes. The promoters and Members of Parliament must put these pre-requisites in mind before initiating constitutional amendments. Constitutional amendments must strictly abide by the parliamentary and popular initiative amendment provisions as provided under Articles 256 and 257 of the 2010 Constitution, respectively. The

entrenched provisions under Article 255(1) of the 2010 Constitution can only be amended through the national referendum under Article 255(2), while the matters unrelated to Article 255(1) can be amended under Article 255(3) by Parliament only, or the people and Parliament.

The basic structure ‘doctrine’ is not applicable in Kenya as the 2010 Constitution has provided multi-tiered amendment procedures that effectively cure the culture of hyper-amendments and achieve the desired balance between rigidity and flexibility in constitutional design and architecture. The national referendum question(s) should be presented separately and distinct per the ‘unity of content’ principle depending on (a) Article 255(1) matters and unrelated matters and (b) whether the amendment falls under parliamentary or popular initiative. State actors cannot initiate popular initiative amendments. They can petition Parliament to initiate amendments via the parliamentary initiative. The President cannot initiate popular amendments. A sitting President can also petition Parliament to initiate parliamentary amendments.

3 Major argument

At the time of writing (October 2024), the 2010 Constitution had resisted more than twenty-two attempts on its amendment. This shows that the 2010 Constitution has been remarkably resilient compared to the previous Constitution, which was successfully amended twelve times on its tenth anniversary. On its fourteenth anniversary since its promulgation in August 2010, there have been more than twenty-two unsuccessful attempts to amend the 2010 Constitution. This is courtesy of the multi-tiered or staged, people-centred, and highly participatory mandatory amendment procedures found under Chapter 16 of the 2010 Constitution. This is enough evidence that the people successfully addressed the culture of hyper-amendments that bewildered the previous Constitution and effectively balanced the rigidity and flexibility in amending the 2010 Constitution.

Purposive interpretation must be adopted for the constitutional amendment provisions. The Kenyan people are the supreme sovereign in constitutional amendments. The people must occupy the vital centre stage as the central promoters under the 2010 Constitution in constitutional amendments. Constitutional amendments must only be initiated to

improve democratic good governance and adjust to positive societal transformations. Constitutional reforms and amendment processes must be people-centred and highly participatory, similar to those processes that led to promulgating the 2010 Constitution.

4 Lessons from South Africa, India, and Lithuania

There are lessons that Kenya can learn from South Africa, India, and Lithuania.

4.1 South Africa

The basic structure ‘doctrine’ does not apply to a Constitution with entrenched rigid, clear, and unambiguous amendment provisions. Superior courts should not invent the exercise of sovereign power outside such a Constitution, especially where the amendment procedure is available and has been strictly followed in amending the Constitution. Superior courts should exercise judicial restraint and caution in applying and borrowing foreign jurisprudence, theories, and principles that could subvert or usurp the supreme sovereign power of ordinary people. There is caution about the danger of mechanistic or formalistic approaches to their adoption. Matters of constitutional amendments are serious, and nothing could have prevented drafters from expressing themselves, including the basic structure ‘doctrine’ and eternity and unamendable provisions. Implying such doctrines or provisions via judicial interpretation is an abuse of judicial power, which must be discouraged in a transformative and progressive Constitution with self-executing, explicit, and in-built amendment provisions, such as the South African Constitution. Like South Africa, Kenya has entrenched self-executing, clear, and in-built amendment provisions in its 2010 Constitution. However, Kenya has different needs, circumstances, and contexts. The 2010 Constitution is predicated on amendments through a national referendum for the basic structure, unlike in South Africa, where there is no provision for a national referendum.

4.2 India

The text, structure, design, architecture, history, and context of a Constitution are essential when it comes to interpreting amendment provisions. Per *Kesavananda Bharati*

v State of Kerala & Another[1] and other decisions, the Indian Constitution only provides for amendment by Parliament, and the basic structure 'doctrine' applies to India. People cannot amend the Constitution. The Indian Supreme Court may be correct to hold as it did (7-6 majority) because for the people to actively participate in amending the basic features, there is a need to allow them to participate. The text, structure, design, architecture, history, and context of Kenya's 2010 Constitution differ from India's. The 2010 Constitution, which has Chapter 16 specifically providing for amendment provisions by parliamentary and popular initiatives, is transformative and progressive, and both people and Parliament can initiate constitutional amendments. The basic structure is specifically amended via a national referendum.

4.3 Lithuania

The Lithuanian Constitution, just like its Kenyan counterpart, provides for its amendment through the *Seimas* (Parliament) and the people and a national referendum for the 'most significant issues' as the basic structure. Lithuania has adopted the constitutional amendment principle of the 'unity of content' in collecting registered voters' signatures for constitutional amendments and the national referendum. While collecting signatures, the voters must endorse each of the 'most significant issues' separately. The same applies during the referendum, as such issues must be presented separately to the people. This is the only way to get the people's actual will to support any constitutional amendments. Kenya must also learn from Lithuania and adopt the 'unity of content' principle in collecting signatures (for purposes of popular initiative amendments) and in the national referendum.

5 'Reverse learning' for South Africa, India and Lithuania

South Africa, India, and Lithuania can learn from Kenya that developing indigenous and 'home-grown' jurisprudence in constitutional amendments is essential. Kiage JA correctly observes that Kenya is part of the globalised world, that superior 'courts will always be part of a continuing conversation on comparative constitutional law and practice', and that

[1] (1973) 4 SCC 225.

Kenya's 'progressive jurisprudence is solid enough and sufficiently persuasive to other jurisdictions'.[2] Kenya has developed her indigenous jurisprudence, that is, *Kenyanprudence*[3] in matters of constitutional amendments. It can only borrow what is good for her from foreign jurisprudence and incorporate it per her contexts, needs, and circumstances. Constitutional amendments are crucial for the 2010 Constitution to remain a living document that responds to the needs and circumstances of each generation but also requires safeguards against abusive amendments.[4]

Both South Africa and India can also learn that the Constitution should provide for a national referendum to amend the basic structure. South Africa, India and Lithuania can learn that the ordinary people must be the central promoters of any constitutional amendment initiatives. The Supreme Court of Kenya (KESC) in *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others*,[5] held that the basic structure 'doctrine' does not apply in Kenya, as the 2010 Constitution has a self-contained mechanism (two-tiered amendment process) to deal with any threat of abusive amendments. This is a very creative, unique, significant and valuable contribution on the jurisprudence of constitutional amendments by the KESC when faced with the possibility of abusive amendments within the framework of two-tiered amendment processes. The KESC also recognised that, in light of the Kenyan history where the President instigated abusive constitutional amendments under the previous Constitution, the President could not initiate constitutional amendments via a popular initiative, as this is a citizen-driven and people-centred process. In light of this, the KESC correctly found that the 2010 Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional, as the President had initiated it.

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2 *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others* (Amicus Curiae) [2021] eKLR 38, 39 (Kiage JA) (hereinafter 'the *BBI 2* case').

3 *Kenyanprudence* is my neologism. The term is coined from the two words: 'Kenyan' and 'jurisprudence'. It is used to refer to the development of jurisprudence that is Kenyan (home-grown, indigenous, robust, and patriotic) and takes into account the peculiar circumstances of Kenyan society, including socio-economic, cultural, political, legal, constitutional, theological, and spiritual factors.

4 Martha Koome, 'Social Transformation through Access to Justice: The Jurisprudence of the Supreme Court of Kenya' (2023) 95 Platform 39, 42 para 28.

5 (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) (hereinafter 'the *BBI 3* case').

6 Recommendations

The following recommendations are proposed as far as Kenya's post-2010 constitutional amendments are concerned.

6.1 Political goodwill and good political leadership

From the experience of implementing the 2010 Constitution, it is clear that good political leadership and political goodwill are essential in ensuring good democratic governance in a country. Sincerely speaking, this has been missing in post-2010, just like in the pre-2010 era. Kenyans must democratically elect leaders of the highest integrity during the general elections and by-elections who would exercise the delegated sovereign power for their benefit and serve the people's welfare. Kenyans should refrain from electing leaders based on ethnicity and 'voter-buying' as this does not, in most cases, bring to a crop of leaders who are responsible for the welfare of the people. Political leaders should have political goodwill and good leadership skills.

The legislative structures at the national and county levels should refrain from being selfish and having greedy ambitions in matters of constitutional amendments where the aspirations of Kenyans are at stake. As stated in this study, constitutional amendments are one way of securing the Constitution's limitations, and the legislative structures must take this role seriously. They should refrain from poor constitutional politics for their benefit at the expense of Kenyans. For example, the Members of County Assemblies demanded and were given incentives (including car grants amounting to Kshs 2 million each) to pass the BBI Amendment Bill, a clear manifestation of greedy and selfish ambitions by the political leaders at the county levels.[6] Kenyans must be aware that the ignorant masses can be managed, bribed, bought, and intimidated, and elections won and stolen (via methods including voter stuffing).[7] The majority can rule without regard for the people's best interests. *Wanjiku*[8] must, therefore, vote wisely during general elections,

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6 *BBI 2* case [340] (Musinga P); 136-137 (Kiage JA).

7 Migai Akech, *Taming the Tyranny of the Barons: Administrative Law and the Regulation of Power: An Inaugural Lecture* (Faculty of Law UoN 2024) 51. See also Kenya National Human Rights Commission, *Mirage at Dusk: A Human Rights Account of the 2017 General Election* (2018).

8 This is a common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people.

by-elections, and national referenda to ensure the leadership and integrity of the political leaders they elect are good and pass progressive constitutional amendments. The people should rise above partisan factors, including tribalism, favouritism, racism, ethnicity, gender, regions, generations, divisions, religion, and corruption, to vote on good leaders to elective political seats and pass progressive constitutional amendments. Kenyans should exercise their direct supreme sovereign power outside the bad politics to benefit wholesome Kenya.

6.2 Enactment of national referendum and public participation legislation

Should a national referendum legislation be in place before initiating constitutional amendments? Should national legislation guide the constitutional amendment processes: parliamentary and popular initiative amendments? The correct answer is in the negative. Currently, no national legislation on referendums guides constitutional Amendment Bills and processes. Chapter 16 provisions of the 2010 Constitution are self-executing. Is Chapter 16 of the 2010 Constitution inadequate? The correct answer is 'No'. The 2010 Constitution, Elections Act 2011 and IEBC Act 2011 have broad provisions. They can be used to conduct national referenda in adherence to the constitutional principles and statutory dictates. Is special legislation required? Yes. However, this is not specified under Article 261 and Fifth Schedule of the 2010 Constitution. Chapter 16 makes it possible for the promoters and other actors to know their obligations in the constitutional amendment processes. In *David Ndii & others v Attorney General & others*,[9] the Kenyan High Court (KeHC) correctly held that constitutional amendment processes can be undertaken in adherence to the constitutional principles under Article 10 despite the absence of a national referendum legislation.[10] The Elections Act 2011 is relatively sufficient for conducting a national referendum in Kenya. The constitutional amendment process is in-built and with multi-institutional checks throughout the process.

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9 [2021] eKLR (hereinafter 'the *BBI 1* case').

10 *BBI 1* case [783 xv], [783 xiv]. See also the *BBI* 3 case [2039] (Ouko SCJ), where it is observed that 'the absence of an enabling legislation on the conduct of [national] referenda does not render the Article inoperative and unenforceable. Parliament is still bound as a matter of constitutional duty to enact the law'.

The history of Articles 257, 95(3) and 109(1) and (2), reveal that a national referendum legislation is required to carry out the process effectively. The CKRC *Final Report* correctly recommended that 'Parliament should enact a Referendum Act to govern the conduct of referenda in the country'.[11] Therefore, Parliament should enact legislation to guide the constitutional amendment processes. Such legislation should be a more detailed framework to guide the multi-tiered amendment process.[12] It is proposed that the national referendum legislation should be enacted to give effect to the constitutional provisions by guiding the procedures to be adopted by the actors, including the promoters, the IEBC, Parliament, County Assemblies, and the President. This is even though Chapter 16 of the 2010 Constitution does not make a requirement for such legislation. The provisions of the Elections Act 2011 are inadequate to guide the processes involved in constitutional amendments, including the national referendum. Such a national referendum legislation should provide for issues such as public participation under Article 10 per the *obiter* of Koome CJ & P;[13] and all the stages of both the parliamentary and popular initiative amendments. Article 82 of the Constitution places an obligation on Parliament to enact national legislation on referendums and elections.

Superior courts have also recommended the passage of this law as sections 49 to 55C of the Elections Act 2011, containing provisions regarding the conduct of national referenda, are insufficient.[14] The Elections Act 2011, Part V, is specific to the national referendum at the end of the constitutional amendment process. The Referendum Bills pending before Parliament must be fast-tracked and passed. The provisions on

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11 Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) 449.

12 Notably, there have been attempts to enact national referendum legislation on constitutional amendments. They include: (a) The Referendum Bill, 2020, National Assembly Bill No. 11 of 2020, and (b) The Referendum (No. 2) Bill 2020, National Assembly Bill No. 14 of 2020. However, these Bills have yet to see the light of the day.

13 *BBI 3* case [315] (Koome CJ & P), [501], [502], [604]. See also the *BBI 3* case (Mwilu DCJ & VP), [2032], [2036], [2038], [2108] (Ouko SCJ). There is a need for Parliament to enact a legislation on national referendum and public participation. Notably, there have been several Bills in Parliament that provide for public participation, but they are yet to see the light of the day. These Bills include the Public Participation Bill, 2016, Senate Bill No. 175 of 2016; Public Participation Bill, 2018, Senate Bill No. 4 of 2018; and the Public Participation Bill, 2019, National Assembly Bill No. 69 of 2019.

14 *Republic v County Assembly of Kirinyaga & Anor Ex-Parte Kenda Muriuki & Anor* (2019) eKLR [58]; *BBI 1* case [602]. There is a need to enact national referendum legislation on constitutional amendments including popular initiative amendments.

parliamentary and popular initiative amendments are in an unsatisfactory state. They need further clarification by national referendum legislation and regulations. It matters not whether such legislation is expressly listed in the Fifth Schedule of the Constitution as it provides that 'any other legislation required by this Constitution' be enacted within five years of promulgation.

A look at the history of Chapter 16 and the CKRC *Final Report* reveals the role of Parliament in enacting national referendum legislation, as already stated. A reading of Articles 94, 95(3), and 109(1) and (2) of the Constitution reveals that Parliament has the power to enact legislation for constitutional implementation. Therefore, a national referenda legislation can be enacted per these Articles. The Elections Act 2011 fails to take care of the lacuna as the Act does not cover the issues to deal with constitutional amendment processes.

6.3 Education awareness of the people as the central promoters of constitutional amendments

There is a need to carry out campaigns on education awareness among the Kenyan people as central promoters of constitutional amendments. Institutions who have a role in this: Parliament (National Assembly and Senate), County Assemblies, IEBC, political parties, law schools, and universities (constitutional amendments be included in the curriculum of law schools and universities), Non-Governmental Organisations (NGOs), Civil Society Organisations (CSOs), Katiba Institute, human rights groups, women and youth organisations, religious organisations, scholars, and academicians. These campaigns will go a long way in ensuring Kenyans are informed of their roles when it comes to constitutional amendments.

6.4 Preamble to be included as among the entrenched matters that require a national referendum to amend

The significance of the role of a Preamble in a constitutional democracy cannot be overemphasised. The role of a Preamble as an essential consideration in the interpretation of the amendment provisions has been explained in detail in Chapter two,

part 3.4.2.1. The Preamble is the supreme sovereign voice of the Kenyan people that entrenches essential values and principles, including the popular sovereignty, constitutional supremacy, freedom, human rights, social justice, the rule of law, equity, equality, national unity, and democracy. As things stand, the Preamble can be amended without rubberstamping the Amendment Bill in a national referendum as it is outside the matters listed under Article 255(1) of the 2010 Constitution. The Parliament (National Assembly and Senate) can amend the Preamble at their will (of course, by following the amendment procedures and allowing public participation). A proposal is made for the Preamble to be included in the list of matters that require a national referendum to amend under Article 255(1) of the 2010 Constitution. This would be an additional security measure for amending the Preamble. Since this proposal requires the amendment of Chapter 16, it can only be effected through a national referendum.

6.5 Call for full implementation and audit of the 2010 Constitution

A call is made for a full implementation of the 2010 Constitution. Implementing the 2010 Constitution is a collective responsibility of County Assemblies and Parliament (National Assembly and Senate), the Judiciary, tribunals, independent commissions and offices, the National Executive, County Executive Committees, and the Kenyan people. For example, the enactment of the national referendum and public participation legislation are part of the implementation of the 2010 Constitution by the Parliament (National Assembly and Senate). Once enacted, this legislation would go a long way in guiding the conduct of parliamentary and popular initiative amendments, national referenda, and public participation in Kenya. An audit of the 2010 Constitution should also be carried out to identify what is working, the challenges facing constitutional implementation, and proposals on the solutions available for improving good democratic governance. This audit and call for full implementation can go a long way in addressing some of the country's constitutional challenges. A good political leadership committed to implementing a transformative Constitution is what Kenya needs most to realise the aspirations found in the 2010 Constitution. Most political leaders are uncomfortable with the judicial decisions emanating from the superior courts, and the full implementation of the 2010 Constitution is also a struggle.

6.6 Consistency in developing transformative jurisprudence by superior courts

There is a need for the training of superior courts' Judges at the Judiciary Training Institute (JTI) on matters of constitutional law theory and practice, foreign jurisprudence, and jurisdictional remit of the superior courts (KeHC, Court of Appeal and the KESC). While most Judges of the superior courts are doing a reasonably good job in terms of the quality of their judgments, some Judges have a long way to go![15] Superior courts' Judges must be industrious researchers and readers of the law to come up with the highest quality of judgments for the development of the law. It must be noted that section 3 of the Supreme Court Act 2011 requires the KESC to incorporate non-legal phenomena in the interpretation of the Constitution, including history. Can Judges write history? No. Should they consult experts in the area? Yes. Other experts that the superior courts' Judges can consult include those in Information, Communication and Technology (ICT) and Economics. Lawyers should shed off the arrogance of the 'learned friends' cap and get expert advice from other experts. They must incorporate multi-inter-and-trans (MIT) disciplinary research approaches, especially when non-legal disputes and issues arise.

The Judiciary should not be an appendage of the national and international interests, political groups, or foreign interests. Judges should breathe life into the 2010 Constitution by making the Judiciary a temple of justice where the pillars of transformative constitutionalism can help Kenya move forward. In transformative judicial politics, judgments reveal that the Judiciary is a great 'institutional political actor'. Judges have their political, socio-economic, religious, and cultural beliefs, ideologies, positions, and

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15 See for example, Walter O Khobe, 'A Rebel Without a Cause? Justice Njoki Ndungu's Legacy of Dissent and the Doctrine of Separation of Powers' (3 March 2019) The Platform <www.theplatform.co.ke/rebel-without-a-cause-justicenjoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/> accessed 2 March 2024, where the author correctly questions the quality of the dissenting judgments of Njoki Ndungu SCJ. It is also worrying that in the *BBI 3* case, Njoki Ndungu JSC wrongly interpreted the constitutional remit of the popular initiative under Arts. 255 and 257 of the 2010 Constitution and concluded that any person in Kenya, including the President, Members of Parliament, and Chief Justice, can utilise the popular initiative! In the same *BBI 3* case, Ibrahim SCJ must also be called out for wrongly finding and concluding that the basic structure 'doctrine' is applicable in Kenya despite the explicit provisions under Chapter 16 of the 2010 Constitution that provide for amendment of the Constitution via parliamentary and popular initiatives. These are just but a few examples that show how Judges of the superior courts have made findings and conclusions that are questionable in their interpretation and application of the 2010 Constitution.

backgrounds. The term 'independent' Judiciary must not be read in a narrow sense, as it must include influence and insidious forces from other institutions, the Judiciary institution itself, the Chief Justice, family members (siblings, spouses and children of Judges), community, families, friends, religious groups, and the media. These are strong forces that should be remembered apart from the common forces such as the National Executive, Parliament, corporate and civil society powers. Superior courts' Judges should always rise above these pressures and choose transformative judicial politics for the development of consistent transformative *Kenyanprudence*.

A look at the performance of the superior courts' Judges in post-2010 Kenya shows that there are active Judges, especially in balancing the power of the governmental actors. The question is, how well are they performing in this regard? Superior courts' Judges are very activist; for example, in the Miguna Miguna deportation cases[16] and when Uhuru Kenyatta refused to swear in Judges.[17] When the ruling class and political elite verbally attack Judges and their judicial decisions, it is a good sign or hallmark of courage, as the politicians do not like what they see as they are uncomfortable with the judicial decisions. For example, during the 2017 presidential election petition, when the KESC annulled the incumbent presidential re-election, Uhuru Kenyatta immediately addressed a gathering saying that a few *Wakora* (Swahili name for 'crooks') could not sit in the KESC and overturn the election results of millions of *Wanjiku*.[18] This statement clearly showed that the political elite and ruling class were uncomfortable with the KESC decision. Recently, President William Ruto expressed his discomfort with the judgment of the KeHC that

16 It is in the public domain that Miguna Miguna was illegally deported to Canada after swearing in Raila Odinga as the 'People's President' in 2017 (refer to Chapter one of this study). Miguna received several court orders against the government to renew his passport and facilitate his return to Kenya. However, the National Executive disobeyed the court orders, and as a result, he remained in forced exile until Uhuru Kenyatta completed his second presidential term.

17 Joseph Wangui, 'Uhuru: I Will Not Appoint Six Rejected Judges' *Nation* (Nairobi, 27 October 2021) <https://nation.africa/kenya/news/uhuru-i-will-not-appoint-six-rejected-judges-3598618> accessed 5 November 2023. These were former KeHC Judges Aggrey Muchelule, George Odunga, Weldon Korir, and Joel Ngugi, and former Chief Magistrate Evans Makori and former High Court Registrar Judith Omange, who were recommended to be Judges of the Environment and Land Court. The five rejected Judges were appointed into office after William Ruto took power as President on 14 September 2022.

18 Dickens Olewe, 'Kenya Presidential Election Cancelled by Supreme Court' *BBC News* (Nairobi, 1 September 2017) <www.bbc.com/news/world-africa-41123329> accessed 5 November 2023.

declared the housing levy in the Finance Act 2023 as unconstitutional[19] by saying that he was given a sword during the swearing-in ceremony not for chopping vegetables but for dealing with those who oppose government policies (such as the housing levy) through the courts.[20] These remarks are aggressive and reckless and a veiled threat to the litigants challenging government decisions, judicial independence, rule of law, and the administration of justice, and show that the President does not respect the 2010 Constitution. There is a bad trend in Kenya's post-2010 era, where the political leadership is always uncomfortable with the transformative jurisprudence emanating from the superior courts.

While the KeHC has been seen as building the pillars of constitutional interpretation, which is a crucial thing, the Court of Appeal is seen as a 'graveyard' of progressive jurisprudence.[21] Hopefully, this will change as some of the Judges of the KeHC have since been appointed to the Court of Appeal,[22] and the KeHC will remain strong, not weak. The jurisprudence of the KESC has been 'seesawing' – upward movement then dashing. So, there is progressive jurisprudence that claws back in the Kenyan jurisprudence? What can be done with this inconsistent jurisprudence on similar legal questions from the KESC, considering it is the apex Court and binding on the lower courts? Does it militate against Kenyan capacity to build a clear constitutional identity, for example, in the election law? What do we do as we wait for crystallisation? There could be 'hope' for sound judgments if the former are bad! There is a need for certainty, predictability and

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19 *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others* (Interested Parties) (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment).

20 Perpetua Etyang, 'LSK Calls Out Ruto Over Crashing Cartels with 'Sword' Remarks' *The Star* (Nairobi, 18 December 2023) <www.the-star.co.ke/news/2023-12-18-lsk-calls-out-ruto-over-crashing-cartels-with-sword-remarks/> accessed 29 December 2023. See also Zamzam Jama, 'President Ruto Faulted Over 'Sword *Ni Ya Kufyeka Wakora*' Remarks' *Citizen Digital* (Nairobi, 17 December 2023) <https://citizen.digital/news/president-ruto-faulted-over-sword-ni-ya-kufyeka-wakora-remarks-n333343> accessed 29 December 2023. The Swahili words 'Sword *Ni Ya Kufyeka Wakora*' means the sword is for cutting crooks.

21 For example, *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR. The Court of Appeal was rightly criticised for backpedalling or turning back the clock in the enforcement of socio-economic rights when it shackled the novel and innovative remedies given by the KeHC.

22 These include the former KeHC Judges Aggrey Muchelule, George Odunga, Weldon Korir, and Joel Ngugi. George Odunga and Joel Ngugi were among the five Judges who decided the *BBI 1* case in the KeHC. Other *BBI 1* case Judges were Ngaah Jairus, EC Mwita, and Mumbua T. Matheka.

consistency in the superior courts so that the political class does not read the divisions and come to exploit them later. The JTI has to deal with it.

There is also a Pan-African jurisprudence movement by African Judges that is informed by the history of colonialism, which is a promising avenue for Judges to learn about what jurisprudence other African countries are producing and developing. The Kenyan legal community is self-confident and generous. The Kenyan jurisprudence is not insular and receives or borrows from scholarly works and foreign jurisprudence to suit its needs, of course, taking into consideration its contexts and circumstances. For instance, in the *BBI* cases, the superior courts used judicial decisions from other jurisdictions, used scholarly works, accepted the briefs of *amici curiae*, and the Judges seriously engaged with the *amici* briefs and submissions. This clearly shows that the superior courts' Judges are accommodative and ready to learn from other jurisdictions (such jurisdictions can also learn from Kenya; that is 'reverse learning'), especially where there are transformative constitutions, common colonial history, and responses to colonialism and neo-colonialism. This is good to enrich and develop the *Kenyanprudence*.

Can Judges cherry-pick history that favours one's bias? No. History should be referred to in its complete sense and considered wholesomely. Two things arise. One, Judges can rely on history, and two, they should be open that history is revisable, and they should not make the history claim too strong or categorically. Judges must be keen to state that 'this is what history is' and 'this is what it means for interpretation'. Where there are two versions of history, Judges must choose the version with a better or more plausible explanation and anchor it in the 2010 Constitution as a supplementary tool and not the primary one. In the *BBI 3* case, Koome CJ & P and Wanjala SCJ correctly accused the KeHC and the majority of the Court of Appeal Judges of selectively referring to the pre-2010 Constitution-making history as a justification for the basic structure 'doctrine' instead

of bringing out the complete account of history.[23] Koome CJ & P and Wanjala SCJ were right in calling out the KeHC Judges and the majority of the Court of Appeal Judges.[24]

The KESC is not conclusive as it does not exist in a vacuum. As such, a good political leadership that believes in judicial independence and integrity would help a lot as there would be a national consensus on where the country should move. When *Wanjiku* and the civil society groups stand firm, such as when the political elite says 'amend the Constitution', they say it is an important project that must be implemented fully. The Judiciary has a long history of being an appendage of the colonial government and neo-colonialism. In the Kenyan case, it has been an appendage of the 'cartels', National Executive, and national and foreign interests. Is the Judiciary on trial? The question is, is there hope for the independence and integrity of the Judiciary? The correct answer is in the affirmative. The Judiciary is the only institution that has shown *Wanjiku* some promise. However, it needs people's support even though it must be criticised. There is a need to make sure the Judiciary is independent and has integrity. Per Article 1 of the 2010 Constitution, all the power resides in the hands of the people as they do not cede all power to the leadership.

6.7 Public interest litigation

There is public interest litigation carried out under Articles 22 and 258 of the 2010 Constitution. There is hope, especially in the public interest litigation where private persons or individuals and the CSOs are very active in defending the 2010 Constitution calling for transformation. Examples are the activist Senator Okiyah Omtatah Okoiti, Katiba Institute, Kituo Cha Sheria, FIDA-Kenya, and Kenya Human Rights Commission, amongst others. *Wanjiku* are not happy with the political leadership, and calls have been made for alternative political leadership. There is a need for political goodwill and commitment to implement the 2010 Constitution to enable us to see the limitations that should be rescued. Kenyans are yet to see the full impact of the 2010 Constitution, and it

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23 *BBI 3* case [220], [221], [222] (Koome CJ & P); [1025] (Wanjala SCJ).

24 See also the *BBI 3* case [439] (Mwilu DCJ & VP) where she correctly states that the KeHC in the *BBI 1* case went 'beyond the plain reading of the text of the Constitution 2010 and misapplied an extra-constitutional doctrine in the interpretation of the Constitution 2010'.

must be fully implemented. The Constitution cannot be amended, as it still needs to be fully implemented! The KESC is commended for developing an indigenous and progressive jurisprudence in the *BBI 3* case on matters concerning constitutional amendments under the 2010 Constitution.

6.8 Strengthening the IEBC as a constitutional commission

The independent constitutional commissions in Kenya include the IEBC. The independent commissions promote and protect constitutional democracy and the sovereignty of the people. The IEBC, for example, is mandated to conduct elections and national referenda in Kenya. In the course of performing these roles, the IEBC ensures that the elections are regular, free, fair and transparent. This guarantees that Kenyans elect into office leaders of their choice to exercise the representative sovereign power on their (people's) behalf and for their benefit. Concerning national referendum, the IEBC verifies the popular initiative amendments and forwards the same to the County Assemblies for approval. The IEBC also conducts national referenda to ratify parliamentary and popular initiative amendments at the tail-end of the constitutional amendment processes. It is safe to conclude that the IEBC is such an important independent commission in Kenya's constitutional democracy because of its role in elections and national referenda. There is a need to ensure that the IEBC is strengthened in terms of resources (including financial and human), capacity building and independence. There is also a need to secure the weaknesses of independent commissions such as the IEBC and support their strengths in appointment and performing functions and resourceful, as already stated. That the IEBC must only be subject to the 2010 Constitution and the law, and not under the control of any person or authority must be reflected in their decisions and performance of functions. This ensures that it performs its roles diligently for the development of constitutional democracy in Kenya.

7 Concluding remarks and further research

This research has addressed the central role of the Kenyan people when it comes to amending the 2010 Constitution, as provided under Chapter 16. The research looked into the parliamentary and popular initiative amendments in the post-2010 era and the

attendant emerging issues thereof. The overall conclusion is that the constitutional amendment provisions must be interpreted in a purposive and value-based manner as required by the 2010 Constitution and, at the same time, recognise the supremacy, centrality, and sovereignty of the Kenyan people.

Further research can be carried out on related matters to constitutional amendments that were beyond the scope of this research. Such matters include the exercise of extra-constitutional processes or powers outside the 2010 Constitution. Such powers can be grouped into two. One is the exercise of direct sovereign powers by the people to make a new Constitution in the exercise of the primary constituent power. This power is legitimate, resides in the people, and is usually exercised outside the current constitutional order.[25] This approach is for those who pride themselves on being democratic, and the process of making a new Constitution may take the form of people-centric and highly participatory processes.[26] On the other hand, there is also the exercise of legitimate powers outside the Constitution through coups or any other Kelsenian theory of grund norm, popular revolutions, secessions,[27] civil wars and sudden changes.[28] This is because there are 'no hard and fast rules, it may take whichever form provided it results in a new constitutional dispensation'.[29] Research on these matters may require MIT disciplinary research studies, including Law, History and Government, African Customary

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25 See *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004) (Ringera J (Rtd)) where he correctly stated that the primary constituent power is a 'primordial one' and the 'basis of the creation of the Constitution, and it cannot, therefore, be conferred or granted by the Constitution'.

26 *BBI 3* case [428] (Mwilu DCJ & VP).

27 Secession can occur through the implementation of Chapter 16 of the 2010 Constitution, and also outside the 2010 Constitution through extra-constitutional means such as wars and sudden changes. See *Attorney General & another v Randu Nzai Ruwa & 2 Others*, Civil Appeal No. 275 of 2012; [2016] eKLR [58], where the Court of Appeal (Musinga, Ouko, Kiage, M'inoti & Mohammed, JJA) held that the people may amend the 2010 Constitution by a national referendum to alter the Kenyan territory under Chapter 16.

28 *Erickson Rover Safaris v Peninah Nduku Muli (Suing as Legal Representative of the Estate of Michael Kyalo Wambua (Deceased)* HCCA No. 56 of 2017; [2019] eKLR where Bwonwong'a J acknowledged that a new constitutional dispensation will be upheld even if it came about through violent means. See also the South Rhodesian case of *Madzimbamuto v Lardner-Burke and Another* (1969) 1A C.645 (P.C.) which was concerned with the legality of the Unilateral Declaration of Independence made by Rhodesia in 1965. There is also the decision of *Uganda v Commissioner of Prisons, ex parte Michael Matovu* (1966) EA 514.

29 *BBI 3* case [428] (Mwilu DCJ & VP).

Law, Political Science, Criminology, Military Science and Security Studies, International Relations, International Law, and other related subjects.

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