BBI: A Textbook Case of Compounding Constitutional Illegalities

By Waikwa Wanyoike

The phrase “compounding illegalities” aptly describes the approach and processes taken by Uhuru Kenyatta and Raila Odinga to change the constitution through the Building Bridges Initiative (BBI).

The following have been the defining processes for BBI thus far. One, the formation of the BBI Steering Committee and Taskforce; two, the decision that the mandate of the BBI is to propose constitutional reforms; three, the decision that BBI constitutional amendments will be introduced through a popular initiative; four, submission of the BBI Bill and verification of its support by the IEBC; five, the referendum path being scripted by BBI proponents. Each of these steps has been riddled with a myriad of illegalities.

Let us discuss these processes one at a time.

BBI taskforce

The BBI Taskforce was born out of the opaque “truce” between Raila Odinga and Uhuru Kenyatta following the dramatic swearing in of Raila Odinga as the People’s President on 9 March 2018 that was presided over by Miguna Miguna. It is unclear the extent of the considerations that placated Raila and led him to the “handshake” with Uhuru at a time when he professed that everything he stood for was diametrically opposed to Uhuru’s beliefs. What was made public, however, were the

nine issues that the two identified as afflicting Kenya's democracy. The issues ranged from ethnic antagonism to a lack of a national ethos with regard to corruption.

The launch of the BBI Steering Committee soon followed on 24 May 2018. The membership of the Steering Committee was drawn from Uhuru and Raila's long-term loyalists, with persons considered politically non-controversial included to give the membership a veneer of diversity. The Steering Committee had only three terms of reference: (i) evaluate the national challenges identified in the BBI (handshake) communiqué and make recommendations on the necessary "reforms that build lasting national unity"; (ii) draw up policy and administrative reform proposals to address the challenges identified, and (iii) consult with members of the public.

After it issued its first report, the Steering Committee's term was extended on 20 January 2020 and its description was changed to a Taskforce. Its revised terms of reference were to conduct public participation to validate its report. However, a mischievous mandate was sneaked into the Taskforce work: "proposing constitutional reforms".

I must pause here and identify how, even this early in the process, Uhuru violated the constitution and the law. The illegalities are at least at three levels. First, all the nine issues that he and Raila identified as bedevilling the country were already issues assigned by the constitution or the law to already existing and established state agencies. Let us sample a few. One – ethnic antagonism and inclusivity are the mainstay functions of the National Cohesion and Integration Commission (NCIC). Two – corruption is the single issue assigned to the Ethics and Anti-Corruption Commission (EACC). Three – the constitution and other laws have already established all manner of agencies and structures to deal with every aspect of devolution, including the Summit (the body bringing together the president and all governors), the Inter-governmental Relations Technical Committee and the Inter-governmental Budget and Economic Council. Finally, we already have institutions – ranging from the IEBC, the NCIC, and the judiciary among others – to deal with electoral justice.

Essentially, what Uhuru did in establishing the Steering Committee and Taskforce to deal with his and Raila's nine issues was to usurp responsibilities that have already been assigned by the constitution and the law to established state institutions and hand them over to a select group of friends and loyalists to steer.

But there are those who will argue that part of Uhuru's constitutional mandate as the President and Head of State is to foster national unity and it is therefore within his powers to appoint a taskforce to assist with this constitutional task. But this argument misses the fundamental point that the President is required to be the first in line to respect the functional mandate of the institutions established by the constitution and the law and not to do anything that undermines or minimises their authority.

The second level of illegality has to do with how Uhuru and Raila settled on members of the taskforce. The constitution insists that, with the exception of the personal staff of the president and his deputy, anyone selected to undertake a public function by and for the executive must undergo a merit-based and competitive selection process. This is to ensure that those assigned public duties are qualified to do what they are assigned to do and are not just sycophants of the appointing authority.

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The third illegality is unilaterally starting a consequential constitutional revision project without first

creating a legal framework to guide the process. Revising a constitution is too sacrosanct a task to be left to three half-baked terms of reference contained in a nondescript gazette notice and assigning the work to a taskforce that is not accountable to the people. Worse, the fact that the constitutional mandate was sneaked into the terms of reference of the taskforce at the last minute only aggravates the disregard Uhuru has for the law.

Popular initiative

The constitution provides two pathways to its amendment. The first is through a parliamentary initiative. The second is the popular initiative. The parliamentary pathway to amending the constitution largely mirrors the manner in which regular laws are introduced in parliament. Ordinarily, and ideally, the executive formulates policy on an issue. That policy is transmitted to the office of the attorney general who works in tandem with parliament to translate it into a draft law. The draft is then introduced in parliament by a member of parliament – ordinarily the majority leader or a member of a political party aligned to the executive.

There is logic to this process. Parliament exists largely to ensure that whatever action is taken by the executive is regulated by law. Ensuring that every action of the state derives its authority from the law is essentially what the principle of the rule of law is all about. But, importantly, the law-making function of parliament is intended to restrain the executive or other arms of government from transgressing on areas not assigned to them or undertaking their work in a way that is inimical to the principles of constitutionalism and rule of law. Hence, the law-making power of parliament is not passive but, at its core, involves ensuring that the law it enacts provides for the necessary guardrails against abuse of public power and sufficient guidance to those charged with implementing public responsibilities.

But how does this relate to the popular initiative process? The point here is that the constitution created the parliamentary initiative process for use by state actors including the executive and this is the path the constitution expects Uhuru and other government actors to take if they want to amend the constitution.

Why then the popular initiative process?

The constitution created this path for the people who do not wield state power to initiate the process of changing the constitution. Understanding the popular initiative as the people's pathway to amending the constitution is critical for a number of reasons. To start with, it reaffirms the constitutional principle of sovereignty of the people – giving the people a pathway to changing the constitution that is not at the mercy of the political leadership.

The second reason is perhaps the most relevant given our circumstances and experience with the BBI thus far. The constitution and the law intend that the person or persons sponsoring amendments through the popular initiative fully bear the costs and inconveniences of initially mobilising the required threshold of at least one million voters to support the proposed amendment. It is only after the promoters deliver the bill and the supporting signatures to the IEBC that the constitution requires that state agencies – starting with the IEBC – engage with and deploy state resources in processing the bill and other ensuing procedures.

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When the state hijacks the popular initiative process it unfairly inverts power relations between the

people and the ruling elites. It also negates the entire constitutional intention of creating a popular initiative pathway since the use of state resources by state officers in order to popularise and attain the initial support of at least one million voters is unfair and discriminatory because similar public resources are not available to the people – who have no favour with the state – when pushing for amendments through the popular initiative.

Briefly, not only did Uhuru violate the law by hijacking the popular initiative pathway to amending the constitution when the law required him to use the parliamentary initiative pathway, but he has also abused his powers by deploying state resources to raise support for BBI constitutional amendments.

IEBC verification and approval by county assemblies

The constitution imposes three foundational obligations on the IEBC as an independent constitutional commission: to protect the sovereignty of the people; to secure observance of democratic values and principles by all state organs; and to promote constitutionalism. However, the IEBC's handling of the BBI process goes against these obligations. The violations range from caving into undue pressure from the promoters of BBI, failing to observe the basic requirements of verification of signatures, using a makeshift administrative (legal) framework that was promulgated without complying with the law and, worse, violating the provisions of that framework.

Let us start with the lack of a proper legal framework. There is no law that guides the IEBC in its verification of signatures or any other aspects entrusted to it in processing the request to amend the constitution through a popular initiative. Yet there are very many issues where it is unclear what the IEBC can or cannot do with regard to a popular initiative to amend the constitution. A law or proper guidance from the court is necessary if for no other reason other than to render IEBC actions legal.

A few examples of the gaps will suffice here. Although the constitution requires that a popular initiative have "supporting signatures" and that the IEBC will then "verify that the initiative is supported by at least one million registered voters", given that the IEBC does not maintain a database of signatures of voters, it is unclear how it should undertake the verification exercise or what it would actually verify. Similarly, it is unclear whether the IEBC has an obligation to provide the public with information about who signed to support the popular initiative, and if so, through which medium.

Yes, the IEBC does not make law. That is the work of parliament. However, the IEBC has an obligation to request parliament to prepare the necessary regulatory framework to ensure its work and processes are guided by law. Where parliament refuses or fails to enact a guiding law, the IEBC has the option to go to court to seek guidance, especially given the importance of the process.

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An illustration is necessary here. In 2014, when the Embu County Assembly impeached Governor Martin Wambora it quickly noticed that, while the constitution allowed the deputy governor to take over the governor's position, there was no national law to determine how the arising vacancy of a deputy governor would be filled. Parliament, which has the authority to pass such a law, had not done so. The County Assembly moved to the Supreme Court to ask for guidance. The Supreme Court provided that guidance because it found that both the position of the governor and of the deputy were so crucial "to the operations of County Government, it is inconceivable that, constitutionally,

they could remain fallow until the next cycle of a general election." Equally, the amendment of the constitution is too crucial a matter for the IEBC to allow itself to rely on guesswork when it has all along had the option to seek authoritative guidance from the Supreme Court.

What the IEBC has done is to illegally arrogate itself law-making powers by cobbling together some vague administrative procedures that it claims to use to guide its verification process.

But this is where it gets even more interesting. The IEBC failed to follow even its own procedures when verifying BBI signatures. First, its administrative procedures require it to compile and publish the list of supporters on its portal for two weeks. The procedures further allow it to receive complaints from members of the public whose information is either wrongly included or is excluded. However, the IEBC was in such haste to facilitate the BBI bill that it published the names for only four days before forwarding it to the County Assemblies.

Lack of a regulatory framework to guide a constitutional amendment driven by a popular initiative not only affects the IEBC but also nearly every step of the process. For example, there is no law that guides the county assemblies on how they should undertake the crucial step of approving the amendment bill. In fact, in 2019, the High Court ordered parliament to enact a law to seal this legislative lacuna. Again, parliament has failed to pass that law.

Yet, it is quite ironical that when the two Speakers – Justin Muturi and Ken Lusaka – were notifying parliament that it would start the process of considering the BBI bill they loudly stated that even parliament did not have the necessary law of parliamentary procedures to guide its own procedure of processing the bill. The Speakers had a quick solution to this – make up the rules and procedures as you go. Then parliamentarians were quite surprised when their process quickly hit a snag as they were unsure whether they were permitted to amend the BBI bill or not.

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Admittedly, there are currently two unsatisfactory bills pending in parliament intended to guide the entire constitutional amendment process – including how to resolve issues relating to preparing for and conducting the referendum. Those bills are full of regulatory gaps including the procedure in parliament. Still, instead of parliament prioritising the passing of these laws, it is focussing on pushing the BBI bill through. A classic case of putting the cart before the horse.

But why does passing a law to regulate the process matter? Because that is what rule of law is all about – the authority to exercise public power must find its validity in a rule, a law. Law provides a framework through which those entrusted with public power to undertake certain processes can be objectively audited for compliance with the law and the constitution. Discretion, especially unregulated discretion, only breeds anarchy. It allows those with power to manipulate public processes for their own personal gain. In many ways, that is the story of BBI.

Crystal-balling future violations

The BBI bill is now before parliament. There are a few things that should be constitutionally clear about how parliament should process the bill. First, and unlike most county assemblies which voted for the bill using a single motion to approve it, parliament must subject the bill to the rigours of the mandatory three readings that bills undergo in parliament before they become law. This is because, under the constitution, parliament has the ultimate responsibility to pass the constitutional amendments into law – especially where a referendum may be unnecessary. The enormity of this

responsibility demands that it must use a proper, predictable, accountable and constitutionally compliant procedure.

Second, parliament has the obligation to facilitate adequate public participation. The constitution requires that, for a constitutional amendment proposed through a parliamentary initiative, the period provided by parliament for public participation should not be less 90 days. Yet, this minimum timeline is constitutionally ring-fenced between the first and second reading of the bill. Similar timelines should apply for a popular initiative and for parliament's passing of the BBI bill. However, Parliament has already indicated it will not comply with this timeline because Uhuru and Raila have imposed a deadline for passing the BBI bill.

Third, the bill is passed by parliament if it is supported by a majority of members in both houses. This is important. A majority of members means at least over 50 per cent of all members of each house and not just those present in parliament at the time of voting.

But given the extent to which promoters of the BBI bill have already violated the constitution, and the haste with which they are pushing for the bill to pass, it is highly conceivable that parliament will violate the very clear rules and expectations of the constitution. Parliament has already committed the first sin by rushing public participation.

Another likely BBI illegality will relate to the referendum. As it is, the BBI bill cannot avoid a referendum because it is packed with issues that require a referendum based on Article 255 of the constitution. This includes re-organisation of the executive, changing the composition and roles of the National Assembly and the Senate, and numerous issues concerning devolution and tampering with the independence of autonomous institutions. There is much more.

At least two violations relating to the referendum are being primed. The first is the possibility that BBI proponents – and especially the president – will only designate certain matters to go to referendum and insist that those issues not submitted to the referendum are adopted into the constitution regardless of the outcome of the referendum. This is problematic because the constitution provides that "if a bill to amend the constitution proposes an amendment relating to a matter" that requires a referendum, the president cannot assent to the bill until after the referendum is held. This means that if the bill is not approved through a referendum the entirety of the amendment bill fails.

> The IEBC has an obligation to request parliament to prepare the necessary regulatory framework to ensure its work and processes are guided by law.

But in the case of the BBI bill, there is a more fundamental problem which makes it impossible to reconcile the process concerning the referendum and assent. The BBI bill has always been constitutionally irredeemably defective in its content. Irredeemably defective because a bill to amend the constitution – either though a parliamentary or a popular initiative – should not contain more than one matter. Essentially, it was illegal for BBI promoters to include in one bill so many unrelated issues. Each issue should have gone into a separate bill. This is actually the issue I should have started this analysis with because the point I am making here is that the BBI bill that was force-fed to the IEBC, bribed through the county assemblies and is now being walked through Parliament has – in its content – been unconstitutional from the start.

This brings me to the second likely violation concerning the referendum that we can expect and this is what the BBI proponents have told us already; the BBI referendum will field only one question. This is wrong. Firstly, the law already authorises multiple questions and leaves that decision to the

IEBC to make. Secondly, not only was it unconstitutional for BBI proponents to include in the amendment bill a myriad unrelated changes but demanding that only one question be presented at the referendum will be aggravating this cardinal sin.

It is not over yet

When on 8 February 2021 the High Court issued orders restraining the IEBC from facilitating and subjecting the BBI bill to a referendum, it made a fundamental observation. It observed that that rushing the bill through the various stages "does not inoculate the resultant proposed constitutional amendment from the possibility that it could yet, upon final disposition of these Petitions, be declared invalid." The litany of violations of the constitution that litter the path the BBI has travelled would make a great mockery of the constitution if the amendments proposed by BBI are eventually pronounced to be part of the Kenya 2010 Constitution.

Ultimately, the passing of the BBI will represent the moment that tested whether Kenyans recognise that the supremacy of the constitution, rule of law and the sovereignty of the people as enshrined in the 2010 Constitution are not mere words. It will be the true and defining moment pitting the people against a gluttonous, insatiable and incorrigible ruling elite.

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