



The Kenyan High Court's BBI Judgement: An Instant Classic

By Gautam Bhatia



On 13th May, the Constitutional and Human Rights Division of the High Court of Kenya handed down its judgment in [David Ndi and Others v Attorney General and Others](#) (the BBI Judgment). Through the course of the judgment, the Court examined a fascinatingly broad range of issues, including the question of whether the [Kenyan Constitution of 2010](#) has an un-amendable “basic structure”, the extent and limits of public participation in law-making, and political representation and the alteration of constituencies. For this reason, and for the clarity of its analysis, the BBI Judgment is a landmark judicial verdict that will be studied by students of constitutional law across the world in the days to come.

The primary issue in the BBI judgment involved a set of contentious proposals to amend the Kenyan Constitution. After winning power in 2017, in a controversial general election (the results were set aside by the Supreme Court the first time, and the Opposition boycotted the rerun), Kenyan President Uhuru Kenyatta created a “Building Bridges to Unity Taskforce” (BBI Taskforce), which was mandated to come up with “recommendations and proposals for building a lasting unity in the country”. After the BBI Taskforce submitted its report, the president appointed a sixteen-member “BBI Steering Committee”, whose terms of reference included “administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report”. The Steering Committee’s report finally turned into a Bill for

bringing about wide-ranging amendments to the Kenyan Constitution (“The Constitution of Kenya Amendment Bill, 2020).

Under Article 257 of the Kenyan Constitution, one of the ways to amend the Constitution is by “Popular Initiative”, which requires – as a starting point – the signatures of one million registered voters (Article 257[1]). Consequently, the BBI Secretariat commenced the process of gathering signatures. At this point, the entire process – as a whole, as well as its constituent parts – was challenged before the High Court through a number of petitions. All these petitions were consolidated, and the High Court eventually struck down the whole of the BBI process as unconstitutional.

The Court framed a total of 17 issues for disposal.

The basic structure

As the challenges were to (proposed) constitutional amendments, at the outset, the High Court was called upon to answer a crucial – preliminary – question: was there any part of the Kenyan Constitution that was un-amendable, i.e., beyond the amendment processes set out in the constitution itself (the “basic structure” question).

The constitutional provisions

To understand this better, let us briefly consider Articles 255 to 257 of the Kenyan Constitution, that deal with constitutional amendments. Articles 256 and 257 set out two methods of amending the constitution: through parliament, and through Popular Initiative. The Parliamentary Process is contained in Article 256, which requires amendments to be passed by a two-thirds majority of both Houses of Parliament. The Popular Initiative process is contained in Article 257. It requires the signature of one million registered voters, followed by a range of procedural and substantive steps, such as certification by the Independent Electoral and Boundaries Commission (IEBC), approval by a majority of county assemblies, and approval by a majority in both Houses of Parliament (failing which, the proposal can be put to a referendum).

Article 255 of the Kenyan Constitution places a further requirement for certain types of amendments. If an amendment falls into one of the ten categories set out in Article 255(1) (including Kenyan territory, the Bill of Rights, presidential terms, etc.), then in addition to the processes described in the previous paragraph, it must also be approved in a referendum by a simple majority (and under certain quorum rules). A perusal of the categories under Article 255(1) reveals – unsurprisingly – that they pertain to core structural issues, and are therefore deemed more *important* (in a way), or – dare we say it – more *basic* than the other constitutional provisions.

The text of the Kenyan Constitution, therefore, sets out two *processes* of amendment: Parliament (Article 256) and People and Parliament (Article 257). It also divides the constitution into two *sets of provisions*: those that can only be amended following a referendum, and those that do not need a referendum (Article 255). The key question in the BBI Judgment was whether Articles 255 to 257 were *exhaustive* when it came to constitutional amendments, or whether there was a third set of provisions that could not be amended *even if* the scheme under these articles was scrupulously followed.

The history

To answer this question, the High Court embarked upon a detailed analysis of Kenyan constitutional history. It noted that if there was one thing that was a defining feature of the 2010 Constitution, it

was that it was meant to serve as a “model . . . of participatory constitution building process”. This meant that the public was meant to be involved in *every step* of the constitution-making process, as opposed to the “20th century model”, where constitutions drafted by experts were submitted for public approval, giving the people a say over only the final version.

Indeed, the 2010 Constitution – the Court argued – was designed to respond to two sets of pathologies that had plagued Kenyan constitutionalism in its previous iterations (starting from independence in 1963). The first was a “culture of hyper-amendment”, where presidents amended constitutions with such ease and such frequency, that the document became little more than a “hollow shell”, creating a raft of “constitutions without constitutionalism”. This was especially true in the 1970s and 1980s, when Kenya effectively became a one-party state, and this was at the heart of demands for constitutional reform when multi-party democracy returned in 1991.

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The second piece of constitutional history that culminated in the 2010 document was a two-decade emphasis on a citizen-led process. The High Court’s account of this history – starting at paragraph 411 of the judgment – is deeply fascinating, and repays careful study. Despite strong pushback from the political executive – with the president sarcastically asking “What does Wanjiku [i.e. the common Kenyan] know about the Constitution?” – efforts to centre the citizen in the constitution-making process remained undeterred. The Constitution of Kenya Review Act of 1997 specified that constitutional review had to be “by the people of Kenya”, and went on to provide a framework for public participation – insulated from legislative and executive interference – at every stage of the drafting process. The Constitution of Kenya Review Commission (the CKRC) implemented this at the ground level through a sequential process that involved civic education, research, public consultation, preparing the draft bill, and considering the commissioners’ report. After a long process that included considering more than 35,000 submissions from the people, a draft constitution was prepared by 2002. This process was, however, short-circuited when the then President Daniel arap Moi dissolved Parliament before the 2002 general election.

In the 2002 elections, however, President Moi lost power, and the opposition coalition that entered into government committed to continuing with the constitutional process. After further consultations, a draft called “the Bomas Draft” was prepared; however, the government attempted to significantly alter the draft through a non-participatory parliamentary process that resulted in a fresh document called “the Wako Draft”. Attempts to force through the Wako Draft were forestalled when, in 2004, the High Court of Kenya famously held that the draft would have to be put to a referendum. In 2005, when the referendum did take place, the Wako Draft was voted down 58-42.

Constitutional reform came back on the table after the large-scale violence in the aftermath of the [2007 general election](#), which needed international mediation. The legal framework for this was provided by the 2008 Constitution of Kenya Review Act, which again placed public participation at the centre (although its implementation in this regard was criticised). On 4th August 2010, the new draft constitution was passed with 68.55% of Kenyans voting in its favour.

Relying upon this constitutional history – i.e., the pathologies of hyper-amendments and the two-decades-long struggle for public participation – the High Court concluded that “these principles of interpretation, applied to the question at hand, yield the conclusion that Kenyans intended to protect the Basic Structure of the Constitution they bequeathed to themselves in 2010 from destruction through gradual amendments.”

This was buttressed by the fact that the Wako draft - which did not respect the principle of public participation - had been voted down by the Kenyan people. Over the course of the years, it had become clear that participation in the constitution-making process required four distinct steps: civic education to equip people with sufficient information to meaningfully participate in the constitution-making process; public participation in which the people - after civic education - give their views about the issues; debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making in a Constituent Assembly; and, a referendum to endorse or ratify the Draft Constitution.

The Court thus found:

What we can glean from the insistence on these four processes in the history of our constitution-making is that Kenyans intended that the constitutional order that they so painstakingly made would only be fundamentally altered or re-made through a similarly informed and participatory process. It is clear that Kenyans intended that each of the four steps in constitution-making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010.

The Court labeled this the “primary constituent power” - i.e., the power possessed by the people themselves, as a constituent body - as opposed to the “secondary constituent power” (the Popular Initiative + Referendum process under Articles 255 and 257) and the “constituted power” (amendment only by Parliament under Article 256). The “primary constituent power” was located *outside* of the constitution’s amendment provisions, and was plenary and unlimited. It followed that there were substantive limitations upon which amendments the secondary constituent power or the constituted power could bring about: such amendments could not “destroy the basic structure of the Kenyan Constitution”, because *that* right - i.e., to make or radically alter the fundamentals of a constitution - lay only with the primary constituent power, i.e., with “the People.”

Thus, while the High Court affirmed the basic structure doctrine in the Kenyan context, it also went one step beyond. In its classical iteration, the basic structure stops at saying that constitutional amendments cannot damage or destroy the basic structure. It hints at the possibility that such alterations can be brought about only through revolution or by a complete destruction of the existing order but - for obvious reasons - does not spell that out. The assumption is that if a constitution is to be replaced altogether, then it can only be done extra-constitutionally - and presumably through great revolutionary upheaval. The Kenyan High Court on the other hand - drawing from Kenyan history - spelt out a concrete, four-step process that *could* be resorted to if the People *did* want to change the basic structure of the Kenyan constitution. There is, of course, an interesting question: now that the *Court* - a body that owes its own existence to the 2010 Constitution - has spelt out the process, is it “extra-constitutional” in any genuine sense? Or is it simply a *third* kind of amendment process that owes its existence solely to the judiciary? This is no doubt a debate that will be joined intensely, both in Kenya and elsewhere, in the days to come.

It is nonetheless important to note, therefore, that the High Court did not actually hold that any provision or principle of the constitution is *entirely* un-amendable (the default position under classical basic structure doctrine). Every constitutional provision is hypothetically amendable, but some - that the Court called “eternity clauses”, borrowing from Germany - can only be amended by “recalling the Primary Constituent Power”, in accordance with the four-step process that the Court set out. As is now familiar to students of the basic structure, the Court declined to set out an “exhaustive list” of eternity clauses, noting only that this would have to be determined on a case-to-case basis, while providing illustrative examples: constitutional supremacy, the role of international law on the one hand (eternity clauses), and the number of constituencies on the other (not an eternity clause).

A final point: it is particularly fascinating to note that the High Court derived its articulation of the basic structure not from a textual interpretation of the word “amend”, or from structural arguments about implied limitations, but from Kenyan social history. Its entire analysis was focused on how Kenyans struggled for – and won – the right to public participation in constitution-making, and *that* was the basis for holding that the core of the constitution could not be altered without going back to the people. A crucial argument of transformative constitutionalism is that constitutional interpretation needs to work with an expanded interpretive canon, which centres people – and social movements – in its understanding of constitutional meaning. The High Court’s judgment is an example *par excellence* of transformative constitutionalism grounded in radical social history.

The popular initiative and the BBI process

A second key issue that fell for determination was the exact meaning of Article 257(1) of the Kenyan Constitution. Article 257(1) states that “an amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.” The BBI Taskforce and Steering Committee, however, had been set up by the President. Consequently, was it legal for it to start gathering the one million signatures needed for triggering amendment by Popular Initiative?

The High Court held that it was not. Going back to the constitutional history outlined above, it held that through multiple iterations of constitutional drafts, it had been clear that the intent of the provision that finally became Article 257(1) was that the power to *initiate* a constitutional amendment lie in the hands of voters. Here, the president’s direct involvement – including establishing the Taskforce and Steering Committee through gazette notifications – made it clear that the amendment bill had not been initiated by the voters. This was also impermissible because the scheme of Article 257 made the president the adjudicating authority of whether or not a referendum was to take place – thus making that authority both the “player and the umpire in the same match”, if he was also allowed to initiate proceedings.

Thus, as the Court summed up:

It is our view 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.

While I find this clear and persuasive, it is – I think – an open question about how *effective* this part of the ruling will be. One can imagine all too easily how – without further safeguards and judicial good sense – such rulings can be subverted through use of proxies as “initiators” of the process. Whether or not that plays out in the future will be interesting to see.

In this case, however, it meant that the BBI process – insofar as it contemplated the Steering Committee recommending “constitutional changes” as part of its terms of reference – was illegal. An executive-led amending process was unknown to the constitution: it had to be parliament (Article 256) or people and parliament (Article 257).

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The Court also found the BBI process to be unlawful for another reason - it violated Article 10's requirement of public participation in law-making. Over the years, the Kenyan judiciary has developed a rich and substantive jurisprudence around public participation under Article 10, that requires *meaningful* participation, and all that it entails (intelligibility, enough time, substantive exchange of views etc.). Here, however, the Court found a very straightforward violation: the Constitutional Amendment Bill had been made available only in English, whereas Kiswahili and Braille were constitutionally-mandated languages.

Thus the Court held:

The copies also ought to have been made available in other communication formats and technologies accessible to persons with disabilities including Kenya Sign Language as required under Article 7(3)(b) of the Constitution. Only then would the voters be deemed to have been given sufficient information to enable them to make informed decisions on whether or not to append their signatures in support of the proposed constitutional amendments.

Constituency apportionment and delimitation

A significant portion of the Constitutional Amendment Bill dealt with effective alterations to Article 89 of the Kenyan Constitution, which deals with "delimitation of electoral units". The Bill sought to introduce 70 new electoral constituencies - but also directed the IEBC to complete the delimitation within a specified time, and the basis of delimitation ("equality of [the] vote."). The roots of this, again, lay in pre-2007 distortions of constituencies that had severely compromised the one-person-one-vote principle. To correct this, in the run-up to the 2010 Constitution, the Interim Independent Boundaries Review Commission (IIBRC) had presented a detailed report, which recognised the importance of stakeholder participation in any constituency or electoral boundary review process, and set out five principles of delimitation that were eventually incorporated into Article 89.

The Constitutional Amendment Bill gave the High Court an immediate opportunity to apply the basic structure doctrine that it had just crafted. The Court found that while the number of constituencies was not part of the eternity clauses, the provisions dealing with the *method* of delimitation were:

Both the text and the history of the Article makes it clear that Kenyans were very particular about the criteria of the delimitation and apportionment of constituencies. This was because the apportionment and distribution of electoral units has a bearing on both the right to representation (which is a political right) as well as the distribution of national economic resources (which is an economic right). The reason for this, as outlined above, is that a substantial amount of national resources distributed to the regions by the national government is done at the constituency level . . . Given this history and the text of the Constitution, we can easily conclude that whereas Kenyans were particular to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual number of constituencies.

Thus, the Constitutional Amendment Bill's departure from the stipulated processes - in particular, by detailing *how* and *when* the IEBC had to do its job - was unconstitutional. Lurking underneath this reasoning, one senses an undercurrent of concern about *institutional independence*: it appears clear that the Constitutional Amendment Bill amounted to an encroachment upon an independent, fourth-branch institution's sphere of work, and - indeed - interfered with how the *ground rules* of the democratic processes were set. This is evident in the Court's - correct - observation that the Bill attempted to amend Article 89 "by stealth", setting up a parallel process of boundary delimitation, as well as dispensing with public participation and taking away the guaranteed constitutional right of individuals to challenge delimitation (also under Article 89):

We say it is an attempt to amend the Constitution by stealth because it has the effect of suspending the operation of Article 89 without textually amending it. The implications of such a scheme if allowed are at least two-fold. First, it creates a constitutional loophole through which the Promoters can amend the Basic Structure of the Constitution without triggering the Primary Constituent Power. Second, such a scheme creates a “constitutional hatch” through which future Promoters of constitutional amendments can sneak in fundamental changes to the governing charter of the nation for ephemeral political convenience and without following the due process of the law.

Although the Court did not put it in so many words, this is – in many ways – a classic checks-and-balances argument: democracy depends upon independent fourth-branch institutions, constitutionally insulated from executive interference (and, in the Kenyan case, buttressed by requirements of public participation). Distortion or undermining of fourth-branch institutions (whether explicitly or implicitly) would amount to undermining the ground rules of the democratic game, which are what render democratic outcomes *legitimate*. Thus – once the Court has committed to identifying a set of constitutional provisions as “eternity clauses”, provisions governing political representation are prime candidates. It is perhaps therefore rather fitting that it was Article 89 that was the basis of the High Court’s first application of the basic structure doctrine.

There were a number of other issues, all of which deserve a detailed analysis of their own, but which we do not have further space to examine here. These include the finding that there was no suitable legislative or regulatory framework to collect signatures and to conduct the referendum; the (fascinating) holding that amendments would have to be presented *separately* in multiple referenda, and not as a *bloc*; and the finding that County Assemblies could not alter or modify a Popular Initiative proposal (so as to avoid political capture), but were only allowed to consider and vote on it. All of these holdings raise a range of important questions that will no doubt be discussed in detail in the coming days.

Democracy depends upon independent fourth-branch institutions, constitutionally insulated from executive interference.

If ever a judgment deserved to be called an instant classic, the Kenyan High Court’s *BBI Judgment* must surely rank as a top contender. While the High Court joins the family of courts that have adopted a variant of the basic structure doctrine, it does so in an entirely unique – and compelling – manner: relying upon social and constitutional history in order to craft a three-tiered hierarchy of constituted power, secondary constituent power, and primary constituent power; it then utilises that same social history to spell out in great detail what the components of primary constituent power would look like, thus taking on the (seemingly) paradoxical task of *constitutionalising revolutionary power*.

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But even more than that, what is perhaps most heartening about the judgment is how it uses constitutional silences and the interpretive openness of constitutional text to advance an interpretation that in *concrete and tangible ways* seeks to empower citizens *against* the executive. From its spelling out of the basic structure, to its interpretation of Article 257, and to its reading of Article 89, at every step, the Court is keenly aware of the power difference between a powerful executive and the individual citizen, and at every step, the judgment works to mitigate that powerful

imbalance upon the terrain of the constitution. In a world that is too full of Imperial presidencies and quiescent courts, the BBI Judgment is an inspiring illustration of courts and constitutions at their very best.

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