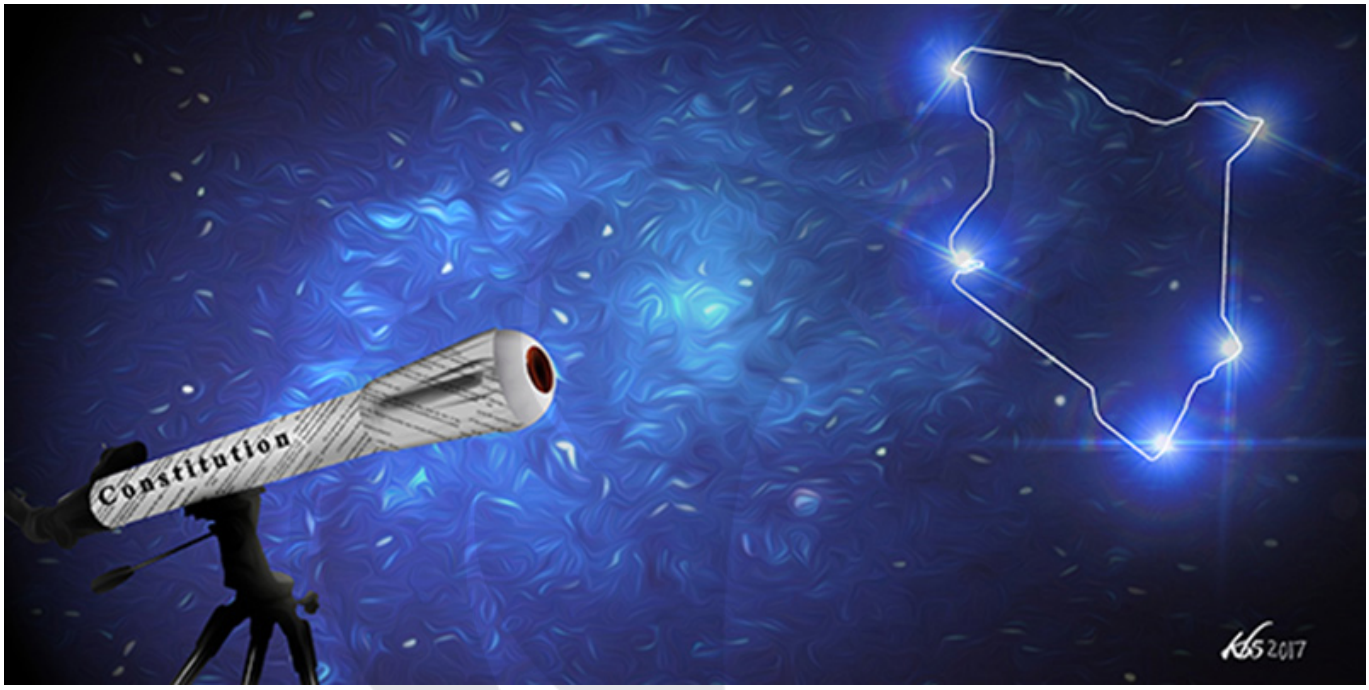
The Kenyan Court of Appeal's BBI Judgment: Thirsting for Sunlight

By Gautam Bhatia



There is a story about how, for the longest time, the poetic perfection of *The Iliad* confounded scholars. How could Homer both be the *first* of the epic bards, *and* the most accomplished? Foundational works are tentative, exploratory, sometimes stumbling, searching for an assurance that they are doomed to never realise. That privilege is reserved for later works, which build upon the foundation and reach the pinnacle.

The mystery was ultimately resolved when it was deduced that Homer was not the first – or even (in all probability) one – person, but part of an entire oral tradition of epic composition (a lesson, perhaps, that whether artist, judge, or lawyer, acts of creation are always collaborative). Yet the point remains: when we consider work that has taken on the burden of a beginning, we should hold it to the standards of a beginning. Not every question will be answered, not every resolution will satisfy, not every path be taken to its logical destination. But without a beginning, there will be nothing to take forward.

I'd like to think of the BBI Judgment in the words of Christopher Okigbo's poem, *Siren Limits*: "*For he was a shrub among the poplars/ Needing more roots/ More sap to grow to sunlight/ Thirsting for sunlight*. . . ." In the years to come, constitutional jurisprudence may put down stronger roots, and more sap may flow that takes it to sunlight, but here is where the beginning is.

In that spirit, in the first section of this article, I raise a couple of questions that future courts may be called upon to answer. These are in addition to some of the issues discussed in the previous posts, which have also been left open by the judgment(s) (constitutional statutes, referendum questions, identifying the exact elements of the basic structure, etc.)

Making the constitution too rigid?

A stand-out feature of both the High Court and the Court of Appeal judgments has been that, for the first time in basic structure history, the doctrine has been held not to constitute a *bar* on amendments, but to require the replication of the Constitution's founding conditions. This, it is argued, provides a safeguard against a possible juristocracy, where the courts stand as barriers to the people's will, thereby leaving a revolution or a coup as the only options.

To this, the counter-argument – mentioned in Judge Sichale's dissenting opinion – is that the judiciary nonetheless remains a gatekeeper, as it will decide *when* a proposed amendment violates the basic structure and therefore needs to go through the rigorous four-step "re-founding" procedure. This becomes problematic, because if Article 257 is meant to empower the common person – *Wanjiku* – to initiate a constitutional amendment process, then placing the constitutional courts as a set of Damocles' swords that might at any point fall upon that process, cut it short, and demand its replacement by the far more onerous re-founding procedure, can hardly be called empowerment. After all, is it fair to expect *Wanjiku* to approach the constitutional court every time, to check in advance, whether Article 257 should apply to a proposed amendment, or whether preparations should commence for nationwide civic education, a constituent assembly, and so on?

I suspect that it is for this reason that more than one judge in the majority *did* try to define the basic structure with a degree of specificity, gesturing – in particular – to the ten thematic areas set out in Article 255(1) of the Constitution. Ultimately, however, the Court of Appeal judgments could not reach a consensus on this point. The upshot of this is that it is likely that the Kenyan courts – more than courts in other jurisdictions – will be faced with litigation that will specifically require them to identify what constitutes the basic structure.

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That said, however, I believe that the concern is somewhat overstated. One thing that comes through all of the Court of Appeal judgments is a clear sense that constitutional amendment is a serious endeavour. The stakes – permanent alteration of the Constitution – are high. In such a circumstance, is it *that* disproportionate to have the constitutional courts involved at the stage of vetting the amendment, simply on the question of *which* procedural channel it should proceed into? After all, there are jurisdictions where pre-legislative scrutiny for constitutional compliance – whether by a constitutional office such as that of the Attorney-General, or even by a court – exists.

And one can easily imagine how the Kenyan courts can develop norms to minimise the disruption that this will cause. For example, the point at which one million signatures are collected and verified could become the trigger point for judicial examination of whether the initiators should proceed to the next steps under Article 257, or whether the four-step re-founding process applies. Note that this need not be an automatic trigger: the requirement that *someone* has to challenge the process can remain, but the courts can develop norms that will expedite such hearings, discourage appeals on the specific question of *which* procedural channel a particular amendment should go down, and so on. The judiciary's role, then, would remain a limited one: simply to adjudicate whether the proposed

amendments are of such import that they need the deeper public participation envisaged in the four-step re-founding process, or whether Article 257 will do. The task will obviously be a challenging one, but not one that is beyond the remit of what courts normally do.

De-politicising politics, and the perils of *vox populi, vox Dei*

There is an argument that both through the basic structure doctrine, and through its interpretation of Article 257, the court evinces a distrust of politicians and political processes, and a (consequent) valorisation of litigation and the judicial process; that the effect of its judgment is to make the constitution too rigid, and effectively impossible to amend; and that, if we look at Article 257 closely, it was *always* meant to be a joint effort between politicians and the people, because the threshold barriers that it places – one million signatures and so on – require the institutional backing of politicians to start with. It is further argued that this is not necessarily a bad thing, as (a) even historically, the 2010 Constitution of Kenya was the product of political compromise, and not the outcome of pure public participation that the High Court's judgment made it out to be; and (b) there is no warrant to demonise politicians and politics as tainted or compromised, or at least, relatively *more* tainted and compromised than litigation and adjudication.

To this, there is an added concern: judgments that claim to speak *in the name of the People* invariably end up flattening a plural and diverse society, with plural and diverse interests, into a single mass with a single desire – which only the court is in a position to interpret and ventriloquize. This, then, turns into the exact top-down imposition of norms and values that the doctrine of public participation is meant to forestall.

While I believe that the Court of Appeal did not make either of the two mistakes indicated above, I do think that the argument is a powerful one, and requires the judiciary to exercise consistent vigilance (primarily upon itself). A reading of the High Court and Court of Appeal judgments, to my mind, makes it clear that the Constitution Amendment Bill of 2020 was executive-driven (indeed, it would be a bold person who would go against the unanimous finding of *twelve* judges, across two courts, on this).

But it is easy to imagine messier and less clear-cut situations. What happens if, for instance, an amendment proposal emerges from a set of people, and then a political party or a charismatic politician takes it up, uses their platform to amplify it, and ultimately helps to push it over the one million signature mark? A point was made repeatedly that politicians are part of The People; now, while the distinction between the two was particularly clear in the BBI case, what happens when it is not so, and when it becomes much more difficult to definitively say, "this proposed Amendment came from the political elite, and not from the People?" Is the answer judicial deference? But if it is deference, wouldn't it simply allow powerful politicians to use proxies, as long as they did it more cleverly and subtly than the protagonists of the BBI?

The difficulty, I believe, lies in the fact that when you say that Article 257 is a provision for The People, you run into a host of very difficult challenges about *who* are the People, who are *not* the People, *when* is it that the People are acting, and so on. The intuitive point that the High Court and the Court of Appeal were getting at is a clear and powerful one: Article 257 envisages an active citizenry, one that engages with issues and generates proposals for amendments after internal social debate – and not a passive citizenry, that votes "Yes" or "No" to a binary choice placed before it by a set of powerful politicians. And while I believe that that is the correct reading of Article 257, it places courts between the Scylla of short-circuiting even legitimate politics, and the Charybdis of stripping Article 257 of its unique, public-facing character.

I think that the only possible answer to this is continuing judicial good sense. Given the issues it had

to resolve, I think that it is inevitable – as pointed out above – that the BBI Judgment would leave some issues hanging. But for me this is not a weakness of the judgment, or a reason to castigate it: I think that there are certain problems that simply can't be resolved in advance, and *need* courts to "make the path by walking."

The grammar of power

Stripped down to the essentials, constitutions are about power: who holds it, who can exercise it, who can be stopped from wielding it; when, how, and by whom. Constitutions are also full of gaps, of silences unintended or strategic, of ambiguities planned and unplanned. Interpretation, thus, is often about the balance of power: resolving the gaps, silences, and ambiguities in ways that alter power relations, place – or lift – constraints upon the power that institutional actors have, and how they can deploy it. When Robert Cover writes, therefore, that "legal interpretation takes place in a field of pain and death," we can slightly modify it to say that "constitutional interpretation takes place in a field of power."

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At its heart, I think that the BBI Judgment is about power. The issues that span a total of 1089 pages are united by one common theme: the judges in the majority believe that the constitution acts as a barrier against the *concentration* of power, and as a channel for its dispersal. Why require referendum questions to be grouped together by unity of content? Because doing so will constrain the power of institutional actors to force unpalatable choices upon people in all-or-nothing referenda. Why interpret Article 257 to exclude public office holders from being initiators? Because to hold otherwise would divest power vested in the public, and instead, place it in the hands of a political executive claiming to directly "speak for the people". Why insist on contextual public participation for the Article 257 process? Because without granular participation, even a "people-driven process" will not be free from centres of power that dominate the conversation. Why insist upon fixing the IEBC quorum at five, and for a legislative framework to conduct referenda? Because independent Fourth Branch Institutions play a vital role in checking executive impunity on a day-to-day basis, in a way that courts often cannot. And lastly, why the basic structure, why *this* form of the basic structure? Because the power to *re-constitute* the constitution is the most consequential of all powers: institutional actors should not have it, but nor should the courts have the power to *stop* it. Thus, the articulation of the primary constituent power, and its exercise through – primarily – procedural steps.

And I think that it is here that we find the most important contribution of the High Court and the Court of Appeal judgments to global constitutional jurisprudence. Reams have been written by now about the "Imperial Presidency", and the slow – but inevitable – shift, across the world, towards concentration of political power rather than its dispersal. Examining the High Court and Court of Appeal judgments through the lens of power, its structures and its forms, reveals a judiciary that is working with constitutional text and context to combat the institutionalisation and centralisation of power, to prevent the constitution from being used as the *vehicle* of such a project, and – through interpretive method – to try and *future-proof* it from ever being so used. It is too early to know if the effort will succeed. The sap and the roots are now the responsibility of future judgments, if sunlight is to be reached, and not just thirsted for.

The hydra and the sword: parting thoughts

There are moments in one's life when you can tell someone, with utter clarity, that "I was there when. . . ." For my part, I will always remember where I was, and what I was doing, when, during oral arguments before the Court of Appeal, I heard Dr Muthomi Thiankolu's ten-minute summary of Kenyan constitutional history through the allegory of the Hydra of Lerna. It ended thus:

> If you drop the sword, My Lords and My Ladies, we have been there before. When the courts drop the sword of the Constitution, we had torture chambers. We had detentions without trial. We had sedition laws. It may sound, My Lord, that I am exaggerating, but the whole thing began in small bits.

I remember it because by the end, I was almost in tears. It took me back to a moment, more than four years ago, when I stood in another court and heard a lawyer channel Justice William O. Douglas to tell the bench: "*As nightfall does not come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air – however slight – lest we become unwitting victims of the darkness.*"

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The chronicle of events that followed those words does not make for pleasant reading. But as I heard Dr Thiankolu speak of an era of executive impunity – an impunity enabled by a judiciary (with a few exceptions) that saw itself as an extended arm of the executive – what struck me was not how familiar (detentions without trial!) his examples sounded, but that he spoke of them in the past tense. And on the 20th of August, as judge after judge in the Court of Appeal read out their pronouncement, it seemed that an exclamation point was being added to those arguments: the past really *had* become a foreign country.

One person's past is invariably another person's present. But the present sometimes overwhelms us with its heaviness. It creates an illusion of permanence that forecloses the possibility of imagining a future where *this* present has become the past. We cannot bootstrap ourselves out of such moments: we need someone to show us the way, or to show us, at least, that a way exists.

And so, perhaps the great – and intangible – gift that the Kenyan courts have given to those stuck in an interminable present, is a simple reminder: *it needn't always be like this*.

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