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The hydra and the sword: Constitutional amendments, political process, and the BBI case in Kenya

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Abstract

This study examines the landmark rulings in the "BBI Case", adjudicated successively by the High Court, Court of Appeal, and Supreme Court of Kenya, from the perspective of comparative political process theory ["CPPT"]. The BBI case involved a constitutional challenge to a set of seventy-four proposed constitutional amendments to the Constitution of Kenya, 2010. It raised a host of issues, ranging from the applicability of the basic structure doctrine, the role of the President in initiating constitutional change, Presidential immunity, and Fourth Branch institutions, among others. This paper analyses two crucial issues in the case: the articulation – for the first time in its history – of a process-oriented basic structure doctrine, by the High Court and the Court of Appeal; and the concurrent holding of the High Court, the Court of Appeal, and the Supreme Court prohibiting the President of Kenya from initiating a constitutional amendment through the "popular initiative" route. It argues that on these issues, the Kenyan courts' reasoning constitutes a creative, unique, and valuable contribution to CPPT, in the context of constitutional change. When faced with the possibility of abusive amendments within the framework of a two-tiered amendment process, the Kenyan courts responded by setting out rigorous procedural constraints upon the amendment power. As a corollary, the role of the judiciary under this approach is not to invalidate or veto abusive constitutional amendments, but to ensure that they pass through a substantive, rich, and deep process of public participation.

Keywords: Kenya; basic structure; comparative constitutional law; amendments; Supreme Court of Kenya

This study analyses the landmark *BBI Case*, which concerned a constitutional challenge to a set of seventy-four proposed amendments to the 2010 Constitution of Kenya. Over 2021

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and 2022, the case progressed through three levels of the Kenyan judiciary: the High Court, the Court of Appeal, and the Supreme Court. All three courts agreed that the proposed amendments were unconstitutional and void, although the reasoning at the Supreme Court partially varied from that of the High Court and the Court of Appeal.

This article analyses two of the core issues in the *BBI Case*: the issue of the applicability of the "basic structure doctrine" in Kenya, and the debates around the nature and role of the "popular initiative" in constitutional change. Through a close case study of the three sets of judgments on both these issues, this article makes the following contributions: *first*, it highlights a new version of the well-known "basic structure doctrine" that emerged from these judgments, one that is focused on a *procedural* solution to the problem of using the constitution's amendment provisions to repeal or eviscerate its key features. This version of the doctrine, I will argue, is particularly relevant in constitutions that have a two-tiered system of constitutional amendments: that is, an amendment system where changes to certain, more "entrenched" provisions are subjected to a higher threshold than others, often including a referendum.

Secondly, the article aims to navigate through the seven separate – and sometimes conflicting – opinions rendered at the Supreme Court, and to distil the legal impact of the judgment for the future of constitutional change in Kenya. I will argue that despite the formal disposition of the Supreme Court judgment, which held that the basic structure doctrine is inapplicable in Kenya, a closer study of the actual opinions suggests that the Supreme Court reserved a degree of power to the judiciary to review constitutional amendments on the lines indicated above, should a case be made out that they sought to eviscerate or repeal the Constitution's key features. This leaves the issue of judicial review of constitutional amendments open, in the years to come.

Thirdly, this article uses the *BBI Case* as an example of how courts can deploy a version of comparative political process theory [or "CPPT"] in defence of preserving constitutional integrity from politically driven projects of sweeping constitutional change. The origins of CPPT can be traced back to the work of John Hart Ely, who argued that judicial review was justified when – and to the extent that – it performed a *representation-reinforcing function*, i.e., when it was directed towards improving democratic processes.[1] A classic example is the famous *Carolene Products* footnote, which locates the justification of judicial review in protecting the rights of "discrete and insular minorities" that are structurally and institutionally shut out from the political process. Modern CPPT accounts accept this insight but argue that Ely's chosen examples of democratic process failures (confined to the United States of the late 20th century) are too narrow. These accounts, therefore, develop Ely's core argument in different directions, extending the range of instances of democratic process failures, and the range of judicial remedies on offer.

I shall propose that the reasoning of the Kenyan courts in the BBI Case – both with respect to the basic structure doctrine and with respect to the popular initiative process – is in conversation with the CPPT accounts proposed by Rosalind Dixon and Roberto Gargarella. Dixon calls for a judicial approach that is both *proactive* (i.e., seeks to tackle process failures at their root) and *mindful* of the limits of judicial intervention and the threats of political backlash.[2] Gargarella's dialogic approach calls upon courts to protect democratic deliberation (that goes beyond inter-branch deliberation, and includes dialogue between *people*) and equality, and to intervene where democratic process failures

[1] J.H. Ely, *Democracy and Distrust* (HUP, Cambridge, 1981).

[2] See e.g. R. Dixon, 'A New Comparative Political Process Theory?' (2020) 18(4) *International Journal of Constitutional Law* 1490, 1496.

impact these values.[3] While the Kenyan courts' approach – as I shall show – is very much their own contribution, and not reducible to Dixon's or Gargarella's accounts, there are nonetheless important overlaps when it comes to certain core, motivating ideas.

This article is structured as follows. In the first section, I provide a brief history of the basic structure doctrine, its motivations, and the difficulties in applying it to modern Constitutions with two-tiered amendment structures (**I**). I then provide a background of the BBI Case, and its trajectory through the High Court, Court of Appeal, and Supreme Court of Kenya [**II**]. I go on to examine two crucial issues in the case: the articulation – for the first time in its fifty-year history – of a *process-oriented* basic structure doctrine, by the High Court and the Court of Appeal [**III**]; and the concurrent holding of the High Court, the Court of Appeal, and the Supreme Court prohibiting the President of Kenya from initiating a constitutional amendment through the "popular initiative" route [**IV**]. Finally, I argue that the larger context of this case made CPPT a particularly attractive framework for the court to deploy and provides us with important insights about the interlinkages between CPPT and constitutional change, an under-explored area so far (**V**). I then conclude (**VI**).

Constitutional change, two-tiered amendment processes, and the basic structure

A spectre has long haunted modern constitutionalism: that of unconstitutional constitutional amendments.[4] In other words, the spectre of unscrupulous political actors using a constitution's amendment mechanisms to eviscerate the Constitution itself. The process: impeccably constitutional. The outcome: the dismantling of the Constitution's structuring values or core principles.

In 1973, the Supreme Court of India attempted to banish this spectre by articulating the basic structure doctrine.[5] Drawn from the writings of the German scholar Dietrich Conrad, the basic structure doctrine – as outlined by the Indian Supreme Court – places substantive constraints upon the power to amend a Constitution. It holds that amendments that "damage or destroy" a constitution's basic structure are substantively unconstitutional, and the judiciary may declare them null and void. The "basic structure" itself refers to the most important normative values that make a Constitution what it is, values that "constitute" its identity, such that without them, the Constitution would no longer be recognisable as the moral, ethical, and political document that it presently is.[6] "Basic features" tend to be articulated in abstract terms (the rule of law; federalism; equality; and so on). Courts, when listing basic features, prefer to provide an illustrative rather than exhaustive catalogue, retaining the discretion to assess a constitutional amendment on the touchstone of a newly articulated basic feature, should the need arise.[7]

[3]R. Gargarella, 'From "Democracy to Distrust" to a Contextually Situated Dialogic Theory' (2020) 18(4) *International Journal of Constitutional Law* 1447.

[4]For a comprehensive treatment, see Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP, Oxford, 2017); R. Albert, 'Constitutional Amendment and Dismemberment' (2018) 43(1) *Yale Journal of International Law* 1.

[5]*Kesavananda Bharati vs State of Kerala* (1973) 4 SCC 225 (Supreme Court of India).

[6]The link between the basic structure and constitutional identity was drawn explicitly in *Minerva Mills vs Union of India*, (1980) 3 SCC 625 (Supreme Court of India).

[7]For a discussion, see S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP, New Delhi, 2009).

The basic structure doctrine has been defended in textual as well as conceptual terms. Textually, its defenders draw a distinction between "amendment" and "repeal." Certain constitutional changes are so fundamental and far-reaching, that – in effect – they amount to repealing the Constitution rather than amending it.[8] Conceptually, the distinction lies between *primary* and *secondary* constituent power: parliamentary (super)majorities have the power to amend the Constitution, but certain changes are – once again – so fundamental, that they amount to *rewriting* it wholesale. *That* power – so the argument goes – can be exercised only by the People, in the exercise of their sovereign power to make and unmake their Constitution.[9]

No matter how eloquently the basic structure doctrine is defended, however, there is a lingering unease about its legitimacy that refuses to go away. In the fifty years since its Indian debut, the doctrine has travelled the world, with mixed success: certain jurisdictions have embraced it,[10] while others have been sceptical.[11] The reasons for scepticism are understandable: the basic structure doctrine cannot be anchored in constitutional text (in fact, to do so would be to create a problem of infinite regress). It gives unelected judiciaries the power to overrule supermajorities and have the final say over constitutional change. What is more, the contours of this power are not spelt out in advance but articulated on a case-by-case basis. It is for these reasons that the defence of the basic structure doctrine often takes a consequential form: it flows from the bitter historical experience of parliamentary supermajorities exploiting temporary political power to effectively rewrite the Constitution, and often (although not always) with a view to entrenching their own position and constitutionalising authoritarianism.

However, a judicial veto might not be the only answer to the problem of abusive constitutional change. Even as the basic structure doctrine has been debated over the last fifty years, amendment mechanisms have evolved and grown far more sophisticated. Constitutions now recognise the need to reinforce the fragile dam of parliamentary supermajorities against the flood of abusive constitutional amendments. One popular solution is that of the *two-tiered amendment design*.[12] Under the two-tiered amendment design, parliamentary supermajorities remain adequate for effecting amendments to most provisions of the Constitution. However, for certain entrenched – "basic" – features, the process is made substantially more onerous, involving actors beyond parliament/congress, and often requiring a ratifying referendum. In essence, the two-tiered amendment design explicitly sets out a constitutional "basic structure", and then also sets out an amendment process that – in theory – is meant to provide exactly the kind of safety valve that the basic structure *doctrine* has hitherto provided.

Does the two-tiered amendment design eliminate the possibility of abusive constitutional amendments? The trite answer is no: language is malleable, and the most carefully crafted text can be twisted out of shape. However, does the two-tiered amendment design eliminate the justification for *judicial review* of constitutional amendments? Here, the answer is more complicated. Two-tiered amendment designs that explicitly provide for a

[8]Indeed, the primary justification offered up for the basic structure doctrine in *Kesavananda Bharati* was *textual*.

[9]See Roznai's distinction between constitutional amendment and constitutional revolution. Y. Roznai, *Unconstitutional Constitutional Amendments* (n4).

[10]Bangladesh, Belize, Pakistan, Slovakia, *inter alia*.

[11]Singapore, Zambia, and Tanzania, *inter alia*.

[12]For a discussion, see D. Landau and R. Dixon, 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438.

mediated role for the People (whether at the stage of initiation, ratification or both) directly address one of the main arguments for the basic structure doctrine outlined above, i.e., the possibility of transient parliamentary supermajorities eviscerating the core principles of the Constitution. One can, of course, still make arguments around the meaning of the word "amend" and draw distinctions between primary and secondary constituent power, but these now begin to sound increasingly sophisticated.

In 2021-22, the Kenyan judiciary was confronted with exactly these issues, in their starkest form: a constitutional challenge to a set of allegedly abusive constitutional amendments (74 of them!), in the context of a two-tiered amendment design *par excellence*. I will argue that the Kenyan courts responded to this unique challenge uniquely: by drawing upon the insights of modern comparative political process theory [CPPT] to provide a new variant of the basic structure doctrine that both respected the design choices underlying the two-tiered amendment structure, while also striving to protect the Constitution from its abuse.

The BBI case: A close analysis

The roots of the BBI case lie in the disputed Kenyan Presidential election of 2017. The election – that saw the incumbent, Uhuru Kenyatta, declared the winner over Raila Odinga – was so ridden with irregularities that the Supreme Court of Kenya took the unprecedented step of setting it aside.[13] In the repeat election, Raila Odinga refused to participate, and Uhuru Kenyatta won by default. Soon after that, the President and his rival engaged in a public reconciliation, popularly called "the handshake." Out of the handshake, there arose the Building Bridges to Unity Taskforce ["the BBI Taskforce"]. Set up by President Kenyatta, the Taskforce's remit was to make "recommendations and proposals for building a lasting unity in the country."[14] On submission of the Taskforce's Report, the President then appointed a sixteen-member BBI Steering Committee, which was asked to recommend "administrative, policy, statutory, or *constitutional changes* that may be necessary for the implementation of the recommendations contained in the Taskforce Report."[15] The Steering Committee's Report, in turn, became the basis of a proposed bill to bring about seventy-four amendments to the Kenyan Constitution ["the BBI Amendment Bill"].[16] As Roznai and Okubasu note, it was perceived within Kenya that at least one of the purposes of the Amendment Bill was a bipartisan drive towards the "expansion of executive power, which would allow both Odinga and Kenyatta to constitutionalize their coalition arrangement and expand it to accommodate others for the sake of winning the 2022 general elections."[17]

[13] *Raila Amolo Odinga vs Independent Electoral and Boundaries Commission and Ors.*, [2017] KESC 42 (KLR) (Supreme Court of Kenya).

[14] Presidential Task Force on Building Bridges to Unity, 'Building Bridges to a United Kenya: from a nation of blood ties to a nation of ideals' (23 October 2019), available at https://d2s5ggbxczybtf.cloudfront.net/bbireport.pdf.

[15] 'Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report' (October 2020), available at https://nation.africa/resource/blob/2486392/88e5205129241296af3755acd99809c1/bbi-report-data.pdf.

[16] The Constitution of Kenya (Amendment) Bill, 2020.

[17] Y. Roznai & D.M. Okubasu, 'Stability of Constitutional Structures and Identity Amidst Political Bipartisanship: Lessons from Kenya and Israel' (2023) 1(1) *Comparative Constitutional Studies* 101.

The Kenyan Constitution contains what we have referred to above as a "two-tiered amendment design." Amendments can be initiated either by Parliament ("the parliamentary initiative") under Article 256, or upon the signature of one million registered voters ("the popular initiative") under Article 257. Both articles then require a series of further procedural steps to be followed. Furthermore, if the amendment refers to one of ten stipulated matters under Article 255 of the Constitution (including, for example, the supremacy of the Constitution, the Bill of Rights, or the functions of parliament), there is an additional requirement of a referendum.[18] The implications of this design will be considered subsequently in this paper.

The BBI Amendment Bill was formally initiated by two cross-party parliamentarians and was framed as a popular initiative. Consequently, the BBI Secretariat commenced the process of collecting one million signatures, and the Bill began to move through the ten stages of the popular initiative process under Article 257, such as ratification by county assemblies. Midway through the process, however, the Bill was challenged on multiple grounds before the High Court of Kenya. This began the year-long constitutional battle over the BBI Amendment, which would go through three courts (the High Court, the Court of Appeal, and the Supreme Court), be considered by nineteen judges, and see fifteen separate judicial opinions.

Before the High Court of Kenya, a total of seventeen issues were framed for adjudication, ranging from the constitutionality of the amendment bill to Presidential immunity, public participation, to whether the Independent Electoral and Boundaries Commission (IEBC) had functioned with requisite quorum, to the framing of the referendum question.[19] For the purpose of this article, we are concerned with – and will consider – two issues: *first*, whether constitutional amendments in Kenya had to pass the test of the *basic structure*; and *secondly*, whether the President could be involved in the initiation of amendment through popular initiative.[20]

To answer the first question, the High Court examined Kenyan constitutional history. It noted that there were two key features important for the adjudication of this case. The first was that Kenyans wanted to guard against the culture of "hyper-amendment" (i.e., a pattern of frequent and far-reaching amendments, driven by political goals) that had plagued its old Independence Constitution (1963), making constitutional compliance broadly optional for the executive.[21] The second was to centre the *people* in the constitution-making process: i.e., an intense form of public participation at every stage of the drafting process.[22] On this basis, the High Court held 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."[23]

[18]Articles 255–257, Constitution of Kenya (2010).

[19]*David Ndii and Ors vs Attorney-General and Ors*, [2021] KEHC 9746 (KLR).

[20]Other issues in the case – in particular, public participation, the framing of the referendum questions, and the protection of the Independent Electoral and Boundaries Commission as a fourth-branch institutions are equally crucial from a CPPT perspective. For reasons of space, however, I will postpone their analysis to a future day.

[21]*David Ndii*, (n19) [406] – [409]. Notably, the Court did not go into the substance of the amendments under challenge, a point that we shall discuss below.

[22]Ibid., [411] – [472].

[23]Ibid., [469].

Thus far, the Court's analysis reflected the articulation of the basic structure doctrine, as had been done in multiple jurisdictions, ever since *Kesavananda Bharati vs State of Kerala*. At this point, however, the Court made a crucial departure. It noted that an examination of history showed that participation in the process of Constitution-making required a four-step process: civic education, public participation, debate in a Constituent Assembly, and a final, ratifying referendum.[24] This, in essence, was how the people exercised their 'primary constituent power'[25] – the power to make or unmake the Constitution or amend its core principles/provisions that constitute its basic structure, often exercised through a referendum. This is in contrast to the 'secondary constituent power'[26] of amending other constitutional principles/provisions that do not form part of this basic structure, usually done through a parliamentary process. Consequently, altering the basic structure of the Constitution – which was essentially an exercise of primary constituent power, as it involved altering constitutional identity – would require a *replication* of the four-step process.[27]

In essence, therefore, the High Court articulated a version of the basic structure doctrine that was fundamentally different from what had come before. So far, the basic structure doctrine entailed *substantive judicial review to invalidate constitutional amendments that violated the basic structure.* By contrast, the High Court's basic structure doctrine did not entail *invalidation*, but the setting out of a *procedural threshold* in order to alter the Constitution's basic structure. And in the next section, we shall examine how this version of the doctrine was embedded within political process theory, and – specifically – responded to the two-tiered amendment design under the Kenyan Constitution.

On the second issue, the High Court 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."[28] In other words, the popular initiative was meant to be a people-driven, bottoms-up method of constitutional change (embodying certain principles of direct democracy). The task of the Court was to guard that process from elite capture. Consequently, the BBI Amendment Bill – being, in effective terms, a President-driven initiative – failed the test of Article 257 and was unconstitutional.[29]

The High Court's judgment was promptly carried to the Court of Appeal, where it was heard by seven judges. By a 7-0 majority, the Court of Appeal upheld the High Court's judgment on the popular initiative. By a 5-2 majority, it upheld the High Court's finding that the basic structure could only be altered through an exercise of the primary constituent power. And by a much narrower 4-3 majority, it upheld the four-step process as an expression of primary constituent power that had to be invoked to alter the basic structure.[30] With respect to the basic structure doctrine, Sichale and Okwengu JJA, in dissent, noted that the general problem that the basic structure doctrine was attempting to address – that of abusive constitutional amendments – *had already been addressed within the Kenyan Constitution* itself, through the two-tiered amendment design[31] (a point we shall return to

[24]Ibid., [472], [474].
[25]Ibd., [474].
[26]Ibid., [474].
[27]Ibid., [783].
[28]Ibid., [497] (emphasis added).
[29]Ibid., [783].
[30]*The Honourable Attorney-General vs David Ndii and Ors.*, Civil Appeal No. E293 of 2021.
[31]Ibid., Sichale JA (dissenting), p. 37; Okwengu JA (dissenting), [76].

in the next section). Kiage JA – in the majority – disagreed with this on its own terms, noting that the provisions for public participation in Articles 255 to 257 were insufficient guardrails against abusive amendments. It was only the public participation in the *deeper* sense – that is, through the four-step process – that could act as a check on "dismembering" the Constitution through amendments.[32] And on the popular initiative, the Court of Appeal agreed with the High Court on the distinction between the representative-led amendment mechanism under Article 256, and the directly democratic mechanism under Article 257. What was of particular interest was Kiage JA's analysis, which – drawing upon constitutional history – saw Article 257 as forming a part of the Kenyan Constitution's response to the pathologies of the Imperial Presidency (i.e., a history where – through constitutional amendments – the power had been increasingly concentrated in the Presidency, at the cost of both other institutions and of public participation).[33]

The Supreme Court of Kenya was the final terrain upon which this constitutional battle was conducted. Once again, the court was faced with two questions: the applicability of the basic structure doctrine in the context of a two-tiered constitutional amendment design, and the nature and purpose of the popular initiative. Interestingly, the appellants' arguments before the Supreme Court saw a subtle shift in their position on the basic structure doctrine. Appellants now argued that the primary constituent power – as identified by the High Court – had been specifically *textualized* in the Kenyan Constitution through the two-tiered amendment design. That is to say, the Constitution itself identified its basic structure (the ten "matters" referred to in Article 255) and then set out a pathway through which the People – acting in the exercise of their primary constituent power – could alter it. That being the case, the basic structure doctrine (or its equivalent) was already encoded into the Constitution, and there was no case to be made for judicial intervention.[34]

The Supreme Court's holding on the basic structure doctrine is somewhat difficult to parse. In its formal disposition, the Supreme Court appeared – by a 6-1 majority (Ibrahim J the sole dissenter) – to set aside the High Court and Court of Appeal's findings on the basic structure doctrine and the four-step sequential process of amendment.[35] However, a study of the individual opinions themselves reveals a somewhat more complicated picture. A majority of the judges agreed that the two-tiered amendment design was itself designed to mitigate the threat of "hyper-amendments" (what the High Court had identified as the reason for the existence of the basic structure doctrine). It therefore achieved the balance between flexibility and rigidity.[36]

A majority also appeared to accept the proposition that the framers intended to make the amendment regime *gapless* – i.e., that Articles 255 – 257 were intended to exhaust the mechanism of constitutional amendment, leaving no scope for the judiciary to add an extra process.[37] However, that said, five out of seven judges also accepted the highly

[32]Ibid., Kiage JA (concurring), p. 96.

[33]Ibid., Kiage JA (concurring), p. 54.

[34]Proceedings before the Kenyan judiciary are broadcast live, and are on YouTube. References to arguments of counsel in this paper are to be taken as references to oral arguments.

[35]The Hon'ble Attorney General and Ors vs David Ndii and Ors, Petition No. 12 of 2021 (Supreme Court of Kenya).

[36]Ibid., Koome CJ (concurring), [192] – [197]; Ndungu J (concurring), [1161] – [1162]; Lenaola J (concurring), [1418]; Ouko J (concurring) [1803].

[37]Ibid., Koome CJ (concurring), [217]; Mwilu DCJ (concurring), [401] – [402]; Lenaola J (concurring), [1439 – 1442], [1451] – [1453]; Ouko J (concurring), [1763] – [1781], [1811].

consequential distinction between "amendment" and "repeal"[38], and a plurality of three out of five of these judges held that *in principle* this distinction would be subject to judicial review (the other two did not express an opinion on this point).[39] A plurality of three also held that *if* a putative amendment to the Constitution was actually a disguised attempt to dismember or repeal it, the sequential four-step process outlined by the High Court *would* apply, while an equal plurality of three rejected this proposition.[40] The deciding judgment – that of Koome CJ – expressed no opinion on this, leaving the question open. Formally, therefore, while the Supreme Court rejected the applicability of the basic structure doctrine to Kenya *in this case*, the seven separate opinions returned a fractured verdict that could well provide the space for future courts – specifically, tailored challenges to constitutional amendments – to revisit the issue.

On the popular initiative, the Supreme Court's findings were much more straightforward. The Supreme Court developed Kiage JA's insight about the Imperial Presidency and noted that the purpose of Article 257 was, specifically, to provide for an amendment process that *kept out State organs*.[41] As Koome CJ noted, "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."[42] The majority also held that Articles 256 and 257 held in balance the principles of representative and direct democracy when it came to initiating constitutional change. Consequently, allowing the President to initiate the amendment process under Article 257 – a provision meant for "the People" – would violate that conscious balance.[43]

The above summary should serve to provide readers with a map of how the three Kenyan courts – the High Court, the Court of Appeal, and the Supreme Court – navigated the various issues around the basic structure doctrine and the popular initiative, in the context of constitutional change. In the next two sections, we will examine these issues from the lens of CPPT. I shall argue that a close analysis of the judgments reveals the Kenyan courts' significant – and unique – contribution to comparative political process theory when applied to controversies around constitutional change, especially in modern Constitutions that contain variants of the sophisticated two-tiered amendment design. Kenyan jurisprudence – as articulated in the BBI judgments – is therefore of great value to students of CPPT, constitutional change, and the intersection of the two.

The basic structure doctrine as a political process

In this Section, I will argue that despite the differing approaches of the High Court, Court of Appeal, and the Supreme Court on the applicability of the basic structure doctrine, what united them was a concern with ensuring that sweeping constitutional change could not be accomplished without substantive and meaningful public participation. This was a

[38]Ibid., Ibrahim J (dissenting), [724] – [725]; Wanjala J (concurring), [1000], [1026], [1122]; Lenaola J (concurring), [1464], [1472] – [1475]; Ouko J (concurring), [1838], [1846], [1849]; Mwilu DCJ (concurring), [407], [418] – [421], [437].

[39]Ibid., Mwilu DCJ (concurring), [421]; Ibrahim J (dissenting); Wanjala J (concurring), [1026].

[40]Ibid., Ibrahim J (dissenting), [724] – [725]; Wanjala J (concurring), [1122]; Lenaola J (concurring).

[41]Ibid., Mwilu DCJ (concurring), [491]; Ibrahim J (dissenting, but not on this point), [789]; Lenaola J (concurring), [1537].

[42]Ibid., Koome CJ (concurring), [243].

[43]Ibid., Koome CJ (concurring), [237] – [242]; Mwilu DCJ (concurring), [480]; Wanjala J (concurring), [1042], Lenaola J (concurring), [1535]; Ouko J (concurring), [1900].

form of participation that was not simply restricted to the two-tiered design's requirement of a referendum in case of proposed amendments to entrenched provisions, but something deeper. It is in this context that I argue for understanding the BBI judgments, and their views on constitutional change, in light of the CPPT accounts of Dixon and Gargarella, which focus on the role of courts as facilitators of genuine and deep democratic dialogue, rather than simply as veto players.

Let us begin by recalling the major objections to the applicability of the traditional basic structure doctrine to a two-tiered amendment structure such as Kenya's, which emerged in the arguments of the State. These objections can be understood at three levels. At the level of the global march of the basic structure doctrine, it was argued that the two-tiered amendment design in Articles 255 to 257 did *constitutionally* what the basic structure doctrine was meant to do *judicially*: that is, protect the Constitution from evisceration at the hands of transient parliamentary super-majorities. At the level of constitutional history and pragmatism, it was argued that Articles 255 to 257 were a direct response to the problem of hyper-amendments under the old Independence Constitution. It was, moreover, a successful response, given that in the twelve years since the Constitution was enacted, no attempt to amend it had gone through. At the conceptual level, it was argued that the scheme of Articles 255 to 257 provided an avenue for the deployment of the primary constituent power to make or unmake a constitution. The process for amending the entrenched matters under Article 255 – which mandatorily involved a referendum – *was* the process for exercising primary constituent power. While in a *Kesavananda Bharati* situation, primary constituent power could only be exercised extra-constitutionally – in a coup or a revolution – the Kenyan Constitution's two-tiered design *did* provide a constitutional procedure for its own unmaking. It was justified because it *did* involve the People, acting in their constituent capacity.[44]

To understand the response to these arguments, let us begin with a closer look at the second one. The interesting thing about this argument is that the most powerful counter was the very case that was being argued before the Court: the BBI case. Had the amendments gone through, in one fell swoop, the Kenyan Constitution would have gone from zero amendments in twelve years to *seventy-four* amendments in twelve years. Note that this is actually a *substantially* greater pace of change than the notoriously easy-to-amend Indian Constitution (the birthplace of the basic structure doctrine), which has been amended a hundred and five times in seventy-two years.

Moreover, the BBI case serves as an object lesson for how the two-tiered amendment mechanism could *potentially* be manipulated towards bringing about abusive constitutional amendments. As every single Court found – and as we shall discuss in greater detail in the next section – the BBI Amendment Bill was a Presidential initiative, that was disguised as a "Popular Initiative" through the (not very subtle) use of proxies. With the President's weight behind it, it was also substantially easier to manipulate the multiple safeguards under Article 257. For example, the Amendment Bill was presented as a set of seventy-four amendments, subject to a straight up-down vote. As the Court of Appeal pointed out, there was no thematic unity between the proposed amendments. Indeed, some of the amendments were included as "sweeteners" for the county assemblies, which

[44]Of course, this left the question open about whether the People, acting under Article 257, still act as a limited organ, as it is *within* the terms of the Constitution. I am grateful to Yaniv Roznai for pointing this out to me.

were required to ratify the bill.[45] As President of the Court of Appeal, Musinga P noted, this contributed to absurd situations where – for instance – one County Assembly considered and ratified the Bill within 48 hours, making an effective mockery of the requirements of public participation and deliberation.[46]

Examples of this can be multiplied and are found scattered throughout the judgments of all three courts. For the purposes of this article, suffice it to say that the State's counsel perhaps put the point a little too optimistically, when they argued that the two-tiered amendment mechanism had solved the problem of hyper-amendments under the old Independence Constitution.

Indeed, this concern was topmost in the mind of the High Court – the first court that heard the BBI challenge. This is evident from a close reading of its judgment. While the Court of Appeal and the Supreme Court extensively debated conceptual distinctions between "amendment" and "repeal" (the basis for the original *Kesavananda Bharati* judgment), the High Court was far more preoccupied with constitutional history, and the lessons of the past. It derived the necessity of *a* basic structure doctrine from Kenya's difficult history of hyper-amendments, from the bitter experience of the Imperial Presidency[47], and from the intensely participatory experience around the framing of the 2010 Constitution.[48]

But of course, the High Court was keenly aware that the structure of Articles 255 – 257 precluded it from simply *importing* the basic structure doctrine as it had been articulated in *Kesavananda Bharati*: substantive judicial review – and invalidation – of constitutional amendments. The two-tiered amendment mechanism under Articles 255 – 257 was materially different from amendment provisions founded on parliamentary super-majorities, in that it already identified a set of entrenched provisions akin to a "basic structure," and provided for popular involvement in attempts to alter them (through a referendum). It therefore required a materially different response from the Court. This response – as noted above – would have to respect the fact that the two-tiered amendment mechanism did provide a role for the People when it came to the amendment of entrenched provisions. It would have to avoid an accusation that instead of protecting the Constitution against politicians, the Court was in effect seeking to protect the Constitution *from the People*.[49]

The High Court's response was to shift from a veto-oriented version of the basic structure (i.e., where courts exercised a *veto* over amendments that violated the basic structure) doctrine to a *process-oriented* version (i.e., courts limiting themselves to

[45]*The Honourable Attorney General vs David Ndii and Ors* (Court of Appeal), (n32); see the analysis in the judgment of Musinga (P) (concurring), [336] – [338].

[46]Ibid., Musinga (P) (concurring), [339] – [342].

[47]For historical examples, see e.g. H.W.O. Okoth-Ogendo, 'The Politics of Constitutional Change Since Independence, 1963–69,' (1972) 71(282) *African Affairs* 9; A. Warris, 'Kenya's fiscal accountability revisited: A review of the historical erosion of the country's fiscal Constitution from 1962 to 2010' in M.K. Mbondenyi *et al.* (eds)., *Human Rights and Democratic Governance in Kenya: A post-2007 Appraisal*, (PULP, Pretoria, 2015) 301; Y. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, (OUP, Oxford, 1970) 223.

[48]See e.g. M. Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Rienner, Boulder, CO, 2008); Y.P. Ghai, 'Civil Society, participation, and the making of Kenya's Constitution' in D. Landau and H. Lerner eds., *Comparative Constitution Making*, (Edward Elger, Cheltenham) 212; C. Murray, "Making and Remaking Kenya's Constitution" (21 July 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891095.

[49]My thanks to Yaniv Roznai for this formulation.

scrutiny over the *process* of amendments, and not their substantive content). The High Court held that, *in principle*, no part of the Constitution – including the basic structure – was immune from amendment or change. The judiciary, therefore, could not *invalidate* constitutional amendments that sought to alter the basic structure. However, given that altering the basic structure amounted to unmaking or remaking the Constitution, the *process* by which this was done would have to replicate the process of creating the Constitution. On a reading of constitutional history (which, unsurprisingly, was strongly contested[50]), the Court found that the process of creating the 2010 Constitution was intensely participatory, and it distilled the sequential four-step process as the one to be followed for all future attempts at constitutional unmaking or remaking. The judiciary, of course, would still have a role in identifying when a constitutional amendment sought to alter the basic structure. At that point, however, the court's role would end by ordering that the amendment in question would have to pass through the four-step sequential process. The task of accomplishing that would move back to the representative bodies and to the People.

I submit that the High Court's move reflects a novel and creative application of political process theory to constitutional change, with a view to "protect[ing] … the political processes of representative democracy against threats or failures."[51] As we can see, in the BBI case, the perceived "threat" was of allegedly abusive constitutional change: a political pact, designed towards executive aggrandisement, imposed top-down, and one that possibly heralded a return to the days of hyper-amendment, by bringing in seventy-four changes to the Constitution at one stroke.[52]

So far, courts across the world have been dealing with challenges such as this through the basic structure doctrine, which enabled them to intervene at the outcome stage: i.e., to veto amendments after they had been passed. Because of the two-tiered amendment mechanism in the Kenyan Constitution, as we have seen, this option was not open to the High Court. Instead, therefore, the High Court grounded its remedy in political process theory, i.e., by seeking to safeguard the *political procedure* that made constitutional change legitimate.[53] In other words, the High Court saw its role not to police the amendments themselves, but to safeguard the process through which amendments could be used to unmake or remake the Constitution.[54]

The logic underlying this – and the links with the political process doctrine – was outlined most clearly in Kiage JA's separate opinion in the Court of Appeal. Kiage JA noted that the existence of a referendum was not a sufficient safeguard against abusive

[50]Amicus Brief of Professor Migai Akech in *The Hon'ble Attorney General and Ors vs David Ndii and Ors* (Supreme Court) (n37), on file with the author. This version of constitutional history was also doubted by Koome CJ in her concurring opinion at the Supreme Court.

[51]S. Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429, 1429.

[52]For the role of political process theory in ensuring accountability from powerful political actors in relatively 'fragile' democracies, see M.J. Cepeda Espinosa and D Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19 *International Journal of Constitutional Law* 548.

[53]For a prior version of this argument, see Amicus Brief of Dr Gautam Bhatia in The Hon'ble Attorney General and Ors vs David Ndii and Ors (Supreme Court) (n37) on file with the author.

[54]Tom Gerald Daly's CPPT-adjacent view – drawn from Samuel Issacharoff – as courts providing the "scaffolding" to support the basic structures of democratic governance from being overwhelmed by the elected organs – is also a potentially useful framing within which to consider the High Court's reasoning on the basic structure issue. See T.G. Daly, 'Post-jurisocracy, Democratic Decay, and the Limits of Gardbaum's Valuable Theory' (2021) 18(4) *International Journal of Constitutional Law* 1474, 1477–8.

constitutional amendments, given the long history of how referenda had been used as a top-down method by political elites to impose a set of pre-decided choices upon the People. This was an especially potent fear in the context of Kenyan – and more broadly, African – constitutional history, where "no sooner did the nations gain independence than the power elites embarked on diluting and dissolving all restraints on power and authority, a blurring and final obliteration of checks and balances and a concentration of power in the Presidency … they did this principally through facially legal and constitutionally compliant changes to their constitutions."[55] Consequently, he held that "an effective bulwark against abusive constitutionalism, therefore, seems to me to be, on the authorities, one that entails more as opposed to fewer people involvement."[56]

Stripping away everything else, this was at the heart of both the High Court and the Court of Appeals' judgments: to safeguard against abusive constitutionalism by *deepening* public participation (a 'political process' intervention *par excellence*!). And with this core justification established, the more abstract conceptual arguments then fall into place. Primary constituent power, by definition, could not be found *within* the Constitution, but outside it. Primary constituent power, being the power to make or unmake a constitution, would have to be understood by looking at the constitution-*making* process as a historical artefact – and thus – in conclusion – lead the four-step sequential process.

As I noted at the beginning of this paper, there are echoes of both Gargarella and Dixon's visions of CPPT in the High Court's reasoning. The focus on public participation – and, in particular, the egalitarian and inclusive public participation of the four-step sequential process, as opposed to the more superficial participation via referendum – overlaps closely with Gargarella's equality-and-deliberation-based understanding of CPPT. And the High Court's framing of a basic structure doctrine that avoided giving the last word to the judiciary, but gave it instead to the People (mediated through the participatory mechanism of the four-step sequential process) responds to Dixon's insight about forms of intervention that ought to be responsive, respect institutional division of powers, and be more about *initiating* dialogue rather than ending it through a strike-down.[57]

However, persuasive as the High Court's reasoning was, it was, of course, not without its weaknesses. It was these weaknesses that a majority of the Supreme Court eventually found insurmountable. As pointed out above, the two-tiered amendment process *had* arguably identified a "basic structure" and provided a way of altering it. That being the case, a third, extra-constitutional process – at the instance of the judiciary – proved to be too hard a sell for the Supreme Court.[58] There is also the conceptual problem that while the primary constituent power is meant to be exercised by the sovereign People acting outside the Constitution, in this case, it was the court – a body established *under* the

[55]*The Honourable Attorney General vs David Ndii and Ors.* (Court of Appeal) (n32) Kiage JA (concurring), p. 53.

[56]Ibid., Kiage JA (concurring), p. 96.

[57]See also R. Dixon and M. Hailbronner, 'Ely in the World: The global legacy of *Democracy and Distrust* forty years on' (2021) 19(2) *International Journal of Constitutional Law* 427. For a related – but different – approach to the issue, see A. Kavanagh, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1483. For a more cautious approach to judicial capacity to enforce due deliberation, see R.H. Pildes, 'Political Process Theory and Institutional Realism' (2020) 18(4) *International Journal of Constitutional Law* 1497.

[58]For a contrary view specifically on this point – viewing the tiered system as *complementary* to implied limitations on the amending power, see Amicus Brief of Professors Rosalind Dixon and David Landau in *The Hon'ble Attorney General and Ors vs David Ndii and Ors* (Supreme Court) (n37), on file with the author.

Constitution – that was setting out the contours and boundaries for how and when primary constituent power was to be exercised – arguably, a contradiction in terms.

But even so, the spectre of abusive constitutional change haunted the Supreme Court as much as it haunted the High Court and the Court of Appeal. It is for this reason that, even as they purported to reject the application of the basic structure doctrine to *this* case, the majority – as we have seen – left the door open for a return of the basic structure doctrine in *some* form, in the case of a demonstrated attempt at constitutional dismemberment. Were that to happen at some point in the future, the only justifiable form that the basic structure doctrine *could* take in the context of a two-tiered amendment mechanism is the political process form (i.e., the four-step sequential process) articulated by the High Court.

However, one sees a potential reconciliation of the tension in Koome CJ's opinion at the Supreme Court. As we have seen above, Koome CJ's opinion is the one that, in clearest terms, left the question "open" as to how the judiciary would respond, in the future, to a case of constitutional dismemberment. That said, Koome CJ also observed that:

> … in a case where the amendment process is multi-staged; involves multiple institutions; is time-consuming; engenders inclusivity and participation by the people in deliberations over the merits of the proposed amendments; and has down-stream veto by the people in the form of a referendum, there is no need for judicially-created implied limitations to amendment power through the importation of the basic structure doctrine into a constitutional system before exhausting home-grown mechanisms.[59]

Koome CJ then went on to dwell at some length upon the *extent* and *depth* of public participation required under Articles 256 and 257, effectively equating the process with the four-step sequential procedure (*sans* the Constituent Assembly, of course). Running through her judgment was a strong endorsement of the civic education, public participation, and referendum (*after* adequate voter education) prongs of the four-step sequential process.

One way of reading Koome CJ's opinion then is to understand the procedures for participation under Articles 256 and 257 as *reflecting* the same (extra-constitutional) conditions required for the exercise of primary constituent power. In other words, the High Court and the Court of Appeal were only incorrect to the extent that they located the four-step sequential procedure *outside* of the Constitution. The correct solution was to read the elements *into* the existing provisions of Articles 256 and 257 (for example, the "public discussion" requirement under Article 256(2), and the referendum requirements under both). This would strengthen the process conditions *internal* to Articles 256 and 257. It would also ensure that attempts at abusive constitutional change would have to run the gamut of public participation in its most procedurally rigorous *avatar*. Participation would have to take place at multiple stages set out under Article 257 (for example, the county assembly stage and the referendum stage, at the very least). In this manner, the process, *in effect*, would mirror the extent of participation that took place at the time of constitution-making.[60]

[59]Ibid., Koome CJ (concurring), [205].

[60]For the sake of completeness, it is important to note that many State counsel argued that the four-step sequential process – if read into Article 257 – would effectively make constitutional amendments so onerous, that it would be far outside the reach of the ordinary Kenyan ("Wanjiku"). *Too* rigorous a set of participation

Of course, the fractured verdict at the Supreme Court means that it is an open question whether Koome CJ's opinion – and, in particular, my reading of her opinion – would become controlling in the future. In my submission, if applied correctly, it could well become an effective political process defence against abusive constitutional change. However, how it is to be applied is a task for a future court, facing prospective constitutional dismemberment.

But for now, in the next section, we shall look at one way in which the court – all the courts, this time – *did* read in an *internal* procedural safeguard against abusive constitutional change into the scheme of Articles 255 and 257: the question of Presidential involvement in the popular initiative.

The popular initiative

The issue of the Popular Initiative might, at first blush, appear to be cleanly separate from the basic structure issue. However, the two are closely linked, and that is why they are considered together in this paper. The link appears in the opinion of Chief Justice Koome, with which we ended the previous section: that is, the numerous opportunities for genuine and deep public participation guaranteed by Article 257 were meant to accomplish, *within* the Constitution, what the High Court's version of the basic structure doctrine attempted to accomplish *extra-constitutionally*.

It therefore becomes important to examine Article 257, and what the courts decided on the question of the popular initiative. In this section, I will argue that in a manner very similar to their analysis of the basic structure doctrine, the courts read Article 257 in a manner so as to deepen public participation in the processes of constitutional change, rather than to stunt it. The basic structure analysis and the popular initiative analysis are, therefore, complementary, and both are informed by the insights of CPPT.

Let us begin by considering the text. Article 257(1) is stark in its simplicity: "An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters."[61] While Article 257(1) is silent about *who* can "initiate" the initiative, a clue is provided by the last sub-clause of Article 255(3), which refers to the process under Article 257 as involving "the people and Parliament."[62]

Unlike the basic structure question, which required the court to reach *beyond* the Constitution (in a sense), the popular initiative question presented a straightforward issue of constitutional interpretation. Although a dispute *was* raised on facts, there was little doubt that – for better or for worse – President Uhuru Kenyatta's fingerprints were all over the BBI Bill. There was a direct line between the famous "handshake" and the BBI Bill, via the President's BBI Taskforce and Committee. In layperson's terms, there was little doubt that President Kenyatta was the "initiator" of the initiative.

The President's defence was simple. He was a citizen of Kenya, like any other. He was, therefore, entitled to exercise his political rights, guaranteed by the Constitution, on equal terms with all other citizens, except where the Constitution expressly prohibited it. Article 257 contained no such express exclusion. Consequently, there was no bar upon Presidential involvement with the initiation of a popular initiative: indeed, in such a case, the

requirements under Article 257, therefore, would defeat its very purpose, and recreate a situation where only the political and other elite would have the resources or mobilisation power to initiate constitutional change.

[61] Article 257(1), Constitution of Kenya, 2010.

[62] Article 255(3), Constitution of Kenya, 2010.

President should be deemed to be acting *as* a private citizen, with an interest – like any other citizen – in taking forward processes of constitutional change.

It was obvious, therefore, that excluding the President would require the court(s) to read in an *implied limitation* into the text of Article 257(1), a limitation that would have to necessarily flow from the structure and purpose of the two-tiered amendment mechanism. And on this point, there was a remarkable degree of unanimity across the three courts. The High Court set the ball rolling when it – once again – looked to Kenyan constitutional history for inspiration. It noted 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 the 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.*[63]

The purpose of Article 257, the High Court held, was to *democratise* the processes of constitutional change, and provide space for the people to participate, a space outside the control of the political elite. The implied limitation upon the President's power to initiate an amendment *via* the route of Article 257, therefore, flowed from the reason for the existence of the popular initiative in the first place.

This argument needed a response, and a response was indeed forthcoming in the Court of Appeal. In addition to reiterating the point about the President's political rights, it was argued in the Court of Appeal that the actual purpose of Article 257 was to avoid *legislative bottlenecks* when it came to constitutional reforms in a presidential system (a well-known problem). In a situation where Parliament was dominated by a political party opposed to the President, the President's plans for constitutional reform could easily be stymied, an undesirable outcome given that the President himself was directly elected, and the head of the executive branch. In this context, Article 257 enabled the President to *bypass* a recalcitrant Parliament, and take his proposals for constitutional change *directly* to the People. In other words, therefore, this was an argument from constitutional design: the framers of the Kenyan Constitution opted for a Presidential system, knowing its problems with multiple veto points and bottlenecks. Having made that choice, they then sought to internally address those problems through an amendment procedure designed to bypass those veto points.

In the Court of Appeal, Kiage JA took this argument head-on, effectively holding that veto points were a feature, not a bug. In his opinion, one sees once more the long shadow of the Imperial Presidency, albeit in a much starker form. Kiage JA noted how the Imperial Presidency came to dominate African constitutionalism after the wave of decolonisation in the 1960s, and that the 2010 Kenyan Constitution was a response – *inter alia* – to the pathologies of the Imperial Presidency.[64] This was crucial, as it then

[63] *David Ndii and Anr. vs Attorney General and Ors.* (High Court) (n19) [497].

[64] *The Honourable Attorney General vs David Ndii and Ors.* (Court of Appeal) (n32), Kiage JA (concurring), p. 55. There is a significant volume of literature on the consolidation of the executive presidency under Kenya's Independence Constitution. See e.g. G. Muigai, *Power, Politics and Law: Dynamics of Constitutional Change in Kenya, 1887–2022* (Kabarak University Press, Kabarak, 2022); E. Kramon and D.N. Posner, 'Kenya's New Constitution' (2011) 22(2) *Journal of Democracy* 89; D. Branch and N.

helped him to resolve the silence in Article 257. If one understood the Constitution as *empowering* the President, then the State's arguments about resolving silences in favour of Presidential power would hold. However, if the Constitution was designed to *limit* Presidential power – as Kiage JA believed that it was – then ambiguities would have to be resolved *the other way*.

A more conceptual gloss on Kiage JA's judgment was provided by other judges in the Court of Appeal, who noted that the scheme of Articles 255-257 reflected a carefully crafted balance between representative (Article 256) and direct democracy (Article 257). Indeed, given that 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 amount to bringing in representative bodies through the back door, after the front door had been firmly closed by the overall amendment scheme.

By direct democracy here, what the Court of Appeal seemed to be getting at was a vision of an active citizenry, one that engaged with issues and generated proposals for amendments after the internal social debate – and not merely a passive citizenry that simply voted "Yes" or "No" to a binary choice placed before it by a set of politicians. This argument was carried forward by Elias Mutuma – one of the counsel – before the Supreme Court, in oral argument: specifically that, Article 257, in its terms, envisaged an active role for the People in the *enactment* of a constitutional amendment, and not simply a situation where the People were *provided* a finished constitutional amendment bill to merely endorse or reject.[65]

These two insights – about the Imperial Presidency and the role of the citizenry as *active participants* in the process of constitutional change – formed the bedrock of the Supreme Court's near-unanimous (6-1) holding that the President could not be involved in the initiation of a popular initiative. All six judges agreed that not only was the Kenyan Constitution designed to *avoid* concentration of power in the hands of the President (especially the kind of power that enabled him to amend the document at will)[66], but that Article 257 took this logic one step further, and empowered the citizenry (through direct democratic mechanisms) specifically *by keeping out State organs.* As Koome CJ summed up the point (to reiterate):

> 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*

Cheeseman, 'The Politics of Control in Kenya: Understanding the Bureaucratic-Executive State, 1952–78' (2006) (107) *Review of Political Economy* 11.

[65]Oral proceedings before the Supreme Court of Kenya.

[66]For literature that supports this reading of the 2010 Constitution from a historical perspective, see e.g. S. Diepeveen, 'The Kenyas We don't want: Popular Thought over Constitutional review in Kenya, 2002' (2010) 48(2) *Journal of Modern African Studies* 231; G.R. Murunga, D. Okello and A. Sjogren, 'Introduction: Towards a New Constitutional Order in Kenya' in *Kenya: The Struggle for a New Constitutional Order* (GR Murunga, D Okello and A Sjogren eds., Zed Books, London, 2014).

> *of the President where they are not explicitly granted would be contrary to the overall tenor and ideology of the Constitution and its purposes.*[67]

The court's interpretation of Article 257, I suggest, is another interesting example of the deployment of the political process doctrine to safeguard a Constitution from abusive amendments. It is now well-documented – across jurisdictions – that provisions guaranteeing public participation in processes of law-making and constitutional change are susceptible to usurpation by institutionally political actors.[68] "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.[69] The inevitable outcome of this is a skewing of the outcome in favour of dominant interests, only with the added veneer of having gone through the crucible of public participation.[70]

All three courts were aware of this problem in the context of constitutional amendment, and specifically aware of it given the history of the Imperial Presidency. As with the basic structure, the judicial response was not intervention at the stage of the outcome, but in the process, with a view to enabling an outcome free of the distorting influence of political power: in this case, by interpreting constitutional silences, in light of the Constitution's "purposes and ideology", so as to *exclude* the President from participation via popular initiative. While the courts deployed concepts of representative and direct democracy to buttress their conclusion, at its heart, the debate about Article 257 was a debate about how best to ensure that its vision of providing an avenue for constitutional change to *citizens* was not informally manipulated to serve the interests of the head of the executive branch.

Here, once again, we see echoes of Dixon and Gargarella. Dixon's critique of Stephen Gardbaum's account of CPPT asks whether certain forms of intervention are "too little, too late", coming only *after* the political process has become fully dysfunctional. The Kenyan judiciary's interpretation of Article 257(1) could almost read like a direct response: at each level, the courts read Article 257(1) so as to avoid distortion at the very *beginning* of the process, and explicitly rejected the State's arguments that the popular initiative technically only began *after* the collection of one million signatures. The courts were entirely aware of the possibility of dysfunction at the stage of initiation, and their interpretation was designed to preclude that. Furthermore, it was an interpretation grounded in the necessity of *equalising* power, in the Gargarellan sense. If, indeed, law is meant to be a "conversation among equals" – and if Article 257 envisaged equal citizens coming together and deliberating over constitutional change, the introduction of the figure of the President would infect the process with hierarchies and power differences, making any hope of an equal conversation illusory. It was, once again, such an outcome that the Kenyan courts were keen to prevent.

[67] *The Hon'ble Attorney General and Ors vs David Ndii and Ors* (Supreme Court) (n37), Koome CJ (concurring) [243].

[68] Interestingly – and prophetically – Gargarella makes specific refence to how one case where CPPT ought to be deployed is to "confront any presidential initiative tending to decide for itself, questions that must be decided by the community." R. Gargarella, 'From "democracy and distrust" to a contextually situated dialogic theory' (n3), 1471.

[69] For a discussion in the context of referendums, see S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP, Oxford, 2012).

[70] For a contrary view in the Kenyan context, see Migai Akech, Amicus Brief (n52).

Of course, the story is far from over. A reading of the three judgments demonstrates a particularly clumsy and ham-fisted attempt by the office of the President to disguise his involvement (via proxies) in the amendment process. One could easily imagine, however, a future President – armed with the findings in this judgment – undertaking a more subtle and ingenious attempt to drive constitutional change from the shadows. The question would then become: to what extent – under the political process doctrine – can a court go behind a putative popular initiative to find the hidden hand of the executive? In the Court of Appeal, Tuiyott JA was most alive to this problem, undertaking a detailed factual analysis to bring out the exact nature of President Uhuru Kenyatta's involvement with the BBI Bill, and warning of future scenarios where executive heads could make an attempt to do an end run around the Court's judgment.[71]

Markers of involvement were also identified by the judges of the Supreme Court; but then again, what of a genuinely messy and complex situation, where the President uses his pulpit to *signal* towards desired constitutional change, which is then taken up (at least, to a degree) organically by his base, in the form of a constitutional amendment bill? Does CPPT have the tools to address situations like this? Should it? It will certainly be fascinating to watch how the BBI case's interpretation of Article 257 – and the political process doctrine underlying it – will hold up in the future, should cases of this kind come back to court. What we can say, however, is that as far as the situation before them was concerned, the judgment(s) of the three courts on this question present a set of fascinating and rewarding insights at the intersection of constitutional change, abusive constitutional amendments, and political process theory.

Considering context

In the previous two sections, we have examined the intersections between CPPT and constitutional change in two-tiered amendment systems. We have discussed how considerations of constitutional design – and the prospect of the manipulation of that design – compelled the Kenyan courts to engage generatively with a constellation of CPPT-oriented ideas. In this section, I want to briefly flag how the larger context of the case also made the CPPT path an attractive one.

Let us begin by noting a curious anomaly about the BBI cases. In a basic structure challenge to a constitutional amendment (or a set of amendments), one would expect a significant section of the debate to focus on how, precisely, the impugned amendments seek to "damage or destroy" the basic structure: which basic features are implicated, how they are being undermined, and so on. But in the BBI cases, one would be wrong. The High Court's judgment contained very little substantive discussion about the amendments *themselves* (other than on the issue of constituency delimitation). This was replicated in the seven opinions at the Court of Appeal: apart from President Musinga, who did devote substantial space to the BBI Amendments (in particular, an amendment introducing a judicial ombudsperson), the other Justices did not spend too much time on substantive analysis, even though it is the substantive analysis that is meant to trigger basic structure review.

[71] *The Honourable Attorney General vs David Ndii and Ors*, (Court of Appeal) (n32) Tuiyott JA (concurring), [60].

Indeed, this was a source of considerable bemusement (and at times, frustration) at the Supreme Court, both during oral argument and in the court's opinions. It was expressed most starkly by Smokin Wanjala J, who observed:

> Speaking for myself from where I sit as a Judge, *and deprived of the romanticism of academic theorizing*, it is my view that what has been articulated as "the basic structure doctrine", is *no doctrine, but a notion, a reasoning, a school of thought, or at best, a heuristic device*, to which a court of law may turn, within the framework of Article 259(1) of the Constitution, in determining whether, a proposed constitutional amendment, has the potential to destabilize, distort, or even destroy the constitutional equilibrium.[72]

Justice Wanjala's unease with being asked to adjudicate (what he considered to be) an abstract question is echoed in the other judgments. It is echoed, for example, in Lenaola J's question: "Why would dismemberment take centre stage when the issue before the courts below was amendment?"[73] And – I submit – it is this that explains the somewhat patchwork character of the Supreme Court's holding on the basic structure. It explains why the justices simultaneously appeared to reject the application of the "basic structure doctrine" to the case before them but also left a window open for some form of judicial review of future constitutional amendments that would – in Wanjala J's words – have the "potential to destabilise, distort, or even destroy the constitutional equilibrium."

That, however, raises the question of why the High Court and the Court of Appeal judgments – otherwise so carefully and closely reasoned – would leave such a big, analytical hole where basic structure analysis ought to have been.

To answer this question, let us note Conor Casey's important insight that courts ought to be "extremely wary when characterising the nature of a particular legislative or constitutional change initiated by the political branches, lest they misstep and needlessly exacerbate other political risks."[74] This wariness runs through Rosalind Dixon's CPPT work as well, who specifically warns of situations where judges may misclassify a political move as abusive constitutionalism because they are committed to a view that existing constitutional arrangements are the only way of fulfilling the requirements of a minimum, democratic core.[75] In his critique of the minimum democratic core idea, Roberto Gargarella adds a further complication by noting that constitutional change is best understood as a vector, not as a scalar: a particular amendment – he takes the example of Latin American constitutional amendments that got rid of Presidential term limits – could, on one axis, constitute democratic backsliding (by concentrating power), while on another axis, be democracy-improving (by expanding political rights).[76]

[72] *The Hon'ble Attorney General and Ors vs David Ndii and Ors* (Supreme Court) (n37) Wanjala J (concurring), [1000].

[73] Ibid., Lenaola J (concurring), [1472].

[74] C. Casey, 'Comparative Political Process Theory and the Importance of Judicial Prudence' (2023) 34(2) *National Law School of India Review* 5.

[75] R. Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (OUP, Oxford, 2023). Another way of understanding the Supreme Court's decision might be through the lens of statecraft, and the deployment of a relatively weaker form of review, as a legitimacy-preserving device. I am grateful to Rosalind Dixon for pointing this out to me.

[76] R. Gargarella, 'On "Abusive Constitutional Borrowing": Some Conceptual Problems – Part II' *Ibericonnect* (21 January 2022), available at https://www.ibericonnect.blog/2022/01/sobre-abusive-constitutional-borrowing-algunos-problemas-conceptuales-parte-ii/.

The BBI battle illustrates exactly this point. There was, of course, a familiar narrative: of an elite political pact (between President Kenyatta and Raila Odinga) and a proxy-driven "popular initiative" that would constitutionalise this pact by creating a new governance structure, with new executive and legislative posts that were designed to rotate power between the two men and their parties. But there was another narrative that was defended equally fiercely before the courts: that the "handshake" was a necessary act of political reconciliation, and that the BBI Bill aimed at creating a more *inclusive* political structure that would distribute power, rather than the existing winner-takes-all system – something especially important for the purposes of conflict-avoidance (it was argued) in Kenya, where political constituencies continued to be divided along ethnic lines. Thus, as Professor Migai Akech noted in his amicus brief, the purpose of the BBI Bill was "to amend the Constitution to address important governance challenges on which Kenyans remain polarized, particularly the system of government, which contributed significantly to the divisive presidential elections of 2013 and 2017."[77]

We therefore see a reflection of Gargarella's point about constitutional change as a vector: it could *both* be true that the BBI Bill aimed at executive aggrandisement *and* that the Bill opened up clogged political channels. We also see the risk that Casey and Dixon highlight: a court too quick to categorise the amendments as abusive *might* be labouring under a misapprehension that only the existing political structure is consistent with core constitutional identity.

It is for this reason – I think – that the High Court and the Court of Appeal trod carefully. Both courts refrained from taking sides in the debate over what the "handshake" truly was about, refrained from getting into the weeds of the seventy-four amendments, and even when they did – *pace* President Musinga at the Court of Appeal – the focus was more on issues around the separation of powers (the judicial ombudsperson debate) and the illogicality of lumping together different amendments in one bill – rather than on the political character of the amendments.

This also explains the utility of CPPT, not only with respect to the finding on the popular initiative (which allowed the courts to completely avoid passing judgment on the nature of the constitutional change) but also with respect to the basic structure doctrine. Classic basic structure review would require a court to make two normative and very contested – and controversial – judgments: *first*, that an impugned amendment touched upon matters related to the basic structure, and *secondly*, that it "damaged or destroyed" the basic structure, to the extent that it would have to be invalidated. CPPT-grounded basic structure review arguably required a court to make only the first of the two judgments, and then pass the question back to the People to decide. This is exactly in keeping with the concerns outlined by Casey, Dixon, and Gargarella; in that sense, even though the term is never used, the BBI judgments represent the most detailed *judicial* engagement with CPPT to date!

Of course, this approach would still require some degree of substantive analysis of the amendments themselves, and it is perhaps there – and to that degree – that the High Court and Court of Appeal judgments came unstuck at the Supreme Court. Interestingly, however – as we have seen – the Supreme Court left the door open for future substantive analysis of exactly this kind. Not only that, Koome CJ's opinion took CPPT to its logical conclusion, by *reading* the core of the four-step sequential process into Articles 256 and 257 (for example, by reading a requirement of public participation prior to the referendum).

[77]Migai Akech, "Amicus Brief" (n52).

In future cases, therefore, we can see that the Kenyan courts will have an array of CPPT-oriented paths to choose from when they are called upon to assess constitutional amendments on the touchstone of Articles 255 – 257. The BBI cases have set Kenyan constitutionalism along the path of a CPPT-inspired approach to constitutional change. Where this path leads in the future will be fascinating to observe. It is time to strap in for the ride!

Conclusion

In this article, I have argued that the BBI Case is an outstanding example of a set of constitutional courts deploying the insights of comparative political process theory to the vexing issue of abusive constitutional change. The three sets of judgments of the High Court, the Court of Appeal, and the Supreme Court provide unique and valuable contributions both to contemporary debates around CPPT, debates around constitutional change, and interlinkages between the two.

In particular, when faced with the possibility of abusive amendments within the framework of a two-tiered amendment process, the Kenyan courts responded by setting out rigorous *procedural* constraints upon the amendment power, with the judiciary acting not as a *veto* player, but as a guardian of a *procedure* designed to ensure deep and substantive public participation in constitutional change. While only time will tell if this approach will be successful in dealing with abusive constitutional amendments (this depends, as well, on how future Kenyan courts will interpret the Supreme Court's finding on the basic structure), the BBI case nonetheless provides us with a blueprint of how comparative political process theory can be deployed by judiciaries in sophisticated and legitimacy-conscious ways, when confronting political power.

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