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Kenya's Constitutional Amendments, Referendum Questions and Promoters of Popular Initiatives: Lessons from Lithuania

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Kenya's Constitutional Amendments, Referendum Questions and Promoters of Popular Initiatives: Lessons from Lithuania

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The Constitution of Kenya, 2010 dedicates Chapter sixteen to its amendment through parliamentary and popular initiatives. The Kenyan experience shows that there have been several proposed constitutional amendments to the 2010 Constitution since 2013 through both parliamentary and popular initiatives that have all been unsuccessful. Several issues have arisen concerning constitutional amendments such as the nature and scope of national referendum questions and whether State actors can initiate popular initiative amendments. In certain instances, the superior courts have had the opportunity to pronounce themselves on these issues through constitutional interpretation of the amendment provisions and determining the constitutionality of the amendment processes and Bills. This article critically analyses the amendment of the 2010 Constitution, the nature and scope of national referendum questions, and whether State actors can initiate popular initiative amendments. This article benefits from the comparative jurisprudence from Lithuania, especially on the nature and scope of national referendum questions, and uses the purposive approach of interpreting the constitutional amendment provisions using the emerging jurisprudence emerging from the superior courts, comparative jurisprudence and scholarly literature.
Keywords: 'Unity of content' principle, Constitution, constitutional amendments, judicial overreach, Kenya, Lithuania, popular initiatives, referendum questions, State actors, superior courts.

Kenijos Konstitucijos pataisos, referendumo klausimai ir tautos iniciatyvų propaguotojai: Lietuvos pamokos

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2010 m. Kenijos Konstitucijos šešioliktas skyrius skiriamas jos pakeitimams parlamento ir liaudies iniciatyvomis. Kenijos patirtis rodo, kad nuo 2013 m. buvo pasiūlyta keletas 2010 m. Konstitucijos pataisų tiek parlamento, tiek liaudies iniciatyvomis, tačiau visos jos buvo nesėkmingos. Iškilo keletas klausimų dėl konstitucinių pataisų, pavyzdžiui, dėl nacionalinio referendumo klausimų pobūdžio ir apimties bei to, ar valstybės subjektai gali inicijuoti liaudies iniciatyvos pataisas. Tam tikrais atvejais aukštesnės instancijos teismai turėjo galimybę pasisakyti šiais klausimais konstituciškai aiškindami pataisų nuostatas ir nustatydami pataisų bei įstatymų projektų konstitucingumą. Šiame straipsnyje kritiškai analizuojamas 2010 m.

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Konstitucijos pakeitimas, nacionalinio referendumo klausimų pobūdis ir apimtis bei tai, ar valstybės subjektai gali inicijuoti liaudies iniciatyvos pataisas. Šiame straipsnyje remiamasi lyginamąja Lietuvos jurisprudencija, ypač dėl nacionalinio referendumo klausimų pobūdžio ir apimties, bei taikomas tikslingas požiūris aiškinant Konstitucijos pataisų nuostatas, remiantis nauja jurisprudencija, atsirandančia iš aukštesniųjų teismų, lyginamosios jurisprudencijos ir mokslinės literatūros.
Pagrindiniai žodžiai: „Turinio vieningumo" principas, Konstitucija, Konstitucijos pataisos, teismų įgaliojimų viršijimas, Kenija, Lietuva, liaudies iniciatyvos, referendumo klausimai, valstybės veikėjai, aukščiausieji teismai.

Introduction

Kenya promulgated a new Constitution on 27 August 2010 that provides for its amendment under Chapter sixteen (Articles 255, 256, and 257) through parliamentary and popular initiatives. These Articles provide for the amendment processes and Bills. Since 2013, the Kenyan experience shows that there have been several proposed amendments to the 2010 Constitution through both parliamentary and popular initiatives that have all been unsuccessful.[1] Several issues have arisen concerning constitutional amendments such as the nature and scope of national referendum questions and whether State actors can initiate popular initiative amendments. In certain instances, the superior courts have had the opportunity to pronounce themselves on these issues through constitutional interpretation of the amendment provisions and determining the constitutionality of the amendment processes and Bills.[2] Part 2 of this article briefly and critically analyses the amendment of the 2010 Constitution. Part 3 discusses the nature and scope of national referendum questions by using comparative jurisprudence from Lithuania. Part 4 discusses whether State actors can initiate popular initiative amendments. Parts 5 and 6 look at the lessons from and 'reverse learning'[3] for Lithuania, and recommendations, respectively. This article uses the purposive approach of interpreting the constitutional amendment provisions using the emerging jurisprudence emerging from the superior courts, comparative jurisprudence, and scholarly literature.

1. Amending the Kenya Constitution

The relevant provisions for amending the Kenyan Constitution are found under Chapter sixteen (Articles 255, 256, and 257), as already stated. These provisions provide for amendment by parliamentary and popular initiatives, and the amendment of the basic structure[4] of the Constitution, as discussed in the paragraphs that follow.

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

[2] See for example, *David Ndii & others v Attorney General & others* [2021] eKLR (hereinafter – 'the *BBI 1* case'); *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others* (Amicus Curiae) [2021] eKLR (hereinafter – 'the *BBI 2* case'); *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) (hereinafter – 'the *BBI 3* case').

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

[4] The basic structure of a constitution can be defined as the basic elements or framework, fundamental and essential features and the design and architecture of a constitution. See the *BBI 3* case [726] (Ibrahim SCJ).

Article 94(3) of the 2010 Constitution provides: 'Parliament may consider and pass amendments to this Constitution'.[5] Article 256 provides for parliamentary initiative amendments. This initiative incorporates public participation in all the stages per Article 10(2). The parliamentary initiative, as provided for under Article 256 as read with Article 255 of the 2010 Constitution, can be discussed in five stages. Firstly, the amendment Bill must be introduced in both Houses of Parliament (National Assembly and Senate) per Article 256(1)(a). Such a Bill should 'not address any other matter apart from consequential amendments to legislation arising from the Bill' per Article 256(1)(b). The second step is the 2nd and 3rd readings stage (passage stage). The Bill 'shall not be called for a second reading in either House within ninety days after the first reading of the Bill in that House' per Article 256(1)(c). This ninety-day period allows the Members of Parliament to read and understand the contents of the Bill and have an informed debate in the Houses. The Bill is passed when each House has passed the Bill, in both its second and third readings, by 'not less than two-thirds of all the members' of that House per Article 256(1)(d).[6] Given that the National Assembly has 349 members, the two-thirds of its members required to pass any amendment Bill is at least 233 members in the first and second readings. On the other hand, given that the Senate has sixty-seven members, the two-thirds of the members required to pass any amendment Bill is at least forty-five members in the first and second readings. Thirdly, the Parliament is obliged to publicise and facilitate public discussion on the Bill per Articles 118 and 256(2). The Parliament, by its nature, exercises indirect, representative, delegated, and donated supreme sovereign power on behalf of the people per Article 1(2) and (3)(a). Therefore, the Parliament has an obligation to report to Kenyans, facilitate public discussion, and factor in valuable proposals from public participation before enacting the amendment Bill.[7] Fourthly, once the Parliament has passed an amendment Bill, the Speakers of Parliament must jointly submit the Bill to the President for assent and publication, together with a certificate that the Parliament has passed the Bill, as per Article 256(3). The President then assents to the Bill and causes it to be published within thirty days after it is enacted by the Parliament per Article 256(4). Lastly comes the referendum stage. The parliamentary initiative takes into account Article 255(1) matters which can only be amended in a national referendum. The President must submit the Bill to IEBC (before assenting it) to conduct a national referendum within ninety days per Article 256(5)(a) if the Bill relates to Article 255(1) matters. When the Bill is subjected to a national referendum per Article 255(2), it is only passed if at least twenty per cent of the registered voters in each of at least half of the counties (24 out 47) vote in the national referendum and a simple majority of the voters support the proposed amendments. Within thirty days after the Chair of the IEBC certifies to the President that the Bill has been approved per Article 255(2), the President shall assent and publish it.

The other method of amendment is the popular initiative. The amendment of the 2010 Constitution through popular initiative is expressly provided for under Article 257, as read with Articles 255 and 256. Popular initiative amendments processes are multi-staged and continuous with public participation, which is central to be considered at every step.[8] The specific processes and actors involved can be discussed in the six stages of popular initiative amendments. The first stage is initiation, and the role players are the promoters. The popular initiative can be a general suggestion or a formulated draft Bill per Article 257(2). If the initiative is a general suggestion, it must be formulated into a draft Bill per Article 257(3). The promoters must collect at least one million signatures of registered voters per

[5] Emphasis added.
[6] Emphasis added.
[7] *BBI 3* case [595] (Mwilu DCJ & VP).
[8] *BBI 3* case [604], [678(v)] (Mwilu DCJ & VP).

Article 257(1). The promoters must deliver the formulated draft Bill and at least one million signatures of registered voters in support to the IEBC for verification per Article 257(4). The second step is the verification stage, and the role player is the IEBC. The IEBC receives the formulated draft Bill and signatures of at least one million registered voters in support from the promoters per Article 257(4). The IEBC's mandate is limited to verifying that the initiative is reduced into a draft Bill, supported by at least one million registered voters, and determining the authenticity of the signatures.[9] Per Article 357(5), the IEBC has an obligation to submit the draft Bill to all the 47 County Assemblies for consideration if it meets the requirement of a draft Bill and has been supported by at least one million registered voters. Third comes the approval by the County Assemblies. Once the draft Bill has been submitted to all 47 County Assemblies, it must be considered within three months after the IEBC submits it, as per Article 257(5). The passage through the County Assemblies stage gives an opportunity for more public participation because this is an obligation in legislative affairs per Article 196. The three-month timeline for consideration of the draft Bill per Article 257(5) and (6) is meant for the Assemblies to solicit public input.[10] Fourthly, once a Bill has been approved by a majority of the County Assemblies (at least 24 County Assemblies), the Bill is introduced in the Parliament without any delay, as per Article 257(7). The amendment Bill is introduced in both Houses of Parliament. This stage is another crucial stage for public participation. The Bill is passed if it is supported by a majority of the Members of each House, as per Article 257(8). Fifthly, if the Parliament passes the Bill, it is submitted to the President for assent per Article 256(4) and (5). The President assents to the amendment Bill and publishes the same within thirty days after the enactment by Parliament. If the Bill relates to Article 255(1) matters, the President, before assenting the Bill, must request the IEBC to conduct a national referendum for the approval of the Bill. Lastly, if either the National Assembly or the Senate fails to pass the Bill, or if the Bill relates to Article 255(1) matters, the proposed amendment must be submitted to the people in a national referendum.[11]

Article 255(1) provides for the constitutional amendment of ten matters that require a national referendum, that is: Constitutional supremacy; Kenya's territory; Popular sovereignty; the national values and principles of good governance; the Bill of Human Rights; President's term of office; the independence of the Judiciary, commissions and independent offices; Parliament's functions; devolution; and Chapter sixteen on constitutional amendment provisions. The approval of constitutional amendments through a referendum under Article 255(2) of the 2010 Constitution must meet two conditions. First, at least twenty per cent of the registered voters in each of at least half of the counties (twenty-four counties) must vote in the national referendum. Secondly, the amendments must be supported by a simple majority of the citizens voting in the national referendum. Article 255(3) of the 2010 Constitution provides that constitutional amendments that are unrelated to the ten matters under Article 255(1) are enacted by the Parliament or the people and the Parliament per Articles 256 and 257, respectively. This provision should be interpreted to mean that any other constitutional amendments that do not relate to the ten matters under Article 255(1) can be made by the Parliament only, or by the people and the Parliament, as per Articles 256 and 257, respectively.

[9] *BBI 3* case [1086] (Wanjala SCJ); *BBI 2* case [108] (Kairu JA).
[10] *BBI 3* case [307] (Koome CJ & P).
[11] Art. 257(10) of the 2010 Constitution.

2. Nature and Scope of the National Referendum Questions

In the *BBI* cases, the issue of 'whether there should be a separate and distinct national referendum' questions arose. The IEBC is mandated to frame the national referendum question(s),[12] but the 2010 Constitution and the Elections Act do not define the nature and scope of such questions. While the KeHC and Court of Appeal (6 vs 1 majority) addressed this issue, the KESC Judges unanimously held that the issue was unripe for determination. It is a trite law that only justiciable issues are ripe for adjudication. In the *BBI 3* case, Koome CJ & P correctly observed that, at the time of filing the *BBI* petitions in the KeHC, the BBI Amendment Bill was yet to be submitted to the County Assemblies, and the IEBC was yet to be invited to determine the form and manner of the national referendum question(s).[13] The IEBC's obligation under Article 257(10) was yet to arise. Tuiyott JA correctly found that there was no live controversy before the KeHC, which should have declined to decide on this question.[14] Koome CJ & P correctly noted that the issue of the nature and scope of the national referendum questions under Article 257(10) is 'deeply fundamental' and cannot be dwelt upon in an 'anticipatory manner'.[15] Therefore, Koome CJ & P was correct in finding that this issue was unripe for determination.[16]

However, as discussed below, some KESC Judges determined the issue despite stating that it was unripe for determination. This was a clear abuse of judicial power because Judges are not demigods and must exercise such judicial power within the 2010 Constitution and the law. Once Judges find that a matter is unripe for determination, they must down their tools. This issue is likely to arise again in the future. Therefore, this part addresses this issue by using comparative jurisprudence from Lithuania.

2.1. Solutions from conventional wisdom

In a multi-subject constitutional amendment proposal, how can the IEBC submit such an amendment Bill to the voters in a national referendum? Conventional wisdom offers three solutions to this question. First is Hobson's choice, named after the English businessman, Thomas Hobson, who was in horse rental business in Cambridge, England.[17] Hobson's customers, mainly students from Cambridge University, had only one option: hiring the one horse which was nearest the stable door. The choice that the customers were given was 'this or none'. This was not their choice but Hobson's choice. Per this option, the voters must either reject or approve the entire amendment Bill or omnibus Bill. The voters have only two choices to vote for or against the amendment Bill: a 'Yes' or 'No'. The second solution is where the voters have the choice to separately reject or approve each and every single individual constitutional proposed amendment in the omnibus Bill.[18]

The third solution for a multi-subject amendment referendum is for the sufficiently and 'closely related' amendment proposals to be grouped in the amendment Bill.[19] In this last solution, the voters are spared from Hobson's choice of voting to reject or approve all proposed changes in the omnibus amendment Bill. The voters are also spared from the impracticality of voting to approve or reject

[12] Elections Act 2011 (hereinafter – 'the Elections Act'), s 49 places the obligation of framing national referendum question(s) on the IEBC.

[13] *BBI 3* case [351] (Koome CJ & P).

[14] *BBI 2* case [251] (Tuiyott JA).

[15] *BBI 3* case [356] (Koome CJ & P).

[16] *BBI 3* case [358] (Koome CJ & P).

[17] *BBI 3* case [2099] (Ouko SCJ).

[18] *BBI 3* case [2099] (Ouko SCJ).

[19] *BBI 3* case [2099] (Ouko SCJ).

each of the single individual proposed amendments despite their number. The third option is highly recommended as the 'subject-matter relatedness' rule. The amendment proposals are grouped based on 'subject matter' per the 'unity of content' principle of constitutional amendment. This third approach is the most applicable to Kenya, which the IEBC should adopt. Packaging multiple constitutional amendments into an omnibus Bill violates Articles 38(3) and 257(10) of the 2010 Constitution and the political right of voters to weigh each and every amendment on its own merit. The omnibus amendment Bills undermine accountability and democracy as they prevent voters from voting for or against specific matters. Articles 10, 82(1)(d), and (2) require that the national referendum must be conducted under a transparent system. Therefore, constitutional amendments to any provision of the 2010 Constitution should not be lumped with other amendments. This prevents the danger of such amendments not being considered by the voters. The drafters of the constitutional amendment Bills usually propose several amendments; of which, only some may be supported by the voters. The omnibus Bill as a vehicle for submitting the whole Bill is not permissible under the Kenyan constitutional design and architecture. This is because such a scenario denies the voters the freedom of choice.

Under Article 257(10) of the 2010 Constitution, the IEBC is constitutionally required to submit to the people the proposed amendment in a national referendum. This means that each proposed amendment per Article 255(1) or the unrelated matters per the 'unity of content' principle must be submitted to the voters in a national referendum. This enables the voters to exercise their freedom of choice and free will to approve or reject the proposed amendments as opposed approving or rejecting the entire amendment Bill. In the architecture and design of the 2010 Constitution, where an amendment Bill proposes several amendments, the IEBC is obligated to formulate several referendum questions per section 49 in the Elections Act for the voters to choose the proposed amendments that they would vote for or against.

The 'unity of content' principle prevents the use of omnibus amendment Bills. This principle requires the formulation of multiple referendum questions where an amendment Bill contains several proposed amendments to Article 255(1) matters and the unrelated matters of the Preamble, the eighteen Chapters, and the six Schedules. The purpose of any national referendum is to give effect to the people's actual will. Therefore, putting several proposed amendments to the 2010 Constitution to a vote in a national referendum as a single issue denies the determination of the people's actual will. If an amendment Bill consists of several matters, the IEBC should put the different proposed amendments to voters as separate national referendum questions. Thereafter, the voters should approve or reject the various proposal amendments instead of requiring such voters to reject the entire omnibus Bill.

In some jurisdictions with similar provisions,[20] the national referendum questions are subjected to vote separately. Such questions are posed through multi-option referendums (with more than two options available) instead of binary referendums (where only two options are available). The majority of national referendums worldwide submit to the voters only two options: the change versus the status *quo* options, and this is sometimes problematic, especially where there are disagreements by the supporters of change on the changes they would like to see.[21] This is because binary choices make it difficult for voters to express their actual will, and such choices encourage polarisation (political and societal divisions), rather than shared goals and promote adversarial rather than deliberative approaches to debate.[22] For example, the Swedish multi-option national referendum shows that the debate is less

[20] A good example is Lithuania, as discussed under Section 3.4 below as a comparative legal analysis.

[21] Constitution Unit, School of Public Policy at University College London, *Final Report of the Independent Commission on Referendums* (July 2018) 107.

[22] *BBI 1* case [612].

divisive than a binary national referendum, as opinions are less polarised. A purposive interpretation of Article 255(1) of the 2010 Constitution reveals that each proposed amendment (read matter) should be considered on its own merit.

2.2. Relevance of the 'unity of content' principle to Kenya

The 'unity of content' principle applies to Kenya. The IEBC's role is to formulate the national referendum questions, as already stated. The IEBC has the discretion to frame the national referendum questions per the contents or scope of the constitutional amendment Bill. Ouko SCJ correctly observes that it is in the "discretion of the IEBC to decide on the most suitable, practical and efficacious option in the circumstances of each proposed amendments".[23] The IEBC should employ the 'unity of content' principle to group the proposed amendments that are related together and then frame a 'Yes' or 'No' question. For example, an amendment that provides for a matter such as devolution, a 'No' or 'Yes' answer can do. More matters should be grouped per the 'unity of content' principle per Article 255(1) matters, the Preamble, eighteen Chapters, and six Schedules of the 2010 Constitution.

Article 257(10) of the 2010 Constitution provides that it is the 'proposed amendment' that is submitted to the voters in a national referendum. Notably, it is a Bill that is used as the primary document for debate and discussion at the County Assemblies and the Parliament, as per Article 257. This clearly shows that the framers of the 2010 Constitution intended to use Bills at the County Assemblies and the Parliament; however, they intended to use the proposed amendment(s) at the national referendum.[24] The terms used under Article 257 change from 'Bill' to 'proposed amendment' under Article 257(10). This informed the Parliament to actualise Article 257(10) by enacting in Part V of the Elections Act, sections 49 and 50. Section 49(1) of the Elections Act provides that the President refers (an) issue(s) to IEBC for the national referendum, and not Bills. Therefore, what is presented to the voters is the national referendum question(s) depending on the circumstances and not the amendment Bill.[25]

In the *BBI 1* case, the KeHC held that Article 257(10) requires all the specific proposed amendments to be submitted to the voters as separate and distinct referendum questions.[26] This is a wrong finding as it is impractical for the voters to vote on each of the 'specific proposed amendments' in the amendment Bill. This is a wrong conclusion as it suggests that 'each of the proposed amendment clauses'[27] and 'all the specific proposed amendments' are to be submitted to the voters as separate and distinct referendum questions. This is the second option of the solutions from conventional wisdom, as explained above. The Court of Appeal Judges (Nambuye, Okwengu, and Kiage JJA) support this wrong finding.[28] Gatembu JA added a qualifier 'subject to the nature of proposed amendment' to the KeHC's finding.[29] Musinga P disagreed with the KeHC and held that it is the amendment Bill that is to be subjected to the national referendum for the people to vote 'for' or 'against'.[30] Tuiyott JA correctly held that the matter was unripe for determination because the IEBC had not yet been seized with its responsibility of framing the question(s) on the BBI Amendment Bill.[31]

[23] *BBI 3* case [2100] (Ouko SCJ).
[24] *BBI 3* case [932] (Ibrahim SCJ).
[25] *BBI 3* case [933] (Ibrahim SCJ).
[26] *BBI 1* case [619], [783 xvii.], [784 xviii.]. Emphasis added.
[27] *BBI 1* case [615]. Emphasis added.
[28] *BBI 2* case [495] (Musinga P).
[29] *BBI 2* case [197] (Gatembu JA).
[30] *BBI 2* case [398] (Musinga P).
[31] *BBI 2* case [251] (Tuiyott JA).

It is also important to look at whether, during the collection of signatures (for popular initiative amendments), the people should support the general suggestion or draft amendment Bill wholesomely if such suggestion or Bill contains several different subject matters. For example, the *Okoa Kenya* initiative prepared a booklet listing several issues, including the increasing revenue and budget allocation to county governments and strengthening devolution, strengthening the role of the *National Land Commission* (NLC), and the role of and benefits for communities in natural resources, and strengthening of public institutions and constitutional commissions. A long amendment Bill was drafted based on these issues, and anyone who signed the *Okoa Kenya* petition supported the general propositions. Ghai and Ghai observe that:

> *We think that this cannot have been what the Committee of Experts had in mind. The Constitution speaks of this method for "an amendment". We believe this means a single change in the Constitution, not a long Bill with 20 or more*.[32]

Ghai and Ghai's observation suggests that a Bill to amend the 2010 Constitution should contain a single change of the Constitution. However, Ghai and Ghai do not define what a *single* change of the 2010 Constitution entails. This could not have been the intention of the drafters of the 2010 Constitution. In practice, a general suggestion or an amendment Bill can contain more than a single change, which is why the 'unity of content' principle is important in such cases per Article 255(1) and unrelated matters. In Kenya, the 2010 Constitution does not provide for the general suggestion or draft amendment Bill to contain a single change. It only provides that the amendment Bill can be introduced in the Parliament or submitted to the IEBC with one million signatures of registered voters (for popular initiative amendments).[33] The promoters can collect the signatures by using the general suggestion for popular initiative amendments, but they must submit a draft Bill with the signatures to the IEBC. Therefore, when the registered voters support the general suggestion, they also support the draft amendment Bill. The observation by Ghai and Ghai that an amendment Bill should contain a single change of the Constitution is a fear that the voters may support a general suggestion or a Bill that contains several different amendments that do not reflect the people's actual will. While the fear is well founded, Chapter sixteen of the 2010 Constitution does not require the different matters found in the general suggestion or draft amendment Bill to be endorsed separately by different lists of signatures of registered voters (for popular initiative amendments). This can be cured by amending the Constitution or enacting a referendum legislation to the same effect. As discussed below, Lithuania's comparative constitutional law theory and practice can provide instructive lessons for Kenya.

As per Article 255(1) and (3), as read with Article 256(5) and 257(10) of the 2010 Constitution, a purposive interpretation reveals that the 'unity of content' principle is the most relevant for the Kenyan constitutional design and architecture. What is to be subjected to the national referendum is the question(s), as opposed to the omnibus amendment Bill. Section 49(2) of the Elections Act states that the issue of the national referendum shall be framed by the IEBC, which shall determine the question(s) to be determined during the national referendum. The national referendum question(s) should be presented separately and distinctly, depending on (a) Article 255(1) matters and unrelated matters, and (b) whether the amendment falls under parliamentary or popular initiative. For an amendment that is popular and has been passed by the Parliament, all those amendments unrelated to Article 255(1) matters stand passed. What goes to the national referendum is, at most, ten referenda questions of the

[32] Yash Pal Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (2nd edn, KI 2021) 147. Emphasis added.

[33] Articles. 256(1)(a) and 257(2), (3) and (4) of the 2010 Constitution.

255(1) matters, depending on the contents of the amendment Bill. On the other hand, an amendment that is popular and not passed by the Parliament, all those amendments in the amendment Bill are presented to the people in a national referendum. In addition to the ten matters under Article 255(1), such an amendment Bill should contain other questions framed per the 'unity of content' principle from the Preamble, eighteen Chapters, and six Schedules of the 2010 Constitution. For example, land and environment, citizenship, leadership and integrity, public finance, public service, and national security can each have a referendum question formulated. All the amendments unrelated to Article 255(1) matters stand enacted for a parliamentary initiative amendment after having been passed by the Parliament. What goes to the national referendum is, at most, ten referenda questions of the 255(1) matters, depending on the contents of the amendment Bill.

2.3. Judicial overreach and ruinous activism of the KESC

As already stated, the KESC in the *BBI 3* case correctly held that the issue of whether the national referendum questions should be presented to the voters as separate and distinct was unripe for determination. However, reviewing their judgements reveals a worrying trend, as some Judges determined this issue.

The Judges correctly pointed out an apparent confusion between Chapter sixteen of the 2010 Constitution and the provisions of the Elections Act. Lenaola SCJ correctly views that a reading of Chapter sixteen on amendments to the 2010 Constitution shows that a Bill to amend the Constitution is the 'medium of amendment'.[34] On the one hand, Chapter sixteen uses the following words: 'a general suggestion', 'A Bill', 'any Bill', 'the Bill', 'a Bill', 'draft Bill', 'a proposed amendment', 'the proposed amendment', 'the amendment', and 'an amendment'. Specifically, Article 257(10) uses the words the 'proposed amendment shall be submitted to the people in a referendum' if the Parliament fails to pass the Bill or relates to Article 255(1) matters.[35] On the other hand, section 49 of the Elections Act speaks of an 'issue' and 'referendum question or questions'. Therefore, Lenaola SCJ's observation that section 49 is 'inelegantly drafted' is correct.[36] Per section 49, it is the 'issue' that is to go to the national referendum, while, under Article 257(10), it is the 'proposed amendment'. This creates confusion, and the correct approach is to read down section 49 to avoid the inconsistency with the 2010 Constitution, which is the Supreme Law. A purposive interpretation of Article 257(10) reveals that what is presented to the people in a national referendum is the proposed amendment depending on Article 255(1) matters or a failure of the Parliament to pass the amendment Bill.

While the above confusion is clear, it is important to call out the KESC Judges who went ahead to determine the nature of the national referendum questions despite acknowledging that the matter was unripe for determination. Lenaola SCJ, while identifying the confusion brought by section 49 of the Elections Act, wrongly opined that 'a Bill in the singular is what is ultimately presented in a referendum'[37] and 'Articles 256 and 257 consistently refers (sic!) to a 'Bill' and not 'Bills''.[38] The correct approach is that an amendment Bill can contain several proposed amendments that should be presented in the national referendum per the 'unity of content' principle, Article 255(1) matters, and unrelated matters. Lenaola SCJ should be called out for exercising judicial overreach and activism by proceeding to determine the issue of separate and distinct referendum questions[39] despite correctly

[34] *BBI 3* case [1696] (Lenaola SCJ).
[35] Emphasis added.
[36] *BBI 3* case [1702] (Lenaola SCJ).
[37] *BBI 3* case [1698] (Lenaola SCJ).
[38] *BBI 3* case [1699] (Lenaola SCJ).
[39] *BBI 3* case [1699] (Lenaola SCJ).

finding and holding that the issue was not ripe for determination.[40] Lenaola SCJ wrongly misquoted the recommendations of the CKRC *Final Report* by stating that the report recommended for entrenched constitutional provisions whose amendment would be through a Bill.[41] The CKRC *Final Report* recommendations referred to the need for the amendment procedure to make a distinction for a Bill seeking to amend the entrenched and other provisions of the Constitution.[42] Ouko SCJ should also be called out for determining the question of separate and distinct referenda questions as follows: the 'language of Chapter Sixteen is that it is the draft Bill that is to be presented to the people in a referendum'[43] despite having found that the issue was unripe for determination.

Similarly, Njoki Ndungu SCJ should also be called out for judicial overreach and activism for finding and holding that section 49 of the Elections Act is unconstitutional (an issue that was not available for determination by the KESC) despite correctly finding and holding that the issue of separate and distinct referenda questions was unripe for determination.[44] Njoki Ndungu SCJ, while observing that the issue of separate and distinct referendum questions was unripe for determination,[45] went ahead and stated that the question met the fitness and hardship test against the ripeness doctrine[46] to warrant the KESC to exercise its mind. According to Njoki Ndungu SCJ, Article 257 of the 2010 Constitution 'refers to a Bill, and therefore, what ought to have been referred to under Section 49(1), (2) and (3) is a Bill and not an 'issue' or a 'question''.[47] Njoki Ndungu SCJ agreed with Musinga P's finding that what is to be submitted to the voters is a Bill and not (a) question(s).[48] She also agrees with Gatembu JA's finding that the Bill containing the amendment proposals is submitted to the voters in a national referendum.[49] Njoki Ndungu SCJ found that the IEBC ought to submit to the voters only a constitutional amendment Bill with a 'Yes' or 'No' question.[50] Njoki Ndungu SCJ also addressed the constitutionality of section 49 of the Elections Act, which departs from the provisions of the 2010 Constitution and confers the IEBC with a non-existent role in drafting the national referendum questions.[51] Njoki Ndungu SCJ declared that 'Section 49 of the Elections Act, to the extent it departs from the provisions or wording of the Constitution in Articles 256 and 257, [is] unconstitutional',[52] and found the following:

> *The question of referendum questions is not ripe, but invoking an exception to determine the issue, amendments to the Constitution be submitted as one referendum question, and Section 49 of the Elections Act, in as far as it departs from the provisions or wording of the Constitution is unconstitutional.*[53]

These decisions of the KESC Judges show that they are serious political actors in matters of constitutional amendments by overstretching their mandate and deciding issues that are unripe for deter-

[40] *BBI 3* case [1712] (Lenaola SCJ).
[41] *BBI 3* case [1699] (Lenaola SCJ).
[42] Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) 76.
[43] *BBI 3* case [2110] (Ouko SCJ).
[44] *BBI 3* case [1345] (Njoki Ndungu SCJ).
[45] *BBI 3* case [1333] (Njoki Ndungu SCJ).
[46] *BBI 3* case [1336] (Njoki Ndungu SCJ).
[47] *BBI 3* case [1341] (Njoki Ndungu SCJ).
[48] *BBI 3* case [1342] (Njoki Ndungu SCJ).
[49] *BBI 2* case [158], [159] (Gatembu JA).
[50] *BBI 3* case [1342] (Njoki Ndungu SCJ).
[51] *BBI 3* case [1343] (Njoki Ndungu SCJ).
[52] *BBI 3* case [1345] (Njoki Ndungu SCJ).
[53] *BBI 3* case [1346(vii)] (Njoki Ndungu SCJ).

mination. This should be discouraged because the KESC is the apex court. Judges should only decide matters ripe for determination and allow other State actors to exercise their constitutional mandates.

2.4. Comparative study on referendum questions: Lithuania

A comparative legal analysis of Lithuania's constitutional law theory and practice is of high relevance in this context. The 1992 Lithuanian Constitution (as amended), Article 9, paragraph 1 provides that a national referendum must decide the 'most significant issues'[54] of the State's life and Nation (People). Such a referendum is announced by the *Seimas* (Parliament), or, if requested, by at least 300,000 citizens with electoral rights or voters. Procedures for the annunciation and execution of the referendum are established by law. Under Article 67, the *Seimas* considers and adopts constitutional amendments and resolutions on referendums.

Chapter fourteen of the Constitution provides for its alteration, supplementation, or amendment. As per Article 147, the motion to amend can be submitted to *Seimas* by ¼ of all its members (that is, at least 36 out of 141), or not less than 300,000 voters.[55] Therefore, both the members of the *Seimas* and the people have the right to initiate constitutional amendments. Article 148 provides for the tiered amendment process.[56] First and foremost, Article 1 (the 'State of Lithuania shall be an independent democratic republic') can only be altered by a national referendum if not less than three-fourths of the Lithuanians with the electoral rights vote in favour – which is a 'factual impossibility'.[57] Secondly, the First Chapter (the State of Lithuania)[58] and the Fourteenth Chapter (Alteration of the Constitution) can only be altered by a national referendum.[59] Thirdly, amendments to other Chapters must be considered and voted on at the *Seimas* twice, with a break of three months between such votes. Such amendments are deemed adopted if not less than two-thirds of all *Seimas* members (i.e., at least 94) vote in favour in both runs. The President has an unconditional duty to promulgate constitutional amendments with no veto power over them.[60] All amendments not adopted can only be 'submitted to the *Seimas* for reconsideration not earlier than after one year'.[61] These amendment provisions create a two-tiered amendment process. The amendment of Chapters One and Fourteen require a more rigorous threshold

[54] These issues include constitutional supremacy, popular sovereignty, Lithuania's independence, territorial integrity and constitutional order, the rule of Law, responsible governance, and direct participation of citizens in the governance.

[55] Art. 147 § 1 of the Lithuanian Constitution.

[56] The 2020 doctrine of limitations on constitutional alteration has emerged in recent jurisprudence from the Constitutional Court. See the Constitutional Court's ruling of 30 July 2020. TAR, No. 2021-14847. Per the ruling, Lithuania's fundamental constitutional acts cannot be repealed or altered. See also Egidijus Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania: On the Structure of the Constitution, the Non-Amendability of Constitutional Provisions, and the Legal Force of 'Pre-Constitutional' Acts' (2023) 48 RCEEL 95, 126–127 who observes that the year 2020 ruling has 'overhauled the system of sources of Lithuanian constitutional law by dividing them into two tiers', namely: (a) Non amendable 'fundamental acts' as 'primary', 'supra-constitutional sources'. This is some 'supra-constitutional law' enshrined in the four historical acts as its sources. (b) The 1992 Constitution (with its constituent part) and official constitutional doctrine (based on it are sources of constitutional law) where constitutional provisions are construed. See also Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania' 131 who further correctly observes that the doctrinal novelty of the notion of 'supra constitutionality' was an ill-considered experimentation as the 1992 Constitution is supreme, and it raises serious questions, including adjusting the doctrine per the legal construction canons.

[57] Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania' 106.

[58] This Chapter provides for matters including national sovereignty, independence, territorial integrity, constitutional supremacy, the rule of Law, referenda, citizenship, and the State language.

[59] Art. 148 § 2 of the Lithuanian Constitution. The turnout and adoption thresholds are not specified; they must be set in a statute.

[60] Art. 149 § 1 of the Lithuanian Constitution.

[61] Art. 148 § 4 of the Lithuanian Constitution.

via a national referendum of three-quarters Lithuanians voting in favour. The other Chapters require a less rigorous threshold of only two-thirds of all the *Seimas* members without requiring ratification in a national referendum.

The Constitutional Court of Lithuania (CCL) has had the opportunity to address the nature and content of the referendum questions under the Lithuanian Constitution. In Case No. 16/2014-29/2014,[62] the CCL addressed the question of organising and calling referendums. The CCL was seized to decide whether Lithuania's Law on Referendums[63] violated Article 6, paragraph 1[64] and Article 7, paragraph 1[65] and the rule of law. The CCL was called upon to investigate the constitutionality of the Law on Referendums that does not provide for roles of the Central Electoral Commission of the Republic of Lithuania (CECRL) and the *Seimas* to assess the draft law's constitutional compliance and give the right to decide on calling a referendum on draft laws that may not be in line with constitutional requirements, respectively. The CCL held that the Law on Referendums, Law on the Central Electoral Commission,[66] and the Law on the Fundamentals of Lawmaking do not contain the legislative omission as alleged by the petitioner as they implicitly empower the CECRL to assess the draft law's constitutional compliance, including reviewing the content and form of the draft constitutional amendment Bill.[67] The CCL ruled that the Law on Referendums conflicted with Article 6 paragraph 1, Article 7 paragraph 1, and Article 9 paragraphs 1 and 3 of the Constitution and the rule of Law because:

> *[I]t does not establish the requirement that several issues unrelated by their content and nature, or several unrelated amendments to the Constitution..., or several unrelated provisions of laws may not be submitted as a single issue in a decision proposed to be put to a referendum… [and] the Seimas … is obliged to adopt a resolution on calling a referendum where the decision proposed to be put to the referendum may not be in line with the [constitutional] requirements*.[68]

The CCL has pointed out that direct participation of citizens in State governance is a 'very important expression of their supreme sovereign power; therefore, a referendum must be a testimony to the actual will of the nation [people]'.[69] In its 11 July 2014 ruling, the CCL noted that when the most significant issues concerning the State's life and Nation are put to a national referendum, 'they must be such issues regarding which it would be possible to determine the actual will of the nation: inter alia, they must be formulated in a clear and not misleading manner'.[70] The CCL construed Articles 2, 4, and 9, paragraph 1, conjunctively and correctly observed that they give rise to the imperative that preconditions must be created to determine the Nation's actual will in a national referendum.[71] The CCL then held that:

> *Consequently, under the Constitution, several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws may not be put to a vote in a referendum as a single issue. Acting otherwise would deny the possibility of determining the actual will of the nation separately regarding each most significant issue concerning the life of the*

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[62] See the Constitutional Court's ruling No. KT36-N10/2014 of 11 July 2014 (Case No. 16/2014-29/2014) on organising and calling referendums (hereinafter – 'the CC's ruling of 11 July 2014').

[63] (Official Gazette *Valstybės žinios*, 2002, No. 64-2570) 4 June 2002, No IX-929.

[64] This paragraph states: 'The Constitution shall be an integral and directly applicable act'.

[65] This paragraph states: 'Any law or other act, which is contrary to the Constitution, shall be invalid'.

[66] 20 June 2002 No. IX-985 (as amended).

[67] CC's ruling of 11 July 2014, 38–39, 43–44, 53.

[68] CC's ruling of 11 July 2014, 53–54.

[69] Constitutional Court's ruling of 22 July 1994. TAR, No. 0941000NUTARG940214. Emphasis added.

[70] CC's ruling of 11 July 2014, 18.

[71] CC's ruling of 11 July 2014, 19.

> *State and the nation…. the approval of citizens for calling a referendum must be expressed separately regarding each issue being put to the referendum, i.e., a single signature may not be given in support of an initiative to call a referendum on several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws.*[72]

Therefore, the issues should be separately addressed during the collection of voters' signatures so that people can endorse their signatures separately against such issues.[73] The same applies during the national referendum voting as such issues should be put separately to the people in the national voting. This is the only way to afford the people the opportunity to decide their support for each initiative separately, and it would be possible to determine whether the people indeed support each of the issues (unrelated by their nature and content). The Law on Referendums must capture the above-outlined sentiments to the extent that several issues unrelated by their nature and content may not be put to a national referendum as a single issue.[74] Where the constitutional amendment relates to several different issues, several separate questions must be presented to the people in the national referendum.

The CCL also referred to the *Guidelines for Constitutional Referendums at National Level*[75] as adopted by the European Commission for Democracy through Law (Venice Commission) at its 47th Plenary Session on 6–7 July 2001. These *Guidelines* under Section II provide that a text submitted to a national referendum must be regulated at the constitutional level and comply with the procedural and substantive requirements. The substantive requirement is that the constitutional amendments must comply with constitutional principles such as democracy, human rights, the rule of law, and international law norms and principles. The procedural requirements are in the constitutional amendment; the question(s) put to a national referendum must have an intrinsic (substantive) connection between the text parts. To guarantee free suffrage for the voters, the people must not be called to refuse or accept as whole provisions without a unity of content. Only those texts that comply with substantive and procedural requirements must be put to a popular vote in a national referendum.[76] The CCL summarised these requirements as follows:

> *Compliance with substantive requirements means compliance with, among other things, essential constitutional principles (democracy, protection of human rights, and the rule of law) as well as with the universally recognized principles and norms of international law. Procedural requirements, inter alia, include the unity of the content of the text—amendments to the Constitution put to the single vote must be related to one another, i.e., the text of some proposed amendments to the provisions of the Constitution must not be put to the single vote if it combines amendments that are, in substance, of a different content.*[77]

Consequently, the Law on Referendums was amended to reflect the CCL's ruling. Therefore, it is safe to conclude that, in Lithuania, where the constitutional amendment relates to several different

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[72] CC's ruling of 11 July 2014, 19, 48.

[73] CC's ruling of 11 July 2014, 48.

[74] CC's ruling of 11 July 2014, 21-22.

[75] These *Guidelines* set out minimum rules for constitutional referendums (on a partial or total revision), and are designed to ensure that they are used in all European countries per the democratic and the rule-of-law principles. See also the *Code of Good Practice on Referendums*, comprising the Guidelines on the Holding of Referendums and the Explanatory Memorandum, as adopted by the Venice Commission at its 70th Plenary Session on 16–17 March 2007. This *Code* is analogous to the *Guidelines* on the procedural and substantive requirements such as the 'unity of content' principle.

[76] Kūris, 'Doctrinal Experimenting with the Constitution in Lithuania' 125.

[77] CC's ruling of 11 July 2014, 31.

aspects, several separate questions must be presented to the people in a national referendum. In addition, all unlawful national referenda (either procedurally or substantively invalid amendment Bills) must not be presented to a national referendum.

Lithuania's constitutional law theory and practice on referendum questions is relevant to Kenya and marries with the 'unity of content' principle. The Lithuanian Constitution, the Law on Referendums, and the jurisprudence of the CCL support the principle of the 'unity of content' in the content and form of the referendum questions. Under this principle, several unrelated constitutional amendments, several unrelated issues or several unrelated provisions of laws must each have separate national referendum questions. This marries well with Article 255 of the Kenyan Constitution, which provides for a national referendum on the ten matters and other unrelated matters not passed by the Parliament. To determine the actual will of the Kenyan people during the constitutional amendment processes and the national referendum, the 'unity of content' principle must apply during the collection of signatures of the registered voters (in the case of popular initiative amendments) and the national referendum. While applying the 'unity of content' principle during signatures collection is not provided by the 2010 Constitution, it can be provided by amending it or enacting a referendum legislation. Such an amendment or legislation should allow the people to append their signatures to each matter or issue separately framed during the signature collection. Also, during the national referendum, the people must vote separately on the questions or issues framed per the 'unity of content' principle per Article 255(1) matters in addition to other questions or issues framed from the Preamble, eighteen Chapters and six Schedules of the 2010 Constitution if not passed by the Parliament. In conclusion, the constitutional jurisprudence from Lithuania offers instructive lessons for Kenya regarding the framing of the issues or questions concerned during the collection of signatures and national referendum.

3. Whether State Actors Can Initiate Popular Initiative Amendments

This issue arose in the *BBI* cases and will likely arise again in future constitutional amendments. It is discussed under the following subheadings: (a) Meaning of State actors; and (b) State actors cannot initiate popular initiative amendments.

3.1. Meaning of State actors

'State actors' is a collective term used that refers to the State organs, offices and officers, and judicial officers. Article 260 of the 2010 Constitution that provides for interpretation defines the terms: 'State organ', 'State office', 'State officer', and 'judicial officer'. A 'judicial officer' means 'a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under Article 169(1)(d)'. Article 169(1)(d) provides for subordinate courts, including 'any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2)'. A good example of presiding officers of a court established by national legislation are the adjudicators of the Small Claims Court under the Small Claims Court Act 2016. The courts established under Article 162(2) are the Employment and Labour Relations Court and the Environment and Land Court, which have the status of the High Court of Kenya.

'State office' means any of the following offices:

a) President, Deputy President, Cabinet Secretaries, Principal Secretaries, Secretary to the Cabinet, Attorney-General, Director of Public Prosecutions, Chief of the Kenya Defence Forces (KDF), commanders of services of the KDF, Director-General of the National Intelligence Service,

Inspector-General and the Deputy Inspectors-General of the National Police Service, Governors or Deputy Governors, and Members of the County Executive Committees.

b) Members of Parliament (National Assembly and Senate) and Members of County Assemblies.
c) Judges and Magistrates.
d) Members of commissions and holders of independent offices under Chapter fifteen of the 2010 Constitution.
e) Offices established and designated as State offices by national legislation.

A 'State officer' means a 'person holding a State office' while a 'State organ' means a 'commission, office, agency or other body established' under the 2010 Constitution. The above State actors possess the State powers (legislative, executive and judicial) in Kenya's constitutional democracy. Because of their powers, they cannot initiate popular initiative amendments reserved for the *Wanjiku*,[78] as discussed below.

3.2. State actors cannot initiate popular initiative amendments

Popular initiative amendments are initiated by the drafting of an amendment Bill and the collection of at least one million signatures of registered voters per Article 257(1), (2) and (3) of the 2010 Constitution, as already stated. The question that follows is whether State actors can initiate popular initiative amendments. This question arose in the *BBI* cases with specific reference to the President, and the correct answer is in the negative for the reasons explained below.

3.2.1. State actors only exercise representative sovereign power

The supreme sovereign power of the people is exercised either directly by the people or via democratically elected and appointed representatives such as the President, Governors, and Members of Parliament. Representative sovereign power is limited and can only be exercised per the 2010 Constitution and the law. Any purported exercise of representative sovereign power outside the 2010 Constitution and the law is unconstitutional, illegal, null, and void *ab initio*.

The *BBI 1* and *BBI 2* cases correctly found that the President initiated the amendment process through several antecedent acts, and the 'State was the real force behind the amendment process',[79] including using State resources to support the process. There was evidence that the National Executive and the President took specific actions not as private citizens, thus portraying the President's role in initiating and promoting constitutional amendments. This was by signing off the initial Communiqué of 9 March 2018 in an official capacity with the Republic's Coat of Arms and the President's seal,[80] the BBI Taskforce and Steering Committee appointed via official gazette notices,[81] and the President received the official reports as part of the State functions. The Steering Committee's terms of reference included proposing constitutional changes, which was the premise for which it drafted the BBI Amendment Bill to implement the President's directive as the appointing authority. The President could

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

[79] As correctly observed by Koome CJ & P in the *BBI 3* case [252].

[80] Uhuru Kenyatta and Raila Odinga, 'The Joint Communique of Building Bridges to a New Kenyan Nation' (9 March 2018).

[81] Gazette Notice No. 5154 dated 24 May 2018 'Establishment of Taskforce on Building Bridges to Unity Advisory'; Gazette Notice No. 264 dated 3 January 2020, Vol. CXXII- No. 7 'The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force Report'.

not be delinked with the BBI Amendment Bill, which resulted from implementing a task assigned by him. The actions were taken by the Presidency (Office) as a State organ and could not be attributed to any person holding the office in his personal capacity.[82]

The 2010 Constitution limits the presidential powers as the President has explicit powers and limits to those powers under Chapter nine and other constitutional provisions. In the *BBI 2* case, Okwengu JA correctly noted that the President's role in the:

> *[A]mendment of the Constitution is at the tail end of the process, as provided under Articles 256(5) and 257(9) of the Constitution, … in his capacity as President, to assent to an Amendment Bill once passed by Parliament or the people through a [national] referendum.*[83]

The President has the option of engaging his political party to pursue constitutional changes via the parliamentary initiative because he has no authority to promote popular initiative amendments.[84] Constitutional amendments can only be pursued via parliamentary and popular initiatives under Articles 256 and 257, respectively. Under Article 257(9) and section 49(1) of the Elections Act, the President's role in popular initiative amendments is limited to assenting amendment Bills and referring such Bills to the IEBC to conduct national referenda. Allowing the President to initiate popular initiative amendments goes against the principle of the separation of powers, checks and balances. The President cannot be a promoter of popular initiative amendments as this infringes Article 10 which usurps the people's supreme sovereign power and voids the social contract between the State and the people. Article 257 impliedly limits the President's participation in initiating constitutional amendments via popular initiatives. This is because if Article 257 allows the President to initiate constitutional amendments, it would upset the balance between direct and representative democracy, which is the provision's characteristic. An interpretation that balances direct and representative democracy should always prevail over one that undermines it. The President's political rights under Article 257 are always curtailed during his term in office.

Article 131(2) of the 2010 Constitution states that the President must safeguard the popular sovereignty. Article 38 cannot be used by State actors to capture popular sovereignty because once a Kenya citizen becomes a President, they cease being an ordinary citizen;[85] and are precluded from playing both participatory and representative democratic roles.

Can a President claim that his political rights under Article 38 are under threat if not allowed to initiate popular initiative amendments? No. The right to propose constitutional amendments is a democratic cause that is protected under the umbrella of political rights. However, Article 20(2) of the 2010 Constitution requires persons to enjoy the Bill of Rights to the 'greatest extent consistent with the nature' of the rights. It follows that an interrogation must be done to determine whether any person claiming violation of his rights is a beneficiary of those rights in the first place. Notably, Article 38(1) guarantees that 'Every citizen is free to make political choices', which limits the enjoyment of this right to 'citizens'. Koome CJ & P was correct to conclude that 'for one to be a beneficiary of the freedom to make political choices they must fall within the category of a citizen'[86] as such freedom is a 'right that does not accrue to State organs or institutions' as they 'cannot be citizens because under Chapter Three of the Constitution, citizenship is limited to living human beings excluding State organs and

[82] *BBI 3* case [255] (Koome CJ & P).
[83] *BBI 2* case [152] (Okwengu JA).
[84] *BBI 2* case [158] (Okwengu JA).
[85] *BBI 3* case [453] (Mwilu DCJ & VP).
[86] *BBI 3* case [249] (Koome CJ & P).

institutions'.[87] The right to make political choices under Article 38 does not accrue to the Presidency (a State organ) and other State organs who are not citizens. Koome CJ & P was correct to conclude that the:

> *[E]xclusion of the institution of the Presidency and other State institutions from initiation of a process to amend the Constitution through the popular initiative route does not violate political rights protected under Article 38(1) of the Constitution.*[88]

The Kenyan constitutional history points to the curbing of the legacy of dominance of the governance system by the imperial Presidency in the pre-2010 era. Chapter nine details the President's powers and authority, and the exercise of such powers. Therefore, there is no need to expand, imply and extend the presidential powers, which is against the text, spirit, architecture and design of the 2010 Constitution. Koome CJ & P correctly found that:

> *In its architecture and design, the Constitution strives to provide explicit powers to the institution of the Presidency and, at the same time, limit the exercise of that power. This approach of explicit and limited powers can be understood in light of the legacy of domination of the constitutional system by imperial Presidents in the pre-2010 dispensation. As a result, Chapter Nine of the Constitution lays out in great detail the powers and authority of the President and how such power is to be exercised. In light of the concerns over the concentration of powers in an imperial President that animate the Constitution, I find that implying and extending the reach of the powers of the President where they are not explicitly granted would be contrary to the overall tenor and ideology of the Constitution and its purposes.*[89]

Since Article 257 does not explicitly preclude the President from initiating popular initiative amendments, such silence must be read in the specific written text of who can promote such amendments.[90] Kenya's history should also be considered as defined by the culture of hyper-amendments promoted by the Parliament, which was an appendage of the Executive branch. Ouko SCJ correctly observed that:

The framers' intention, guided by that background, was to provide a check against a future imperial presidency, by deliberately limiting presidential power in the process…; to give consent to the Bill and to request the IEBC to conduct a national referendum.[91]

This role is ceremonial, as even if the President does not request the IEBC to conduct the national referendum, the IEBC can proceed with it upon the expiry of thirty days.

The President's role with respect to Article 255(1) matters, as read with Articles 256(5) and 257(10), it is one of guardianship of the constitutional amendment processes. The President is obligated to review the amendment Bills when presented for assent and refer the same to the IEBC for a national referendum to be held if such Bills contain Article 255(1) matters. This role of the President cannot be taken by a player and an umpire in the same process.[92]

Therefore, State actors cannot originate amendment Bills through popular initiative and then sponsor a citizen to collect signatures and draft such Bills. The true intention of popular initiative

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[87] *BBI 3* case [250] (Koome CJ & P); *Famy Care Limited v Public Procurement Administrative Review Board & Another*, HC Petition No. 43 of 2012; [2013] (Majanja J) where it was it was legally correctly found that the 'definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution'. See also Mumbi Ngugi J in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others*, HC Petition No. 278 of 2011; [2013] eKLR.

[88] *BBI 3* case [251] (Koome CJ & P).

[89] *BBI 3* case [243] (Koome CJ & P). Emphasis added.

[90] *BBI 3* case [1917] (Ouko SCJ).

[91] *BBI 3* case [1917] (Ouko SCJ).

[92] *BBI 3* case [245] (Koome CJ & P).

amendments must be guarded against abuse by looking beyond the promoter to identify the hands behind such sponsorship.[93]

3.2.2. Popular initiative amendments are reserved for the Wanjiku

Popular initiative amendments are a preserve of the *Wanjiku* in their exercise of direct supreme sovereign power in the Kenya's constitutional democracy. In the *BBI 2* case, Okwengu JA correctly found that popular amendments are initiatives of the ordinary citizenry instead of law-making bodies.[94] Under Article 257, State actors cannot initiate an amendment via a popular initiative. Ouko SCJ also correctly observed that Article 257 envisages amendments originating outside of the government's legislative, executive and judicial structures.[95] The legislative, executive and judicial structures cannot be considered as 'the people', as envisioned under the 2010 Constitution.

Per the social contract theory, the private citizens (the people) own the constituent power, and not the representatives. Gerber explains that citizens (voters) can constrain elected representatives' behaviour in America by proposing, voting and enacting policies directly independent of the legislative structures.[96] Galligan further explains that a 'popular initiative' is a direct action that empowers the people to initiate, abrogate, or introduce laws and a national referendum on constitutional and non-constitutional matters.[97] Setala also explains a 'popular initiative' as a petition by several citizens to call for a national referendum on legislative changes as an alternative to the representative structures.[98] Numata observes that governments usually adopt popular referendums, allowing citizens to vote on specific laws directly.[99] Direct legislation by the people, such as popular initiatives and national referenda, provides education and empowers the people to check the policies of elected representatives.[100] The golden thread from the above scholarship is that popular initiatives are exercises of the direct supreme sovereign power by the people, as opposed to elected and appointed representatives. In the *BBI 3* case, Ouko SCJ correctly described a popular initiative as an 'initiative by the general public; in common parlance, simply, the people'.[101]

Article 255(3)(b) of the 2010 Constitution provides that the people and the Parliament, per Article 257, can amend matters unrelated to Article 255(1). Bhatia correctly observes that:

> *[T]he scheme of Articles 255–257 reflected a carefully crafted balance between representative (Article 256) and direct democracy (Article 257). Indeed, given that, since Article 255(3) specifically mentioned the people and Parliament, it clearly viewed "the People" as an entity distinct from representative bodies. Allowing the President to be involved in initiating an Article 257 process, therefore, would amount to bringing in representative bodies through the back door, after the front door had been firmly closed by the overall amendment scheme.*[102]

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93 *BBI 2* case [60] (Tuiyott JA).

94 *BBI 2* case [112] (Okwengu JA).

95 *BBI 3* case [1909] (Ouko SCJ).

96 Elisabeth Gerber, 'Legislative Response to the Threat of Popular Initiatives' (1996) 40(1) AJPS 99–128.

97 Denis Galligan, 'The Sovereignty Deficit of Modern Constitutions' (2013) 33(4) OJLS 703–732.

98 Maija Setala, 'On the Problems of Responsibility and Accountability in Referendums' (2006) 45(4) EJPR 699–721.

99 Chieko Numata, 'Checking the Center: Popular Referenda in Japan' (2006) 9(1) SSJJ 19–31.

100 See generally, Numata, 'Checking the Center'.

101 *BBI 3* case [1892] (Ouko SCJ).

102 Gautam Bhatia, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya' (16 March 2023) SSRN 15 <http://dx.doi.org/10.2139/ssrn.4390358> accessed 18 July 2024.

Therefore, State organs such as the Presidency and Members of Parliament that do not fall within the 'people' as provided under the 2010 Constitution cannot initiate popular initiative amendments in their capacities as democratically elected representatives.[103] Wanjala SCJ correctly and firmly believes that a popular initiative amendment is a 'people-centered process… [that] excludes any other constitutional entity or institution'.[104] While the President has rights as a Kenyan citizen, some are constitutionally limited; hence, he cannot initiate popular initiative amendments and await the same Bills under Article 257(9) and assent to them.[105] This would be an absurdity that could not have been the framers' intention for the President under Article 256(5)(a) and (b) to request the IEBC to conduct a national referendum within ninety days for approval and also assent the same Bill. The President has specific roles in popular initiative amendments, and those roles exclude initiating such initiatives.[106]

The President has no powers to determine whether a national referendum should be held, but instead the President must request the IEBC to hold such a national referendum if the amendment relates to matters referred to under Article 255(1) of the 2010 Constitution or if the Parliament fails to pass an amendment Bill from a popular initiative. The KeHC was, therefore, right in finding that the popular initiative under Article 257, as read with Article 255, is a reserve of the Kenyan people in exercise of their supreme sovereign power directly and the President or other State actors cannot utilise these Articles to amend the Constitution.[107] The KeHC correctly concluded that it was:

> *[N]ot within the President's power to initiate proposals to amend the Constitution, ostensibly as a Popular Initiative, under the pretext of promoting and enhancing the unity of the Nation. The Constitution can only be amended as prescribed in Articles 255, 256 and 257 of the Constitution.*[108]

The KeHC correctly held that:

> *[A] Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment independent of the law making power of the governing body … cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests.*[109]

Therefore, it is safe to conclude that State actors, including the President, cannot initiate popular initiative amendments as this is a preserve of the *Wanjiku* as individuals or organizing as civil society groups.

3.2.3. Legislative authority lies with the Parliament

The national government's legislative authority resides with Parliament per Article 94(1) of the 2010 Constitution. State actors can only propose to the Parliament or the people and cannot initiate amendments under Articles 256 and 257 or officially promote such processes. Any suggestion that State actors can promote popular initiative amendments is untenable under the 2010 Constitution without petitioning the Parliament. The KeHC was right in the *BBI 1* case where it was held that:

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[103] *BBI 3* case [481] (Mwilu DCJ & VP), [1535] (Lenaola SCJ).
[104] *BBI 3* case [1042] (Wanjala SCJ), [1535] (Lenaola SCJ).
[105] *BBI 3* case [1535] (Lenaola SCJ).
[106] *BBI 3* case [1536] (Lenaola SCJ).
[107] *BBI 1* case [499].
[108] *BBI 1* case [588].
[109] *BBI 1* case [497]. Emphasis added.

Under the Constitution, the President is not a Member of Parliament and therefore cannot directly, purport to initiate a constitutional amendment pursuant to Article 256 of the Constitution. This is because, under Article 94(1) of the Constitution, the legislative authority of the Republic at the national level, is vested in and exercised by Parliament. It follows that the President has no power under the Constitution, as President, to initiate changes to the Constitution under Article 256 of the Constitution since Parliament is the only State organ granted authority by or under the Constitution to consider and effect constitutional changes. The President, if he so desires, can however, through the Office of the Attorney General, use the Parliamentary initiative to propose amendments to the Constitution.[110]

State actors including the Presidency can initiate constitutional amendments by petitioning the Parliament to amend the 2010 Constitution via the parliamentary initiative. Therefore, the *BBI 1* case, *BBI 2* case and *BBI 3* case (6 vs 1 majority) decisions were correct to declare the BBI Amendment Bill as an initiative of the President who cannot initiate popular initiative amendments; hence, it was unconstitutional, illegal, null and void *ab initio*. State actors cannot initiate popular initiative amendments. They can petition the Parliament to initiate amendments via the parliamentary initiative. The President cannot initiate popular amendments. A sitting President can also petition the Parliament to initiate parliamentary amendments.

4. Lessons from and 'Reverse Learning' for Lithuania

The Lithuanian Constitution, just like its Kenyan counterpart, provides for its amendment through the *Seimas* (Parliament) and the people and a national referendum for the 'most significant issues' as the basic structure. Lithuania has adopted the constitutional amendment principle of the 'unity of content' in collecting registered voters' signatures for constitutional amendments and the national referendum. While collecting signatures, the voters must endorse each of the 'most significant issues' separately. The same applies during the referendum, as such issues must be presented separately to the people. This is the only way to get the people's actual will to support any constitutional amendments. Kenya must also learn from Lithuania and adopt the 'unity of content' principle in collecting signatures (for purposes of popular initiative amendments) and in the national referendum.

Lithuania can learn from Kenya that developing indigenous and 'home-grown' jurisprudence in constitutional amendments is essential. Kiage JA correctly observes that Kenya is part of the globalised world, that superior 'courts will always be part of a continuing conversation on comparative constitutional law and practice', and that Kenya's 'progressive jurisprudence is solid enough and sufficiently persuasive to other jurisdictions'.[111] Kenya has developed its indigenous jurisprudence, that is, *Kenyanprudence*[112] in matters of constitutional amendments. It can only borrow what is good for Kenya from foreign jurisprudence and incorporate it per Kenyan contexts, needs, and circumstances. Constitutional amendments are crucial for the 2010 Constitution to remain a living document that responds to the needs and circumstances of each generation but also requires safeguards against abusive amendments.[113]

[110] *BBI 1* case [490].

[111] *BBI 2* case 38, 39 (Kiage JA).

[112] *Kenyanprudence* is my neologism. The term is coined from the two words: 'Kenyan' and 'jurisprudence'. It is used to refer to the development of jurisprudence that is Kenyan (home-grown, indigenous, robust, and patriotic) and takes into account the peculiar circumstances of Kenyan society, including socio-economic, cultural, political, legal, constitutional, theological, and spiritual factors.

[113] Martha Koome, 'Social Transformation through Access to Justice: The Jurisprudence of the Supreme Court of Kenya' (2023) 95 Platform 39, 42 para 28.

Lithuania can learn that the ordinary people must be the central promoters of any constitutional amendment initiatives. The Supreme Court of Kenya (KESC), in the *BBI 3* case, recognised that, in light of the Kenyan history where the President instigated abusive constitutional amendments under the previous Constitution, the President could not initiate constitutional amendments via a popular initiative, as this is a citizen-driven and people-centred process. In light of this, the KESC correctly found that the 2010 Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional, as the President had initiated it.

5. Recommendations: Enactment of National Referendum and Public Participation Legislation

Should a national referendum legislation be in place before initiating constitutional amendments? Should national legislation guide the constitutional amendment processes: parliamentary and popular initiative amendments? The correct answer is in the negative. Currently, no national legislation on referendums guides constitutional amendment Bills and processes. Chapter sixteen provisions of the 2010 Constitution are self-executing. Is Chapter sixteen of the 2010 Constitution inadequate? The correct answer is 'No'. The 2010 Constitution, Elections Act 2011 and IEBC Act 2011 have broad provisions. They can be used to conduct national referenda in adherence to the constitutional principles and statutory dictates. Is special legislation required? Yes. However, this is not specified under Article 261 and Fifth Schedule of the 2010 Constitution. Chapter sixteen makes it possible for the promoters and other actors to know their obligations in the constitutional amendment processes. In the *BBI 1* case*,* the Kenyan High Court (KeHC) correctly held that constitutional amendment processes can be undertaken in adherence to the constitutional principles under Article 10 despite the absence of a national referendum legislation.[114] The Elections Act 2011 is relatively sufficient for conducting a national referendum in Kenya. The constitutional amendment process is in-built and with multi-institutional checks throughout the process.

The history of Articles 257, 95(3) and 109(1) and (2) reveals that national referendum legislation is required to carry out the process effectively. The CKRC *Final Report* correctly recommended that the 'Parliament should enact a Referendum Act to govern the conduct of referenda in the country'.[115] Therefore, the Parliament should enact legislation to guide the constitutional amendment processes. Such legislation should be a more detailed framework to guide the multi-tiered amendment process.[116] It is proposed that the national referendum legislation should be enacted to give effect to the constitutional provisions by guiding the procedures to be adopted by the actors, including the promoters, the IEBC, Parliament, County Assemblies, and the President. This is even though Chapter sixteen of the 2010 Constitution does not make a requirement for such legislation. The provisions of the Elections Act 2011 are inadequate to guide the processes involved in constitutional amendments, including the national referendum. Such a national referendum legislation should provide for issues such as public

[114] *BBI 1* case [783 xv], [783 xiv]. See also the *BBI* 3 case [2039] (Ouko SCJ), where it is observed that 'the absence of an enabling legislation on the conduct of [national] referenda does not render the Article inoperative and unenforceable. Parliament is still bound as a matter of constitutional duty to enact the law'.

[115] CKRC *Final Report* 449.

[116] Notably, there have been attempts to enact national referendum legislation on constitutional amendments. They include: (a) The Referendum Bill, 2020, National Assembly Bill No. 11 of 2020, and (b) The Referendum (No. 2) Bill 2020, National Assembly Bill No. 14 of 2020. However, these Bills have yet to see the light of the day.

participation under Article 10 per the obiter of Koome CJ & P);[117] and all the stages of both the parliamentary and popular initiative amendments. Article 82 of the Constitution places an obligation on the Parliament to enact national legislation on referendums and elections.

Superior courts have also recommended the passage of this law as sections 49 to 55C of the Elections Act 2011, containing provisions regarding the conduct of national referenda, are insufficient.[118] The Elections Act 2011, Part V, is specific to the national referendum at the end of the constitutional amendment process. The Referendum Bills pending before the Parliament must be fast-tracked and passed. The provisions on parliamentary and popular initiative amendments are in an unsatisfactory state. They need further clarification by national referendum legislation and regulations. It matters not whether such legislation is expressly listed in the Fifth Schedule of the Constitution as it provides that 'any other legislation required by this Constitution' be enacted within five years of promulgation. A look at the history of Chapter sixteen and the CKRC *Final Report* reveals the role of the Parliament in enacting national referendum legislation, as already stated. A reading of Articles 94, 95(3), and 109(1) and (2) of the Constitution reveals that the Parliament has the power to enact legislation for constitutional implementation. Therefore, the national referenda legislation can be enacted per these Articles. The Elections Act 2011 fails to take care of the lacuna as the Act does not cover the issues to deal with constitutional amendment processes.

Conclusion

Besides briefly discussing the amendment of the Kenyan Constitution, this article has discussed two arising issues in Kenya's post-2010 constitutional amendments: (a) the nature and scope of national referendum questions; and (b) whether the State actors can initiate popular initiative amendments. The national referendum questions should be presented separately and distinct depending on (a) Article 255(1) matters and unrelated matters, and (b) whether the amendment falls under the parliamentary or popular initiative, per the 'unity of content' principle. On the one hand, for popular and parliamentary initiative amendments passed by the Parliament, all those amendments unrelated to Article 255(1) matters stand passed. What goes to the national referendum is, at most, ten national referendum questions of the 255(1) matters, depending on the scope of the amendment Bill. On the other hand, for a popular initiative amendment not passed by the Parliament, all those amendments in the Bill are presented to the people in a national referendum. In addition to the ten matters under Article 255(1), such a Bill should contain other questions framed per the 'unity of content' principle from the Preamble, eighteen Chapters and six Schedules of the 2010 Constitution. State actors cannot initiate popular initiative amendments. They can petition the Parliament to initiate amendments via the parliamentary initiative. The President cannot initiate popular initiative amendments. A sitting President can also petition the Parliament to initiate amendments through the parliamentary initiative.

[117] *BBI 3* case [315] (Koome CJ & P), [501], [502], [604]. See also the *BBI 3* case (Mwilu DCJ & VP), [2032], [2036], [2038], [2108] (Ouko SCJ). There is a need for the Parliament to enact a legislation on the national referendum and public participation. Notably, there have been several Bills in the Parliament that provide for public participation, but they are yet to see the light of the day. These Bills include the Public Participation Bill, 2016, Senate Bill No. 175 of 2016; Public Participation Bill, 2018, Senate Bill No. 4 of 2018; and the Public Participation Bill, 2019, and National Assembly Bill No. 69 of 2019.

[118] *Republic v County Assembly of Kirinyaga & Anor Ex-Parte Kenda Muriuki & Anor* (2019) eKLR [58]; *BBI 1* case [602]. There is a need to enact national referendum legislation on constitutional amendments including popular initiative amendments.

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