

Epistocracy or Democracy—The Place of the Common Person in Constitutional Amendment in Kenya

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Abstract

Epistocracy is the rule by the elite while democracy entails the rule of the people by the people for the people. The common person is supposed to have space to determine how they wish to be governed. Kenya's constitution provides that all sovereignty belongs to the people. And that such sovereignty can be exercised either directly or indirectly through elected representatives and established institutions. With respect to constitutional amendments, the people can participate through either a popular initiative or a parliamentary initiative. Both routes could eventually require the direct participation of the people through a referendum. In some other jurisdictions, amendment of the constitution is a preserve of the legislature. In others, reference is always made to the common person. In Kenya, the law is not clear on 'who' can initiate an amendment to the constitution through the popular initiative. The common person in Kenya is poor; can't afford necessities of life like food and healthcare; and to some extent, forms a large segment of the illiterate population. The common person relies on the benevolence of the elite and is easily influenced by them to even vote in a certain way. This situation would appear to make the concept of democracy a mirage. This paper examines the place of the common person in various attempts at amending the 2010 Constitution. It is argued that though the common person is legally empowered to participate in constitutional amendments, the reality is that it is the epistocrats who determine such constitutional changes. Recommendations on improving the level of participation of the common person in constitutional amendments are postulated to include continuous and enhanced 'awareness' seminars as well as improving underlying social conditions such as access to food, health and education.

Keywords: constitution, common person, amendments

1. Introduction

1.1 Who Is a 'Common Person?'

Popular sovereignty 'is the notion that no law or rule is legitimate unless it rests directly on the consent of the individuals concerned, that is the people'. (G La France et al., 1989)¹ Some

scholars view sovereignty of the people as 'popular sovereignty', stating that it is the only source of power. (FX Serene, 2020)² The people are expected to be drivers in their own governance. This would require that they are empowered to sufficiently participate in such governance choices.

In many countries the elites and the international community are the promoters and guidance [sic] of sovereignty. (NA Check, 2020)³

It has been stated that:

In spite of occasional protests to the contrary, the popular initiative is founded upon the general theory that representative government in this country is a failure. It implies also that constitutional government is a failure. Assuming this, it proposes to give the people *enmasse* law-making powers independent of and superior to legislatures and councils; and laws thus enacted must stand as final, in defiance of constitutions or supreme courts. (WH Brown, 1905)⁴

At the height of the clamour for a new and people driven constitution in Kenya in the 1990s, it is reported that the then President Moi retorted by asking ‘What does Wanjiku know about the constitution?’ (O Otieno, 2021) ⁵The reformists of the time are said to have used the term ‘Wanjiku’ to push for a people-driven constitutional review. The reformists wanted to prove that ‘Wanjiku’ knows about the constitution. Previous constitutional amendments were left to the political class.

The name ‘Wanjiku’ is used in political circles in Kenya to refer to ‘every ordinary person’, a person without power, a down-trodden person, a person that lies within the bottom strata of society. ‘Wanjiku’ is that person who is always either exploited or susceptible to exploitation. ‘Wanjiku’ is less fortunate and impoverished. Being within the lower strung of society, ‘Wanjiku’ has no access to resources and—in struggling to survive—lives from hand to mouth. Such ‘Wanjiku’ can be found in all societies.

The political elite is considered selfish and self-seeking, always seeking to protect their own interests, which are almost invariably contrary to those of ‘Wanjiku’. The political elite in South Africa made Parliament supreme and through it, many oppressive laws were passed which were intended to protect the political elites. In Kenya between 1963-2010, constitutional amendments by the political elites made the executive supreme over all other arms of government. This resulted in wanton and unchecked plunder of national resources to the detriment of ‘Wanjiku’. The exercise of power was largely unchecked. In Uganda, the political class after independence consolidated power in the executive.⁶ Overall, the political elite presents the picture of the

‘exploiter’—exploiting and diverting resources meant to uplift ‘Wanjiku’—to their own benefit.

Is ‘Wanjiku’ innocent in this scheme of things? Well, no. ‘Wanjiku’ can be considered to be a co-author of her miseries. She is a willing co-participant in the exploitation. For example, in Kenya—‘Wanjiku’ demands money from politicians before casting her vote. ‘Wanjiku’ will be seen lining up at the roadside for handouts. ‘Wanjiku’ will attend political rallies and demand to be facilitated a ‘listening’ allowance. ‘Wanjiku’ will form myriad temporary ‘Youth’ and ‘Women’s’ groups to ‘extort’ money from political aspirants. At the end of a campaign period, many political candidates, including the eventual winner would have spent enormous resources on campaigns. The winner then uses their office to ‘re-coup’ their election expenses as well as shore up more money for the next campaign. In their quest to shore up resources for campaigns and a better lifestyle, the political class is not likely to pass laws that vest resources in programmes beneficial to ‘Wanjiku’ such as free education, clean drinking water, free universal healthcare, unemployment support, free housing, and others. The political class will make weak and near unenforceable laws on corruption. For the political elites, their pivotal interests lie in capturing the state machinery and use it for their self-enrichment, status, and power. The well-being of the broader public remains in practice the least of their concerns. (A Burimaso A., 2020)⁷

Other actors take a cue from the political class and sell admission letters to high schools and colleges, sell job vacancies, extort money from motorists, and extort money for otherwise free government services. It can be said of ‘Wanjiku’ that-

The population is severely impoverished, lacks proper educational and health facilities, as well as other basic services they need to prosper such as electricity, roads, and openness to the outside world.⁸

The same ‘Wanjiku’ ends up either not affording obvious services or spending a lot of money on what should be free services. ‘Wanjiku’ thus becomes vulnerable to political manipulation. In the words of Prof Makau Mutua—(M Mutua, 2021)⁹ ‘Wanjiku’ is actually the co-driver of our problems. Of her problems. She co-creates those problems with the betrayer class. There is a symbiotic relationship between ‘Wanjiku’ and

her oppressor. She is cut from the same moral cloth with her tormentor. She enables the tormentor. She feeds the beast.

And at the next election cycle, 'Wanjiku' will be waiting for handouts as the politicians gladly dish them out. It has been reported that elected representatives are expected by 'Wanjiku' to be a mobile bank—paying medical bills, school fees, contributing to weddings, dowry payment and using the MP's car as an ambulance. Elected representatives in turn 'steal' from 'Wanjiku' by demanding higher pay, and engaging in activities whose end result is to divert funds meant for 'Wanjiku's' welfare such as education and health—to their own pockets. (J Khamis, 2011)¹⁰ This happened in Germany at the end of World War I, when the Nazi's successfully manipulated the suffering of 'Wanjiku', won 'Wanjiku's' support to overthrow the Weimar Republic and plunged the country into a very serious dictatorship.¹¹ The political class is thus viewed with suspicion when it comes to constitution making, including amendments.

There is then a group of intellectuals and another one of civil society. These groups are highly educated and not easily manipulated by politicians. They belong to the middle to upper class of society and are well resourced. Some of them finance political aspirants. This group can compete effectively against the political elite for 'Wanjiku's' ear. This group usually packages its message to appeal to 'Wanjiku'.

The preamble to the Constitution starts with the expression 'We the people adopt, enact and give this constitution to ourselves'. Article 1(1) states that all sovereign power belongs to the people of Kenya'. An attempt has been made to explain the phrase 'sovereignty' in which the Rev Dr. Timothy Njoya has expressed himself thus: (T Njoya, 2017)¹² It is impossible for people to be human without being sovereign. Being sovereign is an ontological essence that people share in common with their God. Sovereignty is the soul of selfhood, the bedrock of nationhood, the essence of self-actualization, and the source of common dignity and destiny. Nationhood transcends kinship, territory, and time; it is the very heart and spirit of universal consciousness that unites the human race into one body of "we the people".

In all efforts at constitutional amendment, 'Wanjiku' is made to believe that she is the decision maker. It has been observed that¹³ in

truth, the elite in all their shades were always in control of the process be they organized civil society at posh hotel talk shops, the religious leaders at Ufungamano House Press Conferences, the business lobby at state dinners or political parties on parliamentary select committees.

In Kenya, 'Wanjiku' through her 'desperate' situation or conduct in relation to political choices or both—makes it difficult for her to actualize her sovereignty. 'Wanjiku' thus remains a bystander in constitutional processes as the epistocrats take control.

1.2 'State Capture' or the Concept of the Shadow State

This has been defined as 'a system of governance in which a form of parallel government is established by a coalition of African rulers, local intermediaries and foreign companies, such that the formal apparatus of the state is not where real power lies'. (N Cheeseman, E Bertrand & S Husaini, 2020)¹⁴

The shadow state consists of friends, business associates, contractors, entrepreneurs, politicians, and relatives of the President and they act as gate-keepers. They surround the President. These act as lobbyists for government contracts, policy decisions and public appointments. They negotiate deals and introduce business persons and key decision makers to the President. These people can mobilize the political and financial resources which determine how elections are either won or lost. They also control low level government officials whom they use to frustrate enforcement of laws and regulations. (S Sishuwa, 2021)¹⁵ Various actors in the shadow state take on the roles of patron/controller, elites, brokers and dealers. (M Swikking, 2017)¹⁶

The shadow state takes over decision making in governance and finance.¹⁷ It takes over all major tendering. It is interested in sustainability. Deep networks are set up. It is responsible for corruption of politics through funding of political parties. It frustrates any attempts at controlling such funding. It is also responsible for manipulation of elections—through irregularities, vote buying, manipulation of electoral laws, electoral violence, disinformation and sometimes, election related judicial decisions. It also attempts to restrict political competition by placing roadblocks in the paths of unwanted politicians.¹⁸ Because of the wide networks, it easily captures any unexpected

newcomer to the 'throne'. It plans and orchestrates to do things in favour of 'Wanjiku'. But in reality, it is the major beneficiary. Its networks are spread in the political class, financial sector, diplomatic circles and security agencies. It raises campaign funds, rallies political support and other charismatic support. It is allowed to build up its wealth through large scale corrupt practices. It determines major appointments in government. It ropes in the judiciary. It interferes with monetary policies of the Central Bank as well as diluting any efforts at checks and balances in the system. (E Gyimah-Boadi, 2021)¹⁹ Its activities are sometimes manifested through perennial or preferential tax exemptions largely to foreign owned enterprises. Such enterprises are in turn expected to make undeclared donations to it or offer kickbacks to members of the shadow state. (O Adigun & U Usim, 2017)²⁰

Even where elections are regularly held, the citizen do not in effect choose their governors. They cannot hold their government accountable. It (shadow state) manipulates elections and contains the citizenry through manipulation. (M Akech, 2021)²¹ Political parties are largely ethnic and individualistic. The political elites nominate either their relatives or those with deep enough pockets to 'buy' the nomination. Citizens who are members of political parties do not have a free hand in the nomination of their candidates. Cases of rigging are rife.²² Voters are presented with candidates chosen by the 'party'. Those who choose to contest as independent candidates hardly have a chance. 'Wanjiku' is not allowed to meaningfully elect her representatives. (MK Kaburu & KG Adar, 2020)²³ This situation puts in question the representation of 'Wanjiku's' interests by elected leaders. The leaders elected on various party tickets must 'tow' the party line at the pain of 'expulsion' from the party—a sure ticket to 'joblessness' and loss of influence. This weakness in the identification of candidates probably contributes to the larger mistrust of the political class by the 'people'.

The electoral process is used to coronate persons who will play ball with the shadow state. It appoints those to manage elections and to give them results they want. Elections are thus stripped of their efficacy. (A Schedler, 2002)²⁴ In Kenya in 2017, the electoral body defied the Supreme Court by failing to open its servers without any consequences., (AFP, 2017)²⁵ The

electoral body cited proprietary rights of foreign companies.²⁶

The shadow state co-opts civil society in its nefarious schemes. Where civil society resists such maneuvers, those that criticize the government are threatened with deregistration²⁷ and their accounts are frozen.²⁸ Also, it may influence the leadership of such organisations. It strives to control access to information by controlling the media. Media houses are threatened with withdrawal of government advertisements, which are estimated to constitute 30-40% of their income. (G Ogola, 2017)²⁹ The common person is left to get only that information that the shadow state wants transmitted.

The constitution provides for the exercise of sovereign power at national and County levels, and that such sovereign power can be delegated to legislative bodies, national and county executive structures and to the judiciary and independent tribunals. Such sovereign power may be exercised also directly by the people.³⁰ Article 38 provides for political rights that allow 'Wanjiku' to be registered as a voter, to join and participate in activities of a political party of 'her' choice, and to present 'herself' as a candidate for either a public office or an office in a political party.³¹ This article allows 'Wanjiku' to contest for offices such as those of President, Deputy President, Governor, Deputy Governor, Senator, and other elective or nomination positions at the County or national level. In effect, it allows 'Wanjiku' to transition from an ordinary citizen to a state officer or public officer. Article 41 allows 'Wanjiku' the 'right to fair labour practices', employers and trade unions also enjoy concomitant rights related to their activities.³² In the course of employment, 'Wanjiku' could be a 'public officer' or a 'state officer'. Chapter seven gives more prescriptions on how 'Wanjiku's' political activities are to be regulated. There are legislative prescriptions that regulate academic standards of occupiers of certain offices such as (Deputy) President and (Deputy) Governor and top level civil servants. These requirements lock out the majority of 'Wanjiku'. These restrictions create an 'elite' class.

In Kenya, these groups usually present themselves as either political elites or as representatives of civil society—NGOs, religious leaders, professional associations and similar formations. These two groups appear to be

antagonistic, each suspicious of the interests of the other. On the one hand, political elites are uncomfortable with any group that attempts to water down their influence or opportunity to entrench themselves. The political class accuses the representatives of various groupings as seeking to take their positions. Representatives of various groupings on the other hand are averse to the desire of politicians to empower themselves and reduce the power of 'Wanjiku' to govern herself. This latter group purports to speak for 'Wanjiku'. Paradoxically, even the political elites claim to speak for 'Wanjiku'. Bottom line is that 'Wanjiku' does not sit on any of the tables represented by these two groups. It has been observed that when a representative of various groupings is elected and joins the political elites, he stops to speak for 'Wanjiku' and descends in the arena of self-interest.³³ The political elites seek to disempower 'Wanjiku' by maintaining them in serious poverty, ignorance, hunger, poor health and less production. Families of the political class access best educational institutions while 'Wanjiku' are left to crowd, sometimes in mud and grass thatched classrooms or worse, under trees. In the schools for the majority of the citizenry one teacher is expected to teach 100 children while in elitist schools such a ratio is kept at teacher: student of 1:25. Political elites access health services from top of the range private hospitals and even in hospitals abroad at the taxpayers expense. It is common practice in Kenya for politicians to seek treatment outside of the country instead of using their condition to improve local facilities. The poorer are left to crowd in public health facilities where patients share a bed, a doctor rarely visits, and drugs are conspicuously absent. The political elites capture state institutions and use them to enrich themselves through corruption and nepotism. Nepotism ensures a network that supports plunder of public resources. This way the political class can mobilize sufficient resources to sustain them in power. The political elites will not do anything that hurts their interests. Institutions for checking corruption have been captured and are used to intimidate political opponents. A disempowered 'Wanjiku' is a mere pawn in the high-class game that is 'popular initiative'.

Some scholars consider civil society to be classless and based on the 'village' model. These scholars see the state as bureaucratic and bourgeoisie in nature. Others argue that there's

no dichotomy between state and civil society as both belong to the same social realities. (JN Moyo, 1998)³⁴ Here the state is considered as the 'collective capitalist' or a 'committee managing the affairs of the bourgeoisie'. Yet other scholars are happy to include opposition political parties in the group of civil society. (A Mujaju, 1997)³⁵ Some scholars see a dichotomy between the state and civil society, civil society and family, civil society and political society, and civil society and the private sector. Such dichotomy is reflected in continuous conflict and confrontation, dialogue, disengagement, domination, and non-partisanship. Civil society seeks to create a self-limiting power. (M Mamdani, 2018)³⁶ Civil society can be trusted to mid-wife political transitions on a level ground. (R Buijtenhuijs & C Thiriot, 1995)³⁷

It is believed that organized civil society does act directly on behalf of the citizens. It exercises residual power of the citizens after the governors have been given some of the citizen's power. Civil society can thus temporarily undertake a political role and thereafter retreat back from the political arena. (K Kibwana, 1996)³⁸

While newer African constitutions pay lip service to the people, declaring that 'all sovereignty is vested in the people', the reality is that the rich and powerful classes, new though they might be, have secured a firm control over the people, to some extent through the state, and some extent through the economy. Poverty in all African states has increased in recent years; the slums have exploded in number and size, causing misery beyond the care of the elite—who create these conditions. (YP Ghai, 2020)³⁹

In his book, former Chief Justice Dr. W Mutunga dissects the tensions, suspicions, agreements and disagreements that characterized constitution making between the political class and civil society in the period 1991-2010. Civil society was clearly bent on having a constitution that gave a lot of freedom to the citizenry whilst limiting political power. Civil society projected itself as the 'voice' of the 'voiceless'. All shades of civil society which included religious organisations, opposition politicians, academics and leaders of Non-Governmental Organisations (NGO's) all spoke with one voice, ostensibly against the previous regime. (W Mutunga, 2020)⁴⁰ Once change was achieved, opposition politicians and

some former NGO leaders got into power and ‘abandoned’ the principles they had earlier stood for.⁴¹ We postulate that it is these epistocrats who influence the agenda and text in constitutional amendments.

2. Comparative Approaches

In the Federal Republic of Germany, the Basic Law (German: Grundgesetz für die Bundesrepublik Deutschland) is the constitution and it came into effect at the end of World War II. Before World War I, Germany was under military rule which continued into World War I. At the end of World War I, the Allied Powers concluded the Treaty of Marseille under which Germany was compelled to pay for reparations of war. These factors—the loss of the war and the resultant humiliation to pay reparations—galvanized the rise of the Nazis who promised a better life for the Germans and that Germany could conquer the World. After World War I, Germany concluded the Weimar Constitution. The Weimar constitution was signed into law on 11 Aug 1919 following dissatisfaction with military rule. This was based on parliamentary democracy. The Nazi movement promised the people a better life free of humiliation. People supported the rise of the Nazi’s. The people were easily buoyed into supporting the Nazi’s. The Nazi’s rode on their populism to gain power. During the Nazi era, a lot of atrocities against both citizens and foreigners were committed. It was a dictatorship per excellence. The Nazi regime of Hitler concentrated all power at the centre.⁴²

The Grundgesetz was drafted on the basis of distrust after the failures of democracy in the Weimar Republic and the mass following of the Nazis. The drafters believed that the people could not be trusted with democracy. Amendments to the German constitution are provided for under article 79. Accordingly, any amendment shall be through a proposed legislation which shall be supported by two-thirds of each of the lower house (Bundestag) and upper house (Bundesrat). Article 20 embodies the principles of democracy, republicanism, social responsibility, federalism and rule of law. Articles 1-19 embody fundamental human rights. These fundamental rights are un-amendable, by way of removal. In Germany, ‘Wanjiku’ is considered to have ‘misbehaved’ during the period of the Weimar constitution. ‘Wanjiku’s’ direct participation in the constitution is thus extremely restricted. It is

considered that ‘Wanjiku’ is better off exercising her sovereignty indirectly through elected leaders and government departments, including the judiciary. The powers of government officials, including the legislature and the Judiciary are circumscribed to prevent the emergence of a dictator. Both the lower and upper houses of Parliament can amend the constitution. (SF Szabo, 2019)⁴³ ‘Wanjiku’s’ participation is indirect through elected leaders.

In France, the constitution of 1791 resulted from the activities of the French revolution. (MA Rogoff, 2011)⁴⁴ The major causes of the French Revolution include the realization that the feudal system of government was not divinely ordained, exclusion of the bourgeoisie from political power, unwillingness of the peasants to support the feudal system, economic difficulties connected to near bankruptcy of the French government, nationwide crop failures in 1788, and general restlessness in the population. People wanted to participate in the governance of their affairs. In the preparation of the first constitution, the King grudgingly allowed wider participation of people’s representatives in what came to be known as the Constituent Assembly. It can be observed that ‘Wanjiku’ exercised her sovereignty indirectly through the Constituent Assembly set up for the purpose of amending the French constitution.

One of the early insights into a ‘popular initiative’ is illustrated by the State of Illinois in USA. (WH Brown, 1905)⁴⁵ Smarting from the rule by a foreign power, the people of Illinois devised ‘Town Hall Meetings’ as fora for law making. This way, they made laws they were comfortable with and agreeable to. Here, ‘Wanjiku’ had a direct participation in law making. They felt the laws that resulted from such engagements were in accord with their wishes. As the population increased, it became necessary to select representatives to Town Hall meetings. In the fullness of time, people became disgruntled with this representative democracy. From this experience, a challenge to exercise of sovereignty by elected representatives was captured thus:

The change from legislation by the people to legislation by final vote of a body of representatives chosen for a specific term was a transformation fraught with the most momentous consequences. The representatives can and do make and put in force many laws the people do not desire, and they neglect or refuse

to make some laws the people do desire.⁴⁶

Nevertheless, they never reverted to the earlier system in which 'Wanjiku' participated directly.

The Swiss constitution is considered one of the most 'unstable' constitutions. (T Priya, n.d.)⁴⁷ Both the citizens and the legislature can demand an amendment. Eighty partial amendments have been made between 1874-1999 (a period of 125 years). This does not make it appear easy to amend a constitution at all. Between 1789 and 2014, over 11,000 amendments had been proposed; however, only 27 amendments were ratified.

In general, a popular initiative is seen as an alternative to direct democracy. It is considered to be fraught with dangers of infringing on human rights where the majority may not consider the interests of the minority. (R Podolnjak, 2015)⁴⁸ In many jurisdictions, the sovereignty of the common person is exercised indirectly by institutions mandated to do so by the constitution, such as parliament and the Constitutional Court. The practice of exercising sovereignty indirectly by 'Wanjiku' appears to be in practice in many jurisdictions.

3. Participation of the 'Common Person' in the Amendments to the 2010 Constitution in Kenya

It has been reported that the British government formed a company through a charter—the Imperial British East Africa (IBEAC) to do business in East Africa. The company metamorphosed into a colonial government thereby making Kenya an appendage of Britain. Later, following some resistance to colonial rule which tended to disrupt their business, coupled with huge losses incurred during the second World War, it became necessary for Britain to give up direct involvement in the colonies. They therefore prepared a constitution and invited some Kenyan elites to discuss at the famous Lancaster conference in 1962. They thereafter handed a constitution to Kenya—the Lancaster or independence constitution.⁴⁹ The conference was held very far from Kenya and only involved a few elites. 'Wanjiku' was not involved.

In Kenya, the first constitution of 1963 was imported from Westminster and focused largely on state institutions, limitation of government and distribution of power. (HWO Okoth-Ogendo, 1972)⁵⁰ After independence, the executive embarked on a journey of amending the constitution using parliament. There was no

recourse to the citizenry. What followed was a systematic emasculation of all other arms of government and eradication of any forms of checks and balances. Both Parliament and the Judiciary were placed under the control of the executive. Many people who were perceived to be against the system were detained without trial.⁵¹ Multipartism was abolished.⁵²

In the 1990's, calls for opening up the political space reached a crescendo. Multipartism was eventually allowed in 1992.⁵³ The Constitution of Kenya Review Commission (CKRC) was born.⁵⁴ The enabling statute provided for several layers for consulting 'Wanjiku'. The people had a genuine distrust for government and politicians born out of 40 years of experience of abuse of power. Civil society wanted the government checked, the powers of the president trimmed, human rights better entrenched in the constitution, participative democracy (elections) enhanced, a devolved form of government, and financial accountability.

The people's power to make a constitution were reinforced by the holding of the High Court to the effect that they had the primordial power to make the Constitution.⁵⁵ In making the Constitution of Kenya, 2010, the common person was involved during civic education, collection of views and at the referendum.

A draft was drawn up and subjected to intensive discussions through civic education. After polishing it, it was given back to the people to vote on it. The first one was rejected in 2005. After further review, the second attempt succeeded in 2010. In terms of promotion and championing the drafts—the government promoted while the opposition politicians and civil society took centre stage in rejecting the 2005 draft. Come 2010, the previous opposition parties and the governing party teamed up to promote its adoption. Campaigning during the referendum stage was a 'fight' between different elitist interest groups, with the common person being manipulated to vote one way or the other.

In Kenya, the approach of the popular initiative would appear to be justified by the fact that 'we the people give to ourselves' this constitution. The Final Report of Technical Working Committee Group 'K' on Constitutional Commissions and Amendments to the Constitution (2005) states that—(Republic of Kenya, 2005)⁵⁶ The committee introduced a

novel idea called popular initiative. This is an innovation where the citizens can on their own motion initiate amendment to the Constitution by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. The committee explained that their intention was a starting point towards curbing dictatorship by Parliament

This committee captured very well the sentiments of the people of Kenya, who expressed dismay at the way constitutional amendments had been made to the previous constitution through the executive and parliament to the total exclusion of the people. The people sought for a way to be involved.

The gateway to constitutional amendments in Kenya's constitution, 2010 can be found in articles 255-257. Article 255 clearly lays down parts of the constitution whose amendment process shall include a referendum, thus involving all the people. Article 256 provides for the Parliamentary process of amending the Constitution in which both houses can pass an amendment with at least two-thirds of the membership. However, should a matter for Parliamentary amendment touch on any of the parts specified in article 255(1), then, the Bill will be subjected to a referendum before assent by the President. Article 257 speaks to an amendment through a 'popular initiative'. Here, the promoters are required to collect a million signatures and prepare their 'proposed amendment' either as a general suggestion or in the form of a draft bill. The draft bill must be approved by a majority of County Assemblies for it to proceed to both Houses of Parliament. If approved, it may be assented to unless it touches on parts specified in article 255(1) in which case, it will then be subjected to a referendum.

Commenting on the popular initiative, Koome, CJ & P had this to say—⁵⁷ [241] My analysis of Article 257 indicates that a popular initiative is an exercise of direct sovereign power; and excludes representative institutions (for example, the Legislature, and the Presidency). In other words, it is a means of direct democracy; and indeed, direct democracy can only be exercised by the people not their representatives since that would convolute the form of democracy at play. It follows therefore that a popular initiative in a constitutional amendment process ought to be seen as an avenue through which citizens engage in the exercise of their sovereignty. This

leads to the conclusion that the popular initiative is a preserve of the citizens, 'the Wanjiku', in Kenyan popular lexicon.

[238] the popular initiative is supposed to be triggered 'from below' at the initiative of the citizenry as opposed to representative institutions.

The courts have not been able to categorically place the common person as the one who should be a 'promoter' of a popular initiative,⁵⁸ with some even stating that a President, as an individual, also has a right to avail himself of a popular initiative.⁵⁹

The Court of Appeal recognized that a popular initiative can be manipulated by vested interests in which it said—⁶⁰ the process of popular initiative must be guarded from abuse. A State actor, who is otherwise barred from initiating a popular initiative, cannot originate a proposal for amendment then hire or sponsor a citizen to formulate it into a Bill and then collect signatures in support. In that instance, the promoter will simply be a surrogate of the State actor. That will not be a truly citizen-driven initiative as it will [be] an enterprise of the State actor. There will be occasion therefore when it will be necessary to look beyond the person who formulates the draft Bill and collects the signatures to discover the hand behind the initiative, only in this way will the true intent of the popular initiative process be protected against manipulation.

Whether it is possible to prevent the 'popular initiative' from being abused is a matter of time. There have been several attempts to invoke the 'popular initiative' in amending the constitution. The first attempt to amend the constitution of Kenya, 2010, took place in 2014. This attempt was dubbed 'Okoa Kenya'. It collapsed at the point of collection of signatures. The promoters were not able to get one million signatures as prescribed by the Constitution.⁶¹ Needless to mention that this 'popular initiative' attempt was promoted by a coalition of political parties—the political elites. In 2019, a second attempt at amending the constitution was promoted by a registered political party and this was called 'Punguza Mizigo'. This attempt succeeded in collecting the requisite signatures but failed at the County Assembly level where it did not get the minimum support of the required County Assemblies. The third attempt was through the 'Building Bridges Initiative'.⁶²

After overcoming the hurdle of collecting signatures and being approved by the required number of County Assemblies, this attempt failed on account of its promoters—it was held that a popular initiative could not be initiated by the President or any other governmental institution.

Clearly these attempts represent a ‘clash’ of interests of various elitist groups. The common person comes in somewhere along the process such as during collection of signatures, public participation or the referendum. With respect to collection of signatures, the common person can be manipulated to sign. Public participation is for the few ‘informed’ persons, more particularly, various elitist groups who seek to entrench their interests. A referendum, like a general election, is driven by the ‘political’ elites and civil society. The common person, in most cases, is too busy worrying about mundane matters of life. Indeed, in the above failed attempts, the courts came to settle disputes pitting different interest groups, all of which purport to speak for the common person. It should be apparent that the common person in Kenya remains largely a pawn in the activities of amending the constitution, being left with a peripheral role to play.

Although it was felt necessary to have a constitution in which the common man had participated in making ‘yet in reality, the notion of a key role for the common man in the Constitution is often only conveniently used by the elite class to advance its own interests.’⁶³ As indicated earlier, it is these elites who gather in posh hotels as religious leaders, civil society, interest groups or Parliamentary committees to plan constitutional amendments on behalf of ‘Wanjiku’.

The idea of amending the constitution from the ‘bottom’ through a popular initiative still remains a mirage. There is a real danger that government functionaries, the political elite, other elites, or the shadow state can easily ‘sponsor’ a popular initiative. It has been said that citizens can only effectively participate in decision making if they have access to information, are able to consult and to actively participate. (Mulyanyuma AA., 2020)⁶⁴

4. Conclusion

Citizens plagued by ignorance, hunger and disease can only be led to exercise the right of the elites who take advantage of their situation. Interestingly, even in countries where basic

needs are covered, there still remains a residual ‘fear’ of the common person being manipulated, hence the use of constitutional institutions. Burimose has observed that the people, the real source of power and legitimacy to rule remains confined to those that can influence public policy process, from the agenda setting through policy formulation and implementation to policy evaluation. These include the political elites that hold high official positions, high-ranking military officers, the rich and the educated that provide their expertise mostly during policy formulation, implementation and evaluation.⁶⁵

Nevertheless, a lot needs to be done to empower ‘Wanjiku’—the common person, so that her voice can have meaning. In particular, Wanjiku needs to be freed from the chains of poverty—lack of food, lack of access to health facilities, and illiteracy. The media also needs to be freed from the clutches of the political and civil society elites, as well as from the ‘shadow’ state. It will equally be useful for political parties to be transformed from the current state of ‘special purpose vehicles’ to ideologically based parties. So far, ‘Wanjiku’s’ participation in constitutional processes in Kenya remains a mirage. Epistocracy reigns.

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