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RESEARCH ARTICLE

Presidential Veto in the Law-Making Process: The Case of Kenya's Amendatory Recommendations

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Abstract
This article contends that the interpretation of article 115 of the Constitution of Kenya as providing for amendatory recommendations as a form of presidential veto to legislative bills is a departure from the common negative veto to bills which was the form envisaged by the drafters of the Constitution. Moreover, it is argued that the interpretation that article 115 of the Constitution allows the president to make positive legislative recommendations which can only be overridden by two-thirds of members of the legislature has transformed the president into the most decisive player in the legislative process in Kenya. The overarching contention of this article is that allowing the president to make positive legislative recommendations that can only be overridden by two-thirds of members of the legislature goes against the goal of tempering presidential powers, which was one of the animating goals that informed the quest for constitutional change in Kenya.

Keywords: Veto; legislative override; presidential powers; amendatory recommendations; Kenya

Introduction

Presidential power is inadequately checked in many parts of Africa.[1] As a result, presidents treat other organs of government, such as Parliament and the judiciary, as subordinates instead of equals.[2] It is in this respect that BO Nwabueze observed that "[p]residentialism in … Africa has tended towards dictatorship and tyranny not so much because of its great power as because of insufficient constitutional, political and social restraint upon that power".[3] Like elsewhere in the African continent, governance in post-colonial Kenya has been characterized by a legacy of an overbearing presidency that has dominated the country's political and constitutional system.[4]

In order to check the influence of the presidency in the country's post-colonial governance and deal with other governance ills that had bedevilled the country, like the misuse and abuse of state

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1 J Hatchard, M Ndulo and P Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004, Cambridge University Press) at 57.

2 M Ndulo "Presidentialism in the Southern African states and constitutional restraint on presidential power" (2002) 26 *Vermont Law Review* 769.

3 BO Nwabueze *Presidentialism in Commonwealth Africa* (1974, St. Martin's Press) at 435; see also F Sekindi "Comparative constitutional supervision of executive authority: Lessons for Uganda from Benin" (2017) 23/2 *East African Journal of Peace & Human Rights* 152.

4 See generally YP Ghai and PWB McAuslan *Public Law and Political Change in Kenya* (1970, Oxford University Press); HWO Okoth-Ogendo "Constitutions without constitutionalism: An African political paradox" in D Greenberg et al (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993, Oxford University Press) 65; and SBO Gutto "Constitutional law and politics in Kenya since independence: A study in a neo-colonial state in Africa" (1987) 5 *Zimbabwe Law Review* 142.

power, disregard for the rule of law, abuse of human rights, corruption and regional and gender-based exclusion in state and social life, Kenya embarked on a constitutional reform process in the early 1990s.[5] This process resulted in the coming into force of a new constitutional dispensation with the promulgation of the Constitution of Kenya of 2010 (the Constitution).

The Constitution envisages the distribution of political power between various institutions and follows the general principle of making Parliament the sole repository of legislative power. This is consistent with the classical doctrine of the separation of powers, according to which the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting and applying the laws to particular cases (judicial power).[6] The executive branch has no independent legislative power under the Constitution. There are only two legislative authorities – the bicameral National Parliament (consisting of two chambers: the National Assembly and the Senate)[7] and the county assemblies (at the county levels, i.e. sub-national units under Kenya's devolved system of government);[8] thus, whatever legislative power the executive possesses is a derivative or delegated one, and therefore subordinate to Parliament's authority.[9] Indeed, in affirming this stance, the Constitution provides that "[n]o person or body, other than Parliament, has the power to make [a] provision [of law] having the force of law in Kenya except under authority conferred by this Constitution or by legislation".[10]

Controversially, the interpretation and application of the Constitution obfuscate the separation of legislative and executive powers in Kenya with respect to the exercise of presidential veto power over legislative bills. The power to veto legislation is traditionally seen as one of the most important presidential prerogatives. Presidents sign legislative bills passed by Parliament, and through the power of assent are thus the last check-and-balance institution on the legislative process.[11] This right of a president to refuse their signature under bills that they do not approve of makes them a crucial player in the legislative process. However, there has arisen a concern in the African context that most states grant the president a strong veto power over legislation passed by Parliament, whereas the presidential veto can only be overridden with an extraordinary majority (two-thirds or more) of Members of Parliament.[12]

What has made the interpretation and application of the presidential veto in Kenya unique is that the president has been permitted to make positive legislative proposals through an amendatory reservation veto system when referring a bill back to Parliament for reconsideration.[13] Under this scheme, the president not only refuses to assent to a bill, but also introduces new provisions as part of the bill to be reconsidered by Parliament after a veto. Even worse, such positive presidential legislative proposals as are contained in the amendatory reservation can only be overturned by a super-majority of legislators, i.e. two-thirds of the members of each legislative chamber in

5 W Mutunga *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992–1997* (2nd ed, 2020, Strathmore University Press); OD Juma "Constitution making and democratization trends in Africa: The Kenyan case" (2004) 1 *The East African Law Journal* 21.

6 See MJC Ville *Constitutionalism and the Separation of Powers* (1967, Oxford University Press).

7 The Constitution, art 93.

8 The Constitution, art 176.

9 The Constitution, art 94(6) envisages that state organs, agencies, and officers can enact delegated legislations in the form of statutory instruments when authorized by legislation. See also the Statutory Instruments Act No 23 of 2013. For critique see KO Opalo "Constrained presidential power in Africa? Legislative independence and executive rule making in Kenya, 1963–2013" (2020) 50/4 *British Journal of Political Science* 1341.

10 The Constitution, art 94(5).

11 G Strohmeier "More legitimation = more competence? Heads of state in parliamentary systems in comparative perspective" (2012) 6/2 *Zeitschrift für vergleichende Politikwissenschaft* 177.

12 O van Cranenburg "Restraining executive power in Africa: Horizontal accountability in Africa's hybrid regimes" (2009) 16/1 *South African Journal of International Affairs* 64. A rare aberration from this trend is the Botswana Constitution, which envisages that the President's veto can be overridden by a simple majority of the legislature. See in this regard sec 87 of the Constitution of Botswana.

13 See the Constitution, art 115.

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Kenya's bicameral Parliament.[14] This practice has led to a state of affairs in which all presidential legislative proposals as contained in amendatory reservations in the post-2010 dispensation have sailed through, as the legislature has been incapable of mustering the requisite super-majority to overturn the president's proposals.

Amendatory reservations such as those allowed in Kenyan legislative practice are positive changes introduced in a particular bill through presidential vetoes after final passage by the legislature;[15] these new presidential legislative proposals are returned to the legislature for another round of deliberation. In most countries such presidential legislative proposals require a simple majority in order to be accepted.[16] Where the president's proposals are unacceptable to the legislature, it should be able to overturn them.[17] This makes the Kenyan approach to presidential reservations unique in comparative constitutional practice: by providing for a positive presidential amendatory reservation and, in addition, requiring a super-majority vote to overturn such proposals, the Kenyan presidential veto has granted the president an unheralded role in the legislative process.

Against the backdrop that the impulse that drove constitutional change in Kenya was the overarching goal of curbing presidential powers, this article demonstrates that presidential power in Kenya has remained resilient, despite the enactment of a new constitution aimed at tempering those powers.[18] This state of affairs is attributed to the weakening of the countervailing powers of the legislature thanks to the requirement for a two-thirds majority of members to override a positive presidential legislative recommendation. This article argues that the constitutional design of the amendatory reservation veto negates the goal of having a state and society founded on the value and principle of democratic governance. It further takes the position that the presidential amendatory reservation power negates the constitutional intention of having the legislature as the sole proponent of legislation, as envisaged in article 94(5) of the Constitution.

This article is divided into five parts: after this introduction, the second part is a historical analysis of presidential veto power in Kenya in the pre-2010 era. There follows an examination of the exercise of amendatory presidential veto powers in the post-2010 dispensation. In addition to the legislative practice approach to the amendatory veto, this section also examines the judicial approach that has ensued following litigation that has challenged the veto practice in Kenya, and demonstrates that the positive nature of this type of presidential veto and the requirement of a two-thirds majority to overturn the proposal has turned the president into a "super-legislator". The fourth part is a critical examination of the constitutional design choice of an amendatory reservation veto which has accorded the president a positive role in the legislative process. It argues that the presidential exercise of veto powers in the form of amendatory reservations enhances presidential powers in the legislative process. The findings are particularly important in light of the fact that one of the goals of constitutional change in Kenya was to curtail rather than boost presidential authority. The conclusion then draws lessons from the study.

The evolution of the veto in the period 1963–2010

Given that constitutions are social creations, they are not written in a historical vacuum.[19] It follows that a study of the exercise of presidential veto powers over bills in post-2010 Kenya cannot be complete without an appreciation of the historical context within which the Constitution emerged.

14 The Constitution, art 115(4).

15 G Tsebelis and E Alemán "Presidential conditional agenda setting in Latin America" (2005) 57/3 *World Politics* 396.

16 Ibid.

17 Id at 397.

18 On the notion of "tempering" power see M Krygier "Four puzzles about the rule of law: Why, what, where? And who cares?" (2011) 50 *Nomos* 64; see also M Krygier "Tempering power" in M Adams, A Meuwese and EH Ballin (eds) *Bridging Idealism and Realism in Constitutionalism and the Rule of Law* (2016, Cambridge University Press) 34.

19 See H Lerner *Making Constitutions in Deeply Divided Societies* (2011, Cambridge University Press) at 26: "[c]onstitutions are rarely, if ever, written on a clean slate".

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Thus, this section is an analysis of the exercise of presidential veto power during the pre-2010 dispensation.

Kenya had a bicameral legislature at independence. Both Houses together were called the National Assembly; Parliament consisted of the President and the National Assembly.[20] The popular chamber or the Lower House was called the House of Representatives and the Upper House the Senate.[21] However, the Independence Constitution was amended on numerous occasions between 1964 and 1969, radically altering its institutional structure, legal content and value orientation.[22] With respect to the legislative structure, lack of political support for and frustrations with the bicameral legislative system led to the dismantling of the Senate through the Constitutional Amendment Act No 4 of 1966, which was assented to on 3 January 1967.[23]

Under the Independence Constitution, the legislative power of Parliament was to be exercised by means of bills.[24] The constitutional design for the process of assent to and veto of bills was encapsulated in section 59(4) of the Independence Constitution: the provision, which was brief, provided that "[w]hen a Bill is presented to the Governor-General for assent, he shall signify that he assents or that he withholds assent".

In essence, the Independence Constitution provided for a block veto and did not envisage the Governor-General (later the president) expressing his reservations in the form of positive legislative proposals. This is akin to the veto under the Constitution of the United States, although the American veto is a "qualified block veto" as it can be overridden by Congress.[25] A block veto is an executive rejection of the entire bill, a prerogative most presidents have.[26] Under the block veto, the legislature makes a legislative proposal to the president, who then has the right to reject it. If the proposal is vetoed, the legislature can override the president if a qualified majority votes to insist on the original bill.[27] However, in the design of the veto under the Independence Constitution, legislative override was not envisaged, meaning the president's veto was final and would result in the collapse of the proposal; thus it can be classified as an absolute block veto.

The "negative" power of an absolute block veto gave the president a notable tool to preserve a favourable status quo, as he was restricted to saying yes or no to a legislative proposal. Such a power to veto significantly restricts the outcomes of the policy-making process.[28] It is noteworthy that in the period immediately after independence, while Kenya was a multi-party democracy, the legislature was largely beholden to the legislative initiative and vision of the executive branch.[29] Thus there never arose any need or opportunity for the president to invoke the veto.

After the Independence Constitution had been subjected to several amendments, a revised version of the Constitution was issued in 1969,[30] section 30 of which providing that "[t]he legislative

20 The Independence Constitution, sec 34(1).

21 For an examination of the structural features of the Independence Constitution see C Singh "The republican constitution of Kenya: Historical background and analysis" (1965) 14/3 *The International and Comparative Law Quarterly* 878; see also JH Proctor Jr "The role of the senate in the Kenyan political system" (1964) 18/4 *Parliamentary Affairs* 389.

22 See HWO Okoth-Ogendo "The politics of constitutional change in Kenya since independence, 1963–69" (1972) 71/282 *African Affairs* 9.

23 See PH Okondo *A Commentary on the Constitution of Kenya* (1995, Phoenix Publishers) at vi.

24 The Independence Constitution, sec 59(1).

25 The Constitution of the United States, art 1(7)(2).

26 E Alemán and G Tsebelis "The origins of presidential conditional agenda-setting power in Latin America" (2005) 40/2 *Latin American Research Review* 11.

27 G Tsebelis and TP Rizova "Presidential conditional agenda setting in the former Communist countries" (2007) 40/10 *Comparative Political Studies* 1159.

28 Alemán and Tsebelis "The origins", above at note 26 at 14.

29 See NM Stultz "Parliament in a tutelary democracy: A recent case in Kenya" (1969) 31/1 *The Journal of Politics* 114; see also A Makhanu "The principle and practice of parliamentary independence: Interrogating the case of Kenya, 1963–2014" (MA thesis, Kenyatta University, 2015).

30 See G Muigai "Constitutional amendments and the constitutional amendment process in Kenya (1964–1997): A study in the politics of the constitution" (PhD thesis, University of Nairobi, 2001).

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power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly". More relevant was section 46 of the Constitution, which regulated the process of presidential assent to and veto of bills. Curiously, this provision did not provide for a veto power but envisaged that the president would assent to all bills passed by the National Assembly.

Section 46 of the 1969 Constitution reflected the politics of the time; Kenya operated as a one-party state during this period. Kenya had become a de facto one-party state in 1969, but the 19th Constitutional Amendment in 1982 went a step further and made a de jure one-party state, further reducing Parliament's role in governance and policy-making.[31] Only members of the Kenya African National Union (KANU) (the ruling party) could hold elected office, and any MP who resigned from KANU lost his or her seat. For nearly three decades MPs watched and acquiesced as Parliament's role was systematically reduced to that of a rubber stamp. Given that under a one-party state, the legislative agenda reflected the views of the executive branch, there was no fear or anticipation that the National Assembly could enact a bill that was contrary to the policies pursued by the government of the day. Thus, it is notable that the assent clause in section 46 of the 1969 Constitution did not provide for a presidential veto over bills.

This state of affairs, where law-making and the assent process operated without a presidential veto, prevailed until the transition from one-party state back to multi-party democratic governance in 1992. Perhaps in anticipation of a divided Parliament after the 1992 elections, Parliament decided to shore up the role of the president in the law-making process. The transition had a considerable impact on the constitutional design of the presidential assent and marked the re-introduction of the presidential veto of bills. Parliament passed the Constitution of Kenya (Amendment) Act No 6 of 1992; after amendment, section 46 of the Constitution, that was to be operational until 2010, provided as follows:

> "(2) When a Bill has been passed by the National Assembly, it shall be presented to the President for his assent.
> (3) The President shall, within twenty-one days after the Bill has been presented to him for assent under subsection (2), signify to the Speaker that he assents to the Bill or refuses to assent to the Bill.
> (4) Where the President refuses to assent to a Bill he shall, within fourteen days of the refusal, submit a memorandum to the Speaker indicating the specific provisions of the Bill which in his opinion should be reconsidered by the National Assembly including his recommendation for amendments.
> (5) The National Assembly shall reconsider a Bill referred to it by the President taking into account the comments of the President and shall either – (a) approve the recommendations proposed by the President with or without amendment and resubmit the Bill to the President for assent; or (b) refuse to accept the recommendations and approve the Bill in its original form by a resolution in that behalf supported by votes of not less than sixty-five per cent of all the Members of the National Assembly (excluding ex officio members) in which case the President shall assent to the Bill within fourteen days of the passing of the resolution."

This constitutional amendment marked a significant change in the design of the presidential veto over legislation. Noteworthy is the fact that in re-introducing the veto, Kenya did not go back to the presidential block veto model that the country had in the immediate post-independence period. Instead, the country embraced an amendatory veto which allowed the president to make recommendations. In order to overturn the amendatory recommendations, the National Assembly had to override the recommendations through a vote of not less than 65 per cent of its members.

The Constitution granted the president the power to offer one more round of amendments after the legislature passed a bill, and incorporated this prerogative as part of the president's veto power.

31 See JA Widner *The Rise of a Party-State in Kenya: From "Harambee!" to "Nyayo!"* (1992, University of California Press).

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These amendments were to be returned to Parliament for an up or down vote. The right to introduce germane amendments to vetoed bills gave the president the opportunity to make a last counter-proposal, and given that the set of possible responses is usually wide, a strategic president could take the initiative and respond with a modified bill that the legislature was more likely to accept than to reject.[32]

The first fundamental difference between the block veto and the amendatory veto in the 1992 constitutional amendment is that in the latter, by allowing the president to express reservations as legislative proposals, the president can make a counter-proposal to the legislature.[33] Presidents with block veto authority can only exercise negative power; by contrast, presidents with power to make legislative recommendations have positive power to shape an alternative version of a bill.[34] In effect, presidential amendatory reservations are positive changes introduced in a particular bill after final passage by the legislature, which are returned to the legislature for one final round of voting. Thus the president's reservation, expressed as a legislative proposal, has one significant procedural advantage in favour of presidents: they are granted the ability to make positive suggestions to vetoed bills.

In most countries, amendatory reservations require a simple majority to be accepted.[35] This enables the president to introduce a last proposal that can eliminate unwanted features of the parliamentary bill as long as it carries enough support to prevent modification or rejection. If, however, the president makes a proposal unacceptable to the legislature, the initiative reverts to the legislature and the power of amendatory reservations is eliminated.[36] In effect, the power to introduce amendatory observations to vetoed bills gives presidents greater discretion to shape legislative outcomes than the typical block veto. This institutional authority to propose and have the proposal accepted has been called "conditional agenda setting", because if the president goes too far in their proposal, they will have their emendation overruled.[37]

The Speaker's interpretation of sections 46(4) and 46(5) of the repealed Constitution was to the effect that the National Assembly shall reconsider a bill referred to it by the president, taking into account the recommendations of the president, and shall either approve the recommendations with or without amendments or reject it in toto and approve the bill in its original form by a resolution supported by votes of not less than 65 per cent of all the members of the National Assembly.[38] Thus an override of the president's memorandum required a super-majority of the members of the legislature. Given the stringent super-majority requirement to overrule the president, it was difficult to override the president's legislative proposals.[39]

This is evident in legislative practice during this period. Although Parliament was initially tame and dominated by the president, it was only a matter of time before it had a policy difference with the president and began to take policy stances that differed from those preferred by the executive branch, as would be expected in a multi-party parliament. In this period, the president vetoed nine bills: the Central Bank of Kenya (Amendment) Bill 2000; the Constitution of Kenya Review (Amendment) Bill 2004; the National Social Health Insurance Fund Bill 2004; the Banking (Amendment) Bill 2004; the Wildlife Conservation and Management (Amendment) Bill 2004;

32 E Alemán and G Tsebelis "Introduction: Legislative institutions and agenda setting" in E Alemán and G Tsebelis (eds) *Legislative Institutions and Lawmaking in Latin America* (2016, Oxford University Press) 16.

33 Alemán and Tsebelis "The origins", above at note 26 at 13.

34 Alemán and Tsebelis "The origins", above at note 26 at 16.

35 Tsebelis and Rizova "Presidential conditional agenda setting", above at note 27 at 1156.

36 Ibid.

37 G Tsebelis "The power of the European Parliament as a conditional agenda-setter" (1994) 88 *American Political Science Review* 128.

38 National Assembly Official Report (Hansard), 24 March 2005 at 149; National Assembly Official Report (Hansard), 5 April 2005 at 391; National Assembly Official Report (Hansard), 23 August 2007 at 3432. See also P Chitere et al *Kenya Constitutional Documents: A Comparative Analysis* (2006, CMI) at 10.

39 Alemán and Tsebelis "Introduction", above at note 32 at 16.

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the Media Bill 2007; the Indemnity (Repeal) Bill 2010; the Animal Technicians Bill 2010; and the Price Control (Essential Goods) Bill 2010.

In all the instances of the exercise of presidential veto in the pre-2010 dispensation, there is no instance when the National Assembly was able to muster the 65 per cent super-majority to override the president's legislative proposal. While the National Assembly increasingly enacted legislative proposals that were at variance with the will of the executive branch, these legislative initiatives were eventually defeated through the president's refusal of assent. The amendatory veto gave the president a significant role in the legislative process, thereby undermining the doctrine of separation of powers.

Presidential reservations in the post-2010 dispensation

Article 94 in the Constitution provides that Parliament's authority is vested in and exercised by Parliament. In stark contrast to section 34(1) of the Independence Constitution and section 30 of the repealed (1969) Constitution, the 2010 Constitution vests legislative authority as an exclusive role of Parliament not shared with the president.[40] Article 109 provides that Parliament shall exercise legislative power through bills passed by Parliament and assented to by the president; the role of the president in the law-making process is elaborated in the design for the assent and referral of legislative bills. Article 115, which regulates the assent and referral of bills, provides as follows:

> "(1) Within fourteen days after receipt of a Bill, the President shall –
> (a) assent to the Bill; or
> (b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.
> (2) If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part –
> (a) amend the Bill in light of the President's reservations; or
> (b) pass the Bill a second time without amendment.
> (3) If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.
> (4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported –
> (a) by two-thirds of members of the National Assembly; and
> (b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.
> (5) If Parliament has passed a Bill under clause (4) –
> (a) the appropriate Speaker shall within seven days re-submit it to the President; and
> (b) the President shall within seven days assent to the Bill.
> (6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under clause (5)(b), the Bill shall be taken to have been assented to on the expiry of that period."

In contrast to the text of section 46 of the repealed Constitution, article 115 does not contain an express provision empowering the president to return a bill back to Parliament by submitting a memorandum to the Speaker indicating the specific provisions of the bill which in his opinion should be reconsidered, including his recommendations for amendments. This constitutional design silence of omitting an explicit empowering provision for an amendatory recommendation poses an

40 The Constitution, arts 94(1) and 94(5).

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interpretation dilemma as to whether the practice should be retained in the post-2010 dispensation or whether the drafters intended to deny this power to the presidency.

The Speaker of the National Assembly has interpreted what he deems as constitutional silence to the effect that:[41]

> "despite the lack of an express provision in Article 115 requiring the President to submit his recommendations on a Bill, the Constitution does not prohibit this practice either, in line with the cardinal principle of interpretation of law that whatever is not prohibited by the Constitution or any law is presumed to be allowed by the same. A keen reading of Article 115 reveals that the President in referring a Bill back to Parliament has a mandatory obligation to note his reservations but may choose to include or not to include specific recommendations on how to deal with the reservation."

The effect of this interpretation is that, contrary to the conventional block veto, the veto power in article 115 is accompanied by amendment ability in the form of reservations, so the president has both negative and positive power. This is a holdover from the era between 1992 and 2010. It means that after Parliament passes a bill, the Kenyan president has another key agenda-setting tool: in addition to the typical block veto which allows the president to reject the entire bill, the Speaker of the National Assembly's interpretation of article 115 is that the president has the constitutional right to introduce take-it-or-leave-it amendments in the form of legislative recommendations. The effect of this is that it gives the president a tool to influence the passage of bills and a high degree of control of the legislative outcome. This prerogative enables presidents to respond to unwanted policy changes with an alternative proposal, making it a much more effective tool than the block veto, which can only be used to protect the status quo.[42]

The Speaker of the National Assembly and the courts have adopted an interpretation of article 115 to the effect that the counter-proposal (the "legislative recommendation") presented by the president is deemed to be accepted by Parliament so long as Parliament fails to marshal a super-majority of two-thirds of members in each chamber to insist on the original version of the bill.[43] Controversially, this also means that where the president's amendments to the bill are not accepted and Parliament cannot override the recommendation, then the bill, including the presidential reservation or recommendation, is the default outcome and is deemed to have been passed.[44] The same position applies where Parliament is unable to get a quorum of two-thirds of members of a chamber to sit during debate on the president's reservations.[45] This is a staggering conferral of a presidential role in the law-making process.

To sum up, article 115 and its interpretation by the Speaker and the courts grant the president broad influence over legislative outcomes. The prerogative to introduce legislative proposals in the form of a reservation recommendation, and the requirement that such a legislative recommendation

41 See the National Assembly Official Report (Hansard), Speaker's Communication: Consideration and Scope of Presidential Reservations, 28 July 2015 at 8–9; see also the National Assembly Official Report (Hansard), Speaker's Communication: Votes & Proceedings, Twelfth Parliament, 18 September 2018 at 778–79.

42 Alemán and Tsebelis "The origins", above at note 26 at 3.

43 Standing Order no 154(5), *Standing Orders of the National Assembly* (5th ed, Government Printer, 2013); see the Speaker's Communication (2015), above at note 41 at 4–14; see also the Speaker's Communication (2018), above at note 41 at 773–74. For judicial decisions see *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR; *Pevans East Africa Limited & Another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR; *Apollo Mboya v Attorney General & 2 others* [2018] eKLR; *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR; *Transparency International (TI Kenya) v Attorney General & 2 others* [2018] eKLR; and *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Another (Interested Parties)* [2019] eKLR.

44 Standing Order no 154(5).

45 Ibid.

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would be deemed as passed unless defeated through a super-majority, provide the Kenyan president with sufficient agenda-setting power to become the most prominent actor in law-making.

An empirical examination of the exercise of presidential veto in the post-2010 dispensation

To show how this institutional weaponry of amendatory recommendation affects legislative choice, the rest of this sub-section interrogates the practice of vetoing bills by the president in the post-2010 dispensation. It shows how the interpretation of presidential reservations adopted by the Speaker of the National Assembly and the courts has endowed presidents with the determinative power of legislative outcomes. In the post-2010 dispensation, the president has vetoed a number of bills and made legislative proposals which were subsequently approved by the National Assembly.[46] The following sub-section will be an in-depth interrogation of four bills whose enactment led to court litigation and adjudication over the interpretation of article 115.

Veto of the Kenya Information and Communications (Amendment) Bill 2013

The Kenya Information and Communications (Amendment) Bill 2013 was passed by the National Assembly on 31 October 2013 to amend the Kenya Information and Communications Act 1998.[47] On 26 November 2013, the National Assembly presented the bill to the president for assent. The passage of the bill triggered an outcry from opposition groups and the media, who urged the president to veto the bill, arguing that it would stunt democracy in a country which enjoys broad press freedoms.[48] The bill was criticised for providing disproportionate penalties targeting journalists and failing to give safeguards for the proportional application of sanctions, and also providing excessively broad functions and / or powers to regulators that would hamper the free and independent operation of media bodies and journalists.[49]

President Uhuru Kenyatta declined to assent to the bill. He issued a memorandum dated 27 November 2013 containing reservations to the bill and detailing the reasons for his refusal, making various proposals and recommendations for its amendment.[50] The president expressed concern about the constitutionality of a number of clauses in the bill. The memorandum contained a number of legislative recommendations proposing the deletion of some clauses in the bill and the introduction of new ones.

On 5 December 2013, the National Assembly debated the president's reservations, approved the recommendations made by the president without amendments and passed the bill.[51] The president then assented to the bill on 11 December 2013. Subsequent to the assent of the bill, media organizations the Editors' Guild, the Kenya Union of Journalists and the Kenya Correspondents Association challenged the constitutionality of the Kenya Information and Communications (Amendment) Act 2013 at the High Court.[52] The petitioners argued in court that the manner in

46 These bills include the Kenya Information and Communications (Amendment) Bill 2013; the Retirement Benefits (Deputy President and Designated State Officers) Bill 2013; the National Flag, Emblems and Names (Amendment) Bill 2013; the Public Procurement and Asset Disposal (Amendment) Bill 2013; the Central Bank of Kenya (Amendment) Bill 2014; the Statute Law Miscellaneous (Amendment) Bill 2014; the Police Service Commission (Amendment) Bill 2014; the Excise Duty (Amendment) Bill 2015; the Public Audit Act 2015; the Higher Education Loans Board (Amendment) Bill 2015; the Ethics and Anti-Corruption Commission (Amendment) Bill 2015; the Finance Bill 2017; the Refugee Bill 2017; the Finance Bill 2018; the Law of Contract (Amendment) Bill 2019; the Finance Bill 2019; the Parliamentary Pensions (Amendment) Bill 2019; the Employment (Amendment) Bill 2019; and the Parliamentary Service Bill 2019.

47 National Assembly Official Report (Hansard), Committee of the Whole House, 31 October 2013 at 47.

48 W Ugangu "Kenya's difficult political transitions ethnicity and the role of the media" in L Mukhongo and JW Macharia (eds) *Political Influence of the Media in Developing Countries* (2016, IGI Global) 21.

49 Article 19 *The Impact of Kenya's Legal and Institutional Frameworks on Media Freedom* (2014, Article 19) at 5.

50 National Assembly Official Report (Hansard), Communication from the Chair: Memorandum on the Kenya Information and Communications (Amendment) Bill 2013, 27 November 2013 at 26–27.

51 National Assembly Official Report (Hansard), Committee of the Whole House, 5 December 2013 at 31–42.

52 See *Nation Media Group*, above at note 43.

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which the bill was referred back to the National Assembly with recommendations on various clauses amounted to the president assigning himself a legislative role not contemplated or provided for in the Constitution, in violation of the doctrine of separation of powers. They further contended that the referral of the bill to the National Assembly with explicit reservations and suggested alternative clauses, and the acceptance of the recommendations by the National Assembly, amounted to a usurpation of legislative authority and a surrender by the National Assembly of their constitutionally vested power.

In a decision rendered by a three-judge bench consisting of Justices Isaac Lenaola, Mumbi Ngugi and Weldon Korir, the High Court noted that the petitioners had assigned a narrow meaning to the term "reservations" that was not in accord with the Constitution. It was the court's holding that it does not expect the president to simply state "I have reservations about this Bill", since without more information in the memorandum, there would be nothing for the legislature to consider, accommodate or reject. This led to the determination that the president properly exercised his constitutional mandate as is vested in his office under article 115.[53]

Veto of the Retirement Benefits (Deputy President and Designated State Officers) Bill 2013

The Retirement Benefits (Deputy President and Designated State Officers) Bill 2013 was intended to provide for the granting of pension and other retirement benefits to persons who have held the office of Deputy President, Prime Minister, Vice-President, Speaker, Deputy Chief Justice or Chief Justice after 1 January 1993. The National Assembly passed the bill in April 2015 and transmitted the bill to the president for assent on 13 May 2015. However, on 27 May 2015, the president returned the bill to the National Assembly for reconsideration with a memorandum containing his reservations.[54] The memorandum contained recommendations that consisted of the deletion of some clauses and the proposing of additional clauses to be included in the bill.

The president's legislative recommendations were considered and passed by the National Assembly on 18 June 2018.[55] The president thereafter assented to the bill on 19 June 2015. Subsequent to assent, a coalition of opposition political parties, the Coalition for Reforms and Democracy, challenged the constitutionality of the legislation in court. This was informed by the fact that the legislative proposals suggested by the president affected the payment of retirement benefits to the leaders of the opposition coalition, ie the presidential candidate and rival to the president in the 2013 and 2017 general elections Hon. Raila Odinga and his running mate Hon. Kalonzo Musyoka, who had previously served as Prime Minister and Vice-President respectively.[56]

In the petition filed at the High Court, the petitioner argued that the powers of the president under article 115 are limited to making reservations and do not extend to making or sharing of legislative powers with the National Assembly or the Senate, and that any proposed amendments to delete or insert new clauses is unconstitutional.[57] The petitioner therefore prayed that the court make a finding that the reservations and proposed amendments contained in the memorandum by the president to the National Assembly during the processing of the Retirement Benefits (Deputy President and Designated State Officers) Bill 2013, and other bills, were in breach of the Constitution.

The High Court, in a bench comprising of Justices Pauline Nyamweya, Wilfrida Okwany and John M Mativo, held that the presidential powers of assent and referral of bills under article 115

53 Id, paras 129–37.

54 National Assembly Official Report (Hansard), Referral of Bills by the President, 9 June 2015 at 1–2.

55 National Assembly Official Report (Hansard), The Retirement Benefits (Deputy President and Designated State Officers) Bill, 18 June 2015 at 40–43.

56 A Shiundu "President Uhuru denies Raila Odinga and Kalonzo Musyoka pension", available at: <https://www.standardmedia.co.ke/kenya/article/2000162370/president-uhuru-denies-raila-odinga-and-kalonzo-musyoka-pension> (accessed 4 August 2022).

57 *Coalition for Reforms and Democracy*, above at note 43.

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permit the president to play a key role in the legislative process. Thus, under the Constitution, Parliament and the president share legislative powers and functions, with the former making laws to which the latter must assent if they are to come into force.[58] The High Court proceeded to endorse the view that the Constitution in article 115 does not provide any specific mode or format for the exercise of the power of reservation; in essence, it is at the discretion of the president.[59] The court proceeded to hold that since the Constitution does not restrict the president as to the format that a reservation will take, what is relevant is that such a format adequately and clearly communicates the president's qualifications or doubts about a bill.[60] This led to a finding that the president had exercised his veto power within the terms of the Constitution.

Veto of the Public Audit Bill 2014

The Public Audit Bill 2014 was aimed at elaborating and regulating the functions and powers of the Office of the Auditor General as established by the Constitution. The National Assembly and the Senate considered and passed the bill, and it was thereafter transmitted to the president for assent on 27 May 2015. However, on 10 June 2015, the president, by way of a memorandum, referred the bill back to Parliament for reconsideration, recommending specific amendments, deletions and additional clauses in the bill.[61] The National Assembly and the Senate reconsidered and passed the bill on 23 June 2015 and 16 December 2015,[62] respectively fully accommodating the president's reservations and recommendations. The bill was subsequently assented to on 18 December 2015.

Subsequent to assent of the bill, a non-governmental organisation in the governance sector, Transparency International, moved to the High Court to challenge the constitutionality of the law. Among other arguments, the petitioner alleged that the president played an active role in legislating by suggesting new amendments to the bill; thus the president exceeded his mandate of "noting reservations" by actually drafting replacements for sections of the law he disliked.[63] Thus the High Court was faced with the questions of whether the president actively participated in the legislative process due to the manner in which he noted his reservations and whether that violated the law-making process.

In answer, the High Court (Justice Chacha Mwita) agreed with the decision of the bench in the judgment on the Kenya Information and Communications (Amendment) Act 2013, noting that the court was unable to find fault with the procedure adopted by the president in making his reservations, which included recommending text that both Houses passed when it was returned to Parliament.[64] With regard to the implication of the higher voting requirement, the judge held as follows:

> "The President's reservations were expressed in his memorandum to Parliament in the form of several recommendations and suggestions that Parliament eventually approved and passed without amendments. The drafters of our Constitution must have intended that the President's reservations should almost prevail when they imposed a higher thresh-hold [sic] of two thirds of members in order to reject or amend the reservations."[65]

58 Id, para 52.
59 Id, para 59.
60 Id, para 61.
61 National Assembly Official Report (Hansard), Communication from the Chair: Referral of Public Procurement and Asset Disposal Bill / Public Audit Bill 2014, 11 June 2015 at 1–2.
62 Senate Debates Official Report (Hansard), Messages from the National Assembly: Presidential Memorandum on the Public Audit Bill, 14 July 2015 at 1–2; Senate Debates Official Report (Hansard), Report: The Public Audit Bill, 16 December 2015 at 26–32.
63 *Transparency International*, above at note 43.
64 Id, paras 137–38.
65 Id, para 133.

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In effect, Justice Mwita claimed a "structural constitutional bias" in favour of the president in the balance of power as to which policy choices and objectives should prevail between the contested preferred outcomes by Parliament and the president.[66]

Veto of the Finance Bill 2017

The National Assembly passed the Finance Bill 2017 on 30 May 2017; thereafter, the bill was presented to the president for assent. However, the president, by way of memorandum, referred the bill back to the National Assembly for reconsideration,[67] arguing that tax on betting was important and adding that clauses 26 to 29 were designed to discourage the youth from focusing on betting, instead redirecting them to engage in productive economic activities.[68] The president went on to recommend an amendment to impose a 35 per cent levy on betting, saying the exclusion of the clauses went against the intent of the proposed taxes. The National Assembly considered and passed the president's recommendations on 15 June 2017, paving the way for assent of the bill.[69]

Subsequent to the enactment of the law, two licensed operators of gaming, lotteries, betting and price competitions, Pevans East Africa Limited and Bradley Limited T/A Pambazuka National Lottery, went to court to challenge the constitutionality of the law. One of the grounds for their claim of unconstitutionality was that the president had overstepped his mandate under article 115 by referring back the Finance Bill 2017 with reservations, including a recommendation on the rates of taxation applicable to betting, lotteries and gaming activities.[70]

The High Court (Justice John M Mativo) affirmed the role of the president in the law-making process. The court adopted the view that the constitutional power of the president to state what is wrong with the bill can be done without making recommendations or proposals to Parliament to avoid the danger of being perceived to be descending to the legislative arena, which is a function of Parliament. However, to the extent that Members of Parliament have the constitutional safeguard and freedom to reject the recommendations, it would be unsafe to conclude that they were influenced by the president's proposal.[71] On appeal, the Court of Appeal (in a three-judge bench consisting of Justices Waki, M'Inoti and Murgor) affirmed the finding of the High Court.[72]

The construction of the exercise of the presidential veto in the post-2010 dispensation

It is noteworthy that in the ten-year period from 2010 to 2020, the president vetoed nineteen bills. This shows that Parliament is increasingly adopting an independent and divergent policy stance from that of the executive branch. However, for the legislature to be a significant and decisive player in governance and policy-making processes, it should be able to prevail whenever there is policy conflict between the political branches. This has not materialised, as Parliament has not been able to override the president's veto and legislative recommendations even in a single instance. This is partly due to the fact that the party system in Kenya exhibits a high degree of fragmentation,[73] making the overriding of a presidential recommendation without the super-majority requirement difficult.

66 For enunciation of the notion of "structural constitutional bias" see J Gould and D Pozen "Structural biases in structural constitutional law", available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797051> (accessed 4 March 2021).

67 National Assembly Official Report (Hansard), Message: Presidential Memorandum on the Finance Bill 2017, 14 June 2017 at 1–2.

68 J Chelegat "How tax on betting made Uhuru reject 2017 Finance Bill", available at: <https://citizentv.co.ke/news/how-tax-on-betting-made-uhuru-reject-2017-finance-bill-168113/> (accessed 23 February 2021).

69 National Assembly Official Report (Hansard), The President's Reservations to the Finance Bill 2017, 15 June 2017 at 82–86.

70 *Pevans East Africa Limited* [2017], above at note 43.

71 Id, para 103.

72 *Pevans East Africa Limited* [2018], above at note 43.

73 See in this regard SK Keverenge "Political party formation and alliances: A case of Kenya" (PhD thesis, Atlantic International University, 2008).

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The president has taken advantage of the inability of Parliament to override his legislative recommendations, turning the veto into an active instrument for getting his desired policy outcomes to prevail. Due to this state of affairs, on 6 November 2019 members of the National Assembly boycotted the House, protesting against what they called "incessant memorandums" by the president overturning bills passed by Parliament.[74] The ruling Jubilee Party's majority whip, Hon. Benjamin Washiali, who is tasked with rallying the House to ensure the passage of the ruling party's and the president's agenda, explained the boycott as being occasioned by members expressing their frustration with an attempt by the president to legislate on their behalf. To quote him: "Members seem fed up with these memoranda. They want space to undertake their legislation [sic] mandate."[75]

The fact that the veto and positive presidential recommendations can only be overridden by a super-majority has given the president sway in the legislative domain;[76] he has used the leeway to make positive legislative proposals by increasing the frequency of invoking the veto and making significant legislative suggestions.[77] The result is that the president has been transformed into a "super-legislator" and has become the most significant player in the law-making process.[78] In addition, the courts have been unable to defend the legislature's law-making primacy, while it is the judiciary that is ordinarily expected to serve as a veritable check on the powers of state organs like the presidency,[79] strengthen democratic rule[80] and serve a guardianship role over the legislature.[81] In effect, both the Speaker of the National Assembly and the courts have abetted an alarming rise of presidential power by allowing the president to serve as lawmaker-in-chief.

However, while the constitutional anchorage of the president's veto power over bills must be acknowledged, two questions arise from the exercise of this power in post-2010 Kenya: does article 115 envisage an amendatory veto which allows the president to make positive legislative proposals when expressing reservations to a bill? And even if such a positive amendatory veto were permissible, what is the right majority threshold of the legislature for overriding the president's positive recommendations? These two questions will be the subject of critical examination in the next section.

74 M Mwai and A Mwangi "MPs now protest incessant memorandums", available at: <https://www.pd.co.ke/news/national/mps-now-protest-uhuru-incessant-memorandums-12559/> (accessed 23 February 2021).

75 M Odhiambo "House adjourns as MPs protest Uhuru veto on bills", available at: <https://www.the-star.co.ke/news/2019-11-06-house-adjourns-as-mps-protest-uhuru-veto-on-bills/> (accessed 22 February 2021).

76 VO Mrimba "From rubberstamp to transformative legislature" (MA thesis, University of Bergen, 2012).

77 G Kegoro "Uhuru could be overreaching his mandate in law making", available at: <https://nation.africa/kenya/blogs-opinion/opinion/uhuru-could-be-over-reaching-his-mandate-in-law-making-1122076> (accessed 6 March 2021).

78 JC Ghai and Y Ghai "The contribution of the South African constitution to Kenya's constitution" in R Dixon and T Roux (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (2018, Cambridge University Press) 277.

79 See S Issacharoff *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015, Cambridge University Press), who argues that courts may be well positioned to weaken presidential power and improve the functioning of the legislature, largely by regulating legislative procedure. See also N Robinson "Expanding judiciaries: India and the rise of the good governance court" (2009) 8 *Washington University Global Studies Law Review* 16; D Landau "Political institutions and judicial role in comparative constitutional law" (2010) 51 *Harvard International Law Journal* 345; D Landau "Political support and structural constitutional law" (2016) 67 *Alaska Law Review* 1069. However, for a contrary view see TG Daly *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (2017, Cambridge University Press), who argues that prevailing theories and institutions have placed too much weight on courts for stabilizing and building transitional democracies.

80 MOA Alabi "The legislatures in Africa: A trajectory of weakness" (2009) 3/5 *African Journal of Political Science and International Relations* 239.

81 See WO Khobe "Constitutional guardianship in Kenya's bicameral legislature: An assessment of judicial intervention in inter-cameral disputes over the enactment of the Division of Revenue Bill" (2021) 6 *Strathmore Law Journal* 1.

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Article 115 of the Constitution does not envisage positive amendatory presidential recommendation

It is not contested that the text of article 115 of the Constitution, unlike section 46 of the repealed Constitution, does not explicitly provide for amendatory presidential recommendations when the president refers a bill back to Parliament for reconsideration. Despite this lack of explicit textual imprimatur, the Speaker of the National Assembly and the courts have held that the lack of an explicit bar to the exercise of such a power means that it is permissible for the president to exercise this referral power. This raises questions as to whether such an approach subverts the intention and constitutional design choice made by the drafters of the Constitution.

Constitutional design choice not constitutional silence

Given that the drafters of the Constitution had various design options, including the absolute block veto, qualified block veto and amendatory veto, the fact that the text only supports the qualified block veto means that for the Speaker of the National Assembly and the courts to claim that the other options not selected by the drafters are also permitted amounts to an interpretive overreach. Any interpretation of article 115 should always bear in mind that the overarching goal of constitutional reforms in Kenya was to restore a more balanced separation of powers, by taking measures to submit the president to stronger forms of control while strengthening Parliament.[82] Taking into account this historical context and purpose of the Constitution, the omission of amendatory presidential recommendation power that had been present in the repealed Constitution should be taken as a conscious and deliberate design choice.

A comparative illustration with constitutional design choice with respect to systems of government helps make the point. Constitutional drafters have various systems of government design options to pick from, including a presidential system, a semi-presidential system or a parliamentary system of government. For example, when the drafters of the 2010 Constitution opted for a presidential system of government, there is no requirement that they should explicitly state in the text of the Constitution that they have rejected the parliamentary model of government; it goes without saying that the alternative systems have been rejected. With the options of an absolute block veto, a qualified block veto and an amendatory veto on the table, the drafters of the Constitution explicitly textualized a qualified block veto design; hence it would be wrong to engage in illegitimate constitutional interpretation, which does not have a foundation in the text, to bring in the amendatory veto that was not sanctioned. A comparative study of the constitutional architecture and design of the presidential veto in Kenya's history shows that whenever an amendatory veto is adopted, it is always explicitly textualized. This was the case with the repealed Kenyan Constitution through section 46 as amended in 1992. Thus it can be safely concluded that failure to textualize an amendatory veto was a conscious constitutional design choice by the drafters; thus it would amount to an illegitimate amendment to the Constitution to claim that an amendatory veto can be introduced through constitutional interpretation.

Reservations not a licence for amendatory veto

A final piece of evidence that the drafters of the Constitution had the intention of embracing a restrictive view of presidential veto is the change from the repealed Constitution to the 2010 Constitution in the textual formulation of the veto. If the ideological commitment to presidential supremacy in the law-making process was strong, one would expect to see it reflected in the norms textualized in article 115 of the Constitution, as under section 46 of the repealed Constitution. It should be recalled that constitutions are rarely written on a blank slate; previous

82 B Sihanya "The presidency and public authority in Kenya's new constitutional order" (SID Constitutional Working Paper no 2, 2011).

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documents often serve as a template. To the extent that Kenyans wanted to constrain the presidential influence in the law-making process, they withheld and restricted the scope of the veto.

What was intended by the constitutional drafters in talking about presidential "reservations" in the text of article 115 is what is called in other jurisdictions a "statement of reasons".[83] A statement of reasons is a way in which a constitution can prevent the arbitrary or capricious use of the veto power, while keeping responsibility in the hands of the president, by requiring any veto to be accompanied by a statement of the president's objections, giving a reasoned justification for the exercise of the veto power.[84] The accompanying veto statement also gives the president an opportunity to lay out precisely what is wrong with the bill and to specify how the bill could be improved.[85] The emerging picture is that the "reservations" envisaged in article 115 are different from the amendatory powers that the president has claimed to propose positive legislative provisions to the legislature when declining to assent to a bill.

Simple majority of the legislature suffices to override a positive amendatory recommendation

It should be underscored that the presidential veto power depends on the legislature as a counterpower to muster the ability to override the actions of the president. The number of legislators required to override a positive presidential recommendation structures the dynamics of inter-branch bargaining. Larger override requirements make it more difficult for a legislature to assemble a large enough coalition to override a presidential recommendation, thereby meaning that outcomes closer to the executive's preferences are generated. In other words, when the president vetoes a legislative proposal, the members of the legislature should be able to muster enough votes to overturn the veto.[86] Thus the ability of the legislature to overturn a presidential veto signals that the legislature has effective influence in shaping public policy in a polity.

However, the National Assembly Speaker's interpretation of article 115(4) of the Constitution, as codified in Standing Order no 154 of the National Assembly and endorsed by the High Court and the Court of Appeal, that to override the president's positive legislative recommendations requires two-thirds of the membership, undermines the legislature's role in the law-making process. This is evident in the fact that despite a record of nineteen bills being vetoed by the president, the legislature has been unable to override even a single veto. In effect, this state of affairs gives the president a remarkably privileged opportunity to get his views made law,[87] and is contrary to the intention of the drafters of the Constitution.

The textual hook: The import of Article 122(1) of the Constitution

Article 122(1) of the Constitution provides that "[e]xcept as otherwise provided in this Constitution, any question proposed for decision in either House of Parliament shall be determined by a majority of the members in that House, present and voting". The implication of this provision is clear: whenever the Constitution has not indicated the voting threshold for any question, then such a question shall be determined by a majority of the members of a House of Parliament.

In the context of the presidential positive legislative recommendations, the Speaker of the National Assembly and the courts have correctly held that the president has no explicit power to exercise such a power in the Constitution. However, they have gone on to imply that the exercise

83 International IDEA, *Presidential Veto Powers* (2015, International IDEA) at 11.

84 See for example Constitution of the United States, art 2, sec 7.

85 International IDEA, *Presidential Veto Powers*, above at note 83 at 11.

86 G Tsebelis *Veto Players: How Political Institutions Work* (2002, Princeton University Press); see also G Tsebelis "Decision making in political systems: Veto players in presidentialism, parliamentarism, multicameralism and multipartyism" (1995) 25/3 *British Journal of Political Science* 289.

87 JC Ghai "Law making and the president (and governors)", available at: <https://katibainstitute.org/law-making-and-the-president-and-governors/> (accessed 6 March 2021).

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of the presidential veto is not explicitly barred by the Constitution, hence is permissible; this means that the Constitution itself does not stipulate the threshold for overriding the presidential positive legislative recommendations. That means that were these recommendations to be accepted as a legitimate format for the exercise of presidential power, the answer to the question on the threshold for overriding such a recommendation lies in article 122(1) of the Constitution. Given that the Constitution does prescribe a specific voting majority for overriding the presidential recommendations, then a simple majority of the members of a House suffices to override such recommendations.

The value of democratic governance and value-laden interpretation of the Constitution

It is glaringly obvious that the courts have embraced the literal-formalist approach to constitutional interpretation in the cases under study. This is contrary to the theory of constitutional interpretation decreed by the Constitution. It is noteworthy that articles 10 and 259 of the Constitution demand that it should be interpreted in a manner that promotes its values and principles; the message is that the Constitution is the moral sail of the country and that its value-oriented nature disavows an interpretative approach that is formalistic and literal. Instead, it demands an interpretation which entails "getting under the skin" of the Constitution in order to look for the best possible meaning so as to secure the realisation of its values and principles.[88] This approach sees provisions in the Constitution not as ends in themselves, but as having an instrumental value; that is, the Constitution is an instrument for the realisation of the values underpinning it. Relevant in the context of interpreting article 115 is the fact that article 94(4) proclaims that legislative power is premised on fostering democratic governance in public life. In addition, article 10(2) stipulates that the national values and principles of governance include democratic and good governance. Thus any interpretation of article 115 should be geared towards the goal of promoting and securing democratic governance.

It is my argument that the Speaker of the National Assembly and the courts have interpreted article 115(4) in a manner that subverts, rather than furthers, the goal of promoting and securing the values and principles of democratic governance. The implication of the requirement of a supermajority to override the president's recommendations is that it suggests that through article 115(4), the Kenyan president can legislate with a minority of only a third of the Members of Parliament. This strikes at and diminishes the legislative authority vested in Parliament and violates the principle of democratic governance enshrined in articles 10 and 94(4) of the Constitution. The implication of this state of affairs is that effective legislative checks on the executive branch are diminished.[89] It means that it is possible for the president in post-2010 Kenya to make and announce major policy or legislative decisions and changes without the concurrence of Parliament. The interpretation of article 115 advanced here links it to the underlying substantive values and principles of the Constitution as provided in articles 10 and 94(4), such as the realization of democratic governance. Thus the courts should limit the concentration of power by the executive when such concentration threatens the attainment of the value of democratic governance.[90] This

88 On the value order established by the Constitution, see WO Khobe "The jurisdictional remit of the Supreme Court of Kenya over questions involving the 'interpretation and application' of the Constitution" (2020) 5 *Kabarak Journal of Law and Ethics* 1. See also *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, paras 364–66.

89 As has been pointed out by Joel Barkan, the institutional features necessary to balance power between the executive and legislature include *the possibility of passing legislation without assent of the president or overruling a presidential veto.* See J Barkan "Legislatures on the rise?" (2008) 19/2 *Journal of Democracy* 124.

90 The Colombian Constitutional Court in Decision C-097 of 2007 held that "[i]n a democratic state the grand democratic political decisions correspond to the organ of popular representation and pluralistic deliberation, not to the executive. Grants of a blank cheque to the executive constitute a way to elude this democratic responsibility." Similarly, the Constitutional Court of Hungary in Decision no 4 of 1993 stated: "Any interpretation which would exclude the simple majority from deliberating according to its political considerations … would contradict the essence of parliamentarianism … [The requirement of a two-thirds majority] would amount to a restriction which is unjustifiable in the case of a

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becomes imperative, as measures such as taxation, which was the subject of dispute between the president and the National Assembly with respect to the enactment of the Finance Bills in 2017, 2018 and 2019,[91] should ordinarily be determined through democratic debate in Parliament, not through unilateral action of the president. It is a truism that in a democratic society founded on the sovereign will of the people, decisions that greatly impact the society should be adopted by the elected body where pluralistic discussion takes place, and not by the president.[92] Therefore an interpretation of article 115 that concentrates power on the president threatens the goal of securing democratic governance in a polity.[93]

The historical context argument

Tempering the power of the presidency was the animating goal of the quest for a new constitutional dispensation in Kenya. However, the interpretation of article 115(4) that a super-majority requirement is required to override a president's positive legislative recommendations leads to a state of affairs where the presidency continues to dominate the governance and policy-making domain. By the courts adopting a literal-formalist approach to constitutional interpretation, they have ended up not benefiting from the historical context that would have enabled them to discern the purpose of the constitutional provisions implicated in the dispute.

At the interpretive methodological level, historical context should animate the approach to interpretation of the exercise of the presidential veto, as this approach is linked to a purposive reading of the Constitution.[94] However, the approach adopted by the Speaker of the National Assembly and the courts in interpreting article 115(4) have ignored this context. In effect, the Speaker and the courts have interpreted article 115(4) in a manner that renders the historical context immaterial and without any bearing on the resolution of the dispute over the province and limits of the exercise of the veto power by the president. It is notable that the Speaker and the courts have exhausted scarcely any constitutional precautions in approaching presidential power in the veto context, with the animating impulse behind constitution-making hardly registering in their approach to the exercise of presidential veto thinking; it should.

A context-sensitive approach to constitutional interpretation takes into account the country's agonised history of the fight to temper presidential powers, and squares this with the Constitution's ultimate ends of creating an accountable and democratic system of governance, in order to come to the conclusion that the presidential legislative recommendations must be capable

Constitution based on principles of parliamentarianism … The Court has consistently held that safeguarding the functioning of the parliamentary system and within it the capacity of Parliament to deliberate and provide firm and efficient government is decisive, in its deliberations." See also A Sajo "Reading the invisible constitution: Judicial review in Hungary" (1995) 15/2 *Oxford Journal of Legal Studies* 253.

91 Twea J of the High Court of Malawi, in *The State, The President of Malawi and others v ex-parte Malawi Law Society and others* [2002–03] MLR 409 (HC), held as follows at 415: "[S]ection 48 of the Constitution vests all legislative powers in Parliament and under section 58(2) Parliament is prohibited from delegating legislative powers that substantially and significantly affect the fundamental rights and freedoms recognized by the Constitution. The President under the Constitution therefore, does not have power to make laws."

92 The Supreme Court of Israel, in *Rubinstein v Minister of Defence* [1997] HC 3267, held in this regard that "the substantive decisions regarding the policy of the state and the needs of the society must be made by its popularly elected representatives. The legislature is elected to by the people to enact its laws, and it therefore enjoys social legitimacy in this activity … The legislature may not refer the critical and difficult decisions to the executive without its guidance." See also A Barak *The Judge in a Democracy* (2006, Princeton University Press).

93 See generally R Gargarella *Latin American Constitutionalism, 1890–2010: The Engine Room of the Constitution* (2013, Oxford University Press) for the assertion that the maintenance and strengthening of an organization of power where authority is centralized in presidents' "hyper-presidentialism" jeopardizes people's individual freedom and neutralizes or undermines the progress towards equality and citizenry empowerment that could be expected from an increase in the number of human rights recognized in a constitution.

94 C Abungu "Revisiting the place of preparatory documents in the interpretation of transformative constitutions" (2019) 13/1 *Vienna Journal on International Constitutional Law* 65; see also W Khobe "The Supreme Court versus Royal Media Services: History as 'super context' in constitutional interpretation" (2018) 34 *The Platform* 50.

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of being repudiated by the legislature. For the president to use his or her recommendations to amass both legislative and executive power would have been unthinkable to the drafters of the Constitution and to Kenyans during its ratification through the referendum in 2010. Taking into account the overarching goal of constitution reforms in Kenya as being the tempering of presidential power, to insist on a two-thirds vote in the legislature to override a positive presidential legislative recommendation means that the country is not upholding fidelity to the veto as it was intended to work, but is in effect engaging in its perversion.

Conclusion

The vesting of a positive presidential role in the legislative process promotes undemocratic tendencies of government which were historically present in pre-2010 Kenya. This contrasts with the expectation that the post-2010 dispensation would lead to the enhancement of democratic governance. The claiming without textual backing of a supra-legislative role for the presidency, through the power to make positive legislative proposals that can only be overridden by a super-majority in the legislature, seems like a return to the old order of authoritarian governance. It fails to ensure the realization of the goal of vesting legislative power in the legislative branch, as articulated in article 94 of the Constitution, and of a fair balance of powers between the branches of government. This has led to a situation where the legislature is weak and has turned into a rubber stamp for the president's policy positions, contrary to the intention of the Constitution which is to temper the powers of the presidency.

Conflicts of interest. None

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