



**August 2021**

## **THE APPELLATE COURT'S RULING ON THE BBI INITIATIVE AND ITS IMPLICATIONS FOR WOMEN'S LEADERSHIP**

### **Background**

On 20<sup>th</sup> August 2021, the Court of Appeal, upheld the Constitutional and Human Rights Division of the High Court of Kenya ruling that the Constitution of Kenya (Amendment) Bill, 2020, was unconstitutional, null and void.

The Constitution Amendment Bill 2020 was an outcome of the Building Bridges Initiative (BBI), an effort by H.E President Kenyatta and Rt. Hon. Raila Odinga, the leading contenders for the presidential election in 2017. With its nine-point agenda, the BBI was expected to generally improve governance and prevent future post-election violence like that of the aftermath of the 2017 elections.

The seven-judge bench advanced various arguments to arrive at this ruling in which they also found that H.E President Uhuru Kenyatta had no authority to promote an amendment of the Constitution through a popular initiative and that he can be sued in respect to his actions or omissions in the Constitution. Moreover, a permanent injunction was issued restraining the IEBC from processing the bill or subjecting it to a referendum.

### **The final orders of the Appellate Court were as follows:**

- A. The upholding of the judgment of the High Court in affirmation of the following:
- i. The basic structure doctrine is applicable in Kenya (Sichale, J. A. dissenting).
  - ii. The basic structure doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution (Okwengu & Sichale, JJ. A. dissenting).
  - iii. The basic structure of the Constitution can only be altered through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum (Okwengu, Gatembu & Sichale, JJ. A. dissenting).
  - iv. Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in

- respect of anything done or not done contrary to the Constitution (Tuiyott, J. A. dissenting).
- v. The President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution.
  - vi. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (The BBI Steering Committee) has no legal capacity towards promoting constitutional changes.
  - vii. The Constitution of Kenya (Amendment) Bill, 2020 cannot be subjected to a referendum in the absence of evidence of continuous voter registration by IEBC.
  - viii. The IEBC does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification of whether the initiative as submitted by the BBI secretariat is supported by the requisite number of registered voters in accordance with Article 257 (4) of the constitution.
  - ix. At the time of the launch of the Constitution of Kenya Amendment Bill 2020 and the collection of endorsement signatures, there was neither legislation governing the collection, presentation and verification of signatures nor an adequate legal framework to govern the conduct of the referendum.
  - x. County Assemblies and Parliament cannot, as part of their constitutional mandate change the contents of the Constitution of Kenya Amendment Bill 2020 initiated through a popular initiative under Article 257 of the constitution.
  - xi. The second schedule of the Constitution of Kenya Amendment Bill 2020, in so far as it purports to predetermine the allocation of the proposed additional 70 constituencies and to direct the IEBC on its functions of constituency delimitation, is unconstitutional.
  - xii. The administrative procedures for the verification of signatures in support of the constitutional amendment referendum made by IEBC are illegal, null and void because they were made without a quorum and in violation of sections (6) and (11) of the Statutory Instruments Act 2013.
  - xiii. A permanent injunction be, and is hereby, issued restraining IEBC from undertaking any processes required under Article 257 (4) and (5) in respect of the Constitution of Kenya Amendment Bill 2020.

### **Implications of the BBI Ruling on Women's Leadership**

Following the delivery of this ruling, the BBI proponents vowed to move to the Supreme Court seeking to challenge the Appellate Court's decision to uphold the ruling made by the Constitutional and Human Rights Division at the High Court to suspend the constitutional change process. The following glaring scenarios could impact women's leadership.

- i. All gains by women lost
- ii. Political divisions
- iii. Heightened political temperatures

iv. Status quo

## **Scenarios**

### **1: The Supreme Court upholds the Court of Appeal Ruling and maintains that the Law Amendment Process as unconstitutional, null and void**

This will retain the status quo further emboldening the anti-gender parity forces to erode and claw back the gains envisaged. This will lead to frustrations among the gender champions.

Retaining the status quo does not guarantee the two thirds gender rule in the event that BBI is not passed which muzzles the voice of women as they remain structurally disadvantaged. However, establishing structures and minimum threshold for political parties to nominate a given number of women consequently implying that women run and eventually win numerous elective seats.

Anti BBI proponents will intensify calls for the proper and full implementation of the CoK 2010 to ensure women gains therein are realized.

### **2: The Supreme Court overturns the ruling made by the Court of Appeal**

While this is a very unlikely scenario, it could pave the way for a referendum and if a majority of Kenyans vote in favor of the Bill, the following shall unfold:

The two thirds gender rule will be realized in all elective and appointive positions through the full implementation of article 27 of the COK, BBI, policy legislative and administrative interventions thus expanding the space for women's leadership.

Passing the BBI will create gender parity in the Senate without necessarily making it the Upper House with veto powers over the National Assembly decisions.

BBI recommends 50/50 membership of the Senate but creates 70 geographical constituencies. 'Top up' still needed to comply with the 2/3 gender rule in the National Assembly and mechanisms for auditing appointive offices for compliance with the view of sanctioning noncompliance.

### **3: The proponents led by the Attorney General decide to appeal the BBI ruling from the Supreme Court in a bid to overturn the Court of Appeal judgement.**

This could also see the Supreme Court rule with finality on all the issues raised including those that were dissenting from the Seven judge bench of the Court of Appeal. Some of the contentious issues could include:

- i. The applicability of the basic structure doctrine
- ii. Popular initiative threshold
- iii. Presidential immunity on initiating a constitutional amendment process

### **4: Amendment of the Constitution by Parliamentary Initiative as provided for by Article 256**

This would involve exploring alternative avenues to amend certain clauses of the Constitution of

Kenya (Amendment), Bill 2020. Parliamentarians have reportedly selected 52 clauses out of the 74 amendments in the BBI bill.

These include:

- i. Increasing constituencies from 290 to 360
- ii. Protection of 26 constituencies that are at risk of being scrapped due to low population quoru
- iii. Nomination of presidential candidates and their running mates to parliament
- iv. Members of Parliament to be made cabinet secretaries
- v. Increasing the allocation to counties to at least 35%
- vi. Creation of theaWard Development Fund
- vii. Seven-year tax break to the youth
- viii. Creation of a Youth Commission – by amending Article 55 of the law on their rights. It will consist of a chairman and six members appointed by the president with the approval of the Senate and hold office for a single term of four years.

**With the fate of the Constitution of Kenya (Amendment) Bill unknown, Women may not realize the following Gender Provisions:**

1. The National Assembly will now comply with the not more than two third gender rule fully. This is through the 360 constituency seats, nomination of four members representing persons with disabilities and two members representing the youth; half being women – and the special seats necessary to ensure realization of the not more than two third gender rule.
2. There is introduced the Best Loser Principle to encourage women who wish to be elected on political party lists to be those that have competed and lost. However, consideration and precedence will be given to those that will have received the greatest number of votes. The filling of the special seats' positions will be determined after declaration of elected members from each constituency or ward.
3. Affirmative Action Sunset clause – capped at 15 years for the National Assembly and 10 years for the County Assembly. The assumption is that parity will have been met.
4. A Senate that meets gender parity – a balanced 50:50 representation of elected men and women, offering equal power especially to determine county allocations that the proposed constitutional amendment has now set at 35% with at least 5% meant for the ward development fund.
5. The Governor and Deputy Governor should be of the opposite gender.
6. The Council of Governors will have two nominees at the Commission for Revenue Allocation that generates the County Revenue Formula. One of the COG nominees must be a woman.
7. The Political Parties are bound to provide to IEBC a list of candidates that is two third gender compliant and further provides for inclusion of persons with disability. There are sanctions for the Political Parties thus fail to comply.

8. Protection and entrenchment of Article 43 – Rights of Health, Housing, Food, Water, Education and Social Security as priority budget items in public finance. The President must address implementation of Article 43 in the annual State of the Nation Address as an accountability mechanism.
9. The Ward Development Fund shall be used to implement priority County Government Functions among others, the rights under Article 43. The Constituency Development Fund will be used for priority National Government Development. Currently, Agenda 4 programmes are centred around Article 43.
10. Protection against Sexual and Gender Based Violence (SGBV) including during elections, teenage pregnancies and early girl marriage. Electoral violence against women is now aggravated assault with harsh penalties.
11. The Citizen Responsibility section is introduced capturing citizens’ responsibilities including parental guidance. This is positive to nurture strong families and make our children responsible citizens as well.
12. The Establishment of the Office of the Judiciary Ombudsman will facilitate receiving and hearing of complaints from citizens on performance of the Judiciary. Barriers women continue to face in access to justice will be addressed as part of the transparency and accountability measures.
13. A Youth Commission is established. Its composition represents diversity and meets not more than two third gender rule. Its functions help integrate youth agenda in public and private sphere. Youth perspectives are also to be mainstreamed in the country’s development agenda. There shall also be facilitated generational mentorship and integration of African traditional values and cultures among the young people.
14. Administrative guidelines on women economic empowerment including women access to procurement opportunities. The business incubation centres and inclusion of an economy clause in the Constitution will greatly aid women in business. Women must be part of the baking and sharing of the national cake.
15. Establishment of the Health Services Commission to monitor the right to health standards is great.
16. Inclusion of the policy guide on Unity and Diversity. The Kenya National Policy Guide on Unity in Diversity including gender issues and gender mainstreaming and addressing intersectionality issues – women with disabilities, young women and women from minority communities.

## **Conclusion**

With the collapse of the Constitution of Kenya (Amendment) Bill, 2020 seemingly evident, the raft of provisions to advance gender equality by propelling more women to leadership and decision-making spaces remain in limbo. Our clarion call is to therefore push for some of the provisions through a parliamentary initiative. Should the parliamentary initiative way fail to bear

fruits, women should demand for the implementation of their constitutionally guaranteed rights in order to ensure an expanded space for women's leadership.