

May 2021

THE BBI RULING AND ITS IMPLICATIONS FOR WOMEN'S LEADERSHIP

Background

On 13th May 2021, the Constitutional and Human Rights Division of the High Court of Kenya handed down its landmark judicial verdict on the seven consolidated petitions challenging the BBI referendum and its legitimacy.

The five-judge bench ruled that the Constitution of Kenya (Amendment) Bill, 2020, was unconstitutional, null and void. The judges advanced various arguments to arrive at this ruling in which they also found H.E President Uhuru Kenyatta had used a popular initiative to vouch for constitutional change, an avenue that is not available to him. This transpired after the BBI bill had been passed with an overwhelming vote by both the National Assembly and the Senate and was awaiting a presidential assent, after which Kenyans would have headed to a referendum before next year's elections. The bench also offered a permanent injunction restraining the Independent Electoral and Boundaries Commission from conducting the referendum.

Gender Provisions on Women's Leadership in the Constitution of Kenya (Amendment) Bill 2020

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.
17. Proposed administrative measures and legislation promoting women agenda including women empowerment.

Implications of the BBI Ruling on Women’s Leadership

Following the delivery of this ruling, the BBI proponents vowed to move to the Appellate Court seeking to have the Constitutional and Human Rights Division at the High Court to suspend its decision that unprecedentedly stopped the constitutional change process. While the Court of Appeal verdict is yet to be known, 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 Court of Appeal upholds the High Court Ruling and terms 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.

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 Court of Appeal overturns the ruling made by the High Court

This will 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.

Conclusion

The Constitution of Kenya (Amendment) Bill, 2020 has a raft of provisions to advance gender equality by propelling more women to leadership and decision-making spaces. This course will however be determined by the Court of Appeal verdict to either overturn or uphold the ruling made by the High Court of Kenya.