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WOMEN – THE CONSTITUTIONAL AND LEGAL FRAMEWORK

Background

Women made substantive gains in the 2010 Constitution in terms of increased representation and participation in political affairs. The Constitution also provided that no more than two thirds of one gender should occupy elective and appointive positions in public spaces.

The Constitution guaranteed women seats in both the national and county legislatures. In the counties, a ‘top up’ mechanism was provided for to ensure that no more than two thirds of the membership of the assembly is of the same gender. 47 seats in the National Assembly and the 16 in the Senate are reserved to be filled by women on the basis of proportional representation, according to the number of seats a party wins in the general election.

Current Realities

The Constitution provides for The Political Parties Act demands the implementation of affirmative action provisions in favour of women to enhance their representation. Political parties are now under a legal obligation to ensure that their nominees including women meet the two-thirds gender principle.

The Constitution Amendment Bill 2020 under the Building Bridges Initiative (BBI) which is headed for referendum in June 2021 abolishes the 47 seats reserved for women representatives in the National assembly and 16 in the Senate to replace them with creation of 70 new constituencies in most populous areas. Membership of the Senate will comprise 50% women.

The 70 new seats will be occupied by women, youth and persons living with disabilities to be filled through proportional representation provided they participated in the general elections in the first place.

Challenges and Constraints

The National Assembly has repeatedly failed to enact legislation on the realization of the two thirds principle in Parliament although it is the least compliant of the 3 elective bodies. Similarly, no

legislation has been enacted to ensure that appointive positions are distributed according to the two thirds gender principle

The judiciary has upheld the constitutional principles in various rulings, but enforcement of the Supreme Court's decisions has been lacking. Court decisions mandating legislative compliance have gone unenforced, including a Supreme Court ruling which advised the President to Dissolve parliament as per constitutional provisions.

Kenya's national legislature has persistently failed to translate the principle of equality into a body of binding laws, regulations, and policies.

During the primaries and general elections, women lack of resources and they get overshadowed by other well-endowed campaign teams with seemingly endless resources. This constrains their ability to project visibility and generate interest among voters.

The Kenyan electoral system the -First -Past -The- Post, (FPTP) cannot deliver on gender balance, particularly in the two thirds rule. In a FPTP system, the winning candidate is the one who gets the largest number of votes in an election and the rest of the votes garnered by the other candidates do not count.

Political Parties

Political parties remain patriarchal in nature and their structures are not accommodative to Women. The manners in which the political party's membership and its organs are constituted remain a barrier as they practice tokenism and have not mainstreamed women.

The inability and capacity of women to exercise their political rights is compounded by their limited access to information about political parties' platforms, systems and policies. Consequently, women participation in political parties remains very low.

The Political Parties Act 2011 does not establish clear guidelines and enforcement mechanisms, allowing violations to go unpunished and providing little incentive or instruction for compliance.

Political parties have not put in place the necessary measures to create an environment for the full and equal participation of women, including meaningful support for affirmative action.

Conclusion and Recommendations

- Reform the PPF to include all parties or at least lower the funding threshold. Currently only 2 parties are funded as they are the only ones that attained at least 5 % of the total votes cast. (It is curious that reserved seats are filled on the basis of seats won while funding is based on total votes garnered).
- Parties without presidential candidates cannot be expected to meet this threshold as they have to compete with presidential candidates who cover the whole country.
- The number of women vying for elective offices must be dramatically increased in order to increase chances of those winning. In 2017, only 7 % of MCAs were women, 4% vied

for gubernatorial seats, 7% National assembly 7% for the Senate and none for the Presidency.

- As an irreducible minimum women must be vigilant to ensure that they do not lose any of the gains, even aspirational gains in COK 2010 but ensure they are protected and advanced. In particular, they cannot afford to have a claw back of the two thirds gender provisions but rather work towards 50/50 dynamic in representation.
- Future lobbying and advocacy to enhance women participation should focus on party nominations to ensure both compliance with the two thirds rule and that such nominations also happen in their strongholds.

Scenarios

1: Changes in the governance reform and priorities

Retaining the status does not guarantee 2/3 gender rule in the event that BBI is not passed which muzzles the voice of women as they remain structurally disadvantaged.

Passing BBI creates 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 and 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.

2: The Political Parties and Elections

Nominating women candidates by political parties does NOT guarantee their election. For example, women political candidates being excluded from political party strongholds and nominated in weak zones for book keeping purposes.

Heightened political and electoral fever has totally eclipsed the women agenda building emphasis on non-issues like wheel burrows, hustler versus dynasty narratives, ethnic alliances etc. Women agenda has been thus subsumed into non issues.

A robust movement championed by and/or supported by women manages to return the country's electoral discourse into real issues including gender equity. Recognition and establishment of social safety nets for casual women domestic workers by the Kenyan government.

3: Evolving political contest

2/3 gender rule realized in all elective and appointive positions through the full implementation of article 27 of the COK, BBI, policy legislative and administrative interventions.

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