

**AN ANALYSIS OF THE BUILDING BRIDGES
(BBI) REPORT & CONSTITUTION OF
KENYA (AMENDMENT) BILL, 2020
IN RELATION
TO
SDG 5:ACHIEVE GENDER EQUALITY AND
EMPOWER ALL WOMEN AND GIRLS
IN
KENYA**

Compiled For SDG Forum Kenya

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1.0 Introduction

The launch of the BBI Report On 26th October 2020, was a culmination of a two year process that had begun on March 18th 2018 in an event now christened the “handshake”. The political dialogue between two Kenyan leaders to calm the situation following the general elections of 2017 identified a nine point agenda undermining nation building and unity. This included the Lack of National Ethos; Responsibilities and Rights; Ethnic Antagonism and Competition; Divisive Elections; Inclusivity; Shared Prosperity; Corruption; Devolution; and Safety and Security. A 14 person taskforce was then appointed to spearhead the process.

Importantly, is that the BBI process came 8 years after the adoption of the 2010, Kenya Constitution (CoK, 2010) and during the third phase of the vision 2030 blueprint. These two frameworks had been providing the foundational principles and institutional architectural for a more progressive, inclusive and participatory democratic developmental state. This period also coincided with the agenda 2030 sustainable development goals, to which Kenya is a signatory. Thus far Kenya has submitted two voluntary national reports highlighting the progress, gains and challenges made thus far many of which mirror aspirations in the vision 2030 and CoK, 2010.

It is against this backdrop that the SDG Kenya Forum, the national CSO coalition on monitoring the implementation of SDGs, undertook an analysis of the BBI report. The purpose of the analysis was to analyze the proposed BBI nine point agenda alongside the constitution to understand the gaps and challenges it brings in trying to respond to gender equality and in particular the work around SDG 5: Empower all women and girls.

2.0 The SDG 5 and Constitutional Gains

An analysis of the Constitution of Kenya, showed that a number of gains with respect to SDG 5 had been made on 8 out of 9 targets under SDG 5¹ as juxtaposed in the table below. These gains included SDG 5 targets 5.1, 5.2 & 5.3 addressing discrimination, violence and harmful traditional practices respectively. Also gains could be discerned with respect to target 5.4, addressing unpaid care work as well as target 5.5 on political participation and leadership. Similarly progress was equally notable on target 5.6 Ensure universal access to sexual and reproductive health. Another area of advancement was on target 5.7, addressing Equal access to economic resources; and SDG 5 target number 5.9, addressing policies and legislation for gender equality and empowerment.

| SDG 5 | Constitution of Kenya, 2010 |
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| 5.1 End all forms of discrimination against all women and girls everywhere. | Article 2 (6) Enforcement of International Conventions - All Conventions relating to gender based inequality and violence that have been ratified by Kenya Article 10(2) (b) recognises equality and non-discrimination as national values and principles of governance that bind all state organs, state officers and public officers. Article 27- Equality and freedom from discrimination |

¹ Except SDG 8: Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women

| 5.2 Eliminate all forms of violence against | Article 29 (c) every person has the right to freedom and |
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| SDG 5 | Constitution of Kenya, 2010 |
| sexual and other types of exploitation. | <p>sources.</p> <p>Article 45 of the Kenyan Constitution (2010) the family institution recognizing it as the natural and fundamental unit of society and the necessary basis of social order.</p> <p>Article 31. Privacy</p> <p>Every person has the right to privacy, which includes the right not to have—</p> <p>(d) the privacy of their communications infringed.</p> |
| 5.3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation. | <p>Article 44. Language and culture</p> <p>3), A person shall not compel another person to perform, observe or undergo any cultural practice or rite.</p> <p>Article 53. further makes it a right for children to be protected from harmful cultural practices, which may include Female Genital Mutilation and early marriage for the girl child (d)</p> <p>55. Youth</p> <p>The State shall take measures, including affirmative action programmes, to ensure that the youth—</p> <p>d) are protected from harmful cultural practices and exploitation.</p> |
| 5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate. | <p>Articles 10(2)(d), Sustainable Development</p> |

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| <p>5.5 Ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life.</p> | <p>Article 27 (6), Article 27 (8) not more than two thirds of the members of any elective or appointive body are of the same gender.</p> <p>Article 38 Political rights</p> <p>Article 54 Persons with Disabilities</p> <p>Article 55 Youth</p> <p>Article 81 reinforces 2/3 rule</p> <p>Article 90(2)(b) Party lists be alternate</p> <p>Article 91(1)(f) political party promote Human rights, Freedoms, gender</p> <p>Article 97 membership of parliament</p> <p>Article 98 Senate membership</p> <p>Article 100 promotion of representation of marginalized groups</p> <p>Article 177 membership of county assembly</p> <p>Article 203 (h) equitable share and other financial laws</p> <p>Article 250 composition of independent commissions</p> <p>Article 59 implementation mechanisms (KNHRC) (NGEC)</p> |
| <p>5.6 Ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences.</p> | <p>43. Economic and social rights</p> <p>a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;</p> |
| <p>5.7 Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and</p> | <p>Article 40- Right to property</p> <p>Article 45 provides that all parties to a marriage are equal and therefore entitled to equal rights before, during and at the dissolution of marriage.</p> <p>Article 60(f) provides that among the principles of land policy is the elimination of gender discrimination in law, customs and practices related to land and property in land.</p> |

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| <p>natural resources, in accordance with national laws.</p> | |
| <p>5.9 Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.</p> | <p>Articles specifically to address gender equality and empowerment of women and girls. These include; Articles 27, 45, 59, 81, 97, 98, 100, 177, and 232.</p> <p>55. Youth: The State shall take measures, including affirmative action programmes, to ensure that the youth—</p> <ul style="list-style-type: none"> (a) access relevant education and training; (b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; (c) access employment; <p>56. Minorities and marginalised groups</p> <p>The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—</p> <ul style="list-style-type: none"> (a) participate and are represented in governance and other spheres of life; (b) are provided special opportunities in educational and economic fields; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure. <p>203. Equitable share and other financial laws</p> <ul style="list-style-type: none"> (l) The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter <ul style="list-style-type: none"> (h) the need for affirmative action in respect of disadvantaged areas and groups; |

3.0 Challenge of realizing the Gains of Constitution of Kenya, 2010 to advance SDG 5

Despite the progressive nature of the CoK, 2010, a number of challenges stood in its way. Upon deeper analysis it emerged that many of the gains targeted at women, girls, youth and PLWD had not translated into equity and equality. Infact a three pronged typology of challenges characterized by lack of implementation, interpretation and litigation emerged as preventing the achievement of some of the targets under SDG 5. In this regard the analysis highlighted a number of implementation encumbrances which included most prominently, the limited budgetary support for gender responsive functions at both national and county governments. There was also the lack of enforcement of critical laws that would even the playing field not only for women but other marginalized groups such as youth, and PLWDS.

The second challenge emanated from the inability to legislate on the two thirds gender rule (2/3) as well as the token appreciation of women in nominated positions in the legislature. In particular the action of the de-whipping women nominated members in Nakuru was even subjected to a legal challenge before it was reversed. The country also witnessed frequent legislative impasse between the National Assembly, Senate and National Executive resulting in the delayed release of shareable revenue leading to a paralysis of County service delivery and development. The Country also witnessed budgetary standoffs between the County Executives and Legislature.

The last category of challenges identified centered on decisions made by Courts of Law or ongoing litigation. This included the decision of the Supreme Court in 2015 regarding the progressive achievement of the two third (2/3) principle, which unfortunately reduced the urgency for the same. There has also been the emerging jurisprudence such as on the age of consent which threatened to undo protections under sexual offences. Similarly, the ongoing case seeking constitutional interpretation to roll back protections from harmful cultural practice such as FGM. Other jurisprudence challenges also arose from succession and divorce proceedings including those that attempted to give an interpretation for unpaid care work. Lastly, the decision of the Chief Justice to the president calling for the dissolution of parliament over the un-fulfillment of the two thirds gender rule which went unheeded.

The analysis also mapped other challenges identified in the BBI nine agenda items and found a Lack of national Ethos had doubled and sometimes tripled marginalization of women and girls. It also brought to the fore the un-fulfillment and infringement of rights that affected women and girls as well as youth and PLWDS. Similarly, continued Ethnic Antagonism and Competition had strenghtend patriarchy and male dominance while Divisive Elections through the first through the post system had not produced gender equality in leadership. In terms of Inclusivity, it was noted that Kenya remained a highly unequal society with inequalities only increasing.

Additionally, with respect to shared Prosperity; it was found that significant segments of population including women, girls, youth and PLWD were still left behind especially economically. Also that Corruption had denied delivery of services and development to citizens something that disproportionately affected more women, girls, youth and PLWD. Accordingly, Devolution had not only been encumbered by under resourced county governments that were unable to deliver on the promise of devolution but also county governments were unlikely to be gender responsive. Laslty, on Safety and Security, was the glaring gender and sexual based violence statistics further characterized by mounting evidence of deleterious lifelong impacts on survivors as well as SGBV prevention and response mechanisms that are grossly under resourced.

4.0 The Impact of the BBI report on SDG 5.

The analysis found that the BBI taskforce intended to make amendments to the 2010 Constitution with a good number of changes relating to provisions on women, youth and PLWDs. These amendments revolved around six out of the nine agenda items namely, Rights and responsibilities, Divisive Elections; Inclusivity; Shared prosperity, Devolution and Safety and Security. Other agenda items including Lack of Ethos, Responsibility and rights, Ethnic Antagonism and Completion and Corruption were to be addressed either through policy, legislative or administrative prescriptions. Some of the key highlights and comments are summarized here in brief as follows;

Responsibilities and rights. In sum, the BBI taskforce reaffirmed the Bill of Rights that contains specific gains in relation to rights of women youth and PLWDs and goes further to expand it by including protection of personal data. The BBI taskforce suggested a Kenyan Charter of Citizen Responsibilities inspired by the National Anthem and the National Values, and includes a Patriot's Pledge to the Nation and the Constitution of Kenya. Among the provisions in the citizen's charter is the responsibility to fulfil parental care towards their children. In particular, the BBI taskforce called for the entrenchment of article 43 on social and economic rights in government policy. There is also a proposal to have a patient's bill of rights². To tackle past human rights excesses, the BBI suggested compensation for victims of past human rights violations.

Comment. The BBI taskforce sought to strengthen and advance human rights in the emerging area of data which is important in view of the rising risk of cyber-crime and cyber security. A review of existing laws to reflect this proviso should naturally follow. However no such review had been mentioned. Further, while the BBI report affirmed the rights of women, youth and PLWD, the provisions on citizen responsibility with regards to children suggests some recognition of unpaid care work. However, the utility of other provisions in the charter of citizenship responsibilities was unclear especially when compared against the current article 10, which also lays out concrete values necessary for a system of governance to achieve the political vision set out in the constitution. The patients' bill of rights is another suggestion that would cure unnecessary detention in health facilities especially of Women. However this comes against a backdrop where efforts towards Universal health Coverage with provision of health insurance cover heavily promoted.

Divisive elections. The BBI taskforce posited that the existing first-past-the-post (FPTP) system was a leading cause of the highly divisive elections, which had produced an unfavourable proportional representation system. As it is currently, the CoK, 2010 provides for a National Assembly consisting of 290 elected members from single constituencies, 47 County Women Representatives and 12 specially selected members representing special interest groups thus totalling to 349 elected members. As a remedy the BBI proposed the current proportional representation and special seats in the national assembly be replaced by a mixed member proportional representation (MMPR) system while taking into account the two-thirds gender rule and the Constitutional requirement. As a result, the composition of parliament would now include 290 members from single constituencies elected through FPTP and 70 members elected through MMPR, thus in total Parliament would have 360 elected members. Additionally, there was a suggested a provision to have Cabinet ministers selected from outside of the national assembly who will be ex officio members.

Comment. Although the overall picture is encouraging, the introduction of a MMPR system at face value did not seem to cure the two third representation of either gender in the National Assembly. The BBI taskforce recommendations also removed the CWR seats and those reserved for persons with disabilities in the National Assembly. Thus, BBI recommendations undermined the inclusion of marginalized persons especially, PLWDs, by degrading the institutional arrangements through which persons with disabilities exercise elected representation. Additionally the proposed MMPR system would have ended up creating a new set of challenges especially given that political parties that were expected to implement through party lists remained unreformed and patriarchal. Further, the proviso for selection of ex-officio members was not specific on whether selection should be in conformity to the two third gender rule. The BBI taskforce in tackling the electoral system did not address the issue of independent candidates as provided for under article 85, yet many women, youth and PLWDs opted to use this avenue to seek leadership positions

Inclusivity. The BBI taskforce recognized that women have not achieved the promises contained in the Constitution of Kenya 2010. As a remedy the BBI proposed a raft of recommendations to cure some of the issues promoting inequality and exclusivity in representation. The BBI taskforce proposals for achieving gender parity in the Senate included, introducing 47 seats for women to bring the total to 94 senators representing either gender that would bring parity between men and women. In the National Assembly, the taskforce recommended abolishing the replacement of the proportional system with the MMPR to achieve two-thirds gender rule constitutional requirement. In this process it did away with the current 47 women representatives and 12 nominated members of the national assembly and 18 senators. Similarly, the County top leadership was henceforth expected to comprise of either gender in its top leadership.

Comment. The introduction of a MMPR system did not seem to cure the two third representation of either gender in the National Assembly. The inconsistency in creating gender parity was also evident in positions within the National Executive identified as President Deputy President, Prime Minister, and Two Deputy prime ministers including Cabinet Ministers. The same was glaringly left out when examined from the perspective of parliamentary and senate house and departmental committees leadership positions. Then there was also the loss of County Women Representative (CWR) seats that would be accompanied by the double loss by women of a seat during decision making on national resources as well as the National government affirmative kitty. Besides, there would be need to ring-fence the National Government Affirmative Fund.

Shared Prosperity. The BBI taskforce proposed enabling institutional architecture for the realization and protection of women's, youth and PLWD and gender equality principles. It reaffirmed the Bill of Rights that contained specific gains in relation to rights of women youth and PLWDs. The BBI taskforce suggested setting up and institutional framework/mechanisms to advance the gains for women, youth and PLWDs. As such there was the proposed Youth commission to, among others, promote the implementation of the rights of the youth under Article 55. In particular, the BBI taskforce called for the entrenchment of article 43 on social and economic rights in government policy. The BBI taskforce also proposed affirmative action measures to compensate for historical inequality and discrimination. There was a proposal to amend the Higher Education Loans Board Act to allow extensive loan repayment grace periods for university graduates. Additionally, to address economic exclusion, the BBI taskforce suggested amendments to the Micro and Small Enterprises Act, 2012 including a proposed tax holiday for youth entrepreneurs.

Comment. The text of the BBI taskforce sought to strengthen and advance economic wellbeing of women, youth and PLWD, in terms of employment and entrepreneurship opportunities. However, this proposal for shared prosperity did not go far enough to advance gender equality measures and disregarded the gender principles of access control of resources. These proposals fell short by not seeking to make women and indeed marginalized persons have control over key factors of production such as land. While the youth commission was a noble interventions, the BBI taskforce did not purpose its governance structure to take into account gender parity in the composition of the implementation mechanisms. Finally, the framing of proposals and suggestions was mainly targeted at public/government institutions while not obligating private organizations, where violations have been noted³.

Devolution. In terms of resource sharing, the BBI taskforce recommends increased allocation to County Governments from at least 15% of last audited accounts to 35% with a 70:30 ratio biased towards development. There also suggestions in the BBI taskforce to create a ward development fund (WDF) for capital expenditure in the Counties for purposes of Article 43.

Comment. While the increase in resources at the county level as suggested is expected to improve delivery of services and other developments, equally important was to have a robust accountability mechanisms. The ratio 70:30 bias towards development though good would not necessarily respond to the felt gender needs at the County level. While the suggestion for WDF was important, the lack of women, youth and PLWDs in elective positions at the ward level was glaring against the lack of criterion for membership to the WDF implementation mechanisms. Women, youth and PLWDs risked being left out in decision making much in the same way as in NG-CDF. Also, there was lack of corresponding accountability mechanism to ensure devolved funds are utilized appropriately.

Safety and Security. The BBI taskforce proposes to amend Chapter Four of the Constitution on the Bill of Rights to provide a constitutional underpinning for privacy of personal data of citizens as an emerging area in human rights owing to technological advancement. Clause 5 of the Bill proposed to amend Article 31 (Privacy) to incorporate the right for the protection of personal data of citizens. There were also changes to the Elections Offences Act 2016, proposed by the BBI taskforce, to enhance penalties against perpetrators of violence against women during elections. Included also was a proposal to resource gender and sexual violence policy and prevention measures. Another innovation in the BBI taskforce related to the effecting of a Victim Protection Trust fund, giving special attention to victims of terrorism.

Comment. There was a strong belief that proposal on privacy of personal data of citizens will cure some emerging form of cybercrime particularly targeted at women. However, there will be need to review existing SGBV frameworks to ensure this right is not used to protect perpetrators. The proposal to resource gender and sexual violence policy and prevention measures was hollow in the face of limited funds allocated to gender functions at national and county levels. In this regard, either the recognition in the constitution of gender as a function at national and county level was needed or a capitation needed to be done for the gender function task budget line at national and county level. In terms of the Victim Protection Trust, the BBI taskforce needed to address the issues of all violence victims but particularly women and girls post-election and ethnic GBV victims.

5.0 The Constitution of Kenya (Amendment) Bill, 2020

Even as the public engaged in debates over the BBI report the promoters of the BBI process shifted their agenda towards having a referendum process. This became a reality 25th November 2020 when

³ See KNHRC

the Constitution of Kenya (Amendment) bill was published and the process of signature collection begun. The table below provides a side by side comparison of the changes contained in the bill.

The Constitution of Kenya (Amendment) Bill, 2020

| SDG 5 | The Constitution of Kenya (Amendment) Bill, 2020 | Objects and Reasons for Amendment |
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| 5.1 End all forms of discrimination against all women and girls everywhere. | <p>Article 31 of the Constitution is amended by inserting the following new paragraph immediately after paragraph (d)—</p> <p>“(e) their personal data infringed.”</p> | <p>Clause 5 of the Bill proposes to amend Article 31 (Privacy) to incorporate the right for the protection of personal data of citizens. The proposed amendment protects personal data of citizens in view of the advancement and adoption of digital technology by a large percentage of the population and boosts the taming of surveillance capitalism.</p> |
| 5.2 Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation. | | |
| 5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate. | <p>Insertion of new Article 18A in the Constitution. 4. The Constitution is amended by inserting the following new Article immediately after Article 18—</p> <p>(b) promote and protect the well-being of the family including respect for their parents and elders;</p> <p>(c) practice ethical conduct and combat corruption;</p> <p>(d) fulfil parental responsibilities towards their children;</p> | <p>Clause 4 of the Bill proposes to insert a new Article 18A (Responsibilities of a citizen) into the Constitution to inculcate virtues and engender the principles of national ethos, comprising the spirit of oneness, honesty and integrity and to set out moral principles to be adhered to by every citizen. The responsibilities include the duty to promote harmonious living with other citizens, to pay taxes and contribute to national development, among others. This Article seeks to give life to the words of our national anthem that when the individual thrives, the country thrives.</p> |

5.5 Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life.

Amendment of Article 82 of the Constitution.

7. Article 82 (1) of the Constitution is amended by inserting the following new paragraph immediately after paragraph (e) — “(f) sanctions for a political party that fails to comply with the principle that not more than two-thirds of the party's candidates are of the same gender.”

Amendment of Article 88 of the Constitution. 9. Article 88 of the Constitution is amended—

(b) in clause (4) by— (i) inserting the words “including ensuring that not more than two-thirds of the party's candidates are of the same gender” at the end of paragraph (d)”;

Amendment of Article 90 of the Constitution.

11. Article 90 of the Constitution is amended—

Amendment of Article 96 of the Constitution.

12. Article 96 (3) of the Constitution is amended by deleting the words “national revenue allocated to the county governments” and substituting therefor the words “revenue allocated to, raised by, or otherwise received by county governments and their expenditure”.

Clause 7 of the Bill proposes to amend Article 82 (Legislation on elections) to provide for Parliament to enact legislation imposing sanctions on a political party that fails to ensure that the party's list of nominated candidates comply with the principle that not more than one-thirds of such candidates are of the same gender. This is to compel political parties to facilitate the actualization of the gender rule in the electoral process from the nomination stage.

The proposed amendment mandates the IEBC to ensure a list of candidates nominated by a political party for an election comply with the principle that not more than two thirds of the nominated candidates shall be of the same gender.

Clause 11 of the Bill proposes to amend Article 90 (Allocation of party list seats) to promote the principle of equality of the vote and entrench ideals of a transparent electoral process. The proposed amendment provides the candidates to be nominated from a party list be based on total votes received by their political party as opposed to the current practice where such allocation is based on seats won by a political party.

Clause 12 of the Bill proposes to amend Article 96 (Role of the Senate) to enhance the oversight role of the Senate on matters relating to all county revenues and their expenditures.

Amendment of Article 97 of the Constitution. 13.
Article 97 of the Constitution is amended—

(ii) deleting paragraph (b) and substituting therefor the following new paragraph— “(b) four members, being two women and two men, representing persons with disabilities; (iii) deleting paragraph (c) and substituting therefor the following new paragraphs— “(c) two members, being one woman and one man, representing the youth; (ca) the number of special seats members necessary to ensure that no more than two-thirds of the membership of Parliament are of the same gender;”

(b) by inserting the following new clauses immediately after clause (3)— “(3) The members referred to in clause (1) (b), (c) and (ca) shall be elected in accordance with Article 90. (4) The filling of special seats under clause (1) (ca) shall— (a) be determined after declaration of elected members from each constituency; and (b) comprise of candidates who stood for election under clause (1) (a) with precedence being given to those who received the greatest number of votes.

Amendment of Article 98 of the Constitution.

14. Article 98 of the Constitution is amended— (a) in clause (1) by— (i) deleting paragraph (a) and substituting therefor the following new paragraph— “(b) ninety-four members, being one woman and one man

Clause 13 of the Bill proposes to amend Article 97 (Membership of the National Assembly) to increase the number of the members of the National Assembly elected from constituencies from the current 290 members to 360 members. This is a consequence of the proposed increase in the number of constituencies. Further, this amendment proposes special top up seats be created to ensure the gender principle is actualized. However, in filling of the special top up seats, it is provided that a first priority in the nomination shall be given to candidates who contested for the constituency seats and were not elected. The affirmative action for topup will only last for fifteen years.

Clause 14 of the Bill proposes to amend Article 98 (Membership of the Senate) to structure the membership of the Senate to achieve gender parity.

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| | <p>from each county, elected by the registered voters of the counties.”</p> | |
| | <p>Article 177 of the Constitution.</p> <p>45. Article 177 of the Constitution is amended— (a) in clause (2) by deleting the words “be nominated by political parties in proportion to the seats received” and substituting therefor the words “be elected through the party list by political parties in proportion to the votes received”; (b) in clause (3) by inserting the words “comprise of candidates who stood for election under clause (1) (a) with precedence being given to those who received the greatest number of votes” at the end of the clause;</p> | |
| | <p>Amendment of Article 180 of the Constitution.</p> <p>47. Article 180 of the Constitution is amended by inserting the following new clause immediately after clause (5)— “5A. In making the nomination under clause (5), a candidate for election as a county governor shall consider a person of the opposite gender.”</p> | <p>Clause 47 of the Bill proposes to amend Article 180 (Election of county governor and deputy county governor) to enhance gender parity in the governance of counties by providing for the candidate of the county governor, in nominating a deputy governor, to consider a person of the opposite gender.</p> |
| <p>5.9 Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.</p> | <p>Amendment of Article 203 of the Constitution.</p> <p>50. Article 203 of the Constitution is amended— (a) in clause (1) by inserting the following new paragraphs immediately after paragraph (k)—</p> <p>“(l) the need to eradicate corrupt practices</p> | <p>Clause 50 of the Bill proposes to amend Article 203 (Equitable share and other financial laws) to expand the criteria for determining equitable share to include the need to eradicate corrupt practices and wastage of public resources the need to ensure the attainment of the economic and social rights guaranteed under Article 43 and ensure the average amount of money allocated per person to a county with highest allocation does not exceed three times the average amount per person</p> |

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| | <p>and wastage of public resources;</p> <p>(m) the need to ensure the attainment of the economic and social rights guaranteed under Article 43;</p> <p>(b) in clause (2) by deleting the word “fifteen” and substituting therefor the word “thirty-five”.</p> | <p>allocated to a county with the lowest allocation. It further increases the percentage of funds allocated to county governments from fifteen to thirty-five to strengthen devolution and ensure that county governments have adequate funds to carry out their operations.</p> |
| | <p>Insertion of new Article 206A in the Constitution</p> <p>52. The Constitution is amended by inserting the following new Article immediately after Article 206— 206A. Constituencies Development Fund</p> | <p>Clause 52 proposes to insert new Article 206A (Constituencies Development Fund) into the Constitution to anchor the Constituencies Development Fund, which shall be used to facilitate the performance of national government functions within the constituencies.</p> |
| | <p>Insertion of new Article 207A in the Constitution</p> <p>54. The Constitution is amended by inserting the following new Article immediately after Article 207— 207A. Ward Development Fund</p> | <p>Clause 54 of the Bill proposes to insert new Article 207A (Ward Development Fund) into the Constitution to establish the Ward Development Fund. The Ward Development Fund shall comprise of at least five per cent of all the county government's revenue in each financial year and ensures equitable distribution and development in the wards of money allocated or collected by the county government.</p> |
| | <p>Amendment of Article 215 of the Constitution.</p> <p>55. Article 215 (2) of the Constitution is amended— (a) in paragraph (c) by deleting the word “five” and substituting therefor the word “two”; and (b) by inserting the following new paragraph immediately after paragraph (c)— “(ca) two persons, one woman and one man, nominated by the county governors;</p> | <p>Clause 55 of the Bill proposes to amend Article 215 (Commission on Revenue Allocation) The amendment also provides for two members to represent county governors</p> |

Insertion of new Article 63. The Constitution is amended by inserting the following new Article immediately after Article 237—

237A in the Constitution. 237A. The Youth Commission (1) There is established the Youth Commission. (2) The Commission shall consist of the following persons appointed by the President, with the approval of the Senate— (a) a chairperson; and (b) six members, with equal representation of both genders, at least four of whom shall be youth.

Clause 63 of the Bill proposes to insert a new Articles 237A (The Youth Commission) into the Constitution. The amendment proposes to establish and provide for the functions of the Youth Commission to, among others, promote the implementation of the rights of the youth under Article 55.

Bill proposes to insert a new Article 11A (Economy and shared prosperity) into the Constitution so as to anchor the aspiration of a new economic model based on value creation and that provides equitable opportunities for all the people, promotes industrialization and supports small and micro enterprises.

Clause 3 of the Bill proposes to insert a new Article 11A (Economy and shared prosperity) into the Constitution so as to anchor the aspiration of a new economic model based on value creation and that provides equitable opportunities for all the people, promotes industrialization and supports small and micro enterprises.

A rapid analysis of the Bill did indicate that some due consideration was done to provide clarity to some sections pertinent to SDG 5. For instance, the amendment to Article 31 (e) providing for data protection that will go a long way towards advancing SDG 5 targets 5.1 and 5.2 by enhancing efforts towards ending discrimination and violence against women and girls. The insertion of a new article 18(A) Citizens responsibilities aligns well with aspirations found under SDG 5 target 5.4 on recognizing and valuing unpaid care and domestic work. In particular amendments to Articles 82 (i), 88 (b), 90, 96(3), 97 (b), (c), (ca), 98, 177 and 180 were designed to address women representation in leadership as highlighted in SDG target 5.5. These have been elaborated upon further to give greater clarity. Other note worthy amendments mapped included Articles 11(A), 203, 206A, 207A and 273 (A) all of which address SDG 5 target 5.9 relating to economic empowerment and marginalization. That notwithstanding some of the earlier observations remain valid. In particular the following observation still merited to be addressed either at the constitutional level or in subsequent legislation.

Political Party structure. Political parties have done little towards formulating policies to enhance women, youth and PLWDs participation. Further still, the manner in which the political party's membership and its organs are constituted remain a barrier. Research into political parties demonstrates that political party structures are not accommodative to Women, youth and PLWDs and remain patriarchal in nature. The inability and capacity of women, youth and PLWDs to exercise their political rights is further compounded by political parties' constitution, rules, policies and plans of political parties that are implemented in a manner that lock out women, youth and PLWD. Political parties are therefore likely to nominate women, youth and PLWSDs in areas that are not perceived strongholds just to meet the threshold.

Accountability mechanisms. The increase in devolved funding through the enhancement of shareable revenues available to counties from fifteen to their five percent as well as CDF and WDF comes against a back drop of weak accountability mechanisms. The lack of corresponding accountability mechanism could create room for pilferage of public funds. Undertaking compliance and audit in 47 counties, 290 constituencies and 1450 wards will no doubt prove to be a challenge.

Persons Living With Disability. The allocation of seats to PLWD will still fall short of the five percent of required in elective and appointive bodies for persons with disabilities. It is unlikely that the State shall ensure the progressive implementation of the principle.

National government Affirmative Action Fund. The removal of the CWR seats will essentially bring to an end the National government county affirmative funds. This kitty has been instrumental in addressing gender responsive needs at the county level.

Misuse of data protection. The provisions for data protection as proposed under article 31 (e) could run counter to the suggested noble intentions. In particular the provision could run the risk of undermining access to data held by perpetrators of crime especially those related to sexual and gender abuse and violence.

6.0 Recommendations for advancing agenda 2030.

In line with SDG 5 target (1), ending all forms of discrimination against all women and girls everywhere
(2) Eliminating all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.

- Provision for limitations on the use of data protection provisions under Article 31(e) are not used to protect perpetrators of crime especially sexual and gender based abuse offences.
- Prioritize the review all cybercrime and cyber security laws to align with proposed amendment to Article 31 (e) and reinforce data protection measures.

In line with In line with SDG 5 target number 4, Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate.

- Prioritize policy and legislative measures towards recognition and valuing of unpaid care work.

In line with SDG 5 target number five, Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life.

- Prioritize efforts to strengthen political parties' grassroots structures, formulate gender equality statements, gender policies and procedures that will allow adequate and quality political participation of women, Youth and PLWDs.
- Engage with the Political Parties Liaison Committee to support to the Office of the registrar of Political parties (ORPP) to ensure enforcement and compliance to the political parties Act and the related amendments related to election nominations and campaign financing.
- Provide measures for political parties to nominate women to vie for seats in stronghold regions to get elected directly.
- Prioritize the need for fulfillment of at least five percent representation of PLWD in all elective and appointive positions.

In line with SDG 5 target seven undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws.

- Introduce constitutional amendment or statute to ring fence the National Government Affirmative Action Funds.

In line with SDG 5 target nine adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.

- Provide for accountability mechanisms to complement the increase in devolved funds as well as to ensure spending is tracked and spent on priority issues especially those identified by women, youth and PLWD.
- Provision of gender as concurrent and cross cutting function through constitutional amendment or by statute.
- Allocation of 30% of development vote is to gender departments at county level towards realization of SDG 5 at county level.
- Capacity building of all elected representatives on applying gender principles to public policy and legislation.

- Increase capacity of county based CSO's to engage at the County level on public policy and legislation.

References

The Constitution of Kenya (Amendment) Bill, 2020

An Analysis of the Building Bridges (BBI) Report In Relation To SDG 5: Achieve Gender Equality and Empower All Women and Girls in Kenya and Constitution of Kenya, 2010 compiled by Kenneth Odary