The BBI Consolidated High Court of Kenya Judgment of the Constitutional and Human Rights Petition No. E282 of 2020 (Delivered May 13, 2021): Snap Overview

By:

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On Thursday May 13, 2021, a five-judge bench delivered a unanimous and very significant judgment permanently injuncting Kenya's Independent and Electoral Boundaries Commission, (IEBC), from proceeding with President Uhuru Kenyatta's initiative - Building Bridges Initiative (BBI). The BBI amendments would not only have merely amended but rather overhauled Kenya's very progressive 2010 Constitution.

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Given that the Building Bridges Initiative was supported not just by President Uhuru Kenyatta, but also by Raila Amolo Odinga, the leader of Kenya's biggest Opposition Political Party, made this a highly salient political case. Rather than dodging the issues raised in the case, the five-judge bench issued a 321-page judgement finding:

- That the Basic Structure Doctrine applies to Kenya. Further, that that doctrine limits the amendment power set out in Articles 255 – 257 of the 2010 Constitution of Kenya. In particular, the Basic Structure Doctrine limits the power to amend the Basic Structure of the 2010 Constitution of Kenya and eternity clauses.
- That 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 2010 Constitution of Kenya.
- That the President does not have authority under the 2010 Constitution of Kenya 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 2010 Constitution of Kenya.
- That the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by the President is an unconstitutional and unlawful entity.
- That being an unconstitutional and unlawful entity, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, has no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the 2010 Constitution of Kenya.
- That the entire BBI Process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and in usurpation of the People’s Sovereign Power.
- That Mr. Uhuru Muigai Kenyatta has contravened Chapter 6 of the 2010 Constitution of Kenya, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of

the Constitution on amendment of the Constitution.

- That the entire unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report is unconstitutional, null and void.
- That the Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission carries out nationwide voter registration exercise.
- That the Independent Electoral and Boundaries Commission does not have quorum stipulated by section 8 of the IEBC Act as read with paragraph 5 of the Second Schedule to the Act for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat.
- That at the time of the launch of the Constitutional of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of referenda.
- That the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed.
- That County Assemblies and Parliament cannot, as part of their constitutional mandate to consider a Constitution of Kenya Amendment Bill initiated through a Popular Initiative under Article 257 of the Constitution, change the contents of such a Bill.
- That the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to predetermine the allocation of seventy constituencies is unconstitutional.
- That the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation is unconstitutional.
- That the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to have determined by delimitation the

number of constituencies and apportionment within the counties is unconstitutional for want of Public Participation.

- That Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of Article 94 of the Constitution and Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.
- That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People.
- That a permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020.

My early analysis of this case suggests it is as significant if not more significant than the Supreme Court of Kenya's 2017 nullification of President Uhuru Kenyatta's presidential election. In addition to the significance of the orders, analysis of this five-judge bench are compelling and make it a landmark judgement not only in Kenya, but beyond.

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