

# CHAPTER 2

## REALISING THE INCLUSION OF YOUNG PERSONS WITH DISABILITIES IN POLITICAL AND PUBLIC LIFE IN KENYA

Lucianna Thuo\*

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### Summary

*Voting is central to citizenship. It is mainly through political participation that the voices of persons with disabilities are amplified and their rights implemented. However, more than being a tool of empowerment and agency, voting is a marker of dignity; those deprived of the franchise not only feel disempowered but dishonoured. The Kenyan Constitution seeks to radically overhaul the exclusion experienced by minorities and marginalised groups, including the youth and persons with disabilities. Notably, article 54(2) requires the progressive implementation of the principle that at least 5 per cent of all elective and appointive positions are held by persons with disabilities.*

*This article assesses constitutional and legislative provisions on participation in political and public life by young persons with disabilities. It also reviews the measures proposed by the Persons with Disabilities Bill 2015 to realise the inclusion of youth in public life. It further proposes to take advantage of the broad wording of article 54(2) of the Constitution which, unlike the gender rule, does not limit the state to specific measures of implementation. This provision, therefore, offers wide latitude in the approaches that may be used to secure greater inclusion in public life of young persons with disabilities. Among other measures, strategic litigation seeking creative remedies, such as a compelling mandamus (which has been effective in securing socio-economic rights), might provide the impetus needed to ensure greater inclusion of young persons with disabilities in all spheres of public life in Kenya.*

### 1 Introduction

The right to political participation is based on the idea of citizens being the ultimate repository of sovereignty within a state.<sup>1</sup> It is widely accepted that, subject to reasonable restrictions necessary to preserve the integrity of

\* LLM (Human Rights and Democratisation in Africa) (Pretoria); Law Lecturer, Kabarak University Law School, Kenya; lucianna.thuo@gmail.com

1 GH Fox 'The right to political participation in international law' in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000) 48 50.

the electoral system, citizens have the right to participate in politics and the conduct of public affairs within a state. It is mainly through political participation that the voices of persons with disabilities are amplified and their human rights implemented.<sup>2</sup>

Even though political participation connotes more than the right to vote, it is asserted that the right to vote is easily the most important participation right, as it forms the basis for securing other rights. According to the United States (US) Supreme Court:<sup>3</sup>

No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

## 2 Participation as a marker of civic dignity

Political participation is an attribute of citizenship, and the idea that one must be sufficiently interested in the affairs of a state to be allowed to take part in deciding the affairs of the state. The requirement of citizenship in order to vote is argued to aid in preserving cohesion and the bonds of a national community.<sup>4</sup>

Citizenship demands an equal distribution of entitlements, the equal recognition of standing and the protection of the rights and interests of all citizens. The right to vote, therefore, is seen as a marker of equal citizenship. According to Fiala-Butora et al,<sup>5</sup> 'we are not equal because we vote, *we are equal because we are allowed to vote*'.<sup>6</sup> Therefore, as noted by Karlawish et al, disenfranchisement results in a systematic neglect of the issues that are most important to the disenfranchised group,<sup>7</sup> and the phenomenon referred to by Prince as 'absent citizenship'.<sup>8</sup>

Moreover, Fishkin<sup>9</sup> asserts that the right to vote is inextricably linked with dignity. He posits that '[i]t is a dignity inhering in the idea that my

2 J Fiala-Butora et al 'The democratic life of the Union: Toward equal voting participation for Europeans with disabilities' (2014) 55 *Harvard International Law Journal* 71 83.

3 *Wesberry v Saunders* 376 US 1 17-18 (1964) (United States Supreme Court).

4 A Blais et al 'Deciding who has the right to vote: A comparative analysis of election laws' (2001) 20 *Electoral Studies* 41 52.

5 Fiala-Butora et al (n 2 above) 100.

6 As above.

7 JHT Karlawish et al 'Identifying the barriers and challenges to voting by residents in nursing homes and assisted living settings' (2008) 20 *Journal of Aging and Social Policy* 65 66.

8 MJ Prince 'Absent citizens: Disability politics and policy in Canada' in MJ Prince *Electoral participation of electors with disabilities: Canadian practices in a comparative context* (2012) 24.

9 J Fishkin 'Equal citizenship and the individual right to vote' (2011) 86 *Indiana Law Journal* 1289 1336.

vote counts just as yours counts – that I am, with respect to the right to vote, your equal’.

The indignity is egregious where disenfranchisement is part of a wider experience of unequal treatment.<sup>10</sup>

Representation is not sought solely for the protection of interests. Having a voice in the manner in which public affairs are conducted, whether directly or indirectly, is also a matter of public recognition, causing one to feel that one ranks equally with one’s countrymen. To be bound by laws in which one has no voice not only results in feelings of exclusion, but also of betrayal and indignity. In the words of Mill.<sup>11</sup>

It is a personal injustice to withhold from anyone ... the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. Everyone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny.

The link between the vote, citizenship and dignity is well articulated by Shklar,<sup>12</sup> who notes that the right to vote has always been contested both historically and theoretically. She equates the right to vote to the right to earn as determinants of one’s social standing. Voting and earning are not only seen in light of agency and empowerment; they are also a mark of social standing, and attributes of citizenship.<sup>13</sup> Voting implies the right to act on one’s own behalf, while earning signifies one’s inclusion as full citizens in civil and political society.

Shklar points out that of all the civic activities identified as belonging to citizens of a state, that is, to rule, to fight, to make laws and to vote, only the right to vote could be expressed by all citizens, as this was tied to the protection of interests. Without the capacity to participate in public affairs, one is in no better condition than a slave – not to one man but to the entire society – because one is at the mercy of the multitude, without any means of protecting oneself.<sup>14</sup> Since every citizen has interests to protect, there is no apparent reason for excluding anyone from citizenship. Therefore, where every citizen has rights to protect and interests to promote, any exclusion from public life denies their civic personality and their social dignity.<sup>15</sup>

10 Fishkin (n 9 above) 1296.

11 JS Mill *Considerations on representative government* (1861) [https://ebooks.adelaide.edu.au/m/mill/john\\_stuart/m645r/chapter8.html](https://ebooks.adelaide.edu.au/m/mill/john_stuart/m645r/chapter8.html) (accessed 7 September 2014).

12 J Shklar *American citizenship: The quest for inclusion. The Tanner lectures on human values* (1989) 387.

13 As above.

14 PS Foner (ed) *Life and writings of Frederick Douglass* (1955) 509, cited in Shklar (n 12 above) 407.

15 Shklar (n 12 above) 396.

Many persons with disabilities experience social exclusion and marginalisation and, in some cases, are institutionalised, leading to feelings of isolation. Persons with disabilities are often viewed by society and the government as needy rather than valuable members of the society.<sup>16</sup> In many countries, these persons are not considered a threat or a force to be reckoned with; therefore, while their votes are desirable during elections, their input into laws and policies are hardly solicited after elections.<sup>17</sup>

This marginalisation limits their opportunities to participate in decision making and policy formulation affecting them,<sup>18</sup> which exacerbates their feelings of isolation, discouragement and powerlessness.<sup>19</sup>

### 3 Background: Understanding participation trends among young persons with disabilities

The youth is defined as persons ‘who have attained the age of eighteen years but have not attained the age of thirty-five years’.<sup>20</sup> Whereas there are inaccurate statistics on the number of youths with disabilities in Kenya,<sup>21</sup> it is estimated that 15 per cent of the population consists of persons with disabilities, of which 60 per cent are youth.<sup>22</sup>

Despite their numbers, Kenyan youths have little impact on the development of policy, decisions and legislation. Many youths feel that they do not receive the respect of communities but are merely pawns in elections and other decision-making processes.<sup>23</sup>

Moreover, research shows that the majority of Kenya’s youths are ‘unemployed, underemployed or underpaid’; meaning that only a small segment of the youth generates their own income.<sup>24</sup> Youths with disabilities are more exposed to poverty than their counterparts without disabilities. Poverty results in a lack of trust and a lack of engagement not

16 SP Harris ‘Civic engagement and disability: Using advocacy and technology to advance the political participation of people with disabilities’ University of Illinois at Chicago 38, <http://www.uic.edu/cuppa/ipce/interior/CivicEngagement&DisabilityFullReport.pdf> (accessed 14 September 2015).

17 Harris (n 16 above) 38.

18 Harris 32.

19 Harris 33.

20 Art 260 Constitution.

21 Equal Rights Trust (ERT) & Kenya Human Rights Commission *In the spirit of harambee: Addressing discrimination and inequality in Kenya* (2012) 132.

22 Action Network for the Disabled (ANDY) *Baseline survey on the accessibility of the electoral processes to persons with disabilities in Kenya* (2013) 7.

23 National Democratic Institute for International Affairs (NDI) *Engaging young people in politics in conflict and post-conflict settings: A toolkit* (2007) 4.

24 KS Njonjo *Youth fact book: Infinite possibility or definite disaster?* (2010) 126.

just in elections, but also in other institutions. This lack of trust manifests in the non-participation in political affairs.<sup>25</sup>

In addition to lowering their income levels and increasing their distrust in authority, poverty causes this constituency to feel disgraced, through no fault of their own, which contributes to a feeling of being second-class citizens.<sup>26</sup> They lose their social standing because of deeply-entrenched societal beliefs that tie work with dignity.

Whether to pursue interests specifically linked to their disability or interests coinciding with the wider segment of society, young persons with disabilities need to participate politically to shape their communities and to become recognised and valued as members of society.<sup>27</sup> Non-participation in decision making reinforces the barriers to youth participation in society.

Moreover, without the participation of youths with disabilities, it is unlikely that the inclusion of persons with disabilities in political and public life will be realised. Not only do they form the majority of the population, but also youths have a greater potential for political and public participation for various reasons: being willing to take political risks; having more time to devote to political causes than the older generation; and having fewer allegiances to traditional voting patterns and political party loyalties.<sup>28</sup>

In addition, research on voting trends indicates that voting patterns are formed within the first three elections of attaining the age of majority,<sup>29</sup> and seldom change past the age of 35 years.<sup>30</sup> This means that those who do not vote are unlikely to start doing so later in life. Therefore, it is imperative that youths, and particularly those with disabilities, are involved in civic life early on, to increase their involvement in decision making and policy formulation throughout their lives and to reduce voter apathy.

Furthermore, the Kenyan Constitution has sought to address the marginalisation of various vulnerable groups, including the youth, indigenous communities, persons with disabilities and women. While

25 NDI (n 23 above).

26 Shklar (n 12 above) 434.

27 International Foundation of Electoral Systems (IFES) and National Democratic Institute for International Affairs (NDI) *Equal access: How to include persons with disabilities in elections and political processes* (2014) 19.

28 As above.

29 A Ellis *Tuning into democracy: Challenges of young people's participation* (2007) 2.

30 As above.

there has been active debate and litigation as to how women's participation rights are to be realised,<sup>31</sup> limited public engagement or litigation<sup>32</sup> has occurred on the exclusion from public life of other marginalised groups, such as persons with disabilities.

## 4 Normative content of the right to participate in political and public life

### 4.1 International level

At the international level, article 25 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to political participation as including the right to vote and to be elected, the right to participate in the conduct of public affairs and the right to have access to the public service. Although these rights were first enunciated in article 21 of the Universal Declaration of Human Rights (UDHR), the ICCPR is considered the most authoritative statement on participation rights as it has been widely ratified.<sup>33</sup> Whilst article 25 rights are *stricto sensu* the only political rights,<sup>34</sup> the rights to assemble and associate and the freedoms of opinion, expression and information are prerequisites for the realisation of article 25 rights.<sup>35</sup> The only permissible restrictions to political rights are those established by law and which are based on objective and reasonable criteria.<sup>36</sup>

Participation in the conduct of public affairs covers a wide range of avenues for participation. It includes taking part in public administration and the formulation of policy at all levels; membership of legislative office

31 See Advisory Opinion 2 of 2012 *In the Matter of Gender Representation in the National Assembly and the Senate* on whether article 27(8) was immediately realisable or subject to progressive realisation, *FIDA Kenya & Others v Attorney-General & Another* [2011] eKLR, which challenged the gender composition of the Supreme Court; *National Gender and Equality Commission v IEBC* High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under art 90 of the Constitution for, *inter alia*, the exclusion of youths, persons with disabilities and women; and *Centre for Rights Education and Awareness (CREAW) v Attorney-General & Another* [2015] eKLR which challenged the non-publication of a Bill to give effect to the 2/3 gender rule.

32 See, eg, *National Gender and Equality Commission v IEBC* High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under art 90 of the Constitution for, *inter alia*, the exclusion of youths, persons with disabilities and women. *Northern Nomadic Disabled Person's Organisation (NONDO) v Governor County Government of Garissa & Another* [2013] eKLR concerned the exclusion of persons with disabilities from county government. Both cases are discussed later in this article.

33 As at 9 March 2016, 168 state parties had ratified the ICCPR; [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsdg\\_no=IV-4&chapter+4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsdg_no=IV-4&chapter+4&lang=en) (accessed 9 March 2016).

34 UN OHCHR 'Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities' (2011) A/HRC/19/36, 3 (OHCHR Report).

35 As above.

36 UN Human Rights Committee, General Comment 25 para 4.

or the exercise of executive power; deciding public issues through a referendum or other electoral process; and engaging in public debate and dialogue with representatives or through advocacy.<sup>37</sup> Of the three elements identified by article 25, the right to vote and to be elected is the easiest to measure, because statistics are taken throughout the process.<sup>38</sup> For this reason, the article addresses the right to vote more elaborately.

Article 29 of the Convention on the Rights of Persons with Disabilities (CRPD) is slightly more elaborate than article 25 of the ICCPR in addressing the participation rights of persons with disabilities. It obliges the state to not only avail political rights but also to ensure that persons with disabilities have the opportunity to ‘effectively and fully participate’ and that this participation be ‘on an equal basis with others’. This means that a legislative provision would not automatically meet the muster of article 29. Moreover, to address interests peculiar to persons with disabilities, the state is required to create an atmosphere conducive to their participation in public life by encouraging these persons to join any non-governmental organisation (NGO) or the administration and activities of political parties and to form and join in the activities of disabled peoples’ organisations (DPOs) representing their interests at international, regional, national and local levels.<sup>39</sup>

The right to participation in political and public life is important as it ensures that the ‘cycles of oppression and marginalisation’ which have been experienced by persons with disabilities are not perpetuated.<sup>40</sup> However, participation cannot be effective if the relevant systems, information and facilities are not accessible. Therefore, article 29 of the CRPD must be read together with article 9, which addresses questions of accessibility of the physical environment as well as information and communication, which is discussed below. The right to legal capacity, provided for in article 12, is also central to participation, and has in some countries been used to disenfranchise certain persons with disabilities, such as those with intellectual disabilities. The article does not address legal capacity at length, since Kenya, unlike many Western countries, does not have a formal guardianship system. The law does, however, require that one be of sound mind before being eligible to register as a voter, and the implications of this are discussed below.

## **4.2 Regional level**

Regionally, the right to political participation is addressed in article 13 of the African Charter on Human and Peoples’ Rights (African Charter) and

37 OHCHR Report (n 34 above) 4.

38 Ellis (n 29 above) 2.

39 Art 29(b).

40 Harris (n 16 above) 4.

the African Charter on Democracy and Governance (ACDG). Article 13 of the African Charter gives every citizen the right 'to participate freely in the government, either directly or through freely chosen representatives'. The weight of article 13 as a participatory rights provision has been called into question because the provision neither refers to the right to vote in genuine and periodic elections nor mirrors the non-discrimination imperative of the ICCPR and the CRPD.<sup>41</sup> Nevertheless, the African Commission on Human and Peoples' Rights (African Commission) has drawn inspiration from international law and ruled as unjustifiable the denial of voting rights to persons with mental disabilities on the basis of a perceived inability to make rational decisions.<sup>42</sup> The ACDG further supplements the African Charter by requiring states to promote the participation of persons with disabilities, among other groups with special needs, in governance through measures such as systematic and comprehensive civic education.<sup>43</sup>

Although neither instrument makes express reference to the right to political participation by persons with disabilities, articles 16 and 17 of the Draft Protocol on the Rights of Persons with Disabilities in Africa (Disability Protocol), prepared by the African Commission's Working Group on Rights of Older Persons and Persons with Disabilities, proposes to remedy this.<sup>44</sup> It obliges states to take legislative and other measures to ensure that persons with disabilities, including persons with psychosocial and intellectual disabilities, participate in political and public life on an equal basis with others, including by availing civic education material in accessible formats; ensuring access to political party membership; the right to vote and hold political and public office by persons with disabilities; facilitating assisted voting; and ensuring accessibility to polling stations.<sup>45</sup>

The Disability Protocol also recommends increased representation and participation of persons with disabilities in national and local legislative bodies.<sup>46</sup> It further calls on states to repeal or amend laws restricting the right to vote or hold office on the basis of disability,<sup>47</sup> and to support the self-representation efforts and capacity of persons with

41 Fox (n 1 above) 66.

42 *Purohit & Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 47-48.

43 ACDEG, art 31.

44 The Protocol was adopted by the African Commission at its 19th extra-ordinary session held on 16-25 February 2016 in The Gambia. The Protocol is now pending submission to the treaty-making process of the African Union, following which it will become a binding legal instrument open to ratification.

45 Arts 17(2)(a)-(c) Draft Protocol.

46 Art 17(2)(d). Unlike the previous drafts, which had recommended that at least 5% of the seats in these bodies be reserved for persons with disabilities, the final draft simply requires the realisation of greater inclusion. This may be due to the realisation of the difficulty of implementing these hard quotas, as the Kenyan experience has demonstrated. A brief discussion on implementing hard quotas for gender inclusion will follow later in this article.

47 Art 16(e).



disabilities through DPOs and NGOs, thus mirroring article 29 (b) of the CRPD.

### **4.3 Right to participation in political and public life in Kenya**

The right to participation in Kenya is addressed in the Constitution, and elaborated upon in the Elections Act,<sup>48</sup> the Political Parties Act 2011,<sup>49</sup> the Elections (General) Regulations 2012 and, more specifically for persons with disabilities, the Persons with Disabilities Act (PWDA).<sup>50</sup>

### **4.4 Constitution**

The participation provisions in the Constitution are expansive. According to Mumbi J in *Centre for Rights Education and Awareness v Attorney-General & Another*.<sup>51</sup>

The Constitution of Kenya has been described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. At its core is the belief that there can only be real progress in the society if all citizens participate fully in their governance and that all, male and female, persons with disabilities and all hitherto marginalised and excluded groups get a chance at the table.

Besides non-discrimination being a national value,<sup>52</sup> article 27 establishes disability as one of the grounds on which a person may not be discriminated against. The Constitution also imposes a duty on all state organs and public officers to address the needs of vulnerable groups in society, including persons with disabilities.<sup>53</sup>

Article 38, which provides for political rights, must be read together with articles 54 and 83. On one hand, every adult citizen is entitled to vote and be a candidate for public office and to hold office in a political party. Article 54(1) further requires that persons with disabilities be treated with dignity and respect and be addressed in a manner that is not demeaning. On the other hand, article 83(1)(b) excludes a person of unsound mind from qualifying as a voter and, by extension, from holding office, since one must be a registered voter to qualify as a candidate for any election in Kenya.<sup>54</sup> The term 'unsound mind' is considered both derogatory and problematic as it is undefined both in the Constitution and in related electoral legislation. Further, whereas the Penal Code (section 11), the

48 Act 24 of 2011.

49 Act 11 of 2011.

50 Act 14 of 2003.

51 *CREAW v A-G* (n 31 above).

52 Art 10(1)(b).

53 Art 21(3).

54 See arts 99(1)(a), 137(1)(b), 180(2) & 193(1)(a) of the Constitution.

Criminal Procedure Code (sections 162-163) and the Mental Health Act (section 26) provide for an adjudication procedure to determine whether a person is of 'sound mind', these laws are restricted to criminal procedure and the management of the financial affairs of a person alleged to suffer from mental illness. The Elections Act does not contain an adjudication procedure for challenging exclusion from registration.

Article 54(2) seems to borrow from the approach taken by article 29 of the CRPD and article 25 of the ICCPR. It envisages inclusion not only in politics but also in all aspects of public life. It requires the inclusion of persons with disabilities not only in elective positions – which was the approach of the previous Constitution – but also in all appointive offices. The 'five per cent rule' in article 54(2) is akin to the 'two-thirds gender rule' in article 27(8), as it requires the state to ensure the progressive realisation of the principle that at least 5 per cent of the members of elective and appointive bodies are persons with disabilities. Parallels between these two provisions are discussed below.

The Constitution elaborates on the rights of youths, and it requires the state to take affirmative action measures to ensure that youths have the opportunity to participate in all spheres of life, including political life.<sup>55</sup>

The general principles of the electoral system in article 81 also require the electoral system to comply with the principle of fair representation of persons with disabilities. This principle is reflected in the composition of the National Assembly, which includes 12 members nominated to represent special interests, including the youth and persons with disabilities;<sup>56</sup> and the composition of the Senate, which includes two youths and two persons with disabilities (with equal gender representation) elected by proportional representation using party seats.<sup>57</sup> Parliament is required by article 100 to enact legislation to enhance the representation in Parliament of all marginalised groups, including persons with disabilities and the youth.

In line with the prescription in the ICCPR of equal access to the public service, the values and principles of public service also require the participation of persons with disabilities in the formulation of policy. The principle of fair competition and merit for appointments and promotions is made subject to, *inter alia*, the principle of affording equal and adequate opportunities for the appointment, training and advancement of persons with disabilities in public service.<sup>58</sup> Parliament is yet to enact legislation to

55 Art 55(b).

56 Art 97(1)(c).

57 Art 98.

58 Art 232.

give effect to the values and principles of public service set out in article 232.<sup>59</sup> Nevertheless, the CRPD Committee commended Kenya for the introduction of a disability-mainstreaming indicator in performance contracting for public services.<sup>60</sup>

#### **4.5 Elections Act**

The Elections Act<sup>61</sup> gives effect to the constitutional provisions on elections and electoral boundary delimitation. The Electoral Code of Conduct requires political parties and referendum committees to guarantee the security and full participation of, *inter alia*, persons with disabilities as candidates and voters, in addition to ensuring their free access to public meetings, their activities and other political events.<sup>62</sup>

However, to qualify for nomination as a candidate for any election, the Elections Act requires one to hold a ‘certificate, diploma or other post-secondary school qualification’, while candidates for presidency or deputy-presidency are required to hold a degree certificate from a recognised university.<sup>63</sup> These educational requirements are often prohibitive for persons with disabilities who wish to vie for elective positions, as discussed below.

The Act also specifies how special seats for the representation of marginalised groups, including persons with disabilities, will be allocated to parties following an election.<sup>64</sup> It further grants the Independent Electoral and Boundaries Commission (IEBC) power, under section 109(o), to make regulations providing for assisted voting for persons with special needs, including persons with disabilities.

#### **4.6 Political Parties Act<sup>65</sup>**

The Constitution and the Electoral Code of Conduct require political parties to respect the rights of marginalised groups to take part in the political process.<sup>66</sup> In a provision appearing to give effect to articles 38 and 81 of the Constitution, the Act further makes the inclusion of minorities and marginalised groups, including persons with disabilities, both in the

59 The Public Service Values and Principles Bill 2014 is still pending adoption by parliament.

60 CRPD Committee Concluding Observations in relation to the initial report of Kenya CRPD/C/KEN/CO/1, adopted by the Committee at its 14th session, 17 August-4 September 2015 1.

61 Act 24 of 2011.

62 Sec 16, Second Schedule to Elections Act.

63 Sec 22; see also secs 24 & 25 as read with arts 99(1) and 193(1)(b) of the Constitution.

64 Sec 36.

65 Act 11 of 2011.

66 Art 91(1)(e) and Second Schedule to Elections Act.

membership and in the governing bodies of the parties a prerequisite for full registration.<sup>67</sup>

To implement the inclusion of marginalised groups, the Act establishes the Political Parties Fund. At least 30 per cent of the funds allocated to each party ought to be used to secure the inclusion of women, the youth, persons with disabilities, ethnic and other minorities and other marginalised groups in Parliament and county assemblies.<sup>68</sup>

#### **4.7 Persons with Disabilities Act**

The PWDA<sup>69</sup> preceded the CRPD, and its limited provisions on political participation should, therefore, be understood in this light. It entitles every adult person with a disability to vote and to use a personal assistant where necessary who is sworn to secrecy; to accessible polling stations and assistive devices to exercise their civic rights.<sup>70</sup> The Act makes it an offence for the assistant to fail to comply with the voting instructions of the person with a disability and to conceal a person with disability, which deprives them of the opportunity to participate in public life.<sup>71</sup> Proposed amendments to the Act are discussed below.

#### **4.8 Elections (General) Regulations**

The Regulations<sup>72</sup> are enacted by the Independent Electoral and Boundaries Commission (IEBC) under section 109 of the Elections Act. To incentivise persons with disabilities to vie for elections, the Regulations entitle these persons to pay only half of the nomination fees charged for any election.<sup>73</sup> Further, Regulation 72 sets out the guidelines for assisted voting, but only provides for the use of a personal assistant.

#### **4.9 Persons with Disabilities Bill 2015<sup>74</sup>**

Despite having ratified the CRPD in 2008, Kenya is yet to bring its disability legislation in compliance with the CRPD and the Constitution.

67 Secs 7(2)(b) & (c).

68 Sec 26.

69 Act 14 of 2003.

70 Secs 29 & 30.

71 Sec 48 & 45 respectively.

72 Legal Notice 128 of 2012.

73 Regs 19(a), 25(a), 29(a), 33(a) & 37(a).

74 The author wishes to acknowledge that the Bill is undergoing stakeholder review and is likely to change by the time of publication. The version discussed here is the one published by the Commission on the Implementation of the Constitution (CIC) in 2015 and may have undergone significant changes by the time of publication. See <http://www.cickenya.org/index.php/legislation/item/491-persons-with-disabilities-bill-2015> (accessed 20 June 2016).

Several attempts to amend the PWDA have been unsuccessful, in part due to the limited representation in Parliament of persons with disabilities, and a reluctance on the part of the media to raise awareness on disability rights.<sup>75</sup> The lack of awareness on disability rights and the low media coverage have in part been attributed to the fact that there are no incentives to actors and institutions to avail information in disability-friendly format.<sup>76</sup> Nevertheless, by virtue of articles 2(5) and (6) of the Constitution, international law (including the CRPD) is directly applicable to Kenya, even in the absence of legislation having been enacted to implement it.<sup>77</sup>

None of the previous attempts at amendment has extensively addressed political participation rights. The furthest these attempts have gone was to require that national and county governments reserve at least 5 per cent of all state and public service positions for persons with disabilities,<sup>78</sup> and that reasonable accommodation measures be adopted to overcome restraints faced by persons with disabilities.<sup>79</sup> Although this Bill has been criticised for being 'full of nice-sounding ideas' without adding 'anything valuable' to the Constitution,<sup>80</sup> it addresses some of the concerns raised by the CRPD Committee in its Concluding Observations to Kenya's initial report. This section reviews the 2015 Bill and whether, if passed, it will facilitate greater participation in political and public life.

The 2015 Bill is a marked improvement on previous Bills. As opposed to piecemeal amendments to the PWDA, the 2015 Bill proposes to overhaul the entire Act. However, the Bill is yet to be tabled in Parliament, as it is still undergoing internal review and stakeholder consultation.<sup>81</sup>

Part III of the Bill sets out *in extenso* the rights of persons with disabilities. It elaborates on the constitutional provisions and reflects the CRPD. Whereas the Constitution places a greater burden on the state to realise the rights of persons with disabilities, the Bill proposes a more collaborative approach between the National Council of Persons with Disabilities, the national and county governments and the private sector.<sup>82</sup>

75 K Njogu 'Media and disability in Kenya' (2009) 24 *Disability Studies Quarterly* <http://dsq-sds.org/Article/view/983/1171> (accessed 13 September 2015).

76 African Union for the Blind 'State of disabled peoples' rights in Kenya (2007) Report' 26.

77 See *CK & Others v Commissioner of Police Meru* Petition 8 of 2012; *Mitu-Bell Welfare Association v A-G* [2013] eKLR, where the courts directly applied international law in the absence of implementing legislation.

78 See clause 4(1) of the Persons with Disabilities (Amendment) Bill 2014.

79 n 78 above, clause 11.

80 J Cottrell Ghai 'The Constitution and disability: The good and the not so good' <http://www.the-star.co.ke/news/constitution-and-disability-good-and-not-so-good> (accessed 31 October 2015).

81 Commission for the Implementation of the Constitution (CIC) <http://www.cickenya.org/index.php/legislation/bill-tracker> (accessed 19 September 2015).

82 See eg clauses 8 & 31(2).

Clause 30 addresses the right of children with disabilities to a name and registration immediately after birth, as set out in article 18 (2) of the CRPD. This right is not expressly provided for in the PWDA. This right must be read together with the right to documents of registration and identification set out in clause 33; which entitles every person to a birth certificate, a national identity card, passport or other identification. Possibly in order to address the lack of accurate statistics on persons with disabilities, the Council will also be tasked with the registration of persons with disabilities and the issue of disability identification cards.<sup>83</sup> However, it is unclear whether disability identification cards will be of equal status to national identity cards, and as such will be used for voter identification and registration in the absence of national identity documents.

Clause 31 provides specifically for young persons with disabilities. Among other proposed measures, the state is required to 'promote full, inclusive and accessible education, training and employment and programmes for youths with disabilities' and to promote their inclusion in mainstream youth organisations and programmes.<sup>84</sup> Clause 31 may be read together with clause 39, which seeks to ensure accessibility of children with disabilities to inclusive and free early childhood, primary and secondary education on an equal basis with others. The obligation to ensure access to education is placed on both the national and county governments, and the courts are given the power to order the unconditional admission of a person with a disability.<sup>85</sup> The Council and the governments are tasked with ensuring that learning institutions take into account the needs of persons with disabilities as well as providing individualised support measures.

Persons with mental disabilities, who are often the most excluded from education due to their special needs, are also specifically provided for in the Bill. The draft, if adopted, would require the Cabinet Secretary in charge of education to develop an adaptable education framework which would award a certification of completion to children with mental disabilities. This certificate would enable participation in elections where a person desires to be elected to office under the Elections Act.<sup>86</sup> The 2015 Bill also entitles every person with a disability to special measures to accelerate their equal participation in, *inter alia*, the political field.<sup>87</sup>

As indicated by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the right to information is a prerequisite to participation and effective decision making.<sup>88</sup> The proposed Bill, if passed, would also oblige both public and private institutions to provide

83 Clause 8(c)(i).

84 Clauses 31(a) & (b).

85 Clause 39(10).

86 Secs 22, 24 & 25.

87 Clause 38.

88 OHCHR Report (n 34 above) 3.

information to the public, including through the internet, radio and television stations, to ensure that the information is in accessible format and technologies appropriate for different kinds of disabilities.<sup>89</sup> It is unfortunate that the Bill does not create penalties for non-compliance with this provision. The Bill further seeks to make sign language a common course in all institutions of higher learning.<sup>90</sup>

To give effect to article 29(b) of the CRPD, clause 47 proposes the mandatory inclusion of at least one male and one female with a disability in the governing body of each political party registered with the Council.<sup>91</sup> It would require the IEBC to ensure the participation of persons with disabilities by facilitating voting procedures, material and facilities which are accessible and easy to understand and use; by protecting the rights of persons with disabilities to vote in secret and to offer their candidature in elections; and allowing assisted voting and facilitating the use of assistive and appropriate technology. This clause largely improves on Regulation 72, which currently benefits only particular categories of persons with disabilities, such as the visually impaired, and which fails to ensure secrecy of the ballot. The clause also requires the Inspector-General of Police to provide protection to persons with disabilities who declare candidature in the general elections.

The Council is also mandated to vet persons with disabilities who desire to vie in any election or declare their interest in any appointive position,<sup>92</sup> and to issue a clearance certificate. Again, it is unclear whether the vetting process undertaken by the Council is complementary to, in lieu of or done alongside vetting by the IEBC.

Clause 55 restates the PWDA's prohibition on concealment of persons with disabilities by a parent, guardian or next of kin,<sup>93</sup> which denies them opportunities, including the right to participate in public life. However, it proposes a harsher penalty by raising the fine upon conviction to 200 000 shillings, up from 20 000 shillings in the PWDA.

Moreover, to address inaccessibility, the Bill restates the obligation of both private and public institutions to ensure accessibility, and to ensure that new buildings meet the accessibility guidelines set out in the Third Schedule. The proposed penalty for non-compliance with an adjustment order is a fine not exceeding 5 million shillings (up from 20 000 in the PWDA),<sup>94</sup> and/or imprisonment for a term of five years or both. This provision would go a long way towards addressing the inaccessibility of voting stations and booths, government offices as well as the format of

89 Clause 43.

90 Clauses 43(6) & 7.

91 Clause 47(2).

92 Clause 47(8).

93 Sec 45.

94 Sec 26(2).

civic and voter education used by the IEBC. It would also address the CRPD Committee's concern about the current lack of measures to sanction non-compliance with accessibility standards.<sup>95</sup>

## 5 Obstacles to realising the right to participate in political and public life by Kenyan youths with disabilities

Despite the elaborate provisions on including both youths and persons with disabilities in political and public life in Kenya, political participation by youths with disabilities remains minimal. Although some barriers to inclusion are specific to youths with disabilities, other barriers affect all persons with disabilities. The barriers to their participation are roughly split into five categories: architectural and physical; attitudinal and cultural; informational and communication; legal and policy; and factors related to socio-economic status.<sup>96</sup> The main barriers are discussed below.

### 5.1 Architectural and physical

Many institutions have made strides in making their facilities accessible, but physical inaccessibility remains a huge barrier to participation. Public transport remains largely inaccessible and costly for most persons with disabilities due to the design of public service vehicles and the attitude of the operators, who often decline to transport wheel-chair users or charge them extra for loading their wheelchairs.<sup>97</sup> Many persons with disabilities, therefore, avoid activities that would require them to leave home, including voting and participating at political rallies. Moreover, few voter registration offices and polling stations are accessible.<sup>98</sup>

In addition, many polling stations are overcrowded during voting, and are characterised by long queues. The long queues are a great strain on persons with disabilities and, in some cases, these persons abstain from voting for fear of stampedes during the voting exercise.<sup>99</sup>

95 CRPD Concluding Observations (n 60 above) para 17.

96 Prince (n 8 above) 28.

97 KNCHR *From norm to practice: A status report on implementation of the rights of persons with disabilities in Kenya* (2014) 33-34.

98 Although there are few statistics on this issue, an analysis by the Kenya National Commission on Human Rights (KNCHR) indicated that little had been done to ensure the participation of persons with disabilities prior to the 2013 elections. See KNCHR *Living and voting with dignity and justice* (2012) 41. The CRPD Committee recommended that Kenya guarantee full accessibility of polling stations and ensure that information on elections is available in accessible formats. See Concluding Observations (n 60 above) para 52(b).

99 ANDY (n 22 above) 5.



Furthermore, even where youths with disabilities succeed and are elected or appointed to office, many government offices and public buildings are not accessible and the information on policies is not available in accessible format.<sup>100</sup> Having persons with disabilities in office helps to highlight the accessibility issues and allows persons with disabilities to impact on projects and funding priorities.<sup>101</sup>

## **5.2 Attitudinal and cultural**

Attitudes towards persons with disabilities remain a major hindrance to their equal and full participation in society. Many youths with disabilities are concealed by their families from birth, thus being excluded from birth and national registration.<sup>102</sup> Others are deprived of registration documents because of the ethnic community to which they belong, such as youths of Somali and Nubian origin.<sup>103</sup> Before youths from these ethnic groups are registered, they are required to provide 'evidence' of their citizenship and go through a vetting process.<sup>104</sup> The CRPD Committee noted that birth registration figures are also low in refugee camps and those of internally displaced persons (IDPs).<sup>105</sup> The lack of valid national identification precludes voting and vying for elective office.<sup>106</sup>

Even where they are registered, there is no provision in the identity card or voter registration form for the category of disability of a person, making it difficult for electoral officials to know what kind of support is required. The disability identity cards proposed by the 2015 Bill might aid in providing the requisite electoral support.<sup>107</sup>

Some persons with disabilities also experience stigma in voter identification and national registration processes because they do not have fingers for imprinting during the identification process.<sup>108</sup> This stigma causes them to opt out of national registration and voter registration exercises. In some cases, persons with disabilities have reported the use of insensitive language during the registration process.<sup>109</sup>

Despite a constitutional stipulation for their inclusion, persons with disabilities were also excluded from party nomination lists in 2013. Their exclusion was challenged in the case of *National Gender and Equality*

100 IFES & NDI (n 27 above) 60.

101 As above.

102 M Redley et al 'The voting rights of adults with intellectual disabilities: Reflections on the arguments, and situation in Kenya and England and Wales' (2012) 56 *Journal of Intellectual Disability Research* 1026 1031.

103 ERT (n 21 above) 4.

104 ERT (n 21 above) 168.

105 Concluding Observations (n 60 above) para 36.

106 As above.

107 Clause 8(c)(i) Persons with Disabilities Bill 2015.

108 ANDY (n 22 above) 5.

109 ANDY 17.

*Commission & Others v IEBC & Others*,<sup>110</sup> where women, youths and persons with disabilities had been left out of the party lists forwarded to the IEBC. Although the members of parliament had already been gazetted and could, therefore, not be removed by a court order, the High Court ordered a repeat of the election exercise in relation to county assemblies, to include these marginalised groups. In *NONDO v Governor County Government of Garissa & Another*,<sup>111</sup> the petitioners also challenged the exclusion of persons with disabilities from county executive committee appointments, which they argued did not comply with the requirements of article 54(2) of the Constitution. While ruling that it was necessary for county governments to be more proactive in ensuring the inclusion of person with disabilities, the Court declined to nullify the appointments for non-compliance with article 54(2) because it could not be demonstrated that the members of the DPO had applied and been denied appointments. Having noted that the county government had not complied with the Constitution and that persons with disabilities are often so marginalised that they are unaware of such appointments, it is unfortunate that the Court declined to order the inclusion of persons with disabilities to comply with the Constitution. These cases demonstrate the need for continuous sensitisation on disability rights.

Persons with mental and intellectual disabilities, in particular, face restrictive attitudes about their voting capacity both from their caregivers and from electoral officials.<sup>112</sup> Discriminatory attitudes on the part of caregivers have a far-reaching impact on participation in public life.<sup>113</sup> The stigma sometimes manifests in violence, with some persons with intellectual disabilities reportedly having been shoved out of voting queues in the 2013 elections.<sup>114</sup> Their desire to offer leadership is often belittled, and some who have endeavoured to vie for public office have had to drop out due to mudslinging by fellow candidates.<sup>115</sup> Moreover, the public and caregivers often have the erroneous perception that all persons with disabilities' needs are met by their families, including the right to political participation, making it unnecessary to encourage them to exercise their political rights.<sup>116</sup> The everyday challenges faced by persons with disabilities to meet their socio-economic needs, coupled with these discriminatory attitudes, have the result that for many realising their political rights is not a priority.

110 n 32 above.

111 As above.

112 Mental Disability Advocacy Centre (MDAC) *The right to legal capacity in Kenya* (2014) 6 24.

113 ERT (n 21 above) 133.

114 MDAC (n 111 above) 38.

115 MDAC 39.

116 Cambodian Disabled People's Organisation (CDPO) *Disability inclusion in the voter registration process* (2015) 31.

### **5.3 Informational and communication barriers**

Mass media plays a critical role in shaping public opinion. Therefore, the lack of information in accessible format deprives youths with disabilities of the opportunity to participate in civic life. A survey by KNCHR indicates that this barrier is experienced more by persons with auditory and visual impairments than by those with physical disabilities.<sup>117</sup> Despite the introduction of sign language in 2010 for all programming of national and international significance,<sup>118</sup> sign language is only available for parliamentary broadcasts and news on selected television stations. There is also a general lack of awareness of disability rights, and poll officials are not trained to communicate with persons with disabilities. Persons with disabilities are reported not to have voted in 2013 as they could not communicate with poll officials using sign language.<sup>119</sup>

While the use of technology provides a great platform for persons with disabilities to take part in public debates and to voice their views while circumventing attitudinal barriers,<sup>120</sup> it is only effective if information that is availed is in accessible format. Persons with intellectual disabilities, for example, require information in easy-to-read format. Persons with visual impairments require facilities such as screen readers.<sup>121</sup> Whereas technology holds great potential for increasing participation by youths with disabilities, the high costs of the necessary devices, internet and training on their use preclude many youths, especially those in rural areas, from acquiring the necessary equipment to facilitate their participation.<sup>122</sup>

Moreover, the complexity of the electoral system poses a challenge to all persons, but more so to persons with disabilities. In Kenya, six elections are held on the same day.<sup>123</sup> The complexity of voting is exacerbated by the fact that voter education drives are often not designed for and targeted at persons with disabilities.<sup>124</sup>

### **5.4 Legal and policy**

As discussed above, article 83 of the Constitution excludes persons of 'unsound mind' from registering to vote. This term is derogatory and

117 KNCHR (n 97 above) 34-35.

118 It is provided for in sec 39 of the PWDA but was operationalised by Legal Notice 182 of 2010.

119 KNCHR (n 97 above) 35.

120 Harris (n 16 above) 10.

121 <http://www.disabled-world.com/disability/accessibility/websitedesign/> (accessed 16 September 2015).

122 Harris (n16 above) 39; see also ERT (n 21 above) 138.

123 The six elections are presidential, gubernatorial, senatorial, parliamentary (both Senate and National Assembly) as well as elections for the woman representative to the National Assembly drawn from each county.

124 CDPO Report (n 115 above) 11.

undefined in Kenyan law. This provision treats mental capacity as synonymous with legal capacity.<sup>125</sup> Whereas the provision does not automatically exclude persons with disabilities, in practice mental illness and intellectual disabilities are conflated, and the lack of a legal definition allows electoral officials to exclude persons perceived to be of unsound mind from voting.<sup>126</sup>

The educational requirements introduced by the Constitution and electoral laws also affect youths with disabilities disproportionately. Youths with disabilities often have lower levels of education because of inaccessibility, poverty, the lack of implementation of the Special Needs Education Policy of 2009, stigma, high dropout rates of girls with intellectual disabilities as a result of sexual abuse, among other factors.<sup>127</sup> A lack of access to education deprives them of the capacity for active citizenship.<sup>128</sup> By operation of law, low education levels also divest them of the opportunity to vie for or be appointed to public office. The Elections Act is in the process of being amended, and the provision on education has been amended to require higher educational levels for members of county assemblies. This provision is expected to come into effect in the 2022 elections. Despite calls for a similar affirmative action measure for persons with disabilities,<sup>129</sup> the threshold is yet to be lowered for persons with disabilities seeking elective office.

Furthermore, Regulation 72, the only provision on assisted voting, only envisages voting with the help of personal assistants. It does not take into account the diversities among persons with disabilities, increasing the likelihood of double marginalisation of people with other types of disability, such as intellectual disability.

## 5.5 Socio-economic factors

Under this category, the barriers to participation by persons with disabilities are rooted in their socio-economic status. Because many youths with disabilities have lower levels of education, they have low-income levels. Both poverty and disability result in stigma and social exclusion, and ultimately result in limited electoral participation. Poverty further precludes persons with physical and sensory disabilities from accessing

125 The Kenya National Commission on Human Rights (KNCHR) and The Open Society Initiative for Eastern Africa (OSIEA) 'How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper' 50.

126 L. Mute 'Shattering the glass ceiling: Ensuring the right to vote for persons with intellectual disabilities in Kenya' (2010) 2 *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)* 4.

127 KNCHR Report (n 97 above) xi.

128 J Lord et al *Human Rights. YES!* (2012) 47.

129 See clause 7 of the Election Laws (Amendment) (No 3) Bill 2015.

assistive devices and technologies necessary for participation.<sup>130</sup> Without resources, it is also impossible to mount effective campaigns for election to public office. It is asserted that even the reduced nomination fees introduced by the Elections Regulations are beyond the reach of most persons with disabilities who wish to vie for elective office.<sup>131</sup>

Political participation cannot be effectively ensured without addressing the underlying factors, such as poverty, which serve to place youths with disabilities at the periphery of public life. As one author aptly points out, it is possible for the law, with one hand, to accord civil and political rights to persons with disabilities, while with the other to effectively disenfranchise them by upholding policies that ignore their particular situation and needs.<sup>132</sup> For these barriers to be minimised, it is necessary to have a significant allocation of resources.<sup>133</sup>

## **6 Strategies for securing inclusion of youths with disabilities in Kenya**

It is difficult to establish a single 'gold standard' for participation that would take into account all the diverse circumstances, obstacles and barriers faced by youths with disabilities around the world, especially since electoral systems and political contexts are ever-changing.<sup>134</sup> Nevertheless, it is necessary to propose strategies that can be adopted because the inclusion of youths with disabilities in Kenya will not happen organically. Concrete steps for the realisation of Convention rights are needed.

Firstly, it is crucial to establish the scope of the state's obligations in relation to the inclusion of persons with disabilities and the mechanisms to be adopted by the state in realising the inclusion of persons with disabilities in political and public life. While the lack of a clear formula under article 54(2) of the Constitution provides wider room for disability advocates seeking creative avenues for inclusion, it also poses a danger of non-compliance by the state.

130 ERT (n 21 above) 134.

131 ANDY (n 22 above) 25.

132 P Alston 'Disability and the International Covenant on Economic, Social and Cultural Rights' in T Degener & Y Koster-Dreese (eds) *Human rights and disabled persons: Essays and relevant human rights instruments*, cited in F Mégret 'The Disabilities Convention: Towards a holistic concept of rights' (2008) 2 *International Journal of Human Rights* 261 265.

133 Mégret (n 132 above).

134 Prince (n 8 above) 41.

The courts, rather than legislation, proved to be effective forums for challenging and eventually removing impediments to voting and representation faced by African-Americans.<sup>135</sup> The courts removed these impediments by addressing themselves to the constitutional rights of every citizen.

In Kenya, strategic litigation has been employed to clarify the scope of the state's constitutional obligations towards women in relation to the two-thirds gender rule.<sup>136</sup> The Supreme Court in *Advisory Opinion No 2 of 2012*<sup>137</sup> ruled that provision was to be progressively rather than immediately realised through legislation; and the state was under an obligation to enact legislation within five years of promulgation of the Constitution – as set out in the Fifth Schedule – that is, by 27 August 2015.

When it became apparent that the Attorney-General had not put the necessary mechanisms in place to adopt legislation in time, CREAM initiated litigation to compel the Attorney-General to publish a Bill setting out a formula of facilitating women's inclusion in Parliament. The High Court found that the Attorney-General, by failing to publish the Bill, had violated his constitutional obligation and threatened the right of women to equality as established in article 27(8), read with articles 81(b) and 100 of the Constitution. He was ordered to prepare and publish a Bill for deliberation by Parliament within 40 days. Whereas strategic litigation is yet to resolve the exclusion of women from elective and appointive positions, it has sparked public debate on inclusion and strategies to secure greater political participation by women.

Article 22(3) of the Constitution also gives wide remedial powers to the High Court in cases involving the violation of fundamental rights, by stating that 'the Court may grant appropriate relief ...' This allows the Court to craft creative remedies – including a compelling *mandamus* to report back periodically – that are appropriate to secure the rights and freedoms set out in the Bill of Rights.

A compelling *mandamus* has been found to be an efficacious remedy in cases involving the right to housing where there is no specific legislation and guidelines to regulate evictions. This remedy was given to ensure that the right to accessible and adequate housing was not 'aspirational and merely speculative'.<sup>138</sup> In *Mitu-Bell Welfare Association v A-G*,<sup>139</sup> the parties were ordered to report to the Court within 90 days on the progress made by the state in resolving the grievances of the petitioners and in realising the right to housing in Kenya. In the *Satrose Ayuma* case, the state was

135 Shklar (n 12 above) 408.

136 *CREAW v A-G* (n 31 above).

137 As above.

138 *Satrose Ayuma & Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others* High Court Petition 65 of 2010.

139 High Court Petition 164 of 2011.

ordered to file an affidavit within 60 days of the judgment detailing proposed measures to realise the right to adequate housing in Kenya. Further, the state was ordered to engage with the petitioners on a programme of action for evictions, to be supervised by independent observers.<sup>140</sup>

The National Council of Persons with Disabilities (Council) or DPOs can use strategic litigation to enforce constitutional participation rights and to seek such creative remedies aimed at ensuring compliance with the quota established by the Constitution and other legislative provisions. The state would then have to report on the extent to which it has given effect to the quotas at all levels of government, both in elective and appointive offices; as well as on the extent to which physical and informational accessibility has been complied with to enable them to hold office. The Court would then have the opportunity to assess the reasonableness of the measures taken and to give appropriate directions. This would ensure that court judgments actually result in greater inclusion in public life. However, for strategic litigation to be effective, it would require ownership of constitutional values by the state and political will. Unfortunately, the Kenyan government has been known to reject and fail to implement decisions of the High Court on constitutional matters.

The Council may also consider lobbying for a Disability Advisory Council or Ombudsperson to advise the executive on inclusion and ways in which barriers to participation can be removed. These advisory councils have worked well in Namibia, Australia, Sweden and the US.<sup>141</sup>

The IEBC, the elections management body, can also actively engage in several ways in the inclusion of youths with disabilities. First, it can, in partnership with cross-disability DPOs, introduce a training programme for its staff and poll officials to sensitise them on disability issues and persons with disabilities' rights and how to engage with persons with disabilities in the electoral process.<sup>142</sup> Such training would provide a useful avenue for resolving misconceptions about disability, especially when it comes to persons with mental or intellectual disabilities,<sup>143</sup> thus allowing them to better serve persons with disabilities in the electoral process.<sup>144</sup> To make it more effective, this training should be extended to all stakeholders in the electoral process, such as political parties, the judiciary, police, the Political Parties Disputes Tribunal and the media.

Second, the IEBC should include more persons with disabilities, representing diverse disabilities, in the management of elections and

140 See paras 111(ii)(d) & (e).

141 Lord et al (n 128 above) 53.

142 A Ward et al 'Ensuring the enfranchisement of people with disabilities' (2009) 20 *Journal of Disability Policy Studies* 79 82, cited in Prince (n 8 above) 28.

143 MDAC (n 111 above) 26.

144 Prince (n 8 above) 7.

conduct of pre- and post-election assessments.<sup>145</sup> Their first-hand experience with the barriers in the electoral process would enable them to advise on the accessibility of electoral systems and procedures and provide guidance in identifying gaps and priorities for removing these barriers. The voter register, for example, can include statistics indicating the level of support needed by persons with disabilities.<sup>146</sup> The inclusion of youths with disabilities as staff of donor partners and implementing organisations would also strengthen their participation in electoral and political processes, especially given the high level of dependence of donor funding for elections in Kenya,<sup>147</sup> by making the inclusion of persons with disabilities part of their agenda.

Third, the IEBC should use sections 109(n) and (o) of the Elections Act to pass specific regulations providing for voting for persons with various disabilities. Regulation 72 appears to only address the needs of people with physical disabilities. There is also no provision for tactile ballots or accessible electoral material. Further, the regulations should provide for the transmission of results in accessible format, to allow for participation of persons with disabilities at all stages of the electoral process.<sup>148</sup>

It is also recommended that the IEBC consider adopting mobile polling stations for all elections to address the accessibility needs of persons with disabilities.<sup>149</sup> A recent proposal by the Commission to cap the number of voters per polling station at 700 would also address concerns about overcrowding and long queues.<sup>150</sup> Polling officials should also prioritise persons with disabilities in voting queues.

The Registrar of Political Parties, as the manager of the Political Parties Fund, should firmly uphold the inclusion of youths with disabilities by political parties as required by section 26 of the Political Parties Act as a criterion for receiving funding allocated to political parties.

145 J Lord et al 'Facilitating an equal right to vote for persons with disabilities' (2014) 6 *Journal of Human Rights Practice* 115-122.

146 Lord et al (n 145 above) 125-126.

147 Kenya is currently ranked the eighth largest recipient of donor funding, and this also manifests in the electoral process. See <http://www.fundsforngos.org/featured-Articles/ten-ten-grantmaking-donors-ngos-kenya/> (accessed 5 October 2014) and USAID 'Support for Kenya's 2013 elections: Rapid assessment review' <http://www.usaid.gov/sites/default/files/documents/1866/Kenya%2527s%25202013%2520Elections.pdf> (accessed 5 October 2014).

148 IFES & NDI (n 27 above) 56.

149 ANDY (n 22 above) 25. Regulation 90 of the Elections (General) Regulations allows the IEBC to arrange for special voting but only for presidential elections. Extending this to other elections would be a great stride towards inclusion.

150 Election Laws (Amendment) (No 3) Bill 2015, clause 13.



To build capacity for public participation, civic engagement trainings for youths with disabilities can provide an avenue for early targeting of youths, thus securing their continued participation in political and public life throughout their lifetime.<sup>151</sup> This can be done through grassroots campaigns and school programmes – which are considered more personal than civic education campaigns and advertisements<sup>152</sup> – the most commonly used by the IEBC. Training sessions would provide the fora to engage with youths with disabilities on their internal political efficacy, namely, their belief that they are competent to participate,<sup>153</sup> and help them identify areas where they can influence policy. Mock elections are proposed as a way of helping youths with disabilities learn the habit of voting at all levels of learning.<sup>154</sup> Alternatively, where literacy levels are low, entertainment events such as caravan tours – already popular in Kenya – can be used to disseminate information on civic engagement by youths with disabilities.<sup>155</sup>

Civic engagement training can be complemented by capacity-building training for youths interested in taking up leadership positions. Research has shown that training sessions build the confidence of those already engaging in policy issues or provide confidence once participants realise that they can influence policy and know how they can go about it.<sup>156</sup> Consequently, there is increased external political efficacy, namely, that persons with disabilities believe that they can influence policy through their efforts.<sup>157</sup>

Use of technology, such as the internet and social media, to engage in public issues and with policy makers is a viable option for increasing the participation of youths with disabilities.<sup>158</sup> Research by Giannoumis et al indicates that it may be a pre-condition for their participation on an equal basis with others.<sup>159</sup> Social media has gained increasing relevance in Kenya as a platform for setting and advancing political agendas.<sup>160</sup> The government has already embraced technology by introducing laptop computers to all public primary schools, although it is not clear whether this extends to educational institutions and facilities for persons with disabilities.<sup>161</sup> Since non-discrimination is a national value guiding policy

151 Ellis (n 29 above) 2.

152 Ellis 10.

153 Harris (n 16 above) 23.

154 Ellis (n 29 above) 10.

155 As above.

156 Harris (n 16 above) 23-24.

157 Harris 24.

158 Harris 14.

159 GA Giannoumis & J Kline 'Active citizenship through the use of new technologies – The experiences of three generations of persons with disabilities' DISCIT No MS4 (2015).

160 C Odinga 'Use of new media during the Kenya elections' unpublished Master's thesis, University of Uppsala, 2013 18.

161 See <http://www.cio.co.ke/news/main-stories/jubilee-government's-laptop-project-will-be-implemented-in-18-months#> (accessed 31 October 2015).

making in Kenya, DPOs can use this project as an avenue to lobby for governmental investment in technology in educational institutions and facilities for persons with disabilities.

While the form of the media may pose challenges to persons with certain kinds of disabilities (such as those with intellectual disabilities who require information in easy-to-read format and persons with visual impairments), the use of technology provides an avenue for circumventing the challenge of inaccessibility which excludes many youths with disabilities from political participation. Accessing government websites would provide access to information without requiring these persons to physically access buildings.<sup>162</sup> The use of technology by persons with disabilities will be bolstered once the 2015 Bill is passed, as it will create an obligation to ensure that everyone providing a service or information to the public avails it in accessible format.

To facilitate greater inclusion, various technologies may be employed. The state at both levels of government should embrace accessible formats by engaging with youths with disabilities either directly or through DPOs to find out exactly how to meet their communication needs.<sup>163</sup> Screen readers identify the content of a webpage, which can then be translated to the user through text-to-speech, sound icons or braille output devices for persons with visual impairments.<sup>164</sup> Sub-titled or sign language videos for persons with auditory impairments, speech recognition software for persons who cannot use a mouse or keyboard and screen reader software for persons with learning difficulties<sup>165</sup> are some of the useful tools that can be used by the IEBC for conducting civic and voter education among persons with disabilities.<sup>166</sup> The IEBC can also adopt a 'twin-track approach': Youths with disabilities are featured in general voter education material alongside developing material specifically targeted at youths with disabilities.<sup>167</sup>

Persons with disabilities themselves can also take up self-advocacy; a powerful avenue to not only advocate for their rights, but which also serves to shift societal perceptions by demonstrating that youth with disabilities can be trusted with decision-making and with leadership positions.<sup>168</sup> It is advisable to build the capacity of persons with disabilities at an early age in order to have a greater chance of improving participation in political and public life.<sup>169</sup>

162 Harris (n 16 above) 26.

163 Harris (n 16 above).

164 <http://www.disabled-world.com/disability/accessibility/websitedesign/> (accessed 16 September 2015).

165 As above.

166 IFES & NDI Report (n 27 above) 47.

167 As above.

168 KNCHR briefing paper (n 125 above) 113.

169 Harris (n 16 above) 9.

Self-advocacy paves the way for peer mentoring and modelling. Peer mentoring has been described as a 'significant empowerment strategy' for political participation.<sup>170</sup> It helps to demonstrate to persons with disabilities that they can have an impact on society. Persons with disabilities who are already engaged in political and public life model to youths with disabilities behaviour that can have an impact on society and, in so doing, it gives the latter a stronger desire to get involved.<sup>171</sup> The greater their participation in political and decision-making activities, the more powerful they feel and the greater their confidence in their ability to effect change.<sup>172</sup>

Moreover, it has been noted that not only are there few DPOs working on electoral access,<sup>173</sup> but DPOs are also generally weaker than their CSO counterparts, possibly due to a lack of education and resources.<sup>174</sup> This affects the self-confidence of persons with disabilities and the realisation of their rights.<sup>175</sup> Beyond project management training, they also lack capacity in the area of elections and how political processes relate to disability.<sup>176</sup> To strengthen their role in facilitating persons with disabilities to exercise their participation rights, it is necessary to build their capacity through training before elections.<sup>177</sup> It is also proposed to work with cross-disability DPOs, as they are more receptive to political activism than DPOs representing one constituency.<sup>178</sup>

## **7 Conclusion**

The Constitution and proposed legislation contain elaborate measures seeking to ensure accessibility of voting procedures and public offices to people with disabilities. The inclusion of youths with disabilities in political and public life in Kenya is realisable, if strategies to secure their inclusion are targeted at persons with disabilities from an early age.

The 2015 Bill is by far the best attempt to amend the PWDA. It addresses many avenues of excluding persons with disabilities, such as the denial of educational opportunities, which ultimately have an impact on their participation in political and public life. If the Council, both levels of government, the private sector and persons with disabilities work together, the barriers to political participation will be minimised and the ambitious

170 Harris 34.

171 As above.

172 Harris (n 16 above) 35.

173 CDPO (n 115 above) 32.

174 IFES & NDI (n 27 above) 60.

175 CDPO (n 115 above) 32.

176 IFES & NDI (n 27 above) 61.

177 IFES & NDI 60.

178 IFES & NDI 30.

constitutional guarantee of including persons with disabilities in all elective and appointive positions will be realised.

Whereas discrimination on the grounds of disability is a global phenomenon, the extent of the discrimination in developing countries like Kenya is deeper, culturally embedded and occurs in settings of severe resource limitations, making it more challenging to address. Home-grown solutions are, therefore, necessary to secure the inclusion of youths with disabilities in public life. Like any other group that has suffered marginalisation the world over, the inclusion of youths with disabilities will not be improved without gravitas, demonstrated through such actions as strategic litigation to seek clarity on the implementation of article 54(2) and other provisions of the Constitution. Strategic litigation has served to clarify the scope of the state's responsibility in ensuring the realisation of the right to political participation by women. The courts have demonstrated that it is possible to hold the state to account where it fails to take specific measures to remedy the exclusion of a protected group.<sup>179</sup> This model can now be employed by other marginalised groups, such as persons with disabilities. Such litigation might prove useful for DPOs in order to breathe life into article 54(2) of the Constitution.

If youths with disabilities step up to claim what is rightfully theirs under the Constitution, it will not only secure their rights, but also give impetus to other marginalised groups to actively seek the implementation of their rights, including participation rights. As Robert Kennedy once said:<sup>180</sup>

Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.

179 *CREAW v A-G* (n 31 above).

180 R Kennedy 'Ripple of hope' speech delivered at the University of Cape Town, South Africa, 1966.