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Strathmore Law School
Madaraka Estate, Ole Sangale Road
P.O. Box 59857 00200
Nairobi - KENYA
Tel. +254-703-034601
editor.sup@strathmore.edu
www.press.strathmore.edu
www.law.strathmore.edu
Twitter: @strathmorelaw

Implementation of political participation standards for persons with intellectual disabilities in Kenya

*Lucianna Thuo**

Abstract

This paper reviews international standards on political participation by persons with intellectual disabilities and how they are implemented in Kenya. On one hand, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) allows limitation of rights based on 'reasonable and objective' criteria. Whereas it is considered unreasonable to restrict participation rights of persons with physical disabilities, General Comment 25 to the ICCPR permits restrictions based on 'established mental incapacity'. On the other hand, the Convention on the Rights of Persons with Disabilities (CRPD) does not foresee any limitation of participation rights; rather it recognises the freedom of persons with disabilities to be involved in decision-making, including the right to vote and hold public office. Kenya is a party to both instruments, having acceded to the ICCPR in 1972 and ratified the CRPD in 2008.

Kenya's law does not deprive persons with intellectual disabilities of legal capacity. In fact, Article 54(2) of the Constitution of Kenya (2010 Constitution) seeks to increase participation of persons with disabilities in decision-making and public life by providing, inter alia, for the progressive inclusion of persons with disabilities in at least five percent of all elective and nominated positions. Whereas Kenya's law allows for limited guardianship, it is the informal guardianship created by the family, on whom persons with intellectual disabilities are dependent for support, which poses the greatest barrier to the exercise of participation

* The author holds an LLM in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria. She is a law lecturer at Kabarak University Law School in Kenya and consultant and visiting lecturer at the Faculty of Law, the University of The Gambia. Her email address is lucianna.thuo@gmail.com.

rights. This informal guardianship, combined with negative societal attitudes and ignorance at all levels including the Judiciary, the electoral management body (the Independent Electoral and Boundaries Commission (IEBC)) and even the wider disability movement, makes political participation rights for persons with intellectual disabilities illusory. If the situation of persons with intellectual disabilities is not addressed, only persons with physical and sensory disabilities will be able to take up the affirmative action measure created by Article 54(2) of the 2010 Constitution.

Introduction

Political participation is central to social inclusion. In fact, voting is seen as the ultimate act of citizenship.[1] However, persons with disabilities have been excluded from many facets of community living, including political participation.[2] This exclusion is particularly severe for persons with intellectual disabilities who have been variously referred to as 'idiots', 'morons', 'feebleminded', 'defectives', 'changelings', 'mentally retarded' and 'learning disabled'.[3]

'Intellectual disability', being a socially constructed concept, has no agreed definition; its meaning is therefore contextual to a society and its medical profession.[4] The definition adopted for this article provides:

> [Intellectual disability] is characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social and practical skills. Conditions associated with intellectual disability include autism, cerebral palsy and Down syndrome. A person with intellectual disability has lifelong support needs; they must be individualized which will lead to improved personal outcomes that may include more independence and enhanced opportunities.[5]

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1 Schriner K and Ochs L, '"No right is more precious": Voting rights and people with intellectual and developmental disabilities' 11 *Policy and Research Brief*, 1 (2000), 5.

2 Lord JE, Stein MA and Fiala-Butora J, 'Facilitating an equal right to vote for persons with disabilities' 6 *Journal of Human Rights Practice*, 1 (2014), 115.

3 Owen F, Griffiths D, Tarulli D and Murphy J, 'Historical and theoretical foundations of the rights of persons with intellectual disabilities: Setting the stage' in Owen F and Griffiths D (eds), *Challenges to the human rights of persons with intellectual disabilities*, Jessica Kingsley Publishers, London, 2009, 23.

4 Dimopoulos A, *Issues in human rights protection of intellectually disabled persons*, Ashgate Publishing, Farnham, 2010, 9.

5 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper*, 2013, 4.

Owing to their low intelligence quotient (IQ) and limited adaptive skills, persons with intellectual disabilities are more vulnerable than other persons with disabilities.[6] Laws restricting legal capacity and negative stereotypes exclude persons with intellectual disabilities from political participation.[7]

Despite this blanket exclusion, persons with intellectual disabilities are not homogenous.[8] They have varying capacities and support needs. Persons with intellectual disabilities with mild impairments can live independently with additional education; those with more severe disability require both educational and social support to integrate fully into society.[9] However, it is claimed that some persons with intellectual disabilities cannot, even with the most extensive support, take part in public affairs.[10] Though intellectual disability is distinct from mental disability, the two are often conflated.[11] Mental disability is a 'disorder that affects feelings and behaviour'.[12] Therefore, while nearly all mental illnesses can be managed or cured, intellectual disability is a life-long condition. Persons with intellectual disabilities hence include those who have difficulties in their intellectual functioning, such as persons with Down's syndrome; on the other hand, persons with psychosocial disabilities include those who are diagnosed with and/or experiencing mental health problems like bipolar disorder, autism or schizophrenia.

Participation rights are not absolute. The International Covenant on Civil and Political Rights (ICCPR)[13] allows limitations based on 'reasonable and objective' criteria, including 'established mental incapacity'.[14] However, the Convention on the Rights of Persons with Disabilities (CRPD) does not foresee any limitation of participation rights; rather it recognises the freedom of persons

6 Dimopoulos, *Issues in human rights protection of intellectually disabled persons*, 11-12.

7 Fourth annual interactive debate of the Human Rights Council on the Rights of Persons with Disabilities, *Interactive debate on participation of persons with disabilities in political and public life*, 1 March 2012 http://www.ohchr.org/EN/Issues/Disability/Pages/politicalpubliclife.aspx on 9 March 2016.

8 Parmenter TR, 'The present, past and future of the study of intellectual disability: Challenges in developing countries' 50 *Salud Pública de México*, 2 (2008), 124.

9 Inclusion Europe and Mental Health Europe, *Mental illness and intellectual disability,* 1 January 2007 http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1277&context=gladnetcollect on 9 March 2016.

10 Fiala-Butora J, Stein MA and Lord JE, 'The democratic life of the union: Toward equal voting participation for Europeans with disabilities' 55 *Harvard International Law Journal*, 1 (2014), 89.

11 Chainoglou K 'The framework for protecting the rights of persons with mental disabilities in Europe' 1 *Cyprus Human Rights Law Review*, 2 (2012), 158.

12 Inclusion Europe and Mental Health Europe, *Mental illness and intellectual disability.*

13 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

14 *CCPR General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25),* 12 July 1996, para 4.

with disabilities to be involved in decision-making,[15] including voting and holding public office.[16] Kenya acceded to the ICCPR in 1972 and ratified the CRPD in 2008. This article focuses on persons with intellectual disabilities because while persons with disabilities face marginalisation, persons with intellectual disabilities are often victims of 'double invisibility':

> Some groups with disabilities are more invisible than others…People with intellectual disabilities find it difficult in many societies to make progress - or at least as much progress as other groups with disabilities.[17]

The Constitution of Kenya (2010 Constitution) provides for the progressive inclusion of while persons with disabilities in at least five percent of all elective and nominated positions.[18] However, because accommodations for persons with intellectual disabilities are 'often less understood and do not receive adequate attention',[19] persons with intellectual disabilities may be excluded from this affirmative action measure.

Universal and regional standards on political participation

Despite the right to political participation being widely acknowledged today, individual political rights were unknown in international law prior to World War II.[20] The right to vote is arguably the most important participation right.[21]

Participation rights in the universal system

Universal Declaration of Human Rights

Coming immediately after WWII, the Universal Declaration of Human Rights (UDHR) included participation rights in its rich catalogue of human

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15 Para n and o, Preamble, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3.

16 Article 29(a), *Convention on the Rights of Persons with Disabilities*.

17 Quinn G, Degener T, Bruce A, Burke C, Castellino J, Kenna P, Kilkelly U and Quinlivan S, *Human rights and disability: The current and future potential of United Nations human rights instruments in the context of disability*, United Nations, New York, 2002, 23.

18 Article 54(2), *Constitution of Kenya* (2010).

19 Caldwell J, Hauss S and Stark B, 'Participation of individuals with developmental disabilities and families on advisory boards and committees' 20 *Journal of Disability Policy Studies,* 2(2009), 103.

20 Fox GH, 'The right to political participation in international law' in Fox GH and Roth BR (eds), *Democratic governance and international law,* Cambridge University Press, Cambridge, 2000, 53.

21 Office of the United Nations High Commissioner for Human Rights, *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*, A/HRC/19/36, 21 December 2011, para 7.

rights.[22] Since only male adults were allowed to vote when it was adopted,[23] it may not be the most progressive international instrument on participation rights.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is the most widely ratified international instrument on political participation.[24] It entitles every citizen, without unnecessary restrictions, to participate in public affairs, vote and be elected and have equal access to the public service.[25] However, since participation rights would be illusory without the rights to information, expression, association and assembly, these are also considered political rights.[26]

The right to take part in the conduct of public affairs

The Human Rights Committee has defined participation in public affairs as a 'broad concept' covering public administration and formulation of policy at all levels.[27] While voting is important to the conduct of public affairs, elections only take place periodically. Alternative means of influencing public policy, including belonging to the executive or legislature,[28] are therefore necessary.[29]

The right to vote and be elected

The right to vote is often referred to as 'active suffrage' while the right to be elected is referred to as 'passive suffrage'.[30] Though the ICCPR[31] allows restrictions to this right, General Comment 25 clarifies that only minimum reasonable and objective restrictions, such as voting age, are permitted.[32] Restrictions based

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22 Article 21, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

23 Mackie TF and Rose R, 'The international almanac of electoral history' 3 *Congressional Quarterly* (1991), 39, quoted in Fox, 'The right to political participation in international law', 52.

24 As of 9 March 2016, the *International Covenant on Civil and Political Rights* had 168 state parties https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsdg_no=IV-4&chapter+4&lang=en on 9 March 2016.

25 Article 25, *International Covenant on Civil and Political Rights*.

26 Office of the United Nations High Commissioner for Human Rights, *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*, para 6.

27 *CCPR General Comment 25,* para 5.

28 *CCPR General Comment 25,* para 6.

29 Fox, 'The right to political participation in international law', 55.

30 ACE Electoral Knowledge Network http://aceproject.org/main/english/lf/lfd02.htm on 9 March 2016.

31 Article 25, *International Covenant on Civil and Political Rights*.

32 *CCPR General Comment 25,* paras 12 and 14.

on literacy, property, physical disability or party membership are considered unreasonable.[33] States are also obligated to take positive measures, such as the effective registration of voters, and put in place mechanisms for persons with disabilities to vote.[34]

Voting restrictions in national laws take three forms.[35] Restrictions based on community living require official integration into society, either through citizenship or through permanent residency, before one can be allowed to determine the society's future.[36] Competence-based restrictions often relate to voting age and mental capacity. Most states presume that with age comes the requisite capacity for reasonable political reasoning, and anyone below the age of majority is prone to manipulation.[37] Autonomy-based restrictions are sometimes hardly distinguishable from competence-based ones.[38] Exclusions based on mental capacity, which presume that persons with mental illnesses or intellectual disability are incapable of reasonable choices, fall into this category.[39]

Because effective active and passive suffrage requires free choice of candidates, states should refrain from imposing unreasonable restrictions on candidature; exclusion of any group from elective office must be justified.[40] States are also obligated to monitor the internal management of political parties to ensure that they do not violate participation rights.[41]

The right to access the public service

The ICCPR makes access to the public service available only 'on general terms of equality', allowing states to formulate restrictions based on education, integrity, minimum age or other special requirements.[42] However, to eliminate

33 *CCPR General Comment 25,* para 10.

34 Lindblad J and Suksi M, *On the evolution of international election norms: Global and European perspectives*, Institute for Human Rights, Turku, 2005, 23.

35 Blais A, Massicotte L and Yoshinaka A, 'Deciding who has the right to vote: A comparative analysis of election laws' 20 *Electoral Studies*, 1 (2001), 52.

36 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote', 54.

37 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote', 43.

38 Katz RS, *Democracy and elections*, Oxford University Press, New York, 1997, quoted in Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote', 42.

39 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote', 51. The study showed that only four countries, of the 63 surveyed, did not have any restrictions on the right to vote based on mental capacity. These were Canada, Ireland, Italy and Sweden.

40 *CCPR General Comment 25,* para 15.

41 *CCPR General Comment 25,* para 16.

42 Office of the United Nations High Commissioner for Human Rights, *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*, para 11.

discrimination in accessing public service, General Comment 25 proposes affirmative action to ensure equal access for all citizens.[43]

Participation rights in regional systems

The African human rights system

Since Article 13 of the African Charter on Human and Peoples' Rights (ACHPR)[44] neither mentions the right to vote, nor mirrors the non-discrimination prescription of the ICCPR, its utility has been called into question.[45] However, the African Commission on Human and Peoples' Rights (the African Commission) draws inspiration from regional and international principles, in accordance with Articles 60 and 61, when interpreting discrimination under the Charter.[46] In *MIDH v Côte d'Ivoire*, the Commission stated:

> The right to participate in government or in the political process of one's country, including the right to vote and stand for election, is a fundamental civil liberty and human right, and should be enjoyed by citizens without discrimination.[47]

The ACHPR entitles citizens to participate freely in government 'in accordance with the provisions of the law'.[48] This seems to imply that national law will determine the parameters of this right; a lower standard if national law is inconsistent with international standards. However, the African Commission has repeatedly asserted that giving national law primacy over international law would render futile the entrenchment of rights and freedoms in the Charter.[49] Therefore, although every state can regulate who can vote and stand for elections, it should not take away already accrued rights.[50]

The ACHPR is supplemented by the African Charter on Democracy, Elections and Governance (ACDEG)[51] which obliges states to promote the participation of social groups with special needs, including persons with disabilities, in governance through, *inter alia*, civic education.[52]

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43 *CCPR General Comment 25,* para 23.

44 27 June 1981, 1520 UNTS 217.

45 Fox, 'The right to political participation in international law', 66.

46 *Purohit & Moore v The Gambia,* ACmHPR Comm. 241/2001, 16 Activity Report (2002-2003), Annex VII.

47 ACmHPR Comm. 246/2002, 25 Activity Report (2008), para 76.

48 Art 13(1), *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.

49 *Media Rights Agenda v Nigeria,* ACmHPR Comm. 105/93, 128/94, 130/94 and 152/96, 12 Activity Report (1998) and *Civil Liberties Organisation (in respect of Bar Association) v Nigeria,* ACmHPR Comm. 140/94, 141/94 and 145/95, 13 Activity Report (1999).

50 *MIDH v Côte d'Ivoire*, ACmHPR, para 82.

51 Adopted by the African Union on 30 January 2007.

52 Article 31, *African Charter on Democracy, Elections and Governance*, 30 January 2007.

The African Commission's Working Group on the Rights of Older Persons and People with Disabilities is currently formulating the Draft Protocol on the Rights of Persons with Disabilities in Africa (Draft Protocol).[53] If enacted into law, this instrument will require that civic education on democracy be made available in accessible formats, that states ensure that persons with disabilities are members of political parties, voters and holders of political and public office and ensure accessibility and facilitate assisted voting.[54] It further proposes representation of persons with disabilities in at least five percent of the national and local legislatures,[55] and the repeal or amendment laws that restrict political participation for persons with disabilities.[56]

The Inter-American System

Article 23 of the American Convention on Human Rights (ACHR)[57] is almost identical to the ICCPR equivalent. However, the ACHR is unique in two ways. First, it lists the permissible grounds for restricting the right[58] unlike the ICCPR which sets out the prohibited grounds in restricting the right. Second, it establishes the right to political participation as non-derogable.[59]

Council of Europe

The First Protocol to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms(ECHR)[60] obliges state parties to hold free elections 'at reasonable intervals by secret ballot' ensuring the free expression of the will of the people.[61] Though it appears narrower than Article 25 of the ICCPR and frames participation as a state obligation rather than a right, the European Court of Human Rights (ECtHR) has interpreted the Convention as providing the same guarantees as the ICCPR.[62]

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53 Published for comment in March 2014 and again in 2016. See, http://www.achpr.org/news/2015/12/d203 on 26 January 2016.

54 Articles 16(a)-(c), *Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa*, 25 February 2016.

55 Akin to Article 54(2), *Constitution of Kenya* (2010).

56 Article 8(d), *Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons With Disabilities in Africa.*

57 21 November 1969, 1144 UNTS 123.

58 Article 23(2), *American Convention of Human Rights*, 21 November 1969, 1144 UNTS 123.

59 Article 27(2), *American Convention of Human Rights*.

60 20 March 1952, 213 UNTS 262.

61 Article 3, *First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, 213 UNTS 262.

62 *United Communist Party of Turkey & Others v Turkey,* ECtHR Judgement of 25 May 1998, 121.

A history of exclusion from political life

Despite express participation provisions in international and regional instruments, women, racial minorities, migrants and persons with disabilities were historically excluded from political life in many countries, based on false assumptions as to their reduced capacity.[63] Thematic human rights treaties, namely, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[64] the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)[65] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[66] therefore included participation rights.

Towards gradual extension of participation rights to persons with disabilities

Despite the phasing out of exclusion for other groups in most countries, persons with disabilities continued to be marginalised,[67] in part due to the lack of an instrument to articulate their rights.[68] Though provided for in the ACHPR, they were lumped together with the elderly as a group in need of protection, rather than as active participants in the realisation of Charter rights.[69] Recommendations for a disability convention began at the 1987 Global Meeting of Experts to Review the Implementation of the World Food Programme of Action Concerning Disabled Persons at the Mid-Point of the United Nations Decade of Disabled Persons.[70] At the time, persons with disabilities were perceived to be sufficiently protected by existing instruments.[71] Consequently, two drafts of the convention failed to secure sufficient consensus at the General Assembly.[72] It was not until the extent of their marginalisation was highlighted by

63 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 81.

64 Articles 7 and 8, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13.

65 Article 5, *International Convention on the Elimination of all Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195.

66 Article 41, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,*18 December 1990, 220 UNTS 3.

67 Dimopoulos, *Issues in human rights protection of intellectually disabled persons*, 79.

68 Despouy L, *Human rights and disabled persons*, United Nations, New York, 1993, paras 280-281 quoted in Quinn, et al, *Human rights and disability,* 303.

69 Article 18(4), *African Charter on Human and Peoples' Rights.*

70 UNGA, *The Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Annex to Resolution 48/96, 20 December 1993, para 7-8.

71 UNGA, *The Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, para 9.

72 UNGA, *The Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, para 9.

the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the Office of the High Commissioner for Human Rights[73] that negotiations began in earnest. The CRPD, which is monitored by the Committee on the Rights of Persons with Disabilities (CRPD Committee) was adopted on 13 December 2006 and came into force on 3 May 2008. The CRPD does not permit limitation to persons with disabilities' participation rights.

Relationship between the ICCPR and the CRPD and its impact on the participation rights of persons with intellectual disabilities

The CRPD on political participation

It is said that the CRPD does not create new rights; rather it sets out concrete measures by which persons with disabilities can access, on equal terms, already existing rights.[74] Since formal recognition of participation rights would have little effect if persons with disabilities are not included the community, participation provisions should be read together with all the other CRPD provisions.

The principles underlying CRPD implementation include 'non-discrimination', 'full and effective participation and inclusion in society' and 'equality of opportunity'.[75] States are required to consult with persons with disabilities in the adoption of legislative and other measures and to take into account persons with disabilities' needs in the development of policies and programmes.[76] To ensure substantive equality, states are required to take positive measures such as reasonable accommodation and affirmative action.[77]Article 9(2)(d) is particularly significant for persons with intellectual disabilities because it requires that signage and information in buildings and other public facilities be made available in 'easy to read and understand forms'. The CRPD targets not only the law but also prejudicial societal attitudes which undermine equality. Article 12 is said to 'emblematic of the paradigm shift' brought about by the CRPD[78] because it rec-

[73] See Despouy, *Human rights and disabled persons*, para 280-281.

[74] De Beco G, 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another role for national human rights institutions?' 29 *Netherlands Quarterly of Human Rights*, 1(2011),87.

[75] Articles 3 (b) & (e), *Convention on the Rights of Persons with Disabilities*.

[76] Article 4, *Convention on the Rights of Persons with Disabilities*.

[77] Article 5, *Convention on the Rights of Persons with Disabilities*

[78] Quinn G, 'Personhood and legal capacity: Perspectives on the paradigm shift of Article 12 CRPD' The Harvard Law School Project on Disability Conference, Cambridge, 20 February 2010, 3.

ognises the personhood of every person with a disability and requires states to provide support in exercising that capacity. Political participation by persons with intellectual disabilities is a sub-set of the wider debate on legal capacity.[79] Moreover, the CRPD's affirmation that persons with disabilities have 'choices equal to others'[80] is significant to political participation because the right to take part in decision making validates one's sense of belonging in a community. Fiala-Butora *et al* submit that it is not the mere act of voting that makes citizens equal; it is the genuine recognition of the right to vote.[81]

Possibly to counter the notion that persons with disabilities cannot intelligently and independently take part in decision-making,[82] the CRPD demonstrates that the problem is rather lack of information in accessible formats, which it requires both state parties and private service providers to make available.[83]

The right to political participation

Article 29 of the CRPD recognises that persons with disabilities have both the right and the *opportunity to vote and be elected on an equal basis with others.*[84] Beyond formal provision for these rights, positive measures, such as ensuring that voting procedures, materials and facilities are accessible,[85] are also necessary.

Whereas states restrict some participation rights for persons with intellectual disabilities, Article 29 leaves no doubt that all participation rights, including the right to hold office, are made available to all persons with disabilities without distinction.[86] Since full legal capacity is a pre-requisite for participation, the next section briefly discusses legal capacity.

The right to legal capacity

Legal capacity has been defined as the sword with which we forge our way in the world.[87] The CRPD Committee perceives it as 'a universal attribute inher-

79 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 104.

80 Article 19, *Convention on the Rights of Persons with Disabilities.*

81 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 100.

82 Schriner and Ochs, '"No right is more precious"', 3.

83 Article 21, *Convention on the Rights of Persons with Disabilities.*

84 Article 29(a), *Convention on the Rights of Persons with Disabilities.* Emphasis added.

85 Article 29(a) (i), *Convention on the Rights of Persons with Disabilities.*

86 In its Concluding Observations on Spain, the CRPD Committee recommended that necessary supports for holding office, including personal assistants, be availed to PWIDs; Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by states parties under article 35 of the Convention: Concluding observations of the Committee on the rights of persons with disabilities: Spain, CRPD/C/ESP/CO/1, 19 October 2011, para 48.

87 Quinn, 'Personhood and legal capacity', 10.

ent in all persons by virtue of their humanity'[88] which includes the 'capacity to be both a holder of rights and an actor under the law'.[89]

Prior to the CRPD, the right to recognition as a person before the law was elaborated in the UDHR,[90] ICCPR,[91] ACHPR[92] and CEDAW.[93] In fact, in the ICCPR, it is a non-derogable right.[94] Even though the CRPD contains no express non-derogation clause, it stipulates that human rights set out in other instruments shall not be restricted or derogated from even if they are recognised to a lesser extent in the CRPD.[95]

Article 12 is arguably one of the most important, though fiercely contested,[96] provisions of the CRPD. It is therefore unsurprising that most of the reservations entered by state parties relate to Article 12.[97] The obligation to support PWID to exercise their legal capacity indicates that all persons with disabilities have legal capacity;[98] however, some need more intensive support to exercise that capacity.[99]

Deprivation of legal capacity affects the exercise of other rights, including participation.[100] According to Dinerstein:

> Plainly, if an individual with disability is deemed not to have legal capacity, the person's ability to make choices, achieve maximum independence and be fully included in the community is fatally compromised.[101]

The simplicity with which Article 12 provides for the right belies the complexity of its implementation. General Comment 1 of the CRPD Committee was adopted following a realisation that Article 12 was not well understood by

88 *CRPD General Comment No. 1, Article 12: Equal recognition before the law*, 11 April 2014, para 8.
89 *CRPD General Comment 1*, para 11.
90 Article 6, *Universal Declaration of Human Rights.*
91 Article 16, *International Covenant on Civil and Political Rights.*
92 Article 3, *African Charter on Human and Peoples' Rights.*
93 Article 2, *Convention on the Elimination of All Forms of Discrimination against Women.*
94 Article 4(2), *International Covenant on Civil and Political Rights.*
95 Article 4(4), *Convention on the Rights of Persons with Disabilities.*
96 Dinerstein R, 'Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision making' 19 *Human Rights Brief*, 2 (2012), 8.
97 There are currently 16 reservations and 20 interpretative declarations: 2 reservations and 10 declarations relate to Article 12, but none of these is by Kenya https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en on 6 July 2016.
98 Article 12(3), *Convention on the Rights of Persons with Disabilities.*
99 Dinerstein, 'Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities', 9.
100 *CRPD General Comment 1,* para 8.
101 Dinerstein, 'Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities', 9.

states.[102] The next section briefly examines supported decision-making, one of the elements of Article 12.

Supported decision making

Guardianship laws fail to recognise that persons with intellectual disabilities, just like people without disabilities, 'have varying capacity in different areas of their lives, and at different times'.[103] Not all require support, and levels of support vary even among those who require it. In essence, Article 12 does not deny that persons with intellectual disabilities have 'decision-making deficits';[104] it requires that states augment rather than take away persons with intellectual disabilities' limited decision-making capacity by providing the necessary supports to foster autonomy.[105]

To eliminate the paternalistic attitudes that lead to substituted decision-making, any support measures should be accompanied by 'appropriate and effective safeguards'.[106] Effective supported decision making (SDM) mechanisms are culturally relevant and context-specific and are developed after a process of dialogue with persons with intellectual disabilities and the society.[107] They also ought to have different levels of support,[108] provide for mediation of conflict and termination of the support relationship by the person with an intellectual disability.[109]

The Human Rights Committee's General Comment 25 appears to endorse SDM by stipulating that '[a]ssistance provided to the disabled…must be independent'.[110] Whereas all persons with disabilities are vulnerable, persons with intellectual disabilities are disproportionately affected by substituted decision-making and the deprivation of legal capacity.[111]

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102 *CRPD General Comment 1,* para 3.

103 Dinerstein, 'Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities', 9.

104 Kenya National Commission on Human Rights and The Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya,* 23.

105 Dimopoulos, *Issues in human rights protection of intellectually disabled persons*, 31.

106 Article 12(4), *Convention on the Rights of Persons with Disabilities*.

107 Inclusion International, *Designing supported decision-making systems: A guide for dialogue*, February 2009 http://inclusion-international.org/wp-content/uploads/2014/07/Appendix-3-SDM-Dialogue-Guide.pdf on 9 March 2016.

108 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya,* 139.

109 Inclusion International, *Designing supported decision-making systems*, 5.

110 *CCPR General Comment 25,* para 20.

111 *CCPR General Comment 25,* para 9.

Features of participation rights of persons with intellectual disabilities vis-à-vis other persons with disabilities

Firstly, while the main impediment for other persons with disabilities is accessibility of voting facilities and materials, the main participatory impediments for persons with intellectual disabilities are possible restrictions of legal capacity and autonomy.[112] Persons with intellectual disabilities form a distinct minority because their psychological features, such as low IQ and limited adaptive skills,[113] make them dependent on others in everyday life. This dependence makes them vulnerable to substituted decision making. Often, persons with intellectual disabilities are treated as mentally ill and either placed under guardianship or institutionalised. In Kenya, an informal family guardianship is created when the family makes decisions in the 'best interests' of persons with intellectual disabilities. Support-givers therefore turn into gatekeepers to the outside world.[114] Participation rights would be illusory without addressing both formal and informal restrictions of legal capacity.[115]

Second, it is yet to be fully accepted that persons with intellectual disabilities can exercise participation rights. According to Walmsley:

> … [i]ncluding people with learning difficulties in academic and political debate will always be a struggle. Unlike other groups of disabled people with different impairments, it is unclear whether they [persons with intellectual disability] will ever be able to engage on equal terms.[116]

On the one hand, persons with varying capacities of intellectual disabilities make it difficult to determine who can take part in political processes without applying an arbitrary standard.[117] States, on the other hand, are entitled to protect the integrity of the electoral system from undue influence. This creates what has been referred to as 'tension between concern for the protection, development and welfare of those with disabilities and a fear for the public good'.[118]

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112 Dimopoulos, *Issues in human rights protection of intellectually disabled persons*, 25.

113 Dimopoulos, *Issues in human rights protection of intellectually disabled persons*, 11.

114 Karlan PS, 'Framing the voting rights of cognitively impaired individuals' 38 *McGeorge Law Review* (2007), 923.

115 *CCPR General Comment 25,* para 26.

116 Walmsley J, 'Including people with learning difficulties: Theory and practice' in Barton L and Oliver M (eds), *Disability studies: Past, present and future*, The Disability Press, Leeds, 2007, 62, 76.

117 Blais, Massicotte and Yoshinaka, 'Deciding who has the right to vote', 51.

118 Owen, Griffiths, Tarulli and Murphy, 'Historical and theoretical foundations of the rights of persons with intellectual disabilities', 24.

Proposed arguments for excluding persons with intellectual disabilities

Capacity-based exclusions are probably among the longest running political exclusions. In the US, persons with intellectual disabilities were excluded alongside other groups. According to Porter:

> [s]uch undesirable elements as paupers, idiots, the insane, etc., were practically excluded by the property test, and the need for specifically disqualifying them did not appear until the property test was gone.[119]

While electoral law did not specifically exclude these groups, social convention was such that they did not show up at the polls anyway.[120] The political elite believed these groups were not 'intellectually competent' to participate in public affairs.[121] However, persons with intellectual disabilities are not inherently incapable of political participation; rather, they lack the necessary support and information to participate.[122] Some persons with intellectual disabilities have demonstrated this by making meaningful contribution to the drafting of human rights instruments.[123] Some of the exclusionary approaches taken by states are considered below.

Status approach

This approach presumes that intellectual disability deprives individuals of legal capacity, necessitating the appointment of a representative to make decisions on their behalf.[124] It presumes that one either has capacity entirely or not at all, without factoring in the natural supports present in society; for example, that everyone implicitly relies on others to assist them to make decisions.[125] This approach manifests itself in guardianship laws in many Western countries.[126] While Kenya's law allows for limited guardianship for persons who are mentally ill restricted to the management of financial affairs,[127] the law does not automatically

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119 Porter KH, *A history of suffrage in the United* States, The University of Chicago Press, Chicago, 1918, 20-21, quoted in Schriner K and Ochs L, "'No right is more precious'", 2.

120 Schriner and Ochs, "'No right is more precious'", 2.

121 Schriner and Ochs, "'No right is more precious'", 3.

122 Schriner and Ochs, "'No right is more precious'", 3.

123 E.g. Robert Martin is not only a self-advocate but also took part in the drafting of the CRPD. New Zealand has endorsed his candidature to the CRPD Committee in 2016. See http://inclusion-international.org/robert-martin-run-crpd-committee-2016/ on 10 March 2016.

124 Quinn, 'Personhood and legal capacity', 14.

125 Quinn, 'Personhood and legal capacity', 12-14.

126 Mute L, 'Shattering the glass ceiling: Ensuring the right to vote for persons with intellectual disabilities in Kenya' 2 *Thought and Practice: A Journal of the Philosophical Association of Kenya,* 1 (2010),7.

127 Section 26, *Mental Health Act* (Chapter 248, Laws of Kenya).

deprive persons with intellectual disabilities of legal capacity in the context of political participation.

Outcomes approach

This approach deprives persons with intellectual disabilities of legal capacity based on a pattern of 'bad decisions' or flawed decision-making process.[128] It presumes that persons with intellectual disabilities are 'incapable of engaging in the complex thinking necessary for making political judgments'.[129] It is therefore necessary for others to act on their behalf, thereby protecting electoral legitimacy and caring for these 'unfortunate' members of society.[130] Scholars have contested this approach, asserting that the state cannot determine what a valid political opinion is,[131] and, in any case, even 'non-disabled' people choose improper leaders[132] by basing voting decisions on irrelevant criteria such as a candidate's height, whether or not they use a nickname or the format of the ballot.[133]

National practices excluding persons with intellectual disabilities from political participation

Exclusion occurs in three main ways. First, the exclusion could be an automatic consequence of a guardianship order, irrespective of the ability to vote[134] or hold office. This exclusion is prevalent in many Eastern European countries such as Bulgaria, and was Hungary's position before 2011.[135] Second, exclusion could stem from individualised capacity assessment, like specific findings of incapacity by a designated decision-making authority.[136] The CRPD Committee has declared capacity assessments discriminatory. Exclusion is not absolute in some countries. In Finland and Norway, persons with intellectual disabilities have the right to vote,[137] but persons under guardianship or suffering from a 'weakened

128 Quinn, 'Personhood and legal capacity', 13.
129 Schriner and Ochs, '"No right is more precious"', 4.
130 Schriner and Ochs, '"No right is more precious"', 4.
131 Arguments by interveners in *Zsolt Bujdosó & Five others v Hungary,* CRPD comm. 4/2011, 16 October 2013), para 5.7.
132 Mute, 'Shattering the glass ceiling', 8.
133 Karlan, 'Framing the voting rights of cognitively impaired individuals', 917.
134 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 75.
135 *Alajos Kiss v Hungary*, ECtHR Judgment of 20 May 2010.
136 E.g. *Act CCI of 2011 on the Amendment of Certain Acts Related to the Fundamental Law* (Hungary); Fiala-Butora, Stein and Lord, 'The democratic life of the union', 78.
137 Section 14, *Constitution of Finland*; Article 50, *Constitution of Norway*.

mental state' are ineligible to vie for parliamentary[138] or municipal elections.[139] In Quebec, persons with intellectual disabilities vote in some elections but not in others.[140]

These exclusions have been criticised for various reasons. First, no empirical evidence has linked the participation of persons with intellectual disabilities to electoral fraud.[141] Second, capacity assessments are discriminatory because only a segment of the population is subjected to testing.[142] Moreover, because the people who carry out capacity assessments are often biased, exclusionary measures are disproportionate.[143] Furthermore, any exclusion, whether absolute or based on capacity assessment, is contrary to Article 12 since it presumes a lack of legal capacity. In addition, capacity assessments cost money most states can ill-afford.[144] Testing also violates the dignity of persons with intellectual disabilities by portraying them as incapable of equal participation in society.

Nussbaum has proposed proxy voting, where the ballot would be cast on behalf of a person with an intellectual disability.[145] However, Fiala-Butora *et al* have argued that proxy voting violates the dignity of persons with intellectual disabilities by demonstrating to society that a person with an intellectual disability's vote only counted because someone else cast it on their behalf.[146] Proxy voting does not appear to find support in any international instrument. The only right exercisable through representatives is the right to take part in the conduct of public affairs.[147] The Inter-American Commission on Human Rights has defined 'genuine periodic' elections as elections where the electorate has the opportunity to express its opinion by voting for a particular candidate or party.[148] An election cannot be considered genuine if the will of a section of the electorate is

138 Section 27, *Constitution of Finland*; Article 61, *Constitution of Norway*.

139 Section 3(3), *Local Government Act* (Act No. 365 of 1995, Finland); Section 3-3, *Representation of the People Act* (Norway).

140 In Québec, one who is under curatorship cannot vote in provincial, municipal or school elections but they can vote in federal elections.
http://www.curateur.gouv.qc.ca/cura/en/majeur/inaptitude/droits/avec/droit-vote.html on 2 September 2014.

141 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 86.

142 Applebaum PS, 'I vote, I count: Mental disability and the right to vote' 51 *Psychiatric* Services, 7 (2000), 850; *Zsolt Bujdosó & five others v Hungary,* CRPD.

143 Applebaum, 'I vote, I count', 850.

144 Email from Lord J, Senior Vice President, Human Rights and Inclusive Development, Burton Blatt Institute, Syracuse University, on 1 August 2014.

145 Nussbaum M, 'The capabilities of people with cognitive disabilities' 40 *Metaphilosophy*, 3/4 (2009), 331.

146 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 101.

147 Article 25(a), *International Covenant on Civil and Political Rights.*

148 *Mexico Elections Decisions*, IACmHR Cases 9768, 9780, 9828, annual report, 1989-1990, 107.

expressed by others, ostensibly on their behalf. The Human Rights Committee's General Comment 25 also requires the electoral system to 'guarantee and give effect to the free expression of the will of the electors'.[149] Notably, Canada has rejected proxy voting. [150]

Authoritative interpretation of political participation by persons with intellectual disabilities

The African Commission on Human and Peoples' Rights

The African Commission appears to have been the first regional body to address capacity-based exclusions to voting, and the exclusion of persons of 'unsound mind' from voting. *Purohit and Moore v The Gambia*[151] challenged The Gambia's treatment of persons detained under the Lunatics Detention Act. The Act defined a 'lunatic' to include 'an idiot or person of unsound mind' but did not have safeguards for certification through independent oversight. Patients were also not allowed to vote. The Commission rejected The Gambia's argument that allowing mental health patients to vote would generate controversy because of their inability to make an informed choice. The Commission found that participation rights under the Charter[152] could only be denied on the basis of legal incapacity, assessed using reasonable and objective criteria, and asserted that legal capacity was not synonymous with mental incapacity. Since the State had only relied on its perception of the patients' ability to make informed choices, its exclusion was not justified.[153]

The European Court of Human Rights

In *Mathieu-Mohin & Clerfayt v Belgium,*[154] ECtHR ruled that suffrage could be limited by proportionate laws that pursued a legitimate aim. In the *Horvath and Kiss v Hungary,*[155] the Court was asked to determine whether voting exclusion following a guardianship order accorded with the ECHR. The ECtHR rejected Hungary's argument that it had a wide margin of appreciation in electoral matters due to the vulnerability of the affected group and found that the extent

149 *CCPR General Comment 25,* para 21.
150 http://www.curateur.gouv.qc.ca/cura/en/majeur/inaptitude/droits/avec/droit-vote.html on 1 September 2014.
151 ACmHPR Comm. 241/2001 16 Activity Report (2002-2003).
152 Article 13(1), *African Charter on Human and Peoples' Rights.*
153 ACmHPR Comm. 241/2001 16 Activity Report (2002-2003), paras 74-76.
154 ECtHR Judgement of 2 March 1987.
155 ECtHR Application No. 11146/11, para 18.

of marginalisation meant that exclusion could only be justified by 'very weighty reasons'.[156] The exclusion was found to be disproportionate as it excluded a significant number of people.[157] Therefore, an 'automatic, blanket restriction' based solely on guardianship, without 'individualised judicial evaluation', was not a legitimate restriction of voting rights.[158]

Whereas the *Kiss case* lifted blanket voting restrictions, it left unresolved whether individualised capacity assessments were compatible with human rights.[159] Following the decision, Hungary introduced individualised capacity assessments.[160]

The CRPD Committee

The CRPD has endorsed a higher standard of inclusion for persons with intellectual disabilities. In its Concluding Observations on the state reports of Tunisia and Spain, the CRPD Committee urged both states to ensure that persons with intellectual disabilities have the right to vote and participate in public life,[161] including providing persons with intellectual disabilities elected to office with personal assistants.[162]

Article 1 of the Optional Protocol to the CRPD allows the CRPD Committee to consider communications from or on behalf of individuals. In the 2011 *Bujdosó case,*[163] the applicants challenged a constitution-based exclusion of the right to vote for people under guardianship. Discontented with the reticence of the ECtHR to deal with finality on the question of capacity assessments in *Kiss,* the interveners asked the CRPD Committee to determine the compatibility of these assessments with Article 29 of the CRPD. The Committee disagreed with Hungary that the limitation of voting rights was proportionate and justifiable, and concluded that capacity assessments disenfranchise otherwise capable individuals. Ruling on the compatibility of capacity assessments with Article 29 of the CRPD, it found that voting exclusions, 'including a restriction pursu-

156 ECtHR Application No. 11146/11, para 42.

157 The Court referred to its dicta in *Hirst v UK* application 74025/01, ECtHR Judgment of 6 October 2005, para 71, that disenfranchisement, being severe, required proportionality of sanction to the conduct of affected individual.

158 *Hirst v UK* application 74025/01, ECtHR Judgment of 6 October 2005, paras 43-44.

159 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 72.

160 Fiala-Butora, Stein and Lord, 'The democratic life of the union', 78.

161 Concluding observations of the Committee on the rights of persons with disabilities: Spain, paras 47-48; Tunisia, 13 May 2011, (CRPD/C/TUN/CO/1), para 35.

162 Concluding observations of the Committee on the rights of persons with disabilities: Spain, para 48.

163 *Zsolt Bujdosó & five others v Hungary,* CRPD.

ant to an individualised assessment, constitutes discrimination on the basis of disability'.[164]

The *Bujdosó* decision conflicts with General Comment 25 of the Human Rights Committee,[165] which allows exclusion based on mental incapacity. However, since the ICCPR and General Comment 25 predate the CRPD, it is arguable that the CRPD standard is an overriding standard, thus binding state parties to both instruments.[166] The CRPD is also one of the fastest and most widely ratified international human rights treaties.[167]

The Human Rights Committee has been urged to revise General Comment 25.[168] In the meantime, the Human Rights Council appears to have endorsed the CRPD standard by calling on states to remove 'any existing exclusion or restriction of political rights for persons with disabilities, including those persons with…intellectual disabilities'.[169] The Human Rights Council appears to be signalling that when it comes to persons with disabilities, the CRPD standard is the *lex specialis* and the *lex posterior*.

Kenya's compliance with universal and regional standards on political participation by persons with intellectual disabilities

In its Initial Report to the CRPD Committee in 2011, Kenya restated its commitment to shifting away from substituted to supported decision making.[170] However, it is unclear how many persons with intellectual disabilities live in Kenya. Whereas the Kenya National Bureau of Statistics (KNBS) and the National Council for Persons with Disabilities (NCPWD) put the figure at 1.7 million in

164 *Zsolt Bujdosó & five others v Hungary,* CRPD, para 9.7.

165 *CCPR General Comment 25*.

166 Articles 18, 30 and 59, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331; Office of the United Nations High Commissioner for Human Rights, *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*, para 28.

167 Lord, Stein and Fiala-Butora, 'Facilitating an equal right to vote for persons with disabilities', 120. As of March 2016, the CRPD had been ratified by 162 states https://treaties.un.org/Pages/ViewDetails.aspx?arc=TREATY&mtdsg_no=IV-15&chapter=4&lang=en on 10 March 2016.

168 Fourth annual interactive debate of the Human Rights Council on the Rights of Persons with Disabilities, *Interactive debate on participation of persons with disabilities in political and public life.*

169 United Nations Human Rights Council, *Rights of persons with disabilities: Participation in political and public life*, A/HRC/19/L.9/Rev 1, 20 March 2012, para 7.

170 UN Doc CRPD/C/KEN/1, 31 August 2011, received by CRPD Committee 3 April 2012, para 121.

2007,[171] and at 1.3 million in 2009, other estimates have quoted 3.6 million.[172] Further, since intellectual disability is sometimes conflated with mental illness, persons with intellectual disabilities may be formally deprived of legal capacity for being mentally ill.[173] Research indicates, however, that very few persons with intellectual disabilities are formally placed under guardianship.[174] Lack of statistics makes it difficult for the State and the NCPWD to implement the CRPD,[175] including providing support for the exercise of legal capacity.

Legal capacity and participation rights

To fully understand participation rights of persons with intellectual disabilities in Kenya, this section reviews electoral law alongside provisions on legal capacity and non-discrimination.[176]

The 2010 Constitution

The 2010 Constitution defines disability as 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out day-to-day activities'.[177] Disability in Kenya can therefore be either really broad or narrow depending on society's perceptions.[178]

The 2010 Constitution also sets out national values and principles to guide constitutional interpretation, policy and law making, including 'human dignity, equity, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised,'[179] which bind everyone, not just the State. It is difficult however to reconcile the value of non-discrimination set out in Article 10, with the exclusion of persons of 'unsound mind' from voting in Article 83 of the 2010 Constitution as will be discussed below. One author refers to this disjuncture

171 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 2014, 17.
172 Equal Rights Trust, *In the spirit of Harambee: Addressing discrimination and inequality in Kenya*, 2012, 140.
173 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya,* 18.
174 Kenya National Commission on Human Rights and The Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya,* 79.
175 Article 31, *Convention on the Rights of Persons with Disabilities*, obliges states to collect disaggregated data about persons with disabilities to guide policies to give effect to the *Convention on the Rights of Persons with Disabilities.*
176 Lord, Stein and Fiala-Butora, 'Facilitating an equal right to vote for persons with disabilities', 120.
177 Article 260, *Constitution of Kenya* (2010).
178 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 16.
179 Article 10(2) (b), *Constitution of Kenya* (2010).

as an 'internal dissonance'[180] and another as 'systemic electoral inconsistency'.[181] The Bill of Rights not only protects equality before the law but also lists disability as a protected ground.[182] The 2010 Constitution also acknowledges every person's inherent dignity.[183] Moreover, State organs and public officers are obliged to address the needs of vulnerable groups, including persons with disabilities, and enact legislation to give effect to Kenya's international human rights obligations.[184] In addition, the general principles of the electoral system include 'fair representation' of persons with disabilities, and Article 97(1) (c) requires the National Assembly to comprise at least 12 nominated members representing various interest groups, including persons with disabilities. The introduction of the devolved system of government, which shifts decision-making from the national to the county levels, further allows greater public participation.[185] On paper at least, the 2010 Constitution clearly attempts to remedy past exclusion of persons with disabilities.

However, in order to be eligible to vote or hold office, the 2010 Constitution and Elections Act 2011[186] require that one be of 'sound mind'.[187] Moreover, Kenya's Initial Report to the CRPD acknowledged that many decisions were still being made on behalf of persons with disabilities without consulting them.[188]

Persons with Disabilities Act 2003

The Persons with Disabilities Act (PWDA) predates the 2010 Constitution and the CRPD and is yet to be amended to accord with the two instruments. Previous attempts at amendment failed because of limited representation of persons with disabilities in decision-making organs and the media's reluctance to raise awareness on disability rights.[189]

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180 Combrinck H, 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' 2 *Africa Disability Rights Yearbook* (2014), 78.

181 JS Nelson, 'Fair measure of the right to vote: A comparative perspective of voting rights enforcement in a mature democracy' 18 *Cardozo Journal of International & Comparative Law* (2010), 429, cited in Combrinck, 'Everybody counts', 78.

182 Article 27(4) and (5), *Constitution of Kenya* (2010).

183 Article 28, *Constitution of Kenya* (2010).

184 Article 21(3) and (4), *Constitution of Kenya* (2010).

185 Katsui H, Ranta EM, Yeshanew SA, Musila GM, Mustaniemi-Laakso M and Sarelin A, *Reducing inequalities: A human rights-based approach in Finland's development co-operation with special focus on gender and disability, A case study on Ethiopia and Kenya,* Institute for Human Rights, Turku, 2014, 70.

186 Act No. 24 of 2011.

187 Articles 83 (1)(b), 99(2)(e) and 193(2)(d), *Constitution of Kenya* (2010); Sections 25(2)(d) & 24(2)(e), *Elections Act* (Act No. 24 of 2011).

188 UN Doc CRPD/C/KEN/1, 31 August 2011, received by CRPD Committee 3 April 2012, para. 121.

189 Njogu K, 'Media and disability in Kenya' 24 *Disability Studies Quarterly*, 4 (2009).

The PWDA defines disability as a 'physical, sensory, mental or other impairment, including any visual, hearing, learning of physical incapability, which impacts adversely on social, economic or environmental participation'.[190] Failing to mention impact on political participation brings the PWDA at variance with the CRPD which sees disability as a long-term impairment that hinders 'full and effective participation in society'.[191]

However, the PWDA recognises the right of every person with a disability to vote and to the support of a personal assistant who is sworn to secrecy.[192] Violation of secrecy by the assistant is an offence.[193] The Persons with Disabilities (Amendment) Bill 2014 had proposed to require both national and county governments to reserve five percent of all State and public service positions for persons with disabilities.[194] However, this provision is conspicuously absent from the Persons with Disabilities Bill 2015.

Elections Act 2011

The Elections Act[195] was enacted to provide for elections under the devolved system of government, and its provisions on voting and eligibility for office mirror the 2010 Constitution as will be seen below.

Political Parties Act 2011

The Political Parties Act provides for a Political Parties Fund, at least 30 percent of which is to be dedicated by parties to promoting representation of the marginalised, including persons with disabilities, in Parliament and in county assemblies.[196]

Elections (General) Regulations 2012

The 2012 Elections (General) Regulations promote the candidature of persons with disabilities' by only requiring them to pay half the nomination fees stipulated for any elective position.[197] Regulation 72 also provides for assisted

[190] Section 2, *Persons with Disabilities Act* (Act No. 14 of 2003).
[191] Article 1, *Convention on the Rights of Persons with Disabilities*.
[192] Section 29, *Persons with Disabilities Act* (Act No. 14 of 2003).
[193] Sections 29(4) & 48, *Persons with Disabilities Act* (Act No. 14 of 2003).
[194] Clause 4(1), *Persons with Disabilities (Amendment) Bill* (Senate Bill No. 24 of 2014).
[195] Act No. 24 of 2011.
[196] Act No. 11 of 2011.
[197] Regulations 19(a), 25(a), 29(a), 33(a) & 37(a), *Elections (General) Regulations* (Legal Notice 128 of 2012).

voting. A person with a disability can apply to the presiding officer to be assisted by a person of their choice (with the exception of a candidate or agent).The assistant must be an adult, but does not have to be qualified to vote. The assistant is required to fill a declaration of secrecy, a violation of which is an electoral offence. Regulation 90 also requires the Independent Electoral and Boundaries Commission (IEBC) to take any special measures necessary to facilitate voting for persons unable to access polling stations for any reason, including disability, in case of a fresh presidential election.

These provisions tend towards the provision of reasonable accommodation for voters with disabilities. Whereas none of these provisions expressly refer to persons with intellectual disabilities, it is arguable that the law could not have intended to only enfranchise people with physical and sensory disabilities, since the 2010 Constitution prohibits discrimination on the basis of disability.[198] The requirement of soundness of mind, however, stands in stark contrast to these provisions, and indicates the need for a change in the law to preclude continued marginalisation of persons with intellectual disabilities.

Judicial interpretation of participation rights

There is no case law from Kenyan courts on legal capacity in the context of political participation under the 2010 Constitution. In the 2010 case of *Priscilla Nyokabi Kanyua v Attorney-General & Another,*[199] the Court was asked to rule on the legality of prisoners' exclusion from the referendum on the Draft Constitution in 2010. The Court found that there was no 'rational governmental objective or purpose' that justified excluding adult inmates from voting. Nevertheless, persons of 'unsound mind' were unable to 'take part in any function that requires exercise of choice due to their status' since they were not 'in control of their faculties'.[200] Therefore, while prisoners could vote, inmates of 'unsound mind' could not. Going by the decisions in *Bujdosó* and *Purohit,* such blanket exclusion would not withstand the CRPD Committee and African Commission's scrutiny today. Though this decision does not expressly disenfranchise persons with intellectual disabilities, lack of a definition of 'soundness of mind' and a history of conflation of intellectual disability with mental illness leaves room for prejudicial interpretation against persons with intellectual disabilities.

198 Mute, 'Shattering the glass ceiling', 10.
199 [2010] eKLR.
200 [2010] eKLR, 22.

The concept of 'unsound mind'

Though non-discrimination is a constitutional value and Article 38 of the 2010 Constitution grants participation rights to all Kenyans, it requires one to be of 'sound mind' to exercise participation rights.[201] While the term is used in various legislation and there is a defined procedure for assessing soundness of mind in criminal trials[202] and under the Mental Health Act,[203] this term is neither defined in the 2010 Constitution nor in legislation. Further, the Elections Act does not contain an adjudication procedure for challenging exclusion from registration on this basis. Moreover, the term is considered 'derogatory and discriminatory'.[204] Article 83(1) (b) does not expressly serve to exclude persons with intellectual disabilities from political participation. However, in the absence of assessment criteria, mental capacity adjudication processes under the Mental Health Act, the Penal Code and the Criminal Procedure Code place complete reliance on medical reports, with little involvement of the person being adjudged to gauge their 'soundness of mind' or lack thereof.[205] Moreover, contrary to the African Commission's finding in the *Purohit case,*[206] mental capacity is considered synonymous with legal capacity.[207]

Lack of a definition and the frequent conflation of mental and intellectual disabilities therefore make this provision amenable to be used to exclude persons with intellectual disabilities.[208] The potential exclusionary effect of this provision was confirmed prior to the 2013 elections. Efforts to register persons with intellectual disabilities were countered by arguments that they were of 'unsound mind'.[209]

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201 Article 83(1)(b), *Constitution of Kenya* (2010).

202 See section 11, *Penal Code* (Chapter 63, Laws of Kenya) and sections 162-163, *Criminal Procedure Code* (Chapter 75, Laws of Kenya).

203 Section 26, *Mental Health Act* (Chapter 248, Laws of Kenya)

204 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 38.

205 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya,* 50.

206 *Purohit & Moore v The Gambia*, ACmHPR, para 75.

207 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya,* 75.

208 Mute, 'Shattering the glass ceiling', 4. According to Ms Wangare, some people with autism are detained at Mathare National Psychiatric Hospital in Nairobi for being 'mentally ill'; Interview with Wangare F, Executive Officer, Kenya Association for the Intellectually Handicapped (KAIH), on 19 September 2014.

209 Interview with Wangare F on 19 September 2014.

Societal attitudes and other barriers to political participation of persons with intellectual disabilities

While Kenya's law does not expressly deprive persons with intellectual disabilities of legal capacity, an informal family guardianship, coupled with prejudicial societal attitudes, pose a huge barrier to political participation for persons with intellectual disabilities in Kenya.

The family set-up

The family is central to the exercise of legal capacity in Kenya.[210] While some persons with intellectual disabilities receive support, few can attest to a positive family life.[211] Family members usually assume the supportive role owing to lack of formal support structures like social welfare.[212] They view persons with intellectual disabilities therefore as a burden or curse[213] and lock them away, despite concealment of persons with disabilities being an offence under the PWDA.[214] Thereafter, they make decisions on their behalf. Ethnicity and gender add another dimension to discrimination, with most persons with intellectual disabilities facing multiple discrimination.[215] Research by the Mental Disability Advocacy Centre (MDAC) indicated that society was more likely to support a male person with an intellectual disability to exercise legal capacity.[216]

Exclusion from registration

Stigma against persons with intellectual disabilities, which are manifested from birth, may preclude birth registration.[217] Without birth registration, it is difficult to obtain a national identity card, a prerequisite for the voter registra-

[210] Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya*, 83.

[211] Kamundia E, 'Choice, support and inclusion: Implementing Article 19 of the CRPD in Kenya' 1 *African Disability Rights Yearbook* (2013), 62.

[212] Interview with Wangare F on 19 September 2014.

[213] Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 23.

[214] Section 45, *Persons with Disabilities Act* (Act No. 14 of 2003).

[215] Katsui, Ranta, Yeshanew, Musila, Mustaniemi-Laakso and Sarelin, *Reducing inequalities,* 70. Equal Rights Trust, *In the spirit of Harambee,* 41.

[216] Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 59.

[217] Redley M, Maina E, Keeling A and Pattni P, 'The voting rights of adults with intellectual disabilities: Reflections on the arguments and situation in Kenya and England and Wales' 56 *Journal of Intellectual Disability Research*, 11 (2012), 1031.

tion process.[218] In the 2013 elections, family members were among those who opposed voter registration of persons with intellectual disabilities.[219] By failing to support persons with intellectual disabilities in obtaining the necessary documents, their families therefore serve as gatekeepers to political participation.

Restrictions of freedoms of movement and association

While relatives of persons with intellectual disabilities theoretically acknowledge their right to make decisions, they view their dependence and reduced capacity as justifications for substituted decision-making.[220] They therefore curtail the movement of persons with intellectual disabilities or require them to be accompanied when they go out.[221] This both erodes the dignity of the person with an intellectual disability and reduces the opportunities for political participation. Freedom of movement is indispensable to political participation.[222] Restricted movement, combined with the perception of reduced capacity, makes it unlikely that persons with intellectual disabilities will be able to attend political meetings or 'campaign for a political party or cause'.[223]

Customary practices

Stereotypes about persons with intellectual disabilities embedded in the culture of some ethnic communities such as the Kikuyu[224] also hinder political participation. Persons with intellectual disabilities are perceived as 'idiots' or 'stupid',[225] resulting in their exclusion from circumcision ceremonies, which signify transition into adulthood.[226] It is highly unlikely that a person not deemed an 'adult' will be considered capable of taking part in adult activities such as voting or providing leadership.

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218 Redley, Maina, Keeling and Pattni, 'The voting rights of adults with intellectual disabilities', 1031.

219 Interview with Wangare F on 19 September 2014.

220 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 33.

221 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 33.

222 Office of the United Nations High Commissioner for Human Rights, *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*, para 6.

223 Article 38(3), *Constitution of Kenya* (2010).

224 Kikuyu is the largest ethnic community in Kenya; CIA World Fact Book https://www.cia.gov/library/publications/the-world-factbook/fields/2075.html on 21 October 2014.

225 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 24.

226 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 24.

The electoral process

Voter registration

The prejudicial attitudes revealed in the 2010 *Nyokabi case* are partly attributable to lack of training.[227] Poorly trained electoral officials serve to discourage persons with intellectual disabilities from voting.[228] Though lobbying by Disabled People's Organisations (DPOs) has facilitated voter registration for some persons with intellectual disabilities, negative societal attitudes precluded many of them from voting.[229] According to Lord *et al*, the voter registration process is crucial in highlighting the diverse accessibility needs of persons with disabilities.[230]

Voter education

Due to the diverse needs of the electorate, voter education should be made available in varied forms for effective outreach.[231] Persons with intellectual disabilities need information in easy read and other accessible formats such as CDs, videos, interactive CD-ROMs, murals or role-play.[232] These formats benefit not only persons with intellectual disabilities but also people with other kinds of disabilities such as people who are deaf.[233] DPOs have previously been excluded from the development of voter education material, but after lobbying, the Kenya Association for the Intellectually Handicapped (KAIH) advised IEBC on the presentation of voter material to persons with intellectual disabilities in 2013.[234]

Drafting electoral legislation

The process of drafting new electoral legislation under the 2010 Constitution provides further evidence of barriers to the full participation of persons with intellectual disabilities. By consulting persons with disabilities through the umbrella body, United Disabled Persons of Kenya (UDPK),[235] the peculiar needs

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227 KAIH has been involved in training judicial officers on legal capacity in Kenya; Interview with Wangare F on 19 September 2014.

228 Mute, 'Shattering the glass ceiling', 4.

229 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 37.

230 Lord, Stein and Fiala-Butora, 'Facilitating an equal right to vote for persons with disabilities', 125-126.

231 Lord, Stein and Fiala-Butora, 'Facilitating an equal right to vote for persons with disabilities', 127.

232 UK Department of Health, *Making written information easier to understand for people with learning disabilities: Guidance for people who commission or produce easy read information* revised edition, 2010, 24.

233 UK Department of Health, *Making written information easier to understand for people with learning disabilities,* 24.

234 Interview with Wangare F on 19 September 2014.

235 Interview with Wangare F on 19 September 2014.

of persons with intellectual disabilities were not addressed since, as this paper has reiterated, their inclusion needs are unique.[236]

Double invisibility

There is a huge inequality among disability groups in Kenya.[237] Many Kenyans perceive disability to mean physical impairment[238] and this has affected the quest of persons with intellectual disabilities greater inclusion. Not only are persons with intellectual disabilities presented with fewer opportunities,[239] but they also have first to lobby other persons with disabilities to convince them of their competence before seeking to exercise their participation rights.[240]

The wider society

Kenya has a very vibrant political culture, with political debate often dominating public discourse, in both electronic and print media and more recently social media.[241] However, the format of the information makes it generally inaccessible for persons with intellectual disabilities,[242] and precludes them from benefiting from and contributing to the dialogue.

Due to the perception that persons with intellectual disabilities are incapable of independent decision-making, they are often ignored by political parties during campaigns and in candidate selection.[243] This coupled with the identity as opposed to issue-based nature of Kenyan politics makes it difficult for persons with intellectual disabilities to access party nominations.

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236 According to Dimopoulos, persons with intellectual disabilities' needs are so peculiar that they do not fit into the models of disability, including the social model; Dimopoulos, *Issues in human rights protection of intellectually disabled persons*, 22.

237 Interview with Mute L, member, ACmHPR Working Group on the Rights of Older Persons and Persons with Disabilities in Africa, on 15 October 2014.

238 Interview with Commissioner Mute L on 15 October 2014.

239 Smith RB, Morgan M and Davidson J, 'Does the daily choice making of adults with intellectual disability meet the normalisation principle?' 30 *Journal of Intellectual & Developmental Disability*, 4 (2005), 227.

240 One person with an intellectual disability reportedly dropped out of the race for a county representative seat in the 2013 elections following pressure from other persons with disabilities; Interview with Wangare F on 19 September 2014.

241 Odinga C, 'Use of New Media during the Kenya Elections' Unpublished Master's Thesis, University of Uppsala, June 2013, 18.

242 Ingstad B and Grut L, 'See me, but do not forget me: People with disabilities in Kenya' SINTEF Health Research (2007).

243 Lord JE, Guernsey KN, Balfe JM and Karr VL, *Human rights. Yes! Action and advocacy on the rights of persons with disabilities*, University of Minnesota, Minneapolis, 2012, 60.

Even where persons with intellectual disabilities meet registration and qualification criteria, they sometimes experience *de facto* discrimination. MDAC recounted the experience of a woman in her 30s who was shoved out of a voting queue by other voters in the 2013 elections. Another person in his 40s, with intellectual disability who attempted to vie for political office was forced to bow out of the race when his opponents carried out a smear campaign, labelling him 'crazy'.[244]

The law in practice

Despite inclusive provisions in the 2010 Constitution, the application of certain laws disproportionately affects persons with intellectual disabilities and exacerbates their exclusion.

Inadequate supported decision making mechanisms

Despite having a transformative Constitution, MDAC's research indicates that lack of support is still a hindrance to the exercise of participation rights by persons with intellectual disabilities.[245] Currently, there are limited SDM mechanisms.[246]

Whereas Regulation 72 of the 2012 Elections (General) Regulations attempts to make voting more accessible to persons with disabilities, it homogenises them and presumes that they need the same kind of support, while support requirements vary. The discretion given to the presiding officer to exclude a person with a disability who does not meet the requirements can also be prejudicially applied against persons with intellectual disabilities where electoral officials are not properly trained. Moreover, unaccompanied persons with intellectual disabilities may have their right to secrecy violated since the Regulation stipulates that the presiding officer assist them in the presence of agents.[247] To address secrecy of the ballot, countries such as Liberia and Ghana have adopted tactile ballots to allow persons with visual impairments to vote on their own.[248] Support caregivers for persons with intellectual disabilities are also not accorded the same treatment as support caregivers for persons with disabilities. According to

244 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 39.
245 Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 36.
246 Interview with Wangare F on 19 September 2014.
247 Regulation 72(2), *Elections (General) Regulations* (Legal Notice 128 of 2012).
248 Lord, Guernsey, Balfe and Karr, *Human rights,* 53.

Ms Wangare, Kenyan society is yet to accept their role as vital to a person with intellectual disabilities.[249]

Educational requirements

Since 2010, eligibility for public office now includes certain educational requirements.[250] These requirements disproportionately affect persons with disabilities, particularly persons with intellectual disabilities, most of who are excluded from accessing education early in life by being locked away.[251] Persons with intellectual disabilities who access education attend special schools where they do not receive the certification required by the law.[252] Exclusion from education also has an impact on their voter literacy levels.[253] To ensure meaningful participation, a holistic approach is therefore necessary, targeting also inclusion in education as required under Article 24 of the CRPD.

According to MDAC, for persons with intellectual disabilities to exercise their participation rights, they would have to live in the community (rather than an institution), be interested in politics, have a support system either in the form of family or an NGO, not be perceived to be of unsound mind by electoral officials and be able to physically access the polling station and mark the ballot either individually or through an assistant.[254] The next section proposes measures to make political participation of persons with intellectual disabilities more effective.

Implementing political participation rights for persons with intellectual disabilities in Kenya

While Kenya's law does not expressly disenfranchise persons with intellectual disabilities, the full exercise of participation rights continues to be hampered by informal family guardianship and negative societal attitudes. Raising awareness to tackle the negative attitudes that continue to engender exclusion is there-

[249] Interview with Wangare F on 19 September 2014.

[250] Articles 99 and 193, *Constitution of Kenya* (2010); Sections 22, 24 and 25, *Elections Act* (Act No. 24 of 2011).

[251] An estimated 98% of persons with disabilities in Kenya do not access education. See *Leonard Cheshire Disability, Making rights a reality: Young Voices on the UN Convention on the Rights of Persons with Disabilities,* 2013, 10.

[252] Interview with Wangare F on 19 September 2014.

[253] Interview with Wangare F on 19 September 2014.

[254] Mental Disability Advocacy Centre, *The right to legal capacity in Kenya*, 27.

fore necessary. In the words of Dinerstein, 'rhetorical identification of the shift from substituted to supported decision making' is one thing, fully implementing a supported decision making regime is another.[255] If the situation of persons with intellectual disabilities is not addressed, persons with intellectual disabilities will be unable to take up the five percent quota established by Article 54(2) of the 2010 Constitution, thereby further marginalising persons with intellectual disabilities not only in the society but also in the wider disability rights movement.

Recommendations

In order for Kenya to meet universal and regional standards of political participation, concerted efforts by all stakeholders including the State, the IEBC, DPOs and families of persons with intellectual disabilities are necessary.

The State

While 'soundness of mind' is not the greatest barrier to the exercise of participation rights, it needs legislative or judicial interpretation. Lack of definitional clarity in the context of prevalent prejudicial attitudes leaves room for it to be prejudicially interpreted against persons with intellectual disabilities.[256] Moreover, the State should put in place, in consultation with all stakeholders, an effective SDM mechanism, with different levels of support and appropriate safeguards. Beyond Regulation 72, it is imperative that the State sets clear parameters for support. Inclusion International has developed a guide for crafting SDM mechanisms that can be adopted.[257] Safeguards against voter fraud and undue influence already present in electoral law[258] can be incorporated into the SDM mechanism.

Beyond reserving positions for persons with disabilities at the national and county level,[259] the State should secure the inclusion of persons with intellectual disabilities in the devolved system through support mechanisms such as formal

[255] Dinerstein, 'Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities', 8.

[256] KNCHR has proposed constitutional amendment. See Kenya National Commission on Human Rights, *From norm to practice: A status report on implementation of the rights of persons with disabilities in Kenya*, 2014, 44.

[257] http://inclusion-international.org/wp-content/uploads/2014/07/Appendix-3-SDM-Dialogue-Guide.pdf on 10 March 2016.

[258] Section 63, *Elections Act* (Act No. 24 of 2011).

[259] *Persons with Disabilities (Amendment) Bill* (Senate Bill No. 24 of 2014).

support persons[260] or personal assistants.[261] Kenya can seek the assistance of countries with a longer history of SDM, since Article 32 of the CRPD promotes international cooperation.[262]

It is also incumbent upon the State to collect statistics on persons with intellectual disabilities to inform policy-making, including streamlining birth and voter registration processes, and inclusive education for persons with intellectual disabilities. Registration and education would facilitate participation by persons with intellectual disabilities.

The IEBC

Electoral officials are uniquely placed to either facilitate inclusion or prolong exclusion. The IEBC should therefore continuously engage with DPOs to orient electoral officials to the unique needs of persons with intellectual disabilities. It is noteworthy that the IEBC is currently developing a gender and disability inclusion policy,[263] which provides an opportunity for the specific needs of persons with intellectual disabilities to be addressed. Where necessary, the IEBC can make specific regulations for participation by persons with intellectual disabilities.[264]

DPOs

Disabled people's organisations can use existing regional mechanisms, such as the African Peer Review Mechanism (APRM), to lobby for the implementation of participation rights. The APRM requires states to report on the implementation of the rights of vulnerable groups, including persons with disabilities. Since APRM secures the highest level of participation (heads of state), it is a good forum for securing state commitment on improving the participation rights of persons with intellectual disabilities, in light of the political sensitivity of the issue.

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260 Caldwell J, Hauss S and Stark B, 'Participation of individuals with developmental disabilities and families on advisory boards and committees' 20 *Journal of Disability Policy Studies*, 2 (2009), 103.

261 Concluding observations of the Committee on the rights of persons with disabilities: Spain, paras 47-48.

262 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya,* 149.

263 http://www.iebc.or.ke/index.php/component/content/article/80-news-archives/october-2014/387-iebc-developing-gender-disability-inclusion-policy on 10 March 2016.

264 Section 109(o) *Elections Act* (Act No. 24 of 2011).

DPOs should empower persons with intellectual disabilities to claim their own rights through self-advocacy. Self-advocacy shifts societal perception as to their decision-making capacity,[265] which would not only allow them to access the vote but also demonstrate that persons with intellectual disabilities are capable of leadership. In Australia, persons with intellectual disabilities representatives on government disability advisory councils are often drawn from self-advocates.[266] Existing self-advocacy initiatives run by KAIH and Users and Survivors of Psychiatry-Kenya (USP-K)[267] should be strengthened.

Donors

Kenya is currently listed as the world's eighth highest recipient of donor funding[268] and the electoral process is no exception.[269] If donors make inclusion of persons with intellectual disabilities part of the pre-election and post-election assessments, it will give a greater impetus for the State to give effect to its CRPD obligations.[270]

The family and the wider society

Since deprivation of legal capacity in Kenya is predominantly informal, the State should take immediate steps 'to raise awareness throughout society, including at the family level'[271] on persons with disabilities' rights and the need to respect their dignity. Although KAIH is currently involved in such training initiatives,[272] it is limited in resources and capacity.

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265 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya*, 113.

266 Frawley P and Bigby C, 'Inclusion in political and public life: The experiences of people with intellectual disability on government disability advisory bodies in Australia' 36 *Journal of Intellectual & Developmental Disability*, 1(2011), 31.

267 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya*, 116, Interview with Wangare F on 19 September 2014.

268 http://www.fundsforngos.org/featured-Article s/ten-ten-grantmaking-donors-ngos-kenya/ on 5 October 2014.

269 United States Agency for International Development, *Support for Kenya's 2013 elections: Rapid assessment review* http://www.usaid.gov/sites/default/files/documents/1866/Kenya%2527s%25202013%2520Elections.pdf on 5 October 2014.

270 Lord, Stein and Fiala-Butora, 'Facilitating an equal right to vote for persons with disabilities', 122.

271 Article 8(1), *Constitution of Kenya* (2010).

272 Interview with Wangare F on 19 September 2014.

Conclusion

The CRPD has had a positive impact on Kenya's law undeniably. Affirmative action provisions such as Article 54(2) of the 2010 Constitution provide evidence of this positive influence. According to one expert, 'the glass is now half-full'.[273] The CRPD's foundational principles can now be built upon to foster further inclusion.

The right to hold office appears more controversial than the right to vote. Even countries with a longer democratic tradition still restrict holding office to those not under guardianship. Although the CRPD Committee's proposal of personal assistants as a support mechanism may not provide the kind of strong guarantee that many crave before accepting that persons with intellectual disabilities can hold office, it is important to remember that disability is an evolving concept.[274] While it may not be foreseeable how persons with intellectual disabilities can effectively hold office, with the continued evolution of support mechanisms, they will be better placed to hold office, thereby reducing their marginalisation both in society and in the disability community.

The current exclusion of persons with intellectual disabilities mirrors the historical exclusion of women, immigrants, slaves and minority groups. While it was once inconceivable that women were capable of political participation, today it is unthinkable to contend that they cannot vote or hold leadership positions. Perhaps, as Inclusion International suggests, it is not that persons with intellectual disabilities are incapable of making decisions and expressing opinions; it is that we are not prepared or at least equipped to hear them.[275]

[273] Interview with Commissioner Mute L on 15 October 2014.

[274] Para (e), Preamble, *Convention on the Rights of Persons with Disabilities.*

[275] http://inclusion-international.org/voices-disability-world-listens/ on 10 March 2016.