



**UNIVERSITY OF NAIROBI**  
**SCHOOL OF LAW**

**A REVIEW OF THE LAW RELATING TO POLITICAL PARTICIPATION  
OF PERSONS WITH DISABILITIES IN KENYA**

**BY**

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**AUGUST, 2019**

## **DECLARATION**

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## **DEDICATION**

This research paper is dedicated to all dear persons in my life who gave it all to see me test the roots of knowledge. A big thank you to my parents, brothers, sisters, nephews and nieces for the sacrifices that they made to make sure that I attain the very best in my quest for knowledge.

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*UN Flagship Report on Disability and Development*, 2018

United Nations Inter-Agency Standing Committee (IASC) *Guidelines on Inclusion of Persons with Disabilities*

Universal Declaration of Human Rights

## **LIST OF ABBREVIATIONS AND ACRONYMS**

|         |   |
|---------|---|
| Edn     | : Edition   |
| EHRC    | : Equality & Human Rights Commission                                  |
| HRBA    | : Human Rights Based Approach   |
| IEBC    | : Independent Electoral and Boundaries Commission                     |
| ICESCR  | : International Covenant on Economic, Social & Cultural Rights        |
| ICCPR   | : International Covenant on Civil and Political Rights                |
| KNHEC   | : Kenya National Human Rights and Equality Commission                 |
| LASPNET | : Legal Aid Service Providers Network                                 |
| LL.M    | : Master of Laws  |
| MCAs    | : Members of County Assembly  |
| NGEC    | : National Gender & Equality Commission                               |
| NCPWD   | : National Council for Persons with Disabilities                      |
| NCSL    | : National Conference of State Legislature                            |
| No      | : Number  |
| OP      | : Original Position   |
| PWDs    | : People with Disabilities  |
| UDHR    | : Universal Declaration of Human Rights                               |
| UDPK    | : United Disabled Persons of Kenya                                    |
| UN      | : United Nations  |
| UNCRPD  | : United Nations Convention on the Rights of People with Disabilities |
| UNDP    | : United Nations Development Programme                                |
| UK      | : United Kingdom  |
| US      | : United States of America  |
| V       | : Versus  |
| WFTO    | : World Fair Trade Organization                                       |

## ABSTRACT

Discussions on the human rights have been on the increase globally since the end of World War II. The main focus of discussions has been on the protection of human rights and prohibiting the discrimination against persons with disabilities (PWDs). International treaties and laws such as Universal Declaration of Human Rights (UDHR), United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and International Covenant on Economic, Social and Cultural Rights (ICESCR) have been ratified and included in various Constitutions of many countries including Kenya which adopted international law in her constitutional provisions. Despite the provisions in Constitution, laws and regulations respect of human rights and protection of the PWDs in regard to political participation has not been achieved in Kenya. This study sought to examine political participation of PWDs in Kenya based on the objectives to establish the extent of political participation of PWDs in Kenya, analyze the legal framework of political participation of PWDs in Kenya, identify the challenges faced by PWDs in relation to political participation in Kenya and to recommend measures necessary for improved political participation of PWDs in Kenya. Theory of justice and human rights based theory were applied to guide the study. Research methodology used included desk research design to examine the laws concerning political participation of PWDs in Kenya. Research variables were: independent variables which were relevant laws governing practice while dependent variables were aspects of political participation by PWDs. The target population in the study was the Kenyan PWDs. Law library was accessed for purposes of obtaining both primary and secondary data. The researcher collected data by methods including data mining from available documents, journal papers, books, periodicals, text books, law books, journals and internet sources, laws, case laws, theses and various government and institutional publications, among others. Reliability and validity analysis for the research was done to ensure consistency, accuracy and predictability and quality of the research. Validity analysis ensured that the analysis techniques were free from error and that research analyzed what it was intended to analyze. Data analysis was done using qualitative approaches such as qualitative legal analysis methods used were as per standards of legal arguments and best practices of doctrinal and analytical research. Research findings revealed that PWDs suffer political, economic and social segregation and are not in a position to participate in politics like other citizens. It was also found that there exist discriminatory processes within the government limit or badly label PWDs. Requirements of membership with the disability organization as a pre-condition for certification of PWD was found to be discriminatory against their political participation of PWDs. Also, requirements for tax exemption for PWDs were found as another barrier. It was found out that though Constitution provides for political participation of PWDs in Kenya various parts of the Constitution have been found to limit political participation of PWDs. Findings further show that weaknesses of Persons with Disabilities Act 2003 in that it does not give protection against unnecessary limitations that come in the name of court interpretations of legal capacity. The research found out that the additional requirements for PWDs in Elections (Party Primaries and Party Lists) regulations, 2017 are discriminative. Findings showed that it was difficult to determine legal capacity of PWDs. There has been over-reliance on health approach to determination of legal capacity of PWDs by the courts. It is recommended that in order to encourage full participation of PWDs in political and public life the following measures should be taken to amend law, encourage implementation of Constitutional quarter of the 5% of jobs, public appointments and to create free environment to encourage political participation of PWDs.

## CHAPTER ONE

### OVERVIEW AND STRUCTURE OF THE STUDY

#### 1.0 Background of the Study

The opportunity to participate in political life is at heart of what defines life in a democracy. Consequently, the right to participation especially for persons with disabilities is firmly anchored in international, regional and national laws. It is provided for by the *United Nations Convention on the Rights of Persons with Disabilities*, UNCRPD, *The African Charter on Human and Peoples' Rights* 1981, *East African Community Policy on Persons with Disabilities* as well as the Constitution of Kenya and Acts of Parliament.

The question of political participation of Persons with Disability (PWDs) has been a subject of discussion globally, regionally and nationally. The subject has evoked numerous debates which are arguably anchored in the spirit of democracy. Manus for instance observes that democracy is perhaps one of the important aspects in the development of any state.<sup>1</sup> It also suffices to note that political participation is critical to democracy.<sup>2</sup> Therefore, ensuring inclusivity is key to full realization of democracy.<sup>3</sup> This ensures that the plight of every group is adequately addressed.<sup>4</sup>

Article 29 of the UN Convention on Rights of Persons with Disabilities, UNCRPD, requires States Parties to guarantee PWDs political rights and the opportunity to exercise them

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<sup>1</sup> Manus Midlarsky, *Inequality, Democracy and Economic Development* (Business and Economics 1st Edn 1997) 65.

<sup>2</sup> Mathew Finkin, 'Bridging the Representation Gap' [2001]3 *University of Pennsylvania Journal of Labor and Employment Law*, 392.

<sup>3</sup> Julie Allan, *Inclusion, Participation and Democracy* (Kluwer Academic Publishers 2nd Edn 2003) 13.

<sup>4</sup> Ibid.

on an equal basis just as the others. The UNCRPD puts an obligation upon member States to ensure that PWDs participate effectively and fully in political and public life on an equal basis as others either directly or indirectly through freely chosen representatives, including the right and possibility for people with disabilities to vote and be elected. The obligation upon State Parties includes ensuring that voting procedures, facilities and materials are appropriate, accessible, easy to understand and use. It also sets an obligation for the State Parties to protect the right of PWDs to vote by secret ballot in non-intimidating public elections and referendums, and to stand for election, effectively perform their duties and perform all public functions at all levels of government. UNCRPD also puts an obligation upon State Parties to guarantee the free expression of the will of PWDs as voters and at their request, by allowing a person of their choice to vote and be voted for. The UNCRPD requires that member States should actively promote an environment in which PWDs can effectively and fully participate in the management of public affairs, without discrimination and on an equal basis with others, in non-governmental organizations and associations concerned with the public and political life of the country, as well as the activities and administration of political parties and to train and join organizations of PWDs to represent PWDs at international, national, regional and local levels.

Article 21 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* outlines the Right to Participation in the Political and Public Life provides that every PWD has the right to participate in political and public life. This protocol puts an obligation on States Parties to take all appropriate political, legislative and other measures to guarantee the right to political participation on an equal basis. Such guarantee includes taking or facilitating systematic and comprehensive civic education for promotion of the full participation of PWDs in development and democracy. It also requires State Parties to



encourage effective participation of PWDs in political and public life in accordance with national legislation. The obligation requires State Parties to put in place reasonable accommodation and other support measures compatible with the secret ballot, including, where appropriate, ensuring access to the polling stations and facilitating assisted voting, in order to enable PWDs to effectively participate in political and public life in accordance with national legislation. The Protocol also requires achievement of greater and effective representation and participation of PWDs on an equitable basis as members of regional, sub-regional, national and local legislative bodies.

The Constitution of Kenya emphasizes that democracy is one of the cardinal national principles.<sup>5</sup> This explains why the Kenyan government is established through a democratic process. The democratic process should aim for every individual or group to feel represented in the government. Article 2(5) of the Constitution of Kenya provides that general rules of international law are part of the law of Kenya. Also Article 2(6) allows any treaty or convention ratified by Kenya to be part of the law of Kenya. This fundamentally adopts the provisions of international law on political participation of PWDs in Kenyan law.

PWDs are considered a marginalized group within the limits of Article 54 (2) of the Kenyan Constitution and therefore are required to have special political participation. Article 54(2) of the Constitution of Kenya provides for the need to improve political representation of PWDs in Kenya. It states that ‘...the State shall ensure that there is progressive implementation of the principle that at least 5% of those elected and appointed in public positions are persons with disabilities.’<sup>6</sup> This constitutional provision operate as an affirmative action that is aimed at

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<sup>5</sup> The Constitution of Kenya, especially on the Preamble and Article 1 (2).

<sup>6</sup> See generally the Constitution of Kenya, Article 54 (2) on ‘Persons with Disabilities’.

improving political representation of PWDs. Article 27(6) of the same constitution deals with the question of 'Affirmative Action' to ensure that PWDs are well represented in the political arena.

The legal framework in Kenya has attempted to address the issue of political representation of persons with disabilities. For example, Constitution of Kenya has played a central role in this topic. Article 260 of Constitution of Kenya provides a compelling interpretation of the term "disability".<sup>7</sup> In addition, Article 19 (3) (a) states that the fundamental rights and freedoms set forth in chapter four of the Constitution of Kenya belong to each individual and are not recognized by the state. Articles 27 (2) and 27 (4) also provide for positive action to ensure equality and prohibit discrimination on the basis of disability. Therefore, political participation of PWDs is an absolute right and therefore need to be enjoyed absolutely.

Far beyond the Constitution of Kenya, and the relevant international instruments, we have the PWDs Act No. 14 of 2003. The objective of this legislation is to respond to issues concerning PWDs. For instance, in its Section 2, disability is defined to mean 'a sensory, mental, physical or other impairment, like hearing, visual, learning or physical incapability, which has direct effect on economic, social and environmental participation'. Finally, the Elections (Party Primaries and Party Lists) Regulations 2017 recognizes PWDs as a special interest group.

From the foregoing analysis, it is observed that the relevant legal framework on this problem is broad. However, despite the many opportunities provided therein, the marginalized groups in Kenya, and especially that of PWDs, are yet to fully realize these opportunities. Firstly, Kenya has not attained the 5% threshold in elective posts, and secondly, the Parliament of Kenya has not made amendments to the relevant statutes so as to actualize this position. For example,

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<sup>7</sup> The Constitution of Kenya interprets the term "disability" as including any physical or sensory, mental, psychological or other impairment, condition or illness that has or is perceived by significant areas of the community as having a substantial or long-term effect on: the ability of an individual to carry out ordinary daily activities.'

the Political Parties Act of 2016 lacks provisions which support the PWDs when participating as political candidates in the electoral process, yet this is the key statute which governs matters of political parties and elections in Kenya. This Act of Parliament should have attempted to actualize the contemplation of the Constitution of Kenya, 2010, with an aim of meeting the 5% threshold.

Other than the shortcomings in the Statute(s), the government has also failed in the nomination process. The number of nominations in elective positions especially in Parliament and County Assembly is appalling. It is noteworthy that the election of PWDs is key in a democratic country such as Kenya. Political participation should not only focus on voting but also on the right to vie for a political post.

The Constitution of Kenya provides limitations to these rights in various Articles. Article 12(1) provides that every citizen is entitled to the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by the Constitution. Article 99(2)(e) specifies *unsound mind* as a reason for disqualification of a person with such disability from being a member of parliament. *Sound mind* and other references to legal capacity of persons are commonly used in law and often require interpretation to avoid ambiguity in relation to use. Lack of clear interpretation of the same has led to reliance on formal and informal mechanisms to determine legal capacity of PWDs. Often, there is over-reliance on physicians' or psychologists' reports concerning capacity of PWDs where in most cases, the PWDs are not consulted in matters concerning them. This issue of unsound mind is also echoed in Article 83 (1) (b) of the Constitution which states that a voter must not be someone of *unsound mind*. The Kenyan

*Election Act* of 2011 also states that those of *unsound mind* may not vote. Courts and formal informal mechanisms often fail to determine the legal capacity of PWDs<sup>8</sup>.

This research is aimed at reviewing the law affecting political participation of persons with disabilities in Kenya. Despite the country having a laid out legal framework on matters of PWDs, the same has not been actualized. It is evidenced that there is lack of sufficient measures to ensure that they have reasonable accommodation in order to fully participate in the political arena.

### **1.1. Statement of the Problem**

The legal framework on political participation of PWDs in Kenya has not addressed the contemplation of Article 12 of UNCRPD and that of Article 54(2) of the Constitution of Kenya. The law requires that political participation of PWDs directly or indirectly. The legal threshold for political participation through progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies PWDs have not been realized. In 2017 General Elections, of the 2009 members of county assemblies (MCAs), only 42 were PWDs which is about 0.02%<sup>9</sup>. This problem of lack of progressive implementation is also in Parliament.

Another problem is that the limitations given to the right to political participation by PWDs are unclear. For example, there are no clear legal mechanisms of determination of legal capacity of PWDs in line with Article 12 of UNCRPD. Capacity is a requirement for political participation of PWDs especially when it comes to being elected into a political office. Approaches that are used to determine capacities such as sound mind and disability. The formal and informal approaches of determining legal capacity over-rely on health definition and

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<sup>8</sup> *K v K* [2009] eKLR

<sup>9</sup> Jemimah Mueni. People with Disabilities have not been fully represented in Kenyan Politics (2017)

doctors' reports and therefore disregard other opinions. In some cases, even doctors' report may vary leading to further confusion. So far, health approach to definition of *sound mind* is admissible in courts though the Kenya Health Policy (2014-2030) does not explicitly define PWDs.

The questions posed include to what extent can PWDs participate in politics within the framework of the Kenyan law? Can PWDs be allowed by the law to be Kenyan President? If not what obstacles are there and how can they be addressed? Capacity would be a critical aspect of the answer to these questions. Despite legal framework on matters regarding political participation of PWDs, they face great challenges and therefore it is difficult for them to compete with other persons for elective posts. This research is aimed at addressing the problem within the relevant legal framework in Kenya.

## **1.2. Justification of the Study**

This study is therefore justified by the rationale that despite having laws addressing the issue of political participation of PWDs, the good results have not yet been achieved. The Constitution of Kenya and other legislations have by far and large attempted to address the problems of inadequate levels of participation and barriers to it. A little effort has been endorsed in that we have some PWDs in Parliament. However, more effort is yet to be put so as to actualize the required Constitutional benchmark. For this to be achieved, it is correct to assert that the continuous failure of political participation of PWDs in Kenya, can be attributed to poor implementation of the legal framework. Gaps in determining legal capacity of PWDs and over-reliance of other formal and informal ways of determining legal capacity of PWDs call for a research to address them. It is therefore important to critically review the relevant law and make necessary recommendations, which is the basis of this research.

### **1.3. Objectives of the Study**

This study advances an argument that the law relating to political participation of PWDs in Kenya requires a review so as to achieve a sufficient political participation by the PWDs. The objectives to this study are as follows:

- i. To establish the extent of political participation of PWDs in Kenya.
- ii. To analyze the legal framework of political participation of PWDs in Kenya.
- iii. To identify the challenges faced by PWDs in relation to political participation in Kenya.
- iv. To recommend measures necessary for improved political participation of PWDs in Kenya.

### **1.4. Research Questions**

This study will be guided by the following research questions;

- i. What is the extent of political participation of PWDs in Kenya?
- ii. What are the characteristics of the legal framework of political participation of PWDs in Kenya?
- iii. What are the challenges faced by PWDs in relation to political participation in Kenya?
- iv. What measures are necessary for improved political participation of PWDs in Kenya?

### **1.5. Research Hypotheses**

This research is based on the following presumptions:

- i. PWDs do not participate adequately in political issues in Kenya.
- ii. Legal framework of political participation of PWDs in Kenya needs significant improvement to avoid exclusion of PWDs
- iii. PWDs face challenges of legal capacity in relation to their political participation in Kenya.

- iv. There is need for measures necessary for improved political participation of PWDs in Kenya to be put in place

## **1.6. Theoretical Framework**

This section will review major theories relating to the question of political representation of PWDs, namely, the *Theory of Justice* and the *Human Rights Based Approach Theory*.

### **1.6.1. The Theory of Justice**

The *Theory of Justice* was postulated by John Rawls<sup>10</sup> in 1971. Objective of the theory was to address issues of distributive justice. The theory advocates for principled reconciliation of liberties and equality which applies to the basic structure of well-ordered societies. The theory is composed of the principles of equal liberty, difference principle and the principle of fair equality of opportunity. Key definitions of terms used in the theory include *utility* – action that focuses on all affected by potential action; *rights* – Freedom and equality of individuals and *justice* – fair distribution of benefits and burdens.

The theory argues that principles of justice are sought to guide the conduct of parties to circumstances of justice. The parties are recognized to face moderate scarcity, and they are neither naturally altruistic nor purely egoistic. Rawl argues that “*justice is the first virtue of social institutions, as truth is of systems of thought.*” That “*each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override*”

For John Rawls, justice implies fairness.<sup>11</sup> It asserts that the initial position of justice rests on two principles: each person has the same inalienable right to claim a fully adequate system of equal fundamental freedoms, a program compatible with the same system of freedoms for all and that social and economic inequalities must fulfill two conditions to be attached to

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<sup>10</sup> M.D.A. Freeman, Lloyd’s *Introduction to Jurisprudence*, (Sweet and Maxwell) 577.

<sup>11</sup> John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge 1971) 3.

positions and posts open to all under conditions of equality of opportunity; and that they should benefit to the maximum of the least advantaged members of society (the *difference principle*). He argues for equality of liberty, saying that "every person must have the same right as the largest set of fundamental freedoms compatible with a similar system of freedoms for others", and that "social and economic inequalities must be regulated in a way that is reasonable for the benefit of all and attached to positions and positions open to all."<sup>12</sup>

The original position is a central element of John Rawls' social contract report. The initial position is designed to be a fair and impartial point of view in our reasoning on the fundamental principles of justice. In adopting this point of view, we must imagine ourselves in the position of free and equal persons who agree and commit themselves jointly to respect the principles of social and political justice.<sup>13</sup>

The 'veil of ignorance'<sup>14</sup> describes the hypothetical original position where Rawls presents the rational contractors as choosing his two principles of justice. Rational entrepreneurs ignore their skills, intelligence and social position. Thus, they are in an original position of equality with each other. From this position, they must choose the principles of justice on which the institutions of society will function. Since each man ignores his skills and his intelligence, he must choose his principles of justice with others.

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<sup>12</sup> John Rawls, *A Theory of Justice* [1999] Revised Edition Cambridge: The Belknap Press of Harvard University Press, 53.

<sup>13</sup> Michael Moehler, 'The Rawls-Harsanyi Dispute: A Moral Point of View' [2015] *Pacific Philosophical Quarterly*, University of Southern California & John Wiley & Sons Ltd. 87-92.

<sup>14</sup> A hypothetical mental state, in John Rawls version of Social Contract Theory, in which we imagine ourselves as being situated behind a 'veil of ignorance' in which we are ignorant of our particular characteristics such as sex, race, IQ, financial status, family background, religious ideology, personal philosophy, etc. The 'veil of ignorance' forces us to imagine ourselves in a position, free of bias, and one in which we are unaware of any particular skills or abilities we may have.



The Rawls' Maximin Rule is arguably one of the central principle in Rawls' work on a 'Theory of Justice' (1971).<sup>15</sup> Maximin is a decision rule. It states that for any decision whose results are uncertain, the party who decides should choose the option that optimizes the expected result as much as possible. There comes a situation in the initial position where people have to choose from different competing alternatives. Rawls believes that by using the Maximin principle, the people will choose their own principle of justice. John Rawls therefore argues for the adoption of two principles of justice, on the grounds that these are the principles that a rational agent, using the maximin rule of decision, would adopt if he were in the initial position (PO).

### **Applicability to of the Rawl's Theory to PWDs**

Rawlsian framework offers reasonable and intuitively compelling ways to approach issues of justice for the PWDs. Rawl's theory of justice proposes principle of equal liberty which is applicable in understanding whether an action protects rights of people from invasion and if it allows for provision of rights for people with disability equal to the rights of others. The principle is anchored on Kantian commitment that no person would want to be treated as mere means. People with disability would not want to be treated as mere means of others achieving their political goals but as critical partners and participants in political processes.

Rawl's theory of justice also proposes the difference principle which appreciates existence of inequalities but gives a moral obligation to improve the worse off. This calls for improvement of conditions such as access to justice for marginalized and vulnerable in the society. It emphasizes the need for fairness in political and other forms of representation for

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<sup>15</sup> Olatunji A. Oyeshile, 'A Critique of the Maximin Principle in Rawls' Theory of Justice' [2008] 3(1) *Humanity and Social Sciences Journal*, 65.

those who are not fairly represented, the worse off, such as people with disabilities. The theory helps to preserve utilitarian belief in net benefits for everyone.

The Principle of fair of fair equality of opportunity is applicable in ensuring that political representation matches the diversity of the society. This principle supports Kantian and utilitarian view that people should be treated equally.

### **Gaps in the Theory of Justice**

Criticisms include: -

- i. The theory is criticized on the basis that its proposition of justice as fairness rejects the concept of individual's beliefs and practices<sup>16</sup>.
- ii. The Original Position and the Veil of Ignorance is criticized that they exclude some morally relevant information in order to promote rationality and that the theory biased in favor of rationality<sup>17</sup>.
- iii. It is difficult to apply the theory to practice<sup>18</sup>. It is criticized that it is difficult for people to place themselves under the Veil of Ignorance in the Original Position so as to formulate what conduct is required of them by the maximin principle.
- iv. The Difference Principle is criticized based on the fact that it mostly ignores claims that people deserve certain economic benefits depending on their actions<sup>19</sup>. For example, those who work hard higher levels of material goods resulting from their work and vice versa.

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<sup>16</sup> e Silva, V. C. (2019). John Rawls' 'justice as fairness' and the demandingness problem. *Acta Scientiarum. Human and Social Sciences*, 41(1), e45292.

<sup>17</sup> Zabdyr-Jamróz, M. (2015). The Veil of Ignorance and Solidarity in Healthcare: Finding Compassion in the Original Position. *Diametros*, (43), 79-95.

<sup>18</sup> Smith, S. R. (2016). *Applying theory to policy and practice: issues for critical reflection*. Routledge.

<sup>19</sup> Freeman, S. (2018). Rawls on Distributive Justice and the Difference Principle. In *The Oxford Handbook of Distributive Justice* (p. 13). Oxford University Press.

## 1.6.2. Human Rights Based Approach Theory

Human Rights Based Approach (HRBA) theory originated with the Unilateral Declaration of Human Rights by the UN in 1948.

### Objectives

The theory aims to empower people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights'.<sup>20</sup> It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.<sup>21</sup> In other words, the approach guarantees citizens 'greater opportunities to participate' in influencing the decisions that apply to their human rights.<sup>22</sup>

### Propositions

The theory is based on the principles participation and inclusion, equality and non-discrimination, accountability and the rule of law, universality and inalienability, indivisibility and inter-dependence and inter-relatedness.

The subject of HR (which forms the basis of HRBA) first became of interest after the passing of the UDHR by the UN in 1948. This debate would later be postulated by HR organizations such as the HR Watch and Amnesty International.<sup>23</sup> In 2003, a 'common understanding' of HRBA was developed by various organizations by proposing the six main pillars, listed above.<sup>24</sup>

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<sup>20</sup> Care about rights? 'What is a human rights based approach?'

<sup>21</sup> UNHRBA Portal, 'What is human-rights based approach?'

<sup>22</sup> Care about rights? 'What is a human rights based approach?' Available at <http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html>. Accessed on 25<sup>th</sup> February 2019.

<sup>23</sup> Forsythe, David (1997). 'The United Nations, Human Rights, and Development'. *Human Rights Quarterly*. 19 (2): 334–349.

<sup>24</sup> Broberg, Morten, & Sano, Hans-Otto. 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development: An analysis of a rights-based approach to development assistance based on practical experiences' (2018) 22(5) *The International Journal of Human Rights*, 664-680.

For purposes of this discussion we shall invoke these pillars so as to address the plight of marginalized persons with regards to PWDs. HRBA has been criticized to the extent that it does not represent specific set of ideas.

### **Applicability of the Human Rights Theory to PWDs**

The theory advocates for a rights-based approach which entails supporting the rights-holders in claiming their rights. It is applicable in transforming people with disability from passive recipients of alms to active rights-holders of their political and economic rights. In this understanding, people with disability can be transformed from traditional alms and help receivers to people who can stand on their own and achieve their required political representation by one of their own.

The theory puts *corresponding obligation* on a party who has a right to be able to assert this right against another party who holds a duty mirroring that right. In practice the duty-bearer is always a public authority, meaning the State. The theory also gives insights into emphasizing focus on facilitating people with disabilities as rights-holders' to access services and to ensuring their participation as free citizens in matters relevant to their lives such as politics and development. Thus, the rights-holders must be empowered to claim their rights against the State. The theory encourages group of right holders or individual people with disabilities to acquire the ability to think and to act freely, to take decisions and to fulfill own potential as a full and equal member(s) of society.

### **Gaps in the Human Rights Based Theory**

- i. The theory promotes inequalities and conflicts between different groups in the society, and possibly even leads to the favouring of some groups in against to others<sup>25</sup>;

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<sup>25</sup> Shestack, J. J. (2017). The philosophic foundations of human rights. In *Human Rights* (pp. 3-36). Routledge.

- ii. HRBA promotes non-sustainable use of natural resources, where one group obtains control over natural resources at the expense of one or more other groups<sup>26</sup>;
- iii. HRBA promotes inappropriate governance, because the grant of rights can also be used to secure power to certain groups at the expense of other politically vulnerable groups<sup>27</sup>.

## **1.7. Conceptual Framework**

Research variables in this research topic of law relating to political participation of persons with disability in Kenya can be categorized into two: independent variables and dependent variables. Independent variable is the related law while dependent variable is political participation of the PWDs. From theories and literature review, political participation of PWDs can be conceived based on the following levels of political involvement: - voting, contesting political position, holding political office, protesting/demonstrating or picketing, political party membership and groups, personal contacting, filing lawsuits, seeking help from politicians, civil disobedience, online politics, signing of petitions, marketing political cause and holding political discussions. The activities can be classified as spectator, transitional and gladiator activities according to Milbrath model<sup>28</sup>.

### **1.7.1. Spectator Aspects of Political Participation by PWDs**

These activities include voting, political discussions, persuading people to vote in favour of someone and wearing political button. The right for PWDs to participate in voting process by voting any candidate of their choice or being voted in for a position is provided for in Kenyan

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<sup>26</sup> Broberg, M., & Sano, H. O. (2018). Strengths and weaknesses in a human rights-based approach to international development—an analysis of a rights-based approach to development assistance based on practical experiences. *The International Journal of Human Rights*, 22(5), 664-680.

<sup>27</sup> Power, S. L., & Wanner, T. K. (2017). Improving Sanitation in the Slums of Mumbai: An Analysis of Human Rights-Based Approaches for NGOs. *Asian Studies Review*, 41(2), 209-226.

<sup>28</sup> Milbrath, LW (1965). *Political participation*. Chicago: Rand McNally

legal framework<sup>29</sup>. However, PWDs is a segment of the population which is expressly or implicitly excluded by law or practice from the franchise by limitations of legal capacity<sup>30</sup>. This limitation also transcends other aspects of political participations such as discussions or persuasion of people to vote in a particular direction.

### **1.7.2. Transitional Aspects of Political Participation by PWDs**

Transitional political activities<sup>31</sup> include contacting political officials, donating towards political cause, attending political rallies, political discussions, signing petitions and marketing political cause, among other activities<sup>32</sup>.

### **1.7.3. Gladiator Aspects of Political Participation by PWDs**

Gladiator political activities include active political party membership, vying for a political office, holding office and political activism, among other factors. Conceptual model to help understand the levels of political participation of PWDs is illustrated in Figure 1.

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<sup>29</sup> Mute, L. M. (2010). Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities in Kenya. *Thought and Practice*, 2(2), 1-18.

<sup>30</sup> Ibid

<sup>31</sup> Priestley, M., Stickings, M., Loja, E., Grammenos, S., Lawson, A., Waddington, L., & Fridriksdottir, B. (2016). The political participation of disabled people in Europe: Rights, accessibility and activism. *Electoral Studies*, 42, 1-9.

<sup>32</sup> Gebrekidan, F. N. (2012). Disability rights activism in Kenya, 1959–1964: History from below. *African Studies Review*, 55(3), 103-122.

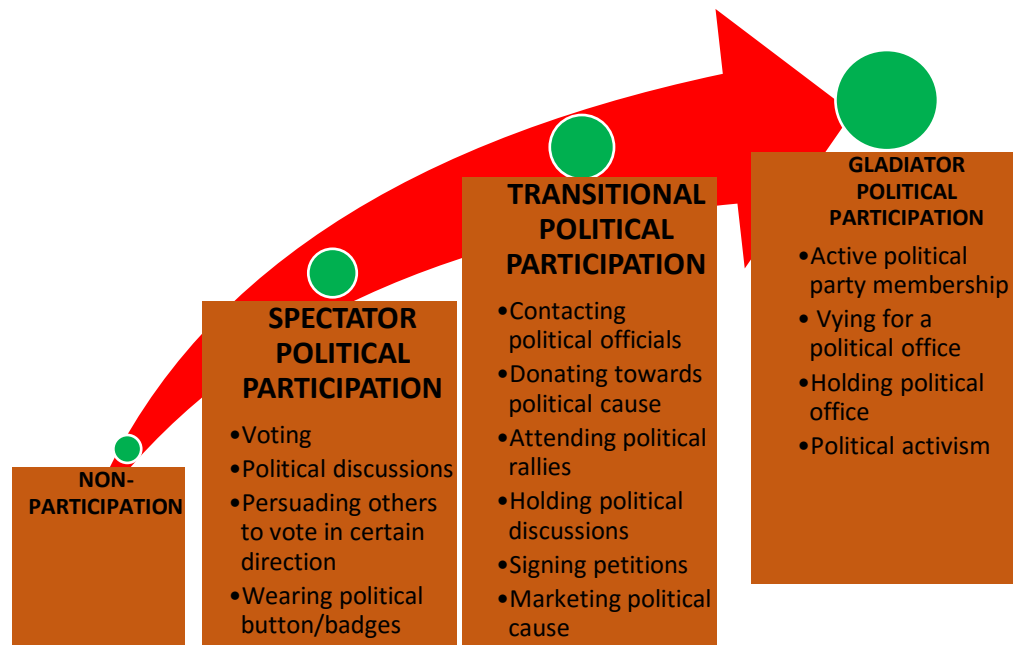


Figure 1: Conceptual framework of PWDs political participation (*Source: Author*)

## 1.8. Research Methodology

This research used desk research design as well as uses the doctrinal and analytical research methods<sup>33</sup> to examine the laws concerning political participation of PWDs in Kenya and the extent to which the laws guide the practice<sup>34</sup>. Research variables were grouped into two: independent and dependent variables. Independent variable was relevant laws governing practice while dependent variable was aspects of political participation by PWDs.

The location of the study was in Kenya. The target population in the study was the Kenyan PWDs. Law library was accessed for purposes of obtaining both primary and secondary data. The researcher collected data by desk research methods including data mining from

<sup>33</sup> McConville, M. (Ed.). (2017). *Research methods for law*. Edinburgh University Press.

<sup>34</sup> Barkan, S. M., Bintliff, B., & Whisner, M. (2015). *Fundamentals of legal research*.

available documents, journal papers, books, periodicals, text books, law books, journals and internet sources, laws, case laws, theses and various government and institutional publications, among others.

The Constitution of Kenya, formed the basis of this discussion. In addition to this, other relevant legislations such as the Persons with Disabilities Act No. 14 of 2003, the Political Parties Act of 2016, and the Elections (Party Primaries and Party Lists) Regulations of 2017 were applied. Also, the UNCRDP and the UDHR also formed part of the research.

Reliability and validity analysis for the research was done to ensure consistency, accuracy and predictability; and quality of the research, respectively. Validity analysis ensured that the analysis technique was free from error and that research analyzed what it was intended to analyze<sup>35</sup>. Data analysis was done using qualitative approaches<sup>36</sup>. Qualitative legal analysis methods used were as per standards of legal arguments and best practices<sup>37</sup>. The research relied on the relevant law including the statutes, international conventions and instruments, judicial precedents, legal opinions, writings and commentaries from eminent scholars and practitioners in this subject and reports.

The researcher applied relevant ethical guidelines of legal research to ensure ethical issues in this research were considered. The researcher ensured that information and data collected was used only for purpose of achieving research objectives.

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<sup>35</sup> Golafshani, N., (2003) Understanding reliability and validity in qualitative research. *The Qualitative Report*, 8(4), 579 – 607.

<sup>36</sup> Hayasaka, K. (2015). Combining documentary archives with survey data to advance from case studies to Large-N analysis of Japanese Commons.

<sup>37</sup> You, J. (2015). US Law and CSR Implementation. In *Legal Perspectives on Corporate Social Responsibility*. (pp. 65 – 83) Springer India.



## **1.9. Literature Review**

Empirical review of literature focuses on extent of political participation, legal framework of political participation, challenges and measures to improve political participation of PWDs in Kenya.

### **1.9.1. Extent of Political Participation of PWDs in Kenya**

Price<sup>38</sup> studied political participation of PWDs and found that there remain serious gaps in literature on successful strategies to increase and promote leadership roles of PWDs in developing countries. The researcher noted that information on how best to provide support in promoting inclusive political leadership for PWDs and recommends additional research to determine how far PWDs have graduated from tokenism to authentic leadership roles in political and public life. He notes that there is need for rigorous and timely evaluation of implemented strategies for improvement of political participation and inclusion of PWDs. The research found out that there are many barriers to political participation faced by PWDs such as societal stigma, discriminatory legal framework and infrastructure and positive rhetoric unsupported by political actions. The research recommends capacity building and leadership training programs which are key for increasing political participation of PWDs.

Thuo<sup>39</sup> reviewed political participation of PWDs and how provisions related to it are implemented in Kenya as well as the limitations under Article 25 of ICCPR based on reasonable and objective criteria. He notes that the UNCRPD does not limit participation rights but recognizes freedom of PWDs to be involved in decision-making, right to vote and that to hold public office. The researcher confirms that Article 54(2) of the Constitution of Kenya provides

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<sup>38</sup> Price, R. (2018). Strengthening participation of people with disabilities in leadership roles in developing countries.

<sup>39</sup> Thuo, L. (2016). Implementation of political participation standards for persons with intellectual disabilities in Kenya. *Strathmore LJ*, 2, 97.

for progressive implementation of PWDs participation to minimum of five percent of *all elective and nominated positions*. The research, however, found out that Kenyan law allows for guardianship of family members over PWDs which is a barrier to political participation by PWDs<sup>40</sup>. The research succeeded in identifying gaps in political participation of PWDs but only focused on persons with intellectual disabilities. It therefore left out other PWDs who are also critical to the understanding of political participation of PWDs.

Thuo<sup>41</sup>, in a second research, focused on voting as a form of political participation of PWDs in the electoral democracy. The researcher assessed constitutional and legislative provisions on participation in political and public life by young PWDs. The research noted that Article 54(2) of the Constitution of Kenya does not put limitations to specific implementation measures but offers wide latitude in the approaches used to secure greater inclusion of young PWDs in political participation in public matters. The research concludes that inclusion of youthful PWDs in political and public life in Kenya is realizable, if strategies for securing their inclusion are targeted at PWDs from an early age. The research highlighted the position of young PWDs in relation to political participation and public life. It focused more on inclusion and left out other forms of political participation of PWDs. In political context, the researcher argues that PWDs must claim their rights by engaging and reforming the structures and institutions charged with upholding them, and expand understanding and sense of entitlement to the rights.

### **1.9.2. Legal Framework for Political Participation of PWDs in Kenya**

Legal framework of political participation of PWDs in Kenya includes international and regional framework such as the international covenant on Civil and Political Rights (ICCPR)

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<sup>40</sup> Ibid

<sup>41</sup> Thuo, L. (2016). Realising the Inclusion of Young Persons with Disabilities in Political and Public Life in Kenya. *Afr. Disability Rts. YB*, 4, 25.

and the African charter on Human and Peoples Rights. ICCPR was enacted to promote basic political freedom of human beings.<sup>42</sup> It upholds the rights of everyone and prohibits torture and degrading of human being. Therefore, it advocates for the right to security and freedom of everyone in the world.<sup>43</sup> The PWDs are too human being so their rights should be held high and right to liberty and right to access political leadership. It also provides everyone with right to recognition anywhere as a person before the law. On the other hand, African charter on Human and Peoples Rights entails absolute adherence equality in national politics and no to discrimination and right to work. It is an approach to empower the disadvantaged which entails substantial participation of the victims.<sup>44</sup> The framework realizes that various factors for example human and financial resource constraints. It was projected that Vision 2030 and Sustainable Development Goals would have influenced the thinking of people towards a non-discrimination society in the next 15 years.

Various researchers have studied legal framework for political participation of PWDs in Kenya. Onyango<sup>45</sup> carried out a critical analysis of the legal framework on the rights of PWDs in Kenya in relation to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the Constitution of Kenya and the Persons with Disabilities Act, 2003 (PDA). The aim of the research was to establish the shortcomings of the provisions of the laws and why despite their provisions, the political participation rights of PWDs in Kenya continue to be violated. It used human rights based approach, social and medical models of disability and socio-

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<sup>42</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171,

<sup>43</sup> Kariuki Muigua (2018). Securing the realization of Environmental and social for persons with Disabilities in Kenya. *Journal of the Kenya Society of Development Studies* volume 2(1).

<sup>44</sup> NGECE (2016). Status of equality and inclusion. The report was prepared by the national Gender and Equality commission with technical support from the Kenya institute for public policy research and analysis.

<sup>45</sup> Onyango, G. O. (2012). A socio-legal critique of the legal framework for the promotion of rights of persons with disabilities in Kenya. *Masters' Research Paper. The Hague: International Institute of Social Studies of Erasmus University Rotterdam.*

legal approaches to present an argument that legal framework for rights of PWDs in Kenya has serious shortcomings. The research concluded that PWDs have different abilities and should therefore be empowered to claim their rights based on the abilities. The research recommends that definition for disability in Kenya should not be precise but should be one that considers what disables PWDs and allows for the reality of the experience of disability, where what is meant by ‘disability’, or being a PWD, is an aspect of existence rather than a monolithic state<sup>46</sup>.

### **1.9.3. Challenges faced by PWDs in Relation to Political Participation in Kenya**

Researchers have noted instances where discrimination in relation to participation has been done away with but the PWDs cannot still effectively participate in politics due to a number of challenges. Heyns, Fombad, Tlakula and Kainja<sup>47</sup> focused on sub-Saharan Africa to examine the challenges facing realization of right to political participation as spelt in national constitutions and in UN instruments, the African Union and other sub-regional bodies. The study took into account the role of social media in facilitating political participation. The researchers conclude by suggest that the crucial right could be implemented more effectively in Africa. Though the research focuses broadly on challenges of implementation of the constitutional provision, it is not specific to PWDs.

Oduor<sup>48</sup> carried out research based on the need for adequate ideological foundation for recognizing and protecting rights of PWDs. In line with political participation the researcher observed that the there is still a challenge in meeting constitutional threshold for number of PWDs in elective positions. He observed that in March 4, 2013 General Elections there were about 12 Members of Parliament (MPs) and Senators and about 100 Members of County

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<sup>46</sup> Ibid

<sup>47</sup> Heyns, C., Fombad, C., Tlakula, P., & Kainja, J. (2019). The Right to Political Participation in Sub-Saharan Africa. *Global Journal of Comparative Law*, 8(2), 128-161.

<sup>48</sup> Oduor, R. M. (2016). Western Liberalism, African Communalism and the Quest for an Adequate Ideological Foundation for the Recognition and Protection of the Rights of Persons with Disabilities in Kenya. *E. Afr. LJ*, 29.

Assemblies (MCAs) with disabilities<sup>49</sup>. The research noted that the realities for PWDs remain stark. It was found out that most PWDs continue to exist in the periphery of society without the benefit of schooling, or employment or active political involvement. The legal five per cent quota for PWDs in appointive and elective positions remains a pipedream, as well as the quota for public procurement opportunities.

Mute and Kalekye<sup>50</sup> studied the protocol to the African Charter on Human and People's Rights in regard to PWDs and observed that Article 18 (4) of the African Charter has conceptual conflation since it treats older persons and PWDs in similar manner, giving the impression that disability and age are close and have same nexus. This creates a challenge to Africa's policy-makers and implementers to since it become difficult to give distinct approaches in ensuring the rights of the aged and PWDs are offered. The treatment of the rights of both older persons and PWDs as same has conceptual and normative flaws.

The authors<sup>51</sup> also note that Article 13 of the African Charter on right of citizens to participate freely in the government of their country is often constrained by legal incapacity used as a basis for excluding PWDs from participating freely in the government of their countries. The legal provisions for exclusion should conform to internationally-accepted norms and standards are invoked. The authors state that there is no objective legal basis for exclusion of PWDs from political participation.

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<sup>49</sup> Ibid

<sup>50</sup> Mute, L., & Kalekye, E. (2016). An Appraisal of the Draft Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa. *E. Afr. LJ*, 68.

<sup>51</sup> Ibid

#### **1.9.4. Measures Necessary for Improved Political Participation of PWDs in Kenya**

Oluchina<sup>52</sup> in his study of political participation of PWDs in Africa noted that in many African countries PWDs continue to be deprived right to vie for electoral posts and that to vote contrary to Articles 2, 12 and 29 of the UNCRPD<sup>53</sup>. This deprivation is often through constitutional or legal provisions that link political rights and legal capacity of the person to occupy the position. The researcher proposes measures that allow for elimination of such contrary provisions in accordance with Article 4 of the UNCRPD so as to improve political participation of PWDs. The researcher suggests that to effectively guarantee the right to political participation for PWDs and more specifically, persons with psychosocial disabilities, all appropriate measures in line with Articles 12(3) and 29(a)(iii) of the UNCRPD should be adopted by the State<sup>54</sup>. Oluchina recommends provision of all the support that is required by PWDs, including personal assistants of their choice. The research recommends assessment of measures put in place against the obligations of PWDs and in all aspects of the society. The measures should be in due regard of the independence, autonomy and dignity of the PWDs. Measures such as alternative ways of to vote should be implemented in situations where it is impossible or very difficult for PWDs to vote in polling stations like other people.

#### **1.10. Limitations of the Study**

Firstly, it is limited to the extent that it only deals with political participation relating to PWDs in Kenya, while there are aspects of politics relating to PWDs such as political representation that are left out of this study. Secondly, it only focuses mainly on Kenya and leaves out other regional countries which also could be having similar legal issues on political participation of

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<sup>52</sup> Oluchina, W. A. (2015). The right to political participation for people with disabilities in Africa. *Afr. Disability Rts. YB*, 3, 309.

<sup>53</sup> Ibid

<sup>54</sup> Ibid

PWDs that could be compared with those in Kenya. Thirdly, this research left out an important aspect of getting opinions directly from the subjects of study, the PWDs. A survey conducted to collect respondent data from the PWDs could have shed more light into the subject of this research. Future research should include this aspect of survey to highlight areas that could have been left out by this research.

## **1.11 Chapter Breakdown**

### **Chapter One: Overview and Structure of the Study**

Firstly, the chapter lays down the background of the study from both the legal and political dimensions. In addition to this, the chapter also identifies the relevant legal framework that shall form the basis of this study. This chapter appears to question the sufficiency and/or application of these laws.

A further reading of this chapter also reveals that the study has developed various research objectives and questions that are aimed at guiding this research. On the question of the theoretical framework, this chapter guides that the author shall adopt the theory of justice and the theory of human rights approach for purposes of addressing the issue in question. Finally, the chapter highlights the relevant research methodology to be applied, the relevant literature review, the limitation of the study and the hypotheses that will be relied upon.

### **Chapter Two: Extent of Political Participation of PWDs in Kenya**

The second chapter of this study investigates and analyzes the problem political participation of PWDs in Kenya. The problem is political in nature, in that, the PWDs, do not have proper political participation as required by law and are also, ironically, in some cases barred by law on the basis of legal capacity.

For this to be achieved, it is expected that the chapter shall look into various election regimes so as to give a comparative analysis as to why the problem is prevalent within Kenya. Therefore, this chapter shall be aiming to compare the problem in question with the legal framework that is aimed to address that.

**Chapter Three:** Legal Framework of Political Participation of the PWDs in Kenya: Is it Adequate?

This is a legal research and therefore the discussion of the relevant legal framework must be addressed. In this vein, this chapter will be aiming to discuss the relevant legal framework in this subject and its applicability.

**Chapter Four:** Challenges faced by PWDs and Measures Necessary for Improved Participation in Relation to Political Participation in Kenya

The chapter identifies and examines the challenges in light of the available legal and policy framework. This chapter addresses measures necessary for adequate political participation of PWDs in Kenya. The investigation of these laws shall be both from the local and international sphere.

**Chapter five:** Conclusion and Recommendations

This chapter shall give an overview of the study, the final findings of the research. Additionally, it will also propose measures with an aim of achieving a proper political representation of PWDs that is within the law.



## **CHAPTER TWO**

### **EXTENT OF POLITICAL PARTICIPATION OF PWDS IN KENYA**

#### **2.1. Introduction**

This chapter discusses extent of political participation of PWDs in Kenya. It discusses how PWDs participate in line with international and regional conventions and in respect to national laws. It also discusses achievements made in Kenya to improve political participation of PWDs.

#### **2.2. Extent of Political Participation of PWDs in Kenya**

The reasonable extent of participation is the critical analysis whether the enactment of Constitution of Kenya 2010 has yield some fruits despite the impediments that surrounds those PWDs in Kenya and beyond. Since independence there has been many enactments and

ratification of treaties and conventions in Kenya but PWDs still remained marginalized. The 1963 Constitution did not give any preference to political and rights to the marginalized persons.<sup>55</sup> The situations worsen when the politicians added other clauses that eliminated PWDs completely from politics and other government appointments. However, change came after the promulgation of Constitution 2010 which gave the marginalized persons rights and protection. Earlier, there were laws that were used by both public and private bodies for instance, Non-Governmental Organizations and United Nations on human rights. However, there were no specific laws to protect the marginalized right equal participation in politics and other civil right.

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The reality, however, is that positive achievement of the constitution in terms of implementation, realization and compliance is yet to be observed. This trend points to the inadequacy of current legal enforcement mechanism in addressing this important issue.<sup>57</sup> One of the many ways in which the government of Kenya has to some extent tried to implement the representation of the PWDs in the politics and government appointments is the creation of the PWDs council through the act of parliament.<sup>58</sup> The main purpose of this act is to provide for the rights and rehabilitation of the PWDs, to ensure equal opportunities for PWDs and for connection reasons. The creation of this council through an act of parliament is seen to be significant for various reasons.

Article 29 of the UNCRPD is explicit on the political participation and public life of every individual person. It shows that all states should make sure that PWDs effectively participate in politics and have equal public rights with others, directly or indirectly through

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<sup>55</sup> The 1963 Constitution, section 70.

<sup>56</sup> *The 1963 Constitution, section 70 and section 91.*

<sup>57</sup> *The New Constitution article 27(3).*

<sup>58</sup> Act of parliament No. 14 Of 2003 on persons with disability.

representatives, for example right to vote and be voted.<sup>59</sup> The article 29 of UNCRPD is highlighted on article 54 (2) of the Kenyan current Constitution which provides for the need to improve political representations of PWDs in Kenya. The state shall ensure the progressive implementation of the principle that at least 5% of those elected in public positions are PWDs.<sup>60</sup> This means that all election laws and processes should not restrict PWDs on their right to vote, voting procedures, facilities and materials should be appropriate, accessible and easy to understand and use.<sup>61</sup> It also means promoting an environment in which people with disabilities can fully and equally participate in public affairs as well as form and join organizations concerned with public and political life at various levels.

The amended constitution of different countries and international treaties are also supporting the inclusion of the PWDs in the politics and governments which has not been actually achieved fully up to this date. Some studies have indicated that the dilemma with PWDs on political representation is as a result of many reasons on which media plays a greater role. Zalkauskaite did content analysis of the newspapers in Lithuania in 1995, 2003 and 2010 to evaluate how media presents PWDs. The results showed that media framed PWDs as a threat to the society. They cannot join any work force or politics instead should only be allowed to access societal welfare benefits.<sup>62</sup> In light to the study, media should not portray them as those who cannot help themselves but depend on the people's help therefore they cannot lead others. Media shapes the opinion of the society and helps in making decision so they help in by highlighting different ways in which PWDs can also be leaders.

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<sup>59</sup> James, E., Harvey, M., & Hatton, C. (2018). Participation of adults with learning disabilities in the 2015 UK General Election. *Tizard Learning Disability Review*, 23(2), 65-71.

<sup>60</sup> Kenyan Constitution

<sup>61</sup> B. Virendrakar et al (2018). Disability inclusive elections in Africa: A system review of published and unpublished literature. *Disability and society*. No. 33.4 pp 509-538.

<sup>62</sup> Zalkauskaite, U. (2012). Crystallization of disability stereotypes in Lithuanian media. *Socialina mokslai*. Vol.75 No. 1. pp83-91

The dilemma in achieving the requirements of Constitution of Kenya in line with political participation of PWDs is aggravated by stereotypes about PWDs and this makes it hard for people to be willing to vote for them. A change on the discussions on them may lead to the achievement of five percent Constitutional threshold. In the Kenyan case media should stop stereotyping PWDs because they are also human beings who deserve their rights to change the perception of the society towards them.

### **2.3. Participation of PWDs in the Face of Discrimination by the Public**

According to Hove and Ciot PWDs are constantly discriminated against by the public.<sup>63</sup> There is little participation of the PWDs in the politics and public service because despite available provisions encouraging their participation<sup>64</sup>. This hinders their fair political competition with others making it very difficult to achieve Constitutional threshold on their numbers even through progressive implementation. Discrimination of PWDs comes with various names referred to the PWDs therefore no one would want to be represented by a lame or a disabled person. Their participation refers to being elected or they make their own decision in politics or get government appointments.

### **2.4. Political Participation of PWDs and Segregation**

According to Lidubwi PWDs suffers segregation and in most occasions not in a position of accessing specialized political, social and health care services. They are not able to access education and get employed as well as rehabilitation services<sup>65</sup>. They are forced to depend on the well-wishers for their daily survival.<sup>66</sup> Segregation means that they cannot compete equally with

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<sup>63</sup> Van H. G. & Ciot M. G. Romanian approach to media portrayals of disability. *Disability and society*. Vol. 25, No. 5, 2010, pp 525-538.

<sup>64</sup> Goggin G and Newell C, *Disability in Australia: Exposing a Social Apartheid* (UNSW Press 2005)

<sup>65</sup> Len Barton *Disability, Politics and the Struggle for Change* (Routledge 2016)

<sup>66</sup> Lidubwi Jackline (2017). Representation of disability in Media. A study of abled differently programmed. Thesis submitted to the University of Nairobi.

others in the society in social institutions such as political provisions like contesting political seats and even in getting financial support from lending institutions<sup>67</sup>. Due to fact highlighted they are not able to be in equal position as others in terms of positive popularity, resources, academic papers and social capital<sup>68</sup>. To achieve the constitution, mandate the Kenyan government should to ensure that even the PWDs are to achieve the above mentioned qualities.

## **2.5. Political Participation of PWDs and Access to Opportunities and Finances**

A study conducted by Virendrakumar et al., (2018) on disability inclusive elections in Africa in 2018 found that the inadequate participation of PWDs in the politics in African has been due to the low level of education of the PWDs.<sup>69</sup> Most of the PWDs are discriminated in the schools or did have the same opportunity in schools as others therefore they cannot do not do much as those without disability in terms of preparing themselves for political opportunities<sup>70</sup>. They cannot also compete for the appointment and elections with them. Education and technical knowledge play a great role during the appointment public servants in a country and this may be considered as one of the dilemma in the implementation of the representation.

The other dilemma that the study revealed is the limited access to the financial resources.<sup>71</sup> Most of PWDs may not have adequate access to the financial resources as compared to others. This has been one of the reasons why they might not compete favorably with others in their campaigns, logistical and even getting follows through wide advertisement. Politics is a game of

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<sup>67</sup> DiLeo D, *Raymonds Room Ending the Segregation of People with Disabilities* (Training Resource Network 2007)

<sup>68</sup> Gabel SL and Danforth S, *Disability & the Politics of Education: An International Reader* (Peter Lang 2008)

<sup>69</sup> B. Virendrakar et al (2018). Disability inclusive elections in Africa: A system review of published and unpublished literature. Disability and society.

<sup>70</sup> Wiener JM, Clauser SB and Kennell DL, *Persons with Disabilities: Issues in Health Care Financing and Service Delivery* (Brookings Institution 1995)

<sup>71</sup> B. Virendrakar et al (2018). Disability inclusive elections in Africa: A system review of published and unpublished literature. Disability and society.

numbers in Africa even though ethnicity also plays a greater role but today one must have a lot of money to influence others to support him/ her. The last general election of 2017 in Kenya has shown that people used a lot of money during campaigns and if you don't have that then your chances of winning is very minimal.

## **2.6. Political Participation of PWDs and Lack of Awareness of Rights**

Lack of awareness of their rights is a major challenge.<sup>72</sup> Some of these people do not know that they have rights which are enshrined in the constitution. The constitution gives them an opportunity to compete with others and also to have access as others in the country. Therefore, it is clearly evident that most PWDs do not know their rights which have led to the underrepresentation in the politics and appointments.

The other point that has led to the dilemma is that negative social attitudes that the society has branded those living disabilities.<sup>73</sup> Some communities in Africa do not tolerate disability. If a child born with deformity it is an automatic death, there is no negotiation over that because it related to curse or bad omen to the family. For example in Kenya and Zimbabwe, “a child born with a disability is considered to be a curse to the entire family.”<sup>74</sup> They are also viewed a “shame” to the entire family, therefore the family and community tend to reject them. In most cases such children hardly develop their full potential because of those beliefs and attitudes from their kinsmen. This may also affect the PWDs perception in the society and family as they live in fear and cannot confront issues affecting the society. They are part of the problem that affects the society therefore live in fear and cannot vie for any post. “These children at times get

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<sup>72</sup> ibid

<sup>73</sup> ibid

<sup>74</sup> Riddell Sheila, *Disability, Culture and Identity* (Taylor & Francis 2016)

minimal attention and stimulation from their parents. They may also not get the best education, best medical care, best meals and best upbringing generally as other children in the family.

## **2.7. Political Participation of PWDs and Influence of Cultural Beliefs**

According to Desta in the whole of Africa most of the PWDs are believed to helpless and hopeless in life and community. Cultural beliefs in Africa have worsened simple matters, where disabilities are related to witchcraft, juju, sex-linked factors, God /supernatural forces<sup>75</sup>. From the cultural perspectives there are a lot of things that may have affected the living conditions of PWDs, without mentioning the attitude that the community has towards them.<sup>76</sup> From many stories and studies from the Africa the issue of isolation of PWDs is majorly based on social fear, neglect, ignorance and superstition<sup>77</sup>. These conditions do not give PWDs chance to compete with others in the politics and public service because they are already termed as a curse, witchcraft and isolated against.

## **2.8. Extent of Reasonable Participation in Voting Process**

PWDs are required to be assisted by persons of their choice during voting process. The person assisting them should do strictly as instructed by the voter. The Polling stations also shall be accessed by the PWDs during election process, and in addition be provided with the necessary services to facilitate the exercise. Media houses, National event organizers and educational events shall provide a sign language inset or subtitles in all newscasts and broadcast. Telephone service provider shall install and maintain telephone devices or units for persons with hearing

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<sup>75</sup> Coleridge P, *Disability, Liberation, and Development* (Oxfam 2001)

<sup>76</sup> Hakeem A. K., (2015). People with physical disabilities and their working life. A case study about Finnish people with disabilities.

<sup>77</sup> Devlieger P, *Rethinking Disability: World Perspectives in Culture and Society* (Garant 2016)

difficulty and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system.<sup>78</sup>

The Persons with Disabilities Act of 2003 PWDs stresses on physical accessibility and employment of PWDs leaving out the aspect of political representation and government appointments. It may be effective in enhancement of structures that provide services to PWDs, but the actualization of this remains a thorn on the flesh<sup>79</sup>. The Act further stresses on physical accessibility, and entrusts the National Council for Persons with Disabilities (NCPWD) with the authority issue orders and put penalties. Even though, physical access remains a great problem that PWDs face. The law remains unpractical and untenable given the strength of the council. To enforce compliance, the NCPWD largely rely on information and advocacy, but ultimately it depends on organizations and institutions on whether they do implement recommendations.

The act of parliament on PWDs was amended in 2013 to become 'principal act' of parliament 2015. The council to become a service provider to all citizens, to assist PWDs reach important services within the organization, assistive devices and other equipment, including the services of a qualified interpreter for the deaf and the blind. The organization shall pass information on the availability of sign language interpreters for the deaf and the blind to the public.<sup>80</sup>

These are indications that the Kenyan government is working towards the implementation of the international treaties and conventions on the PWDs to have political representation and access to government jobs. The council is the first step in the research on the number of the PWDs, the problems and there after look for the solutions for these problems.

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<sup>78</sup> Ibid.,

<sup>79</sup> Oliver M and Campbell J, *Disability Politics: Understanding Our Past, Changing Our Future* (Routledge 1998)

<sup>80</sup>The Persons with Disabilities (Amendment) Bill, 2013



There has been an increase in the number of those elected as members of national assembly, senate and Member of county assemblies. The number of those nominated to either national or senate and county assemblies in the 47 counties have also increased. The government has also appointed those PWDs as CEC in the county government and Principle secretaries in the national assembly.

The Kenyan constitution 2010 is the basic legal foundation in which the equal representation in politics and governments appointments of PWDs in Kenya<sup>81</sup>. It further ratifies the international laws automatically in the state. The document on the bill of rights prohibits discrimination on various grounds such as Social origins, sex, religion, ethnic or disability.<sup>82</sup> Develop policies and enact laws which not only prohibit discrimination but also redress the inequality that has, in the past, been created by discrimination on these grounds<sup>83</sup>. Under this law indicates that nomination in the senate is that two for PWDs where one women and one man is nominated senators with disability. Additionally, according to the Kenya gazette of July 2013 published by IEBC on the nomination of Member of county assembly in accordance with election act No. 24 of 2011, there were at least one PWDs nominated in a county totaling to 47 PWDs nominated in the country.<sup>84</sup> In the last general election there was a good number of PWDs nominated to the national assembly. All these have shown a remarkable step towards the achievement of equal participation in politics and government appointments.

## **2.9. Chapter Summary**

This chapter outlined the extent of political participation of PWDs in Kenya. It outlined participation of the PWDs despite discrimination, difficulties in accessing opportunities and

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<sup>81</sup> Wanyande P, *Governance and Transition Politics in Kenya* (Univ of Nairobi Press 2007)

<sup>82</sup> Constitution 2010 on Bill of rights of Kenyans.

<sup>83</sup> Marshall CA, *Disabilities: Responses: Practice, Legal, and Political Frameworks* (2009)

<sup>84</sup> Kenya gazette 17 July 2013, THE CONSTITUTION OF KENYA, 2010 THE ELECTIONS ACT (No. 24 of 2011)

finances, lack of awareness, influence of cultural beliefs and their level of participation in voting process. It is concluded that PWDs do not participate fully in political matters of the country.

## **CHAPTER THREE**

### **LEGAL FRAMEWORK OF POLITICAL PARTICIPATION OF THE PWDs IN KENYA**

#### **3.1. Introduction**

This chapter presents the legal framework of political participation of PWDs in Kenya. It looks at the framework within international law, the Constitution, Acts of Parliament, other laws and regulations as well as decision of courts.

#### **3.2. Legal Framework of Political Participation of PWDs under International and Regional Law**

There are several instruments available within the legal framework outlining means of political participation of PWDs under international law. There are also instruments that detail how the

rights to political participation can be limited. These are divided into broader international and regional legal framework.

### **3.2.1. Universal Declaration of Human Rights, UDHR**

The UDHR is a universal international law that outlines the human rights. Article 19 of the UDHR provides as follows: -

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 20(1) and (2) specifies the right to freedom of peaceful assembly and association. It states that no one should be compelled to belong to an association, including political association. Article 21 of the UDHR provides that everyone, including PWDs, has the right to take part in the government of his country, directly or indirectly, through freely chosen representatives. It also provides that everyone has the right to equal access to public service in his country. The will of the people shall be the basis of the authority of government.

### **3.2.2. The UN Convention on the Rights of Persons with Disabilities, UNCRPD**

Article 3 of the UNCRPD<sup>85</sup> outlines the general principles of the Convention which include respect for dignity, individual autonomy as well as freedom to make personal choices. It also outlines principles of non-discrimination, full and effective participation and inclusion in society as well respect for difference and acceptance of PWDs as dignified humans. The Article also outlines the principle of equality of opportunity for all.

Article 4(1)(b) outlines the need for State Parties to ensure appropriate measures to abolish laws, regulations and practices that constitute discrimination for PWDs. Article 5 of the

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<sup>85</sup> The Universal Declaration of Human Rights. United Nations General Assembly in Paris on 10 December 1948 (*General Assembly resolution 217 A*)

UNCRPD<sup>86</sup> calls for protection against all forms of discrimination including those that arise from political participation. Article 6 of the UNCRPD sets obligation upon State Parties to ensure that women with disabilities are discriminated against and that they enjoy their rights as set in the convention.

Article 8 of the UNCRPD outlines the state obligations to ensure awareness creation for PWDs concerning their rights and freedoms. These rights and freedoms include the right to political participation within the state. Article 9 of the UNCRPD outlines State obligations to ensure access to information, physical environment, transportation and information and communications as well as technologies that go with them. In terms of political participation, measures should be put in place for PWDs to access voting facilities and technologies including polling stations. Article 16 of the UNCRPD puts obligation state to eliminate exploitation, violence and abuse. This transcends elimination of political exploitation and political violence.

Article 21 of the UNCRPD puts obligation on State Parties to take appropriate measures to ensure that PWDs exercise their rights and obligations and receive and impart information and opinions on equal basis. It outlines ways in which the obligation can be exercised including means of facilitation information to PWDs.

Article 29 of the UNCRPD is very specific to political participation of PWDs. Article 29 (a) states that should effectively and fully participate in political and public life on an equal basis with others. It outlines that this can be done either directly or indirectly through freely chosen representatives, including the right and opportunity for PWDs to vote and be elected, *inter alia*. The article puts obligation on State Parties to ensure voting procedures, facilities and materials are appropriate, accessible and easy to understand and use by the PWDs. It further calls upon State Parties to protect the rights PWDs to vote by secret ballot in elections and public

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<sup>86</sup> Ibid, Article 5

referendums without intimidation. It also requires guarantee of the free expression of the will of PWDs as electors and, if required, at their request, allowing assistance in voting by a person of their own choice. The article also provides for PWDs participate in NGOs and associations that are related to their public and/or political life in matters and activities of administration of political parties. It further provides for PWDs to be free to form and/or join organizations of PWDs at international, national, regional and local levels.

### **3.2.3. International Convention on Civil and Political Rights, ICCPR**

Article 25 of the ICCPR defines obligations of States Parties in relation to the right to take part in political matters, vote and be voted in and have equal access to public service positions. Article 25 is complementary to the *General Comment* No. 25<sup>87</sup> on Article 25 of the ICCPR as adopted by Human Rights Committee. The *General Comment* states that any conditions applying to the exercise of rights under Article 25 should be based upon objectives and reasonable criteria.

According to Paragraph 8 of the *General Comment* No. 25<sup>88</sup>, all citizens including PWDs have a right to take part in the conduct of public affairs through means such as debates, dialogue or through representation. It states<sup>89</sup>:

*“Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.”*

Paragraph 10 on the General Comment declares as unreasonable any restrictions on voting based on disability, literacy, educational and other requirements. Also, in similar note, Paragraph 15 of the *General Comment* No. 25 states that no person, whether PWDs or not, should suffer

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<sup>87</sup> CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service

<sup>88</sup> Ibid

<sup>89</sup> Ibid, Paragraph 8

discrimination or disadvantage of any kind as a result of political candidacy. Any such conditions as to disadvantage a particular group should be clearly explained by the State Party.

#### **3.2.4. The African Charter on Human and Peoples' Rights 1981, ACHPR**

Article 9 of the African Charter on Human and Peoples' Rights provides for rights of every individual to receive information and to express and disseminate opinion within the law. This article allows PWDs to receive information and to express themselves in respect to political participation and in any other respect within the law.

Article 10 provides for free association of everyone within the law. It prevents persons from being compelled to join association. This article protects peoples, including PWDs from any form of compulsion to be part of political association. Article 11 of the ACHPR provides for free assembly of people subject to legal restrictions and to such an extent as to not infringe other peoples' rights and freedoms.

Article 13 of ACHPR gives obligation to State Parties to provide measures for every citizen to have the right to participate freely in the government of his country through direct participation or through chosen representatives as provided by the law. It also provides for every citizen the right of equal access to the public service that every individual shall have the right of access to public property and services in strict equality as others before the law.

Article 18(3) puts obligation on State Parties to eliminate all forms of discrimination against women. This article covers women with disability in relation to discrimination against their political participation. Article 28 also prohibits discrimination and encourages respect and tolerance. Article 19 provides that all people are equal and have the same rights. It also provides that domination by a people by another is not justifiable. This helps to ensure political

participation and equality for PWDs. Article 27(2) provides that the rights should be exercised in due regard to the rights of others.

### **3.2.5. The Treaty for the Establishment of the East African Community**

Article 6(d) of the Treaty for Establishment of the East African Community provides that Partner States shall be guided by the principle of good governance that provides for recognition, promotion and protection of human and peoples' rights according to the provisions of the African Charter on Human and Peoples' Rights. Political rights of PWDs are safeguarded within this provision along with other rights of the people. Article 120(c) of the Treaty provides for the development and adoption of a common approach towards the disadvantaged and marginalized groups. PWDs are among the disadvantaged groups in respect to political participation.

### **3.2.6. East African Community Policy on Persons with Disabilities, EACPPWD**

The EACPPWD is based on provisions of Article 120(c) of the Treaty for the Establishment of the East African Community and Article 39 of the East African Community Common Market Protocol. Article 39 provides for promotion and protection of the rights of marginalized and vulnerable groups. It also recognizes Resolution 61/196 of the UNCRPD and urges Partner States to ratify the Convention. The policy outlines a framework for promoting the political participation and representation of PWDs in all public decision-making structures.

## **3.3. Legal Framework for Political Participation of PWDs under Kenyan**

### **Laws**

Legal framework in Kenya is defined by the Constitution, Acts of Parliament, County Government Acts, Government regulations and policies.

### **3.3.1. The Constitution of Kenya**

Article 2(5) and (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya. This means that international laws on PWDs are applicable in Kenya. Article 10(2) provides that participation of the people national values and principles of governance include human dignity, equity, inclusiveness, equality, non-discrimination and protection of the marginalized. This means that the Constitution allows political participation of all persons including PWDs without discrimination.

Article 20 of the Constitution provides that all persons shall enjoy rights and fundamental freedom within Bill of Rights. This means that all including PWDs shall be part of this enjoyment of rights within the UDHR. Article 24 of the Constitution spells instances when human rights can be limited within the law. Article 27 of the Constitution provides for non-discrimination where Article 27(4) and (5) outlaws discrimination on basis of disability. Article 32(1) provides freedom of opinion, which included political opinion. Article 33(1)(a) provides for the right to freedom of expression including freedom to seek, receive or impart political information or ideas.

Article 36 of the Constitution provides freedom of association including political association. It outlines the right to form, join or participate in political activities of an association of any kind. Under Article 37, PWDs can also participate in right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities. Article 38 outlines the political right of all persons including PWDs to the right to free, fair and regular elections. The Article 38(3) provides for the right for adult citizens including PWDs to be registered as voters and to vote.



Article 54 of the Constitution is specific to PWDs that the PWDs are entitled to be treated with dignity and respect to be given access to public facilities such polling stations and political information and for the use of sign language and Braille for communication. The Constitution has been found to limit rights of PWDs with regard to political participation due to the issue of legal capacity. Articles 144, 150, 158, 168, 181 and 245(7)(c) of the Constitution specify grounds on which lack of legal capacity is a basis for disqualification from political office or participation.

### **3.3.2. Persons with Disabilities Act No. 14 of 2003**

Section 12(1) of the Persons with Disabilities Act 2003 provides that no one shall discriminate with regard to holding employment position. Section 29 specifies the rights of PWDs. It provides that all PWDs shall be entitled at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections. It provides that a person who undertakes to render assistance strictly according to the instructions of the voter and that a person who contravenes this provision is guilty of an offence. Section 30 of the Act provides that polling stations shall be made accessible to persons with disabilities during elections.

The weakness of this Act is that it does not give protection against unnecessary limitations that come in the name of court interpretations of legal capacity. The Act requires adaptations to make Constitutional quarter of the 5% of jobs, public appointments and/or elections of PWDs realizable. The implementation of this Act has been weak.

### **3.3.3. Political Parties Act of 2016**

Section 3 of the Political Parties Act of 2016 provides that political parties shall promote inclusiveness, democracy and participation in creating policies and nomination of candidates.

This section allows for PWDs to be included and to participate within political parties of their choice.

Section 4 of the First Schedule to Section 6(2)(e) of the Act provides that political parties shall promote policies on alternatives that respond to interests, concerns and needs of Kenyan citizens. The political interests of PWDs are also covered under this section as well as in Section 4(e) of the Schedule that requires affirmative action in line with Article 27(6) of the Constitution.

#### **3.3.4. Elections (Party Primaries and Party Lists) Regulations of 2017**

Section 15(2) of the Elections (Party Primaries and Party Lists) regulations, 2017 require that if an aspiring candidate in elections is a PWD an additional requirement of certification by the National Council for Persons with Disabilities. This provision does not guarantee equality of treatment as provided by international law and the Constitution of Kenya. The limitation of certification requirement amounts to treatment of PWDs in different breath compared to others.

#### **3.3.5. The Public Procurement and Asset Disposal Act, 2015**

Section 157(5) and (10) of the Public Procurement and Asset Disposal Act, 2015 allows for participation of PWDs in public procurement process by reserving and providing for at least 30% of all procurement value in each financial year be allocated to youth, women and PWDs.

#### **3.3.6. County Disability Acts**

Counties in Kenya have also enacted county disability Acts to respond to special needs of PWDs with counties. Examples include Nairobi City County Person with Disabilities Act, 2015, the Machakos County Persons with Disabilities Act, 2016 and The Mombasa County Persons with Disabilities Act, 2017, among others.

### **3.4. Case Laws on Political Participation and Legal Capacity of PWDs in Kenya**

In the judgment of *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another*<sup>90</sup> in Petition 147 of 2013 of the High Court of Kenya the court directed IEBC to develop a program, policies and measures that aim to increase the participation of women, youth, persons with disabilities, marginalized groups and other vulnerable persons to effectively participate in political processes.

In *K v K*<sup>91</sup> a son alleged that his elderly father could not manage his property and other affairs and requested the court to declare the father suffering from mental disorder. The father raised an objection and provided medical report to the contrary. Honorable Lady Justice Kalpana Rawal made an order for further medical examination by an independent medical expert. The Honorable Judge found that the applicant failed to show that he deserved the court's discretion and dismissed the application. The case shows that people subjected to determination proceedings of legal capacity can challenge the process if they can access means to do that. The over-reliance by courts on medical reports may be subject to questions of whether medical approach alone can substantively determine legal capacity of PWDs. The question of whether or not the court can restore legal capacity where there is sufficient evidence by affidavit or otherwise remains more theoretical than practical<sup>92</sup>.

In *Ramesh Liladhar Shah v Joseph Kibe Mungai* the court applied for selling of Mr. Shah's interest in the property he jointly owned with his wife on the basis of his lack of legal capacity to manage the property under Section 26(3) of the Mental Health Act. Court upon

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<sup>90</sup> National Gender and Equality Commission V Independent Electoral and Boundaries Commission & another [2013] eKLR

<sup>91</sup> High Court at Nairobi, *K v. K*, Petition 36 of 2009, 1 December 2009

<sup>92</sup> Mental Disability Advocacy Centre, *The Right to Legal Capacity in Kenya*

reliance on reports from two doctors found that it was obvious that Mr. Shah “could not follow the proceedings and was totally unaware and incapable of being aware of what was going on around him.” The court failed to invite Mr. Shah in order to verify these claims. The court therefore granted the application on the grounds that selling of Mr. Shah’s interest was in his best interest. This decision did not consider safeguards required under Article 12 of UNCRPD but made decisions on his behalf.

### **3.5. Chapter Summary**

This chapter presented the legal framework of political participation of PWDs in Kenya. It outlined the legal framework under international and regional law as well as national laws, policies and regulations. It further presented case laws on limitation of political participation of PWDs as well as the question of legal capacity. It is concluded that despite provisions of the law, PWDs are restricted in the exercise of their political participation rights. It is like the law gives the PWDs rights by one hand and takes them by another hand.

## **CHAPTER FOUR**

### **CHALLENGES FACED BY PWDS AND MEASURES NECESSARY FOR IMPROVED POLITICAL PARTICIPATION IN KENYA**

#### **4.1. Introduction**

Challenges faced by PWDs in Kenya are numerous. This chapter focuses on challenges related to their political participation. It discusses measures necessary for improved political participation of PWDs.

## **4.2. Challenges faced by PWDs in Relation to their Political Participation in Kenya**

The challenges include discrimination even by government and the justice system as well as by nature of politics. This section will discuss various challenges related to political participation of PWDs in Kenya.

### **4.2.1. Discriminatory Processes and Attitudes**

There are many discriminatory processes within the government that limit or label PWDs in a way that makes them seem different from others and thus affect their participation in political processes. According to Mugambi<sup>93</sup>, only in Kenya is where most documents refer to PWDs as *physically challenged* and therefore gives impression to the public that the PWDs have no capacity to participate in some processes, political or not. For example, some employers demand for driving licenses even for jobs that do not require driving thus discriminate some PWDs such as the blind and the deaf<sup>94</sup>.

### **4.2.2. Challenges of Certification to Participate in Nomination and Elections**

The process of acquiring disability card is long, costly and dreary. The national identification is issued free of charge. Membership with the disability organization is a pre-condition for certification as a PWD. This certification is required for a PWD to participate in political parties by contesting a political position in elections. Schedule to the Elections (Party Primaries and Party Lists) Regulations, 2017 require that Form 4 be signed by an institution certifying that the person is “*living with disability*” and requires specification of type of disability. This irregular

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<sup>93</sup> Mugambi, S. 12 Challenges only disabled people in Kenya can relate to. <https://www.standardmedia.co.ke/ureport/article/2001323352/12-challenges-only-disabled-people-in-kenya-can-relate-to>

<sup>94</sup> Ibid

reference to PWDs as persons living with another entity called “disability” wrongly represents the PWDs and encourages wrong attitude towards PWDs’ political ambitions.

#### **4.2.3. Challenges with Taxation as a Form of Political Participation**

Though the law provides for tax exemption of PWDs so that they can actively participate in the economy despite challenges, the implementation of such provisions is a burden. Kenya revenue Authority (KRA) demands the renewal of tax exemption certificates to the PWDs as if the permanently disabled persons miraculously changed. The process also requires certification and over-reliance on medical definition of disability causes a challenge of neglecting other forms of definitions.

Some of the requirements for tax exemption by KRA are outlined below: -

- i. Disability *Medical Assessment Report* stipulating the *nature of disability* and upholds the signature of the *Director of Medical Services (AFYA HOUSE LG 29)*.
- ii. National Council for Persons with Disability (NCPWD) card
- iii. A letter from the employer where applicable, clearly stating the *nature of disability* and *how it affects the employee’s productivity* at place of work.

Reliance on medical assessment alone gives the challenge of discriminating other forms of disability. It is another challenge to specify who signs the report and which institution to give disability card given the long and dreary process of acquiring the card. It is also another problem for employers to be able to specify nature of disability and the extent to which it affect the PWDs productivity. The form also states that such tax exemptions is renewable, thus putting unnecessary burden on persons with permanent disabilities. This ambiguous criterion is a challenge since there is no clear approach to determining disability. In *K v K*<sup>95</sup> the court relied on

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<sup>95</sup> High Court at Nairobi, *K v. K*, op. cit. page 44

two contradicting medical reports concerning the same person and ordered another report which confirmed one of the contradicting reports. The case was dismissed.

#### **4.2.4. Challenge of Access to Physical Facilities including Buildings**

Most government offices are either inaccessible or located in inaccessible places to PWDs. It is even a challenge to access polling stations which are often classrooms or public halls used by people undertaking daily activities. The design is often not adapted for use PWDs and this makes them have problems of access. This happens despite existence of laws and regulations concerning access to facilities. Article 19 of the UNCRPD outlines access to physical facilities and other facilities without discrimination. Section 30 of the Persons with Disabilities Act 2003 Act provides that polling stations shall be made accessible to persons with disabilities during elections. Despite this, there are challenges to PWDs on accessing polling centres and offices which are not adapted for their access.

#### **4.2.5. Access to Information that Facilitates Political Participation**

Most government websites are inaccessible to PWDs and do not offer alternative formats in the documentation. It is a challenge and costly to obtain PWD friendly formats such as Braille versions, audio formats etc. Lack of such information makes it hard for PWDs to be able to know and exploit their political rights of participation in public life. This is explained in *General Comment* No. 15 relating to Article 19 of UNCRPD which states in part:

*“Personal autonomy and self-determination is fundamental to independent living, including access to transport, **information, communication and personal assistance**, place of residence, daily routine, habits, decent employment, personal relationships, clothing, nutrition, hygiene and health care, religious, cultural and sexual and reproductive rights.”*

This means that PWDs have the right to access information and facilities as described without any form of discrimination. This position is also supported by Article 54 of the Constitution of Kenya, yet challenges of implementation are real.

#### **4.2.6. The Challenge of Non-Inclusion**

In most cases PWDs are excluded from mainstream processes, even those concerning them. It is common to see public and private job adverts written “*persons with disabilities are encouraged to apply*” but they mostly do not take extra measures to ensure PWDs are brought on board. This non-inclusion is contrary to Articles 3(a) and 19 of UNCRPD which requires that be given their rights to allow full and effective participation and inclusion in society.

#### **4.2.7. The Challenge of Legal Capacity**

Legal capacity and its proofs is a major challenge in the justice system. It is a challenge to develop substantively legislation specifying the duties and responsibilities of all actors. It is a challenge for legislation to recognize the systematic powerlessness and exclusion of many people in making decisions about their lives, and creating the right balance between rights, responsibilities and responsibilities to enable people to lead and live well in the community by following their own path of life. It is important to find, develop and facilitate support systems, but also adopt legislation that gives PWDs legal recognition. The available system over-relies on health approach to legal capacity and non-involvement of PWDs in matters important to their lives.

### **4.3. Measures Necessary for Improved Political Participation of PWDs in Kenya**

Measures necessary for improved political participation of PWDs are outlined in Article 29 of UNCRPD and Article 54(2) of the Constitution of Kenya. The following measures have been recommended in literature as necessary for improved political participation of PWDs.



#### 4.3.1. Measures Addressing Legal Barriers

PWDs require certain *positive actions* that must be taken to ensure they can genuinely enjoy their fundamental rights on the basis of equality. The problem of failure to meet this requirement is a key characteristic of many countries in Africa including Kenya. For example, deaf and dumb persons are deprived of the right to defense since judicial and investigating authorities most often have no permanent interpreters, who are critical in such cases.

Laws that limit political inclusion of PWDs should be amended to be non-discriminative. Such laws include Elections (Party Primaries and Party Lists) Regulations, 2017 require that certification of PWDs to be able to contest as special group, policy requiring Disability *Medical Assessment Report* to be signed by Director of Medical Services and law requiring legal capacity for certain political offices, among others.

The existing *negative actions* which lead to the legal exclusion of PWDs from acts of daily life should be eliminated. There are instances when deaf and dumb persons unable to express themselves in writing are termed *legally incapacitated*. This occurs so despite availability of other effective means of communication including sign language.

A similar example of legal barrier is when blind persons are barred from acting as guardians, even in cases where they can perfectly be able to act as parents, and also as guardians. The law should be clear on the criteria for qualifying or disqualifying capacity of PWD from being guardian. This raises a question of whether the law is fair to PWDs in terms of judging their capacity.

It has been reported that in some Latin American countries, blind persons barred from voting or from standing for election, on the grounds that “*it is difficult for them to vote responsibly or preserve secrecy.*” In Kenyan general elections of 2017, the African Union

Observers Mission noted that there were no *tactile ballots* for visually impaired voters<sup>96</sup>. There is need for tactile ballots to help persons with visual impairments to be able to participate in the voting process.

#### **4.3.2. Measures to Guarantee Expression of Political Will of PWDs**

Article 29 of the UNCRPD requires State Parties to guarantee PWDs political rights and the opportunity to enjoy them on an equal basis with others. There should be proactive steps to ensure that PWDs are express their political will and effectively participate in public life in alignment with international, regional, and national commitments which fight inequality. Including PWDs in political life directly supports the commitments and recommendations that foster political participation of PWDs. The obstacles can be resolved through strong support from political parties and Parliament, in liaison with disability rights organizations.

#### **4.3.3. Measures that Promote Environment for PWDs to Participate in Public Affairs**

Article 29 of the UNCRPD provides for State Parties to put in place measures that promote an environment in which PWDs can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including participation in NGOs and associations that are related to public and political life of the country as well as in the activities and administration of political parties. Measures should be put in place to ensure such are realized and that PWDs are allowed to form

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<sup>96</sup> African Union (2017) Preliminary Statement African Union Election Observer Mission to the 2017 General Elections in Kenya

and join organizations of PWDs to represent themselves at international, national, regional and local levels.

So far the Kenyan government has put in place a legal entity called National Council for Persons with Disabilities (NCPWD) as a state corporation as well as the Kenya National Commission on Human Rights (KNCHR) which champions the rights of PWDs and other persons. The Kenyan government has also established National Development Fund for Persons with Disabilities (NDFPWD) to economically empower PWDs to realize their goals and to participate actively in nation building. Other measures established for PWDs include cash transfer, Albinism Support Program and legal advisory services within the framework of NCPWD.

#### **4.4. Chapter Summary**

This chapter discussed challenges faced by PWDs in relation to political participation in Kenya. It outlined discriminatory processes, challenges of certification to participate in elections, taxation and tax exemption challenges, access challenges in relation to information and physical facilities, legal capacity challenges and those related to non-inclusivity. The chapter also discussed measures necessary for improved political participation of PWDs in Kenya.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1. Introduction**

This chapter presents summary of findings, conclusions and recommendations made. It summarizes the findings of the extent of political participation of PWDs, legal framework as well as challenges faced by PWDs in relation to political participation in Kenya.

### **5.2.1. Conclusions**

This section summarizes the conclusions of this research. Summary related to each objective is presented in this section.

#### **5.1.1. Political Participation of PWDs in Kenya**

It has been found out that there is inadequate participation of the PWDs in the politics and public service. This problem exists despite available legal and policy provisions encouraging participation of PWDs. The problem hinders fair political competition of PWDs with other citizens therefore making it very difficult to achieve Constitutional threshold through progressive implementation.

The research has also found that PWDs suffer political, economic and social segregation and are not in a position of accessing specialized political, social and health care services like other citizens. They are not able to easily access education and get political positions as others<sup>97</sup>. Findings show that they are mostly forced to depend on the well-wishers for their daily survival and are mostly not able to participate equitably in the economy of the country due to segregation.<sup>98</sup> Segregation makes PWDs not be able to compete equally in social institutions such as political provisions like contesting political seats and even in getting financial support<sup>99</sup>.

The research has also established that most PWDs have limited access to the financial resources.<sup>100</sup> This has been found to be one of the major reasons why they might not compete favorably with others in political campaigns and even getting followers through wide

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<sup>97</sup> Len Barton *Disability, Politics and the Struggle for Change* (Routledge 2016)

<sup>98</sup> Lidubwi Jackline (2017). Representation of disability in Media. A study of abled differently programmed. Thesis submitted to the University of Nairobi.

<sup>99</sup> Gabel SL and Danforth S, *Disability & the Politics of Education: An International Reader* (Peter Lang 2008)

<sup>100</sup> B. Virendrakar et al (2018). Disability inclusive elections in Africa: A system review of published and unpublished literature. Disability and society.

advertisement. Politics is a game of numbers in Africa one is mostly required have a lot money to influence others to support him/ her and to even pay for party registration as a candidate.

Lack of awareness of their political rights has also been found to be major challenge to PWDs.<sup>101</sup> Some of PWDs do not know that they have rights which are enshrined in the constitution. This lack of awareness of political rights by PWDs has led to the under-participation in the politics and appointments.

Cultural beliefs have also been found to worsen the situation of PWDs participation in political and public life<sup>102</sup>. It has been established that culture greatly influences community attitude towards PWDs and poses greater challenge to achieving their political participation goals.<sup>103</sup> Isolation of PWDs has been found to be mainly based on social fear, neglect, ignorance and superstition<sup>104</sup>. These conditions do not give PWDs chance to compete with others in the politics and public service because they are already termed as cursed.

### **5.1.2. Legal Framework for Political Participation of PWDs in Kenya**

This research has found out that the Constitution provides for political participation of PWDs in Kenya and allows international law to be part of Kenyan law. However, various parts of the Constitution have been found to limit political participation of PWDs in Kenya. It has been found to limit rights of PWDs with regard to political participation due to the issue of legal capacity. Articles 144, 150, 158, 168, 181 and 245(7)(c) of the Constitution specify grounds on which lack of legal capacity is a basis for disqualification from political office or participation.

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<sup>101</sup> *ibid*

<sup>102</sup> Coleridge P, *Disability, Liberation, and Development* (Oxfam 2001)

<sup>103</sup> Hakeem A. K., (2015). People with physical disabilities and their working life. A case study about Finnish people with disabilities.

<sup>104</sup> Devlieger P, *Rethinking Disability: World Perspectives in Culture and Society* (Garant 2016)

Findings further show that weaknesses of Persons with Disabilities Act 2003 in that it does not give protection against unnecessary limitations that come in the name of court interpretations of legal capacity. The Act requires adaptations to make Constitutional quarter of the 5% of jobs, public appointments and/or elections of PWDs realizable. Its implementation has also been weak.

This research also found out that Section 3 of the Political Parties Act of 2016 which provides that political parties shall promote inclusiveness, democracy and participation in creating policies and nomination of candidates has not been effectively implemented in relation to PWDs. Though this section allows for PWDs to be included and to participate within political parties of their choice, little has been done by political parties in Kenya in this regard. Implementation of section 4 of the First Schedule to Section 6(2)(e) of this Act has not been effectively implemented to promote policies on alternatives that respond to interests, concerns and needs of Kenyan citizens.

The research finds that the additional requirements for PWDs under section 15(2) of the Elections (Party Primaries and Party Lists) regulations, 2017 that specify certification by the National Council for Persons with Disabilities is discriminative. The provision has been found to limit equality of treatment as provided by international law and the Constitution of Kenya. The limitation of certification requirement amounts to discriminatory treatment of PWDs.

The research finds that participation of PWDs in public procurement has been encouraged by government policy on reservation specified in Section 157(5) and (10) of the Public Procurement and Asset Disposal Act, 2015. Though there are progressed to realize at least 30% of all procurement value in each financial year be allocated to youth, women and PWDs the PWDs still find it challenging to participate due to various barriers.

Findings from reviewed case laws show that the courts find it difficult to determine legal capacity of PWDs. There has been over-reliance on health approach to determination of legal capacity of PWDs. The problem is compounded when there are conflicting reports from specialists in the same area. Such determinations by courts are found to ignore involvement of the concerned PWDs and mostly no chance is given for the concerned to prove himself otherwise.

### **5.1.3. Challenges Faced by PWDs and Measures Necessary for Improved Political Participation**

This research has found out that there are many challenges facing PWDs. Among them are discriminatory processes within the government that limit or label PWDs in a way that makes them seem different from others and thus affect their participation in political processes. Reference to PWDs as *physically challenged* in government documents gives impression to the public that the PWDs have no capacity to participate in some processes.

Other challenges include requirements of membership with the disability organization as a pre-condition for certification as a PWD is discriminatory against political participation. Certification requirements for PWDs to participate in political parties by contesting a political position in elections has also been found to be discriminatory.

The challenge of requirements for tax exemption for PWDs is another barrier. It has been found that KRA demands the renewal of tax exemption certificates to the PWDs causing unnecessary limitation to permanently disabled persons to realize this exemption as citizens. The process also requires certification and over-relies on medical definition of disability which is another challenge of neglecting other forms of definitions.

It is worthy to note that despite legal and policy provisions to facilitate access to facilities and to information, most government offices are either inaccessible or located in inaccessible places to PWDs. It has also been found that it is a challenge to access polling stations which are often classrooms or public halls used by people undertaking daily activities. The design is often not adapted for use PWDs and this makes them have problems of access.

Another challenge found out by the researcher is that it is difficult and costly to obtain PWD friendly formats of government documents such as Braille versions, audio formats etc. Lack of such information makes it hard for PWDs to be able to know and exploit their political rights of participation in public life. It has also been established that in most cases PWDs are excluded from mainstream processes, even those concerning them.

Developing substantively legislation specifying the duties and responsibilities of all actors has been found as a challenge. It is difficult for legislation to recognize the systematic powerlessness and exclusion of many people in making decisions about their lives. The available legal system over-relies on health approach to legal capacity and non-involvement of PWDs in matters important to their lives, which is a serious problem with implementation of legal provisions.

## **5.2.2. Recommendations**

### **5.2.1. Recommendations on Extent of Political Participation of PWDs in Kenya**

It is recommended that in order to encourage full participation of PWDs in political and public life the following measures should be put in place: -

- i. All election laws and processes should not restrict PWDs on their right to vote, voting procedures, facilities and materials should be appropriate, accessible and easy to understand and use.



- ii. Environment in which PWDs can fully and equally participate in public affairs as well as form and join organizations concerned with public and political life at various levels should be created.
- iii. The state should ensure the progressive implementation of the principle that at least 5% of those elected in public positions are PWDs. Monitoring of this aspect should be done in order to know if there are achievements towards the provision or not.

### **5.2.2. Recommendations on Legal Framework on Political Participation of PWDs in Kenya**

The following recommendations address the issues of legal framework: -

- i. Since deaf and dumb persons are deprived of the right to defense permanent interpreters, who are critical in such cases, are recommended in courts in Kenya. Rules of engagement of such interpreters should be outlined in law to avoid miscarriage of justice.
- ii. Laws that limit political inclusion of PWDs should be amended to be non-discriminative. Laws such as Elections (Party Primaries and Party Lists) Regulations, 2017 that require certification of PWDs to be able to contest and law requiring legal capacity for certain political offices, among others, need amendment. PWDs should be allowed to hold the office of the President as long as clear guidelines that determine their legal capacity do not bar them.
- iii. The existing *negative actions* which lead to the legal exclusion of PWDs from acts of daily life should be eliminated in laws, regulations and administrative processes. Laws and regulations should be clear on instances when deaf and dumb persons who unable to express themselves in writing can be termed to have *legal capacity* or not.
- iv. Laws and regulations should be created or amended to allow blind persons to participate in their role as guardians, in cases where they can perfectly be able to act as parents, and

also as guardians. The law should be clear on the criteria for qualifying or disqualifying capacity of PWD from being guardian.

- v. The Elections Act and regulations should allow use of *tactile ballots* for visually impaired voters. This is needed to help persons with visual impairments to be able to participate in the voting process.

### **5.2.3. Recommendations on Addressing Identified Challenges**

The following recommendations address the challenges identified in this research: -

- i. The many discriminatory processes within the government that limit or label PWDs in a way that makes them seem different from others and thus affect their participation in political processes should be removed. Such include removal of references to PWDs as *physically challenged* or as *people living with disabilities*.
- ii. Improvements should be made to process of acquiring disability card to shorten it, make the card be free just like the national identity card. The condition of membership with the disability organization as a pre-condition for certification as a PWD should be removed. The requirement of certification for a PWD to participate in political parties by contesting a political position in elections should be amended to be more non-discriminatory.
- iii. Requirement by KRA for the renewal of tax exemption certificates to the PWDs for permanently disabled persons should be abolished. Over-reliance of the process on medical definition of disability should also be abolished.
- iv. PWDs should be included in mainstream processes. Measures should be put in place for full political participation of PWDs. Efforts should be made by employers to go beyond just writing *persons with disabilities are encouraged to apply*. Such efforts should include involving NCPWD to help get suitable job candidates.
- v. Government websites should be easily accessible to PWDs and should offer alternative formats in the documentation. It should be easy to obtain PWD friendly formats such as Braille versions, audio formats etc.
- vi. All government offices should be accessible and located in accessible places to PWDs. All polling stations should be accessible to PWDs and the design should be adapted for use by PWDs.

- vii. It is important to find, develop and facilitate support systems, but also adopt legislation that gives PWDs legal recognition. The available system should not over-rely on health approach to legal capacity. It should encourage involvement of PWDs in matters related to their lives.

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