

Walk the Talk:

A critical analysis of the legal framework on the inclusion of SIGs



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Acronyms

ANC	Amani National Congress	NGO	Non- Governmental Organization
CSO	Civil Society Organization	NIMD	Netherlands Institute for Multiparty Democracy
DRC	Dispute Resolution Committee	NRA	National Reconstruction Alliance
EAC	East Africa Community	ODM	Orange Democratic Party
EACPPWD	East African Community Policy on Persons with Disabilities	ORPP	Office of the Registrar of Political Parties
FGDs	Focus Group Discussion	OWL	ODM Women League
FORD-K	Forum for the Restoration of Democracy(Kenya)	OYL	ODM Youth League
GCK	Green Congress of Kenya	PDU	Party of Democratic Unity
ICCPR	International Convention on Civil and Political Rights	PPDT	Political Parties Disputes Tribunal
ICESCR	International Convention on Economic, Social and Cultural Rights	PPK	Peoples Party of Kenya
IEBC	Independent Electoral and Boundaries Commission	PWDL	Persons with Disabilities League
JFP	Justice and Freedom Party	PWDs	Persons living with Disabilities
KANU	Kenya African National Union	SIG	Special Interest Groups
KIIs	Key Informant Interviews	TNA	The National Alliance
KYC	KANU Youth Congress	UDHR	Universal Declaration of Human Rights
KWC	KANU Women Congress	UDPK	United Persons with Disabilities
MP	Member of Parliament	UNCRPD	UN Convention on the Rights of Persons with Disabilities
NARC	National Alliance Rainbow Coalition	URP	United Republican Party
NEAB	National Elections and Appeals Board	WDM	Wiper Democratic Movement
NEC	National Executive Committee	WFD	Westminster Foundation for Development
NGEC	National Gender and Equality Commission	WL	Women League
		YL	Youth League

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The consortium hopes the findings and recommendations from this publication will inform the interventions that strengthen the meaningful participation of Special Interest Groups in the electoral process and governance.

Foreword



Kenya is one of the countries hailed for having the most progressive constitutions in the world, particularly in regard to Articles on inclusive participation, representation, electoral system, electoral process, and political parties. It further provides for the inclusion of special interest groups (SIGs) i.e., women, youth, persons with disabilities (PWDs), the marginalized, and other minority groups. The right to participate in political and public life is also a well-established principle of international human rights law.

Special interest groups, particularly women, youth, and persons with disabilities, however, face difficulties in participating in the public sphere. The hallmark of the dawn of constitutionalism is the provision of rights-based public participation, equality, and inclusion in governance processes in Kenya. Despite the progressive nature of Kenya's Constitution, there still exists formal and informal barriers to political participation for women, youth, and PWDs. Among the formal challenges include the design and effective implementation of the legal framework.

This assessment report assesses the extent to which Kenya's legal framework governing political parties supports the inclusion and participation of SIGs in the electoral process and examines the views and proposals of marginalized groups concerning inclusion. Moreover, it also makes recommendations for possible areas of intervention to support and strengthen the participation of the SIGs in the electoral process. Kenya just concluded its third election in the 2010 constitution, which provided a great opportunity for learning and taking steps to strengthen the political participation of minority groups mainstream recommendations in the general electoral process.

I am most grateful to the political parties who participated in the interviews and the collection of information. The text has benefitted greatly from feedback obtained from a cross-section of parties in the country. I would like to thank the Registrar of Political Parties, Mrs. Ann Nderitu for her strategic insight into the legal framework, and the invaluable contribution of Prof. Collins Odote and his task team who helped develop the report. With gratitude, I acknowledge my colleagues at The Oslo Center; Phoebe Mungai, Stephen Maribie, Edin Allio, Isaac Juma, Daisy Mukung, Michael Sanya, and Bjarte Tora; the Netherlands Institute for Multiparty Democracy (NIMD); Danish Institute for Parties and Democracy (DIPD); Mzalendo Trust and Centre for Multiparty Democracy – Kenya (CMD) for their comments for their tireless review of the content and methodology that formed the basis for the report.

The Oslo Center hopes the assessment report will assist the political parties' respective party leagues; women, PWDs, and the youth continue to organize and operationalize the findings with the overall aim to support the participation and inclusion of the SIGs within the established legal framework. This is an opportunity for the political parties to utilize the full potential of the SIGs to contribute to the transformation of society, sustainable development, and good governance through the strategic implementation of the recommendations.

A handwritten signature in black ink, appearing to read 'F. Jarle Rode', written over a white background.

Finn Jarle Rode
The Executive Chair of the Board
The Oslo Center



Executive Summary

Participation in political and public life is a critical element of socially inclusive development, along with the realization of human rights. The right to participate in political and public life is a well-established principle of international human rights law. Special interest groups, particularly women, youth, and persons with disabilities, however, face difficulties in participating in the public sphere. Resolving these difficulties requires strategic responses using a myriad of tools. Law is one such tool. The design of effective legal measures and their faithful implementation is essential for ensuring the active, meaningful and equal participation of women, youth, and persons with disabilities in the political affairs of any society.

As part of its continued programmatic support in Kenya focusing on democracy promotion and strengthening of key democracy institutions including political parties, the office of Registrar of Political Parties, women and youth structures in political parties, the Oslo Centre commissioned a study to assess the extent to which Kenya's legal framework governing political parties supports the inclusion and participation of marginalized groups in the nomination process, their participation in elections as well as to determine how party nominations have impacted Kenya's democratic and participatory status.

This study sought to consider the efficacy of the Kenyan legal framework on the inclusion of these special interest groups, specifically through considering political party nomination processes and dispute resolution processes. The following key questions underpinned the research:

- i. Has the legal framework enhanced inclusion of the marginalized groups? (Women, youth and PWDs);
- ii. What is the perception of the marginalized groups on their inclusion in the legal framework;
- iii. What are the views and proposals of marginalised groups concerning inclusion and implementation of the legal framework;
- iv. What have been the successes, challenges and opportunities of the legal framework governing elections for special interest groups;
- v. How have the IEBC, ORPP and Political Parties prepared for the nomination processes;
- vi. How have the political parties prepared and implemented mechanisms for the disputes arising from party nominations, and
- vii. How have the disputes resolution mechanisms impacted the inclusion and participation of women, youth and PWDs in party nomination.

The study adopted a qualitative approach preceded by a robust review of the international and national legal frameworks governing the participation of women, youth, and persons with disabilities in the political and governance process of the country. In addition, judgements from the existing dispute resolution mechanisms in the country were also analyzed. These were complemented by key informant interviews and focused group discussions targeting officials, youth, women, and persons with disabilities from seven political parties (United Democratic Alliance, Orange Democratic Movement, Wiper Democratic Movement, KANU, Ford Kenya, Amani National Congress and Jubilee). A complete overview of the methodology adopted in this study is in Chapter 1.

KEY FINDINGS:

- **Special Interest Groups believe that the Constitution is supportive of their inclusion in politics. They however highlight that there remains a gap in the implementation and legislation of these Constitutional provisions. As a result, the achievement of the gender quota and inclusion of persons with disabilities to constitute 5% of elective and appointive positions in the country are yet to be met.**
- **Failure to implement the Elections Campaign Financing Act has resulted in prohibitively high cost of elections leading to an uneven playing field for special interest groups.**
- **While political parties have adopted provisions in their constitutions to promote the inclusion of special interest groups, respondents however felt that political parties only support inclusion in theory.**
- **Party nomination rules have not provided clear guidelines on how to identify aspirants for indirect nomination to contest various seats as well as formulation of the party list to ensure equitable representation of all SIGs.**
- **The Office of the Registrar of Political Parties (ORPP) and the Independent Electoral and Boundaries Commission (IEBC) have supported the participation of special interest groups in political parties through the implementation of the law. For instance, in the run up to the 2022 general elections, IEBC rejected 79 party lists which did not meet the two thirds gender principle in their nomination lists. The ORPP facilitated the process of candidates vying for elections as independent candidates both giving meaning to the constitutional provisions on independent candidates and allowing marginalized groups dissatisfied with their party nomination processes to participate as candidates in the August 2022 General Elections.**
- **Special interest groups are aware of their political rights as well as the laws in place on elections and nominations.**
- **The efforts to amend the Constitution through the failed Building Bridges Initiative and the recent Memorandum by President Ruto to the Speakers of the National Assembly and the Senate calling for a constitutional amendment to actualize the two-thirds gender principle to enhance gender inclusion and affirmative action demonstrates the gaps in the current constitutional architecture on this issue.**

1.0 Introduction



1.1 Background

A democratic and just political process is characterized by the equal and meaningful participation of significant segments of society, and inclusive political parties are fundamental units of that process. The measure to which political platforms can be said to be accessible and facilitative of participation of citizens depend on PWDs, young people and women being included in political parties.

Through their control over the electoral process, political parties play a key role in increasing the participation of PWDs, young people, and women in politics. Since they are primarily in charge of recruiting and selecting candidates for positions with decision-making authority, they play a particularly significant role in determining the proportion of PWDs, women, and young people in elected office. In addition, political parties play a significant role in representing the concerns and priorities of special interest groups. This is because they play a crucial role in expressing, aggregating, and legitimizing their interests in government through the formulation of strategies, goals, and policies as well as the promotion of their voters' interests.

1.2 Objectives of the Study

The Oslo Center commissioned this research to investigate how the process of political party nominations have affected Kenya's democratic and participatory status and if the legal framework governing political parties has supported the inclusion and participation of marginalized groups in the process. This study assesses the content and implementation of the legal framework, governing political parties' operations and party nominations and their effect on the country's democratic and participatory processes. This report captures the outcome of the assessment of the impact of the legal and regulatory framework of SIGs' participation in party politics.

1.3 Methodology

The research adopted a qualitative research methodology. To answer the research questions, information was gathered from both primary and secondary sources. Desk review of relevant laws, research and documentation were conducted, while focus group discussions (FGDs) and key informant interviews (KIIs) were used to collect primary data.

The study focused on registered political parties and relevant stakeholders. The choice of the select political parties was influenced by the political parties that The Oslo Center works with, namely, KANU, ODM, UDA, FORD Kenya, Jubilee, Wiper and ANC. The selection of regions was based on the parties' dominance and popularity. The 10 regions selected for this study were Bungoma, Kakamega, Nakuru, Kiambu, Nandi, Machakos, Homabay, Nairobi, Mombasa, and Kajiado. However, due to logistical challenges, the following regions were covered instead; Kisumu, Machakos, Meru, Mombasa Nairobi, Nakuru, Nandi, Tana River, Turkana, and Wajir.

The study has also analyzed the dominant political parties' policies and regulations in addition to examining the legal and regulatory environment relevant to SIG's participation in political parties.

1.4 Sampling

Key Informant Interviews (KIIs) were used to gain insights into the level of knowledge of the legal and regulatory framework, and electoral dispute resolution mechanisms of SIGs as well as the institutional preparedness. Purposive sampling technique was used to arrive at the study participants. The study used open-ended questions through a semi-structured interview guide while carrying out the interviews.

Participants included Political Parties Management, Members of Political Parties SIGs leagues, women and youth aspirants, those elected and those who lost, and officials from the Political Parties Dispute Tribunal. The study reached a total of 161 respondents and participants as illustrated in table 1 below.

Table 1: Sample size

DATA COLLECTION METHOD	NUMBER OF RESPONDENTS
QUESTIONNAIRES	68
FOCUS GROUP DISCUSSIONS (11)	78
KEY INFORMANT INTERVIEWS	15
TOTAL	161

1.5 Data Collection

Various data collection tools were utilized to collect data including questionnaires, FGD schedules and interview guides. Given the dimension of the study (legal and regulatory framework, impacts of design implementation on SIGs electoral dispute resolution mechanisms and institutional preparedness) some of the data was obtained from secondary sources. The collection of secondary data, such as the legal and regulatory framework, an analysis of the courts' decisions were obtained from relevant institutions and publications, such as government publications. Some of these include electoral judgements and legal provisions from the National Council for Law Reporting (Kenya Law) .

Table 2: Regions where FGDs were conducted

REGION	TOTAL
KISUMU	1
MACHAKOS	1
NAKURU	3
NANDI	3
TANA RIVER	1
TURKANA	1
WAJIR	1
TOTAL	11

1.5.1 Focus Group Discussions

11 focus groups were held with a total of 78 SIGs of whom majority were party members.

1.5.2 Key Informant Interviews

The study used open-ended questions semi-structured interview guide, while conducting KII interviews. These were employed to compile in-depth data on the study's topic. Women MCAs, women candidates, young people, people with disabilities, and managers of political parties, officials from NCPWD, ORPP and PPDT were among those interviewed. (See annex 2 for a list of KII's conducted)

1.6 Data Analysis

Data analysis was done using both descriptive and narrative techniques. Data was analyzed using the thematic summaries and categories to derive conclusions. The analysis process involved several steps such as

- i. Data was prepared for analysis by transcribing the interviews conducted.
- ii. The second step involved thematic analysis which allowed the identification of themes emerging from the data. This was followed by organizing the data into the themes and organizing them into related topics and categories.
- iii. Lastly, the next step involved finalization of the name of the theme, writing description and illustration of the same with a few quotations from the original text so as to help communicate the meaning to the reader.

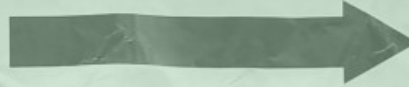
1.7 Ethical Considerations

Several factors were considered in the course of conducting the study this included informed consent and freedom to withdraw from the research process and confirming availability for carrying out the FGD and KIIs.

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
YOUR VOTE, YOUR FUTURE



POLLING STATION



2.0 Electoral Landscape & Trends in Kenya



2.1 The Kenyan Political Context

Political parties have played a critical role in Kenya's history, dating back to the pre-independence era. They were a critical tool in agitating for independence, with the first political party being formed in the early 1920s. In 1960, Kenya's oldest political party to date, Kenya African National Union (KANU) was formed. Another major party, the Kenya African Democratic Union (KADU), was also formed in the same year. These two parties fiercely contended to be the founding ruling party in the newly independent Kenya, in which endeavor, they both mobilized the youth. Women also played a critical role in the push for independence by engaging in peaceful protests and labor strikes.¹ KADU dissolved and merged with KANU after the 1963 elections, and most of its members joined the ruling party KANU.

Kenya was transformed into a de facto one-party state in 1969, under the ruling party, KANU. In 1982 the country became a de jure one-party state. This era lasted until 1992 when the agitation that had been spearheaded by civil societies and opposition political parties, such as Ford-Kenya led to the re-introduction of multi-party dispensation

Politics in Kenya has largely been characterized by neopatrimonialism which traces back to this one-party, and tenders, in exchange for drumming up political support for their patron.² This has resulted in a political culture replete with corruption and bribery, with patron-client relationships dominating the political sphere. For special interest groups such as women, persons with disabilities, youth and members of marginalized communities, these costs of entering politics have constituted barriers to their participation.

¹ Yolande Bouka, Marie E. Berry & Marilyn Muthoni Kamuru (2019): Women's political inclusion in Kenya's devolved political system, *Journal of Eastern African Studies*

² Jeffrey S. Steeves (1997) Re-democratisation in Kenya: 'Unbounded politics and the political trajectory towards national elections, *Journal of Commonwealth & Comparative Politics*, 35:3, 27-52, DOI: 10.1080/14662049708447751

Kenya's first elected leaders, who were the country's educated elite, were by all definitions considered youth. As time progressed, however, there was established a Youth Wing in KANU, which came to be associated with- sycophancy and terrorizing political opponents. Despite the contribution of women in Kenya, women have been marginally represented in elected political leadership. The new democratic wave that followed the return to multi-party politics in Kenya also sprouted several women's rights organizations that actively pushed for the increased representation of women in politics culminating in the inclusion of the two-thirds gender rule and its continued push for its realization. Figure 1 illustrates the trend of inclusion of women in parliament.

The democratic wave culminated in the promulgation of the 2010 Constitution which re-introduced a bicameral legislature, and introduced aspects of federalism with the establishment of 47 county governments. The Constitution also secured the duty of government to respect and implement the two-thirds gender rule as well as the political rights of persons with disabilities, youth, and marginalized communities as special interest groups. Apart from articulating the values and centrality of these rights, it also prescribed affirmative action mechanisms to ensure the inclusion of special interest groups, which are explored in detail in Chapter 3 of this report.

This study did not find data on election or nomination of youth and persons with disabilities prior to the 2010 Constitutional imperative. Table 3 indicates the trend of inclusion of persons with disabilities in Kenya between 2013 and 2022. Table 4 indicates the trend of inclusion of youth in parliament between 2013- 2022.

Figure 1: Women in Parliament in Kenya 1963-2022

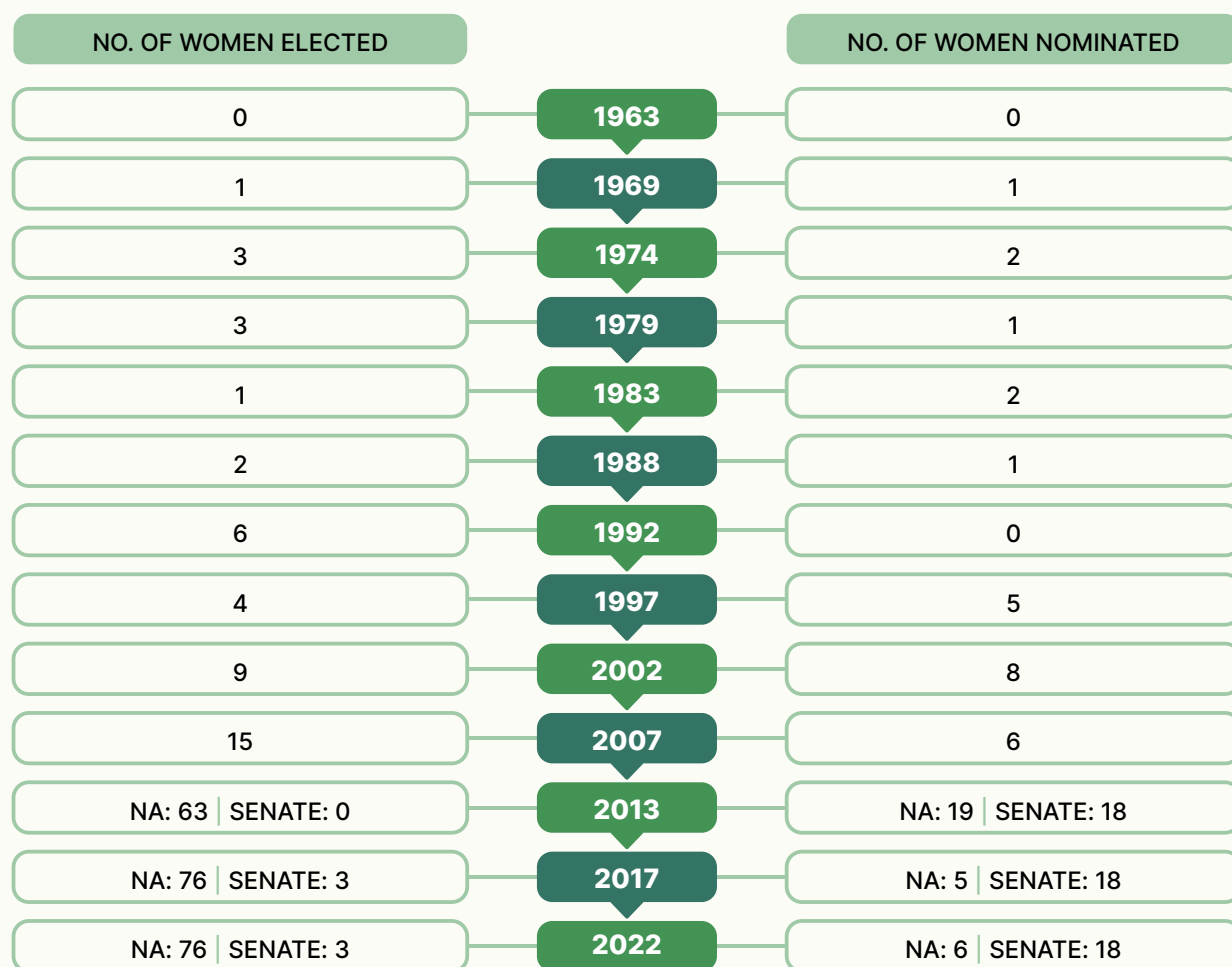


Table 3: Persons with Disabilities in Parliament and County Assemblies 2013-2022

YEAR	NO. OF PWDs IN NATIONAL ASSEMBLY	NO. OF PWDs IN SENATE	NO. OF PWDs IN COUNTY ASSEMBLIES
1980	9	4	62
1980	4	2	38
1980	4	2	37

Table 4: Youth in Parliament 2013-2022

YEAR	NO. OF YOUTHS IN NATIONAL ASSEMBLY	NO. OF YOUTHS IN SENATE
1980	37	14
1980	36	12

2.2 2022 Elections

The 2022 elections saw increased participation by members of special interest groups as candidates across the board. Consequently, this resulted in increased inclusion though marginal. This includes three women who aspired to be elected deputy presidents. ³ Female deputy governor candidates also doubled from 30 in 2017 to 62 in 2022.

More women (7) were elected as County Governors (Kirinyaga, Nakuru, Meru, Kwale, Machakos, Homabay, and Embu Counties) and as deputy governors, eight (8) (Kiambu, Murang'a, Trans Nzoia, Narok, Bungoma, Taita Taveta, Kilifi and Makeni). Elected women MPs increased from 27 in 2017 to 30, aside from the 47 women representatives and 6 women nominated by political parties.

In 2022, a record number of more than 600 candidates persons with disabilities sought election, across national and county positions. Out of this number, seven were successful, accounting for a 1% success rate. Despite the above progress, gaps still remain. For example, about 45% of counties in Kenya lack representation of PWDs, (21 out of 47 counties) up from 39% (17) in the 2017 general elections. ⁴

Despite Kenya's significant youth population (29%), political participation and inclusion of the youth in political parties is low. ⁵ The 12th Parliament (2017-2022), there were 48 members of parliament classified as youth. In 2022, this number increased to 63, accounting for about 18% of parliament's membership. The number of Senators below 35 years also counts to 7, with Youth Members of County Assemblies elected also numbering more than 900.

³ Preliminary Statement of Initial Findings and Recommendations of the IRI/NDI International Election Observer Mission to Kenya's August 9, 2022, General Elections. Available at: <https://www.iri.org/resources/preliminary-statement-of-initial-findings-and-recommendations-of-the-iri-ndi-international-election-observer-mission-to-kenyas-august-9-2022-general-elections/>

⁴ 'Kenya, a pacesetter in political inclusion of persons with disability' (WFD, 23 November 2022). Available at: <https://www.wfd.org/story/kenya-pacesetter-political-inclusion-persons-disability>

⁵ 2019 Kenya Population and Housing Census Results. Available at: <https://www.knbs.or.ke/2019-kenya-population-and-housing-census-results/>

A Key feature of the 2022 elections was the increased incidence of negotiated democracy, following the introduction of the nomination of candidates by consensus rather than by ballot within a political party. The term 'negotiated democracy' is used in Kenya to refer to the practice of agreeing on how to distribute political positions in advance of an election. The phrase became popular following the introduction of devolution in 2010, when political and community leaders in some of the forty-seven counties decided to come to pre-election agreements about the distribution of seats between rival ethnic groups and clans. Part of the logic behind these deals was that arranging the outcome of multiparty politics in this way would reduce the stakes of the election and hence the prospects for ethnic violence. However, in some cases, these negotiations themselves proved to be highly controversial, especially after some of the participants claimed that the initial terms of the deals that they had struck had not been honored.⁶

The increased number of independent candidates to 7,177 independents in 2022, by 64% (4,648) in 2017, points to the frustration faced by candidates in political parties.⁷

2.3 Inclusive Politics: Global Imperatives and Prerequisites

Inclusivity in politics is imperative for sustainable democracy. All citizens of voting age have a right to take part in the governance of their country, participate in public affairs, and to be elected in free and fair elections conducted by independent electoral agencies. These rights are exercisable by everyone irrespective of gender, sex, or disability. These fundamental rights are the bedrock of democracy.⁸

Inclusive politics requires that all individuals and groups in society have an equal chance to engage in democratic and political processes. The measure of a democracy is assessed by the extent to which it facilitates particularly the weak and marginalized to not only have their voice heard but also to take meaningful leadership positions in politics. Failure to provide for these compromises the quality of democracy, and exclusion of marginalized groups is a core contributor to conflicts and instability in societies and an inhibitor to democratic transition or consolidation.⁹

Taking inclusion as “the targeted efforts to culturally, socially, economically, civically, or politically incorporate underprivileged, disadvantaged, marginalized, or subaltern social groups”¹⁰, there are three global prerequisites that govern the process of inclusion in politics. First is the existence of robust legal and regulatory frameworks with provisions that recognize and protect the rights of and provide mechanisms for marginalized groups to participate in political processes on an equal footing with other members of society.

The second issue is the existence of mechanisms for affirmative action, recognizing that past discrimination and unequal and unfair treatment have prevented marginalized groups from being included in politics. To correct this, there requires special measures that provide positive impartiality to these groups to enable them to catch up with and gain an equal footing in politics. The third imperative is the existence of democratic institutions, particularly election management bodies and political parties, and their adherence to inclusivity principles. The extent to which these institutions are aware of and seek to enforce requirements for inclusivity determines the levels of inclusive politics. The electoral system design plays a critical role in facilitating or inhibiting inclusive politics.

⁶ Cheeseman N, Bertrand E, and Husaini S (2023), A dictionary of African Politics. Oxford University Press.

⁷ Record set as over 7,000 independent hopefuls cleared by deadline (ORPP, 2022) Available at: <https://www.orpp.or.ke/index.php/8-latest-news/238-record-set-as-over-7-000-independent-hopefuls-cleared-by-deadline>

⁸ 'Inclusive Political Participation' (Source, 24 April 2014) Available at: <https://asksource.info/topics/cross-cutting-issues/inclusive-political-participation>

⁹ <https://www.idea.int/news-media/news/political-inclusion-vital-sustainable-democracy>

¹⁰ Claudia Zilla (2022) Defining democratic inclusion from the perspective of democracy and citizenship theory, *Democratization*, 29:8, 1518-1538, DOI: 10.1080/13510347.2022.2090929

The existence of well-designed rules and institutions must be accompanied by a comprehensive dispute resolution mechanism. This is out of the recognition that there will be many instances where the rules are either ignored or applied unfairly to the detriment of marginalized groups requiring recourse to dispute resolution mechanisms. A robust, impartial, and credible body is therefore imperative to inclusivity. Lastly, the levels of awareness and appreciation amongst the populace of the need for inclusivity will help to ensure that the society is an inclusive one and that marginalized groups get support and the opportunity to both participate and be elected in political spaces.

2.4 Past Challenges with Inclusivity in Political parties

Despite the centrality of a political party in a democracy, Kenya's political parties have not met the democratic standard of inclusion of all persons. For instance, women played an important role during the fight for multiparty elections in Kenya. However, by 1997, there were only 18 women represented in Parliament. At such time, a motion to encourage political parties to nominate one-third of women candidates to vie for political posts at the national and ward level was shot down. It was only through the lobbying of women's groups such as the Women Parliamentary Caucus that the two-thirds gender rule was drafted into the constitution in 2010. The rule provides that there should be no more than two-thirds of a gender represented in the membership of any elective position or the governing body of any political entity. More than one decade since the promulgation of the Constitution, this standard is yet to be fully achieved.

Persons with disabilities, on their part, have faced dire marginalization in Kenya. Often regarded as causing shame, PWDs have limited access to education, health, employment, and other basic social services. This includes challenges relating to physical access. They are excluded politically as they have measured access to participate in political processes, and equality of opportunity.

The inclusion of PWDs within political parties remains inadequate with significant legal gaps existing and lack of PWD leagues amongst most parties in the country.¹¹ The National Gender and Equality Commission has observed that Special Interest Groups have historically been limited to addressing their specific issues. For instance, persons with disabilities have not been put at the same level as other members and they are mostly required to speak about disability issues. The same would apply to women and the youth. This minimizes their chances of moving the masses on other topical issues hence lowering their chances of election through popular contest.

Other past challenges with inclusivity in political parties included the inaccessibility of political party offices by persons with disabilities. Secondly, the offices and officials of parties were not accessible because there were no set channels of communication. One needed to be well-connected before they could get access to a political party leader.

According to the Office of the Registrar of Political Parties (ORPP) 2022 data, youth constitute only 35% of political parties' membership.¹² The low rate of participation has been attributed to high voter apathy among the youth, which also results in low voter turnout.¹³ Political parties are however a critical avenue to legitimacy and financial support for youth leaders.

¹¹ Preliminary State of Political Inclusion for persons with Disability on Within Political Parties in Kenya in 2020 (Westminster Foundation for Democracy, 2020) Available at: <https://www.wfd.org/sites/default/files/2022-01/WFD-KIPP-Baseline-Report-The-State-of-Political-Inclusion-of-Persons-with-Disability-PWDs-within-Political-parties-in-Kenya.pdf>.

¹² Beyond Polemics and Political Obscurity to Meaningful Political Participation by the Kenyan Youth (ICJ Kenya, May 7, 2022). Available at: <https://icj-kenya.org/news/beyond-polemics-and-political-obscurity-to-meaningful-political-participation-by-the-kenyan-youth/>

¹³ 'It's an illusion of choice': why young Kenyans are boycotting the election (The Guardian, 5 August 2022) Available at: <https://www.theguardian.com/global-development/2022/aug/05/young-kenyans-boycotting-the-election>.

Before promulgation of the 2010 constitution, there were no dedicated avenues of conflict resolution within the party and the electoral management institutions. There was also recurring violence experienced during campaigns and during party primaries acts, which was a deterrence to participation of women, youth and persons with disabilities in political party activities. In a study conducted by the Kenyan Chapter of the International Federation of Women Lawyers in the run up to the 2022 General Elections, it was concluded that political parties remain a significant barrier to women's inclusion in politics and leadership. The areas cited as the most problematic include lack of transparency within parties, lack of access to campaign finance and lack of free and fair political party nominations which are normally skewed against women aspirants.

2.5 Addressing the Inclusivity Gap in Political Parties Through Party Nominations

Party lists are an affirmative action tool established in the Constitution to ensure equitable representation of special interest groups and the marginalized in Parliament and County Assemblies.¹⁴ These seats are allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election. There is thus an imperative for political parties to include in their membership and leadership members from marginalized groups from whom it will nominate.

Parties are required to present party lists for SIGs to IEBC nominating members to the National Assembly, the Senate, and the County Assemblies using proportional representation.¹⁵ At the County Assemblies level, each political party is required to submit a party list for County Assembly for the special interest groups consideration – 8 persons, 4 PWDs, 4 Youth. Priority is given to a person with disabilities, the youth, and any other candidate representing a marginalized group.

Each political party has to submit the following party lists to IEBC:

- National Assembly Party List – 12 nominees to the national assembly
- Senate (women) party list - 16 women nominees to the senate
- Senate (youth) party list – 2 youth nominees to the senate
- Senate (persons with disability) party list – 2 persons with disability nominees
- County Assembly (gender) party list – 47 party lists, each representing a county and separately consisting of the number of nominees equal to the number of wards in the respective county

In the 2022 electoral cycle, the IEBC set the 25th of June 2022 as the deadline on which parties were allowed to present their party lists.¹⁶ It thereafter falls upon the IEBC to audit the submitted lists to confirm compliance with the constitutional and statutory provisions.

The current legal and legislative framework provides for elaborate nomination and dispute resolution mechanisms for disputes relating to party nominations. This encourages political parties to adhere to the legal provisions on the inclusion of SIGs in party nominations since they are aware that failure to do so would result in convoluted legal battles that may portray the parties in a bad light. The number of disputes handled by IEBC, the PPDT, and courts relating to party primaries and party list nominations points towards the awareness of participants.

¹⁴ Articles 97(1),98(1), and Article 177(1) of the Constitution of Kenya

¹⁵ Ibid

¹⁶ Kenya Gazette Notice Number 6378 Vol CXXIV No – 101, 3rd June 2022

3.0 Legal Framework Governing Political Parties and its influence on Party Nominations



3.1 International Laws

As a starting point, the foundation of democracy and the impetus to ensure the political inclusion of all persons is based on the principle of the inherent dignity of all persons. The other side of the coin is the principle of non-discrimination, meaning that all persons, regardless of race, color, sex, religion, political or other status, are entitled to certain universal rights and freedoms. These principles of inherent dignity and non-discrimination are affirmed in the Universal Declaration of Human Rights,¹⁷ the International Covenant on Civil and Political Rights (ICCPR)¹⁸, and the African Charter on Human and Peoples' Rights 1981.¹⁹

The UDHR also sets out the right of all persons to take part in their government, either directly or through freely chosen representatives.²⁰ This is echoed in the ICCPR²¹ as well as the African Charter on Human and Peoples' Rights.²² These provisions also include the right of all persons to public services and the right to vote.

Persons with Disabilities

The rights of persons with disabilities are asserted in the UN Convention on the Rights of Persons with Disabilities, 2006 (UNCRPD), whose purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. State Parties are obligated to guarantee persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. They also undertake to promote actively an environment in which persons with disabilities 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.²³

¹⁷ Article 2.

¹⁸ Article 26.

¹⁹ Article 19.

²⁰ Article 21.

²¹ Article 25.

²² Article 13.

²³ Article 29 (b) of the UN Convention on the Rights of Persons with Disabilities, 2006.

In the East African Community (EAC), the East African Community Policy on Persons with Disabilities, (EACPPWD) provides that member states shall be gender responsive and shall include disability interests through establishing mechanisms that promote equal access to resources and benefits to both men and women; and through encouraging active involvement/ participation of PWDs in leadership and decision-making processes about policies and programs that affect their daily lives.

Women

Women's Right to political participation has a broad international framework, starting from the universal right against discrimination provided for in the UDHR and ICCPR. It is more specifically articulated in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which prescribes that States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.²⁴

The Beijing Declaration and Plan for Action 1995 identified the inequality between men and women in the sharing of power and decision-making at all levels as one of twelve critical areas that needed the attention of the international community and civil society. It called upon states to take strategic action to ensure women's equal access to and full participation in power structures and decision-making. Identified actions for political parties include the removal of all barriers in party structures and procedures that directly or indirectly discriminate against the participation of women, development of initiatives that allow women to participate fully in all internal policy-making structures and appointive and electoral nominating processes, and incorporation of gender issues in their political agenda, taking measures to ensure that women can participate in the leadership of political parties on an equal basis with men.

In the African Continent, the African Charter on Human and Peoples' Rights mandates States to ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.²⁵ The Protocol to the African Charter on Human and People's Rights (ACHPR) on the Rights of Women in Africa (Maputo Protocol), expands this provision and, provides for the right of women to participate in political and decision-making processes.²⁶ The Treaty establishing the East African Community also lists as one of its objectives the mainstreaming of gender in all its endeavors and the enhancement of the role of women in cultural, social, political, economic and technological development.

Lastly, Goal 5.5 of the Sustainable Development Goals prescribes that states shall ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life. Goal 10.2 also sets the goal of encouraging and promoting the social, economic and political inclusion of all by 2030, regardless of age, sex, disability, race, ethnicity, origin, religion or economic or other status.

²⁴ Article 7(a).

²⁵ Article 18.

²⁶ Article 9.

Youth

In Kenya, 'a youth' is defined as a person aged between eighteen (18) years and thirty-four (34) years.²⁷ Full and effective participation of youth in the life of society and in decision-making is among the priority areas in the 'World Programme of Action for Youth for 2000 and Beyond' adopted by the UN General Assembly in 1995.²⁸ The UN called on States parties to take action to develop and/or strengthen opportunities for young people to learn their rights and responsibilities, promote their social, political, developmental, and environmental participation, remove obstacles that affect their full contribution to society, and respect their freedom of association.

The African Youth Charter, 2006 enjoins state parties to take measures to promote active youth participation in society including guaranteeing the participation of youth in parliament and other decision-making bodies in accordance with the prescribed laws and facilitating the creation or strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance.²⁹

3.2 The Constitution of Kenya, 2010

The Constitution underlines the national values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized.³⁰ These values are the prism through which state organs and state officers ought to interpret and apply the provisions of the Constitution and any law in Kenya.

It further articulates the right to equality and freedom from discrimination whereby men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres.³¹ Echoing the international body of laws on non-discrimination, the constitution further states that neither the state nor any person shall discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.³² The State is further impelled to undertake legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination, particularly, youth and marginalized groups.³³ Article 100 of the Constitution expounds on the term 'marginalized groups' and indicates that this includes women, persons with disabilities, youth, ethnic and other minorities and marginalized communities. More than ten years following the promulgation of the Constitution, this provision is yet to be legislated.

The Constitution also provides for the establishment of Kenya's electoral management body, the Independent Electoral and Boundaries Commission (IEBC), which is responsible for the conduct and supervision of elections for seats.

The basic requirements of a political party are set out in Article 91, including that every political party shall have a national character; abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party; respect the right of all persons to participate in the political process, including minorities and marginalized groups; respect and promote human rights and fundamental freedoms, and gender equality and equity; and subscribe to and observe the code of conduct for political parties.

²⁷ Article 260, Constitution of Kenya.

²⁸ 'World Programme of Action for Youth for 2000 and Beyond (UN, 1995). Available at: <https://www.un.org/esa/socdev/unyin/documents/wpay2010.pdf>

²⁹ African Union Youth Charter, Article 11. Available at: https://au.int/sites/default/files/treaties/7789-treaty-0033_-_african_youth_charter_e.pdf

³⁰ Article 10(2)(b)

³¹ Article 27 (3)

³² Article 27 (4) and (5)

³³ Article 27(6)

The Constitution, consequently, not only underscores equality before the law but also makes inclusive politics a mandatory cornerstone of Kenyan politics. Despite the electoral system not being a pure proportional representation system, it captures provisions for party lists and affirmative action which seek to ensure that women, youth, and persons with disabilities are represented in elective politics. At the National Assembly level, there are set forty-seven seats for women to be elected one each to represent each of the country's counties; twelve members to represent special interest groups including youth and persons with disabilities; while within the Senate political parties are to nominate sixteen women, two youth and two persons with disabilities.

3.3 Kenyan Legal Framework on Inclusion of Special Interest Groups

i. Persons with Disabilities Act, 2003

This Act establishes the National Council for Persons with Disabilities, which is mandated to issue adjustment orders to premises, services or amenities that are inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment and to register persons with disabilities among other roles.

The Act was enacted before the adoption of the 2010 Constitution and while it provides for civic rights,³⁴ it does not expound the breadth of political rights of PWDs, nor does it offer actionable remedies for challenges faced in the political sphere. Civic rights in this instance include the provision of assistance to persons with disabilities during voting, accessibility of polling stations and registration of organizations for persons with disabilities. It does not contain a robust provision to promote the participation of persons with disabilities in politics beyond acting as voters.

The proposed revisions to this law in the Persons with Disabilities Bill, 2022 are overdue as they contain robust proposals on civic and political rights for persons with disabilities including the right to participate in public and political life and the opportunity to enjoy the right on an equal basis with others and to vote and be voted for in any public or political office hence reinforcing the political rights captured in the Constitution.

ii. Political Parties Act, 2011

The Political Parties Act mandates political parties to promote inclusiveness, democracy and participation of the people in the formulation of its policies and in the nomination of candidates for elections.³⁵

Establishment of the Office of the Registrar of Political Parties

The Office of the Registrar of Political Parties is established under Section 34 of the Act and mandated to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act, regulate political party nominations in accordance with the Act and to investigate complaints received. The ORPP's mandate is thus critical to ensuring that the constitutional role of inclusivity placed on political parties is indeed realized. It also has powers to hold political parties accountable through issuing warnings, suspending parties for up to one year, withholding funds and effecting deregistration of errant political parties.

³⁴ Section 29, Persons with Disabilities Act, No. 14 of 2003.

³⁵ Section 3(1A), Political Parties Act

Registration of Political Parties is Contingent on Inclusion

Pegged on Article 91 of the Constitution, the Political Parties Act provides that a political party can only be registered if it meets key requirements such as gender equality and equity, respect for the rights of all persons to participate in political processes and other human rights and fundamental freedoms. This is to ensure that women and all other marginalized groups can participate in politics both as voters and as candidates as set out in Article 91 of the Constitution.

Political Parties are also required to mobilize citizens to participate in political decisions, a task they should perform with an inclusivity lens. More particularly the Act requires political parties to promote the representation in Parliament and County Assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities.

Code of Conduct for Political Parties

Code of Conduct for Political Parties is provided in Schedule One to regulate the behaviour of members and office holders of political parties, aspiring candidates, candidates and their supporters, to promote good governance and eradicate political malpractices such as violence, intimidation or bribery. It mandates that each political party shall respect the right of all persons to participate in the political process including special interest groups, respect and promote gender equity and equality, human rights and fundamental freedoms; and be tolerant and inclusive in all their political activities.

Political Parties Fund

The Act establishes the Political Parties Fund which is to be administered by the Registrar of Political Parties. 15% of the Fund is to be distributed proportionately to political parties based on the number of candidates of the political party from special interest groups elected in the preceding general election. Based on this guaranteed allocation, the youth, women and PWD leagues within the parties should demand the 15% allocated to them and prepare five-year work plans in advance in order to push their agenda.

Under the Act, a political party shall not be entitled to receive any funding from the Fund if its registered officials fail to meet the two-thirds gender rule and if the party's governing body does not have representation of special interest groups. This provision is key in promoting the inclusion of SIGs in political parties. However, political parties ought to be intentional to promote SIG interests in the party through deliberate recruitment and crafting a relevant agenda.

An amendment to the Act in 2022 significantly lowered the requirements for political parties to have access to the Fund, such that any party that has an elected Member of Parliament or Member of County Assembly can access a portion of the fund. Before, a party had to have at least 20 elected MPs, 3 elected Senators, 3 elected Governors and 40 Members of the County Assembly to access the Fund.

Negotiated Democracy

A key amendment in the 2022 election cycle was the introduction of the indirect party nomination method.³⁶ Under this method, a political party selects delegates from its list of members, rather than holding an internal voting exercise among its members. Such a list is thereafter submitted to the Registrar seven days prior to the nomination date, on which day interviews of such potential candidates will be undertaken. The procedure of selection in indirect nomination is to be provided in a party's nomination rules. While indirect nomination has its benefits such as allowing parties to strategically use their limited resources, it is disadvantageous to members of special interest groups. This is because there is a bias towards persons affiliated with party leaders and persons with wide resources. The process may benefit from the Political Party Primaries Bill, 2020 which had clear proposals on protecting the interests of SIGs, especially during the nomination process.

³⁶ Sections 38A, 38F and 38G of the Political Parties Act

Coalition Political Parties

Another key amendment in this election cycle was the introduction of coalition political parties, which is considered a political party. Two or more political parties may form a coalition or a coalition political party before or after an election and shall deposit the coalition agreement with the Registrar. The coalition agreement is to be deposited with the Registrar, and should have the following contents: the parties which are members of the coalition; the policies and objectives of the coalition; the overall structure of the coalition; the criteria or formula for sharing of positions in the coalition structure, roles and responsibilities within the coalition; the coalition election rules, and the coalition nomination rules, as well as the dispute resolution mechanisms and procedures.

iii. Election Campaign Financing Act, 2013

This Act was established to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns.

Section 5 of the Act provides that the IEBC will make rules to regulate election campaign financing in the case of a general election, at least twelve months before the election.³⁷ However, in the last two electoral cycles, parliament has failed to adapt the proposed campaign finance regulations which have recommended capping election costs.

Despite the prescription of offences such as receipt of funds from an anonymous or illegal source, or from the State, the requirement for candidates and political parties to disclose the sources of support is yet to be enforced. Further, the practice of the ruling party using public resources such as cars on the campaign trail is commonplace and rarely if ever, do consequences follow these illegal acts.

There are concerns that the Act is difficult to implement in its present form due to some provisions. Key among them is the requirement by political parties to establish an expenditure committee that would regulate spending by a candidate, a political party, or a referendum committee. There have been attempts at amending the same including the Election Campaign Financing (Amendment) Bill, 2021 which sought to repeal the said requirement. There is a need for parliament to consider the report prepared by the Constitutional Implementation Oversight Committee regarding the said Bill with a view to making the process of implementation of the Act possible.

iv. Elections Act, 2011

Role of the ORPP

The Elections Act governs the conduct of elections at all levels by the Independent Electoral and Boundaries Commission (IEBC). The Act expounds on the role of the Registrar of Political Parties, providing that they have a role of receiving party nomination rules from parties six months before nomination of their members, and certifying the same. Such rules are thereafter forwarded to the IEBC who shall within fourteen days, review such rules against the prescribed regulations and issue the political party with a certificate of compliance; or require the political party to amend the rules to ensure such compliance within fourteen days.

Party Lists

Section 34 provides the process of nomination of party lists. It prescribes the submission of the different lists to the IEBC, who then review the list to ensure compliance with the prescribed regulations and issue the political party with a certificate of compliance; or require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list. Before such submission, such lists ought to be produced before the Registrar of political parties for certification under Section 35A, with the role of Registrar being to verify that the names appearing in the party list belong to registered members of the political party and certify the party list within seven days.

³⁷ Section 5, Campaign Financing Act

The Act stipulates that the party lists shall contain alternates between male and female candidates in the priority in which they are listed; that county party lists for marginalized groups shall prioritize persons with disabilities, the youth, and any other candidate representing a marginalized group. Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation, which will be proportional to the number of seats won by the party in the given legislative entity.

v. Elections (Party Primaries and Party Lists) Regulations, 2017

These Regulations prescribe the principles to guide the conduct of party primaries and the constitution of party lists, and they include providing equal opportunities for all eligible candidates; non-discrimination against any eligible candidate, and being inclusive and participatory. They also obligate political parties, to make the party's nomination rules available to its members, to post them on their website, and to deposit the same at its party branches. It also provides that the content of these rules should include the criteria, procedures, and circumstances under which non-competitive nomination methods, including direct nominations and consensus may be employed, as well as the structure and mandate of the party's Election Board.

Regulation 15 provides the requirements for a person aspiring to be nominated. Among the documents one is to submit when seeking nomination, where the candidate is a person with disability, the candidate shall, in addition to the requirements specified, submit a declaration certifying disability which shall be certified by the National Council for Persons with Disabilities.

Regulation 20 reiterates that party lists ought to list the names of persons who would stand elected if the party were to be entitled to all the nomination seats available and that such lists ought to alternate between male and female candidates. Where a party list fails to conform with the law, Regulation 26 states that the IEBC shall reject such a list and require the political party to resubmit the party list. Failure to resubmit such a list will result in such a party not being considered in the allocation of seats.

vi. County Laws

There has barely been any progress in the creation of a legal framework to support women's political participation at the county level, with no laws being in place to facilitate the same. Indeed, some counties are in the process of drafting a gender policy, while others are yet to commence the legislative process.

With respect to county disability laws, the County Governments of Homabay, Kisii and Machakos have enacted County disability laws. These laws have established a county authority with the aim of protecting the rights and interests of persons with disabilities

3.4 Party Constitutions and Nomination Rules

This study reviewed the Party Constitutions of the UDA, Jubilee Party, ODM, Ford Kenya, Wiper Democratic Party, KANU and ANC.

All the Constitutions contained a commitment to the inclusion of special interest groups. For instance, the UDA Constitution that its membership is open to all Kenyan citizens irrespective of race, gender, colour or creed. The Orange Democratic Movement lists one of its objectives as promoting the full participation of women, youth, minorities, the disabled, and any other disadvantaged groups in the management of public affairs and national development through affirmative action and mainstreaming their participation in Party activities and structures at all levels.

All the Parties have a Women, Youth and Person with Disability League or Congress. The National Organs have representation from these Leagues or Congresses. Special interest groups are also represented at the County level, constituency level as well as the ward level of these parties.

UDA has a National Dispute Resolution Committee whose mandate is to receive, hear and determine disputes resulting from internal party elections or nominations.

Party Nomination Rules

While Political Parties are required to publish their nomination rules on their websites and to forward such rules to the IEBC, this study was only able to obtain the Jubilee Party Nomination Rules, 2016.

The Jubilee Party Nomination Rules 2016 provide for the conduct of party primary nominations as well as that of party lists. Rule 41 prescribes the National Assembly, Senate and County party lists shall be prepared in strict compliance with the Constitution and Elections Act and should reflect the ethnic diversity of Kenya. The procedure for application for nomination is commenced by sending a duly filled prescribed application to the National Elections Board, accompanied by a signed Code of Conduct and payment of nomination fees, within the set.

Internal Disputes Resolution Bodies

The Jubilee Rules establish an Appeals Tribunal which is to hear and timelines determine any disputes arising from the nomination process. Such appeal may be lodged in either English or Kiswahili, without undue formalities, and sent to the Appellate Tribunal and ought to set out key details of the contested nomination and the grounds of such appeal. This application is to be subject to prescribed fees.

The UDA Electoral and Nomination Dispute Resolution Committee Rules and Procedures provide that Committee Members are to be guided by the following principles: natural justice and procedural fairness, declaration of any conflicts of interest and avoidance of bias, integrity, transparency, and confidentiality. They provide that proceedings shall be by way of hearings, which will be conducted at the Party Headquarters or any venue that the Secretariat shall approve by general notice, that an Applicant or Respondent who receives a Hearing Notice shall be expected to be at the venue of the hearing in person accompanied by their advocate(s) if they so desire, and that failure to heed to a Hearing Notice by either party shall not preclude EDRC from proceeding to hear and dispense with a dispute.

In the Wiper Democratic Party, the National Elections and Appeals Board (NEAB) has the mandate to hear and determine disputes arising from Party elections, Party nominations and Party lists for nomination as Member of Parliament or County Assembly. With respect to party lists/ special seats, the rules provide that the National Elections Board (NEB) shall nominate and present a list of members to the IEBC. They also provide that the party list shall not contain a name of a candidate nominated for an election. Further that the Party will take measures to ensure that not more than two-thirds of the members in the published list of election nominees are of the same gender.

The KANU party also has an internal dispute resolution mechanism consisting of the Dispute Resolution Committee and the National Appeals Tribunal. Members are encouraged to handle their grievances before the party's internal dispute resolution mechanism before they can resort to court or other forums.

Similar to other parties, ANC has an internal dispute resolution structure that has to be exhausted before a person can resort to external dispute resolution mechanisms or court.

Conclusion

Despite these laws, IEBC struggles to ensure political parties comply and ensure the nomination of special interest groups, especially PWDs. This can be attributed to the political context of the country, where political parties do not have a culture of respect for the interests of special interest groups and the failures on the part of the IEBC to hold parties accountable to the rule of law. This encourages a continued culture where special interest groups are not prioritized in their positions in the party lists.

To illustrate, the names on the party lists have to appear in the order of priority, such that the name that comes first on the list will be considered first in case the party gets a nomination slot. Unfortunately, there is no order of priority in the nature of marginalization apart from the requirement that the names alternate between men and women on the list. Whereas the legal provisions for the National Assembly and Senate are clear, those that prescribe the composition of County Assembly party lists are less so. In each County Assembly, four slots are available for members of special interest groups. If each party was to place men as the first name on the party list, the likelihood of the SIG seats going to men alone is very high. If all parties place PWDs as third or fourth on the party list, as tends to happen in practice, it is very unlikely that any PWD will make it into the county assembly.³⁸ There is therefore a need to consider the intersectionality of SIGs so as to generate a formula that is inclusive of PWDs when generating party lists.

While all parties have established women, youth and PWD leagues, the effectiveness of these leagues however remains to be seen. While the effectiveness of these leagues in promoting representation would be enhanced by having the leagues influence the development of the party lists the majority of the lists are developed without input from the party leagues and leagues for persons with disabilities.

The youth, women and disability leagues also do not have adequate resources to push their agenda. For instance, leaders of the said leagues rarely have dedicated office space at party headquarters to conduct their activities. Furthermore, budgetary allocation for activities of women, youth and disability leagues is not guaranteed. The disconnect between the perspectives of senior party leaders and those of the youth also affects the funding of youth activities.

³⁸ Jill Cottrell Ghai, 'Katiba Institute' <https://katibainstitute.org/party-list-special-interest-groups/>

4.0 Impacts of Design Implementation of the Laws on Party Nominations on Special Interest Groups



4.1 Extent of Support by Legal Framework

The Constitution of Kenya has clear provisions seeking to enhance the inclusion of youth, women and persons with disability on the political plane, with political parties being a vehicle to achieve this end. There are, however, gaps in the legislative framework with respect to laws mandating and directing the process of inclusion of women in parliament and persons with disability.

While the Elections Act and the Political Parties Act can be interpreted to provide for implementation of Article 100 on the promotion of representation in Parliament of Marginalized groups, the article provides room for development of more specific and detailed legislation. The past proposals for a law to regulate the conduct of party nominations should also be utilized to provide for increased participation of these groups in political party nominations and in politics broadly.

The amendment of the Political Parties Act in 2022 to include indirect nomination processes, introduced the aspect of negotiated democracy,³⁹ wherein persons may be nominated without election by party members. This resulted in a marked increase of independent candidates, who sought election away from the umbrella of a political party. There is also a lack of clarity in political party rules on how exactly this process is to be undertaken. The impact of this section on the inclusion of special interest groups is yet to be seen, but it is feared that it will in the long run be detrimental. This is due to it providing an avenue for departure from competitive nominations where all candidates, especially SIGs, have an equal chance of being chosen. From the early evidence, a number of special interest groups were impacted negatively by the adoption of indirect nomination by political parties, especially where the basis for choice was on considerations of how well-resourced a candidate was.

³⁹ Section 38A, Political Parties Act

4.2 Gaps and Inconsistencies in Legal Framework

One of the major legislative gaps is the failure to legislate the two-thirds gender rule in Kenya. While Article 81 (b) and Section 4(2) of the Political Parties Act provide that political parties ought to comply with the two-thirds gender rule, there is need for a mechanism to guide these bodies on the implementation of this rule. This effort has been unsuccessful in parliament, despite several attempts to pass such a law. This has been attributed to lack of support by the Executive arm, patriarchal notions held by legislators as well as a lack of consequence for the failure to legislate this provision.

A memorandum by the current President to the Speakers of the National Assembly and the Senate however indicates the current administration's commitment to enacting the two-thirds gender rule. With resolute support, this gap could be addressed in the near future.

Another gap is that more than a decade since the Constitution's promulgation, Article 100 of the Constitution on the enactment of legislation promoting the representation of marginalized groups is yet to be legislated and implemented. A bill is currently pending before Parliament on the same. Consequently, participation of PWDs in public office is yet to meet the five percent threshold required by the Constitution. It would be critical for such a law to provide disaggregated targets for the inclusion of PWDs in political positions, the lack of which has been a challenge to promoting the inclusion of PWDs.

It was noted that the legal framework is blind to the intersectionality within Special Interest Groups. While the law recognises the inequalities faced by women, persons with disability, youth and members of marginalised groups, it fails to consider that a person's identity may cut across these categories of SIGs. For instance, while there is a provision to nominate 16 women to the Senate, the law is silent on the inclusion of women who are persons with disability and youth in this category. This aspect of intersectionality could be utilised to ensure that inclusivity goals are attained. Political Parties should be sensitised to nominate persons that cut across the SIG categories and to position them strategically in their party lists.

Article 81 (b) and (c) on principles for electoral systems in Kenya provides for gender balance and fair representation of persons with disabilities respectively. Article 137 however on qualification and disqualification of a person for election as president has blanket provisions that do not consider special interest groups. One of the qualifications as outlined under Article 237(d) mandates a person to be nominated by not fewer than two thousand voters from each of the majority of counties. This translates to at least twenty (24) four counties.

CASE STUDY

In **Lichete v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party) (Constitutional Petition E275 of 2022) [2022] KEHC 13244 (KLR) (Constitutional and Human Rights) (18 July 2022)** the court held that the Petitioner, a PWD, ought not to have been disqualified on account of the insufficient number of signatures collected by him. In overturning the decision of the IEBC Dispute Resolution Committee, the High Court observed that it was wrong for the petitioner to be placed on the same footing with the other presidential aspirants who did not suffer a disability. Doing so indeed amounted to placing the bar higher for the petitioner in comparison with the other contestants.

With respect to party nomination rules, a gap that cuts across the political parties is the failure to stipulate how the process of indirect nomination is to be undertaken. Such rules should first indicate that this process is bound by the Constitutional principles of inclusion and equity. They could indicate a weighted system against which a candidate could be selected such as merit, popularity, etc. This would ensure that the process of selection is transparent and would guard against the current practices of patrimonialism which party leaders continue to exploit.

4.3 Adherence to Existing Provisions

Generally, respondents opined that there is lack of adherence to the legal framework on the inclusion of special interest groups. They identified some of the challenges to the implementation of these laws as corruption, bias and low levels of awareness of the law by special interest group members. It was suggested that a reward mechanism like the ORPP giving bonus incentives to parties that have high numbers of SIGs would motivate political parties to comply with the existing provisions of the law.

i. Party Lists

The party list system has been fully implemented at the county level, with the result being that a large majority of county assemblies are compliant with the two-thirds majority rule. Respondents indicated that several challenges are faced by those elected through party lists such as exclusion from membership of House committees as well as holding leadership positions at the County Assembly. The National Legislature, on its part, constituted by the National Assembly and the Senate are however non-compliant with the two-thirds gender rule, due to the lack of a legislative framework.

The failure to elect PWDs in 21 County Assemblies alludes to a failure in the law to ensure the inclusion of PWDs as well as to the lack of will among political parties to prioritise PWDs in ranking in party lists.

ii. Women Representatives

The efficacy of the inclusion of women who represent whole counties in an assembly of persons representing constituencies has been questioned, particularly with respect to funding where women representatives receive equal funding to MPs, despite representing the much larger county.

The Supreme Court's Advisory opinion in **the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR** observed that to ensure the full realization of the constitutional requirements on gender parity, the state has to take certain steps by means of positive and good faith over a period of time. The period contemplated under the Constitution is 5 years from the date of promulgation of the Constitution.

The position of the Supreme Court was underscored by the High Court in 2015 in the case of **Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR**. It is now over 12 years since the constitution was promulgated yet the two-thirds gender rule is yet to be achieved. These decisions coupled with the 2020 advisory opinion of Chief Justice emeritus David Maraga to the president of the republic to dissolve parliament for failure to adhere to the 2/3 gender constitutional requirement and to the advisory opinion of the Supreme Court, have not ensured constitutional compliance in the 2022 electoral cycle.

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iii. Election Campaign Financing

Despite the Elections Campaign Financing Act being established in 2013, the Act has never been implemented. While IEBC duly made Election Campaign Financing Rules under Section 5 in both 2016 and 2021, such rules were not approved by Parliament and were thus not implemented. In their Observers Report of the 2022 Elections, the National Democratic Institute (NDI) posited that in the absence of campaign finance regulations, an uneven playing field for electoral contestants prevailed which was to the disadvantage of marginalized groups, including women, youth, and persons with disabilities (PWDs), who lack the same access to financial capital and networks of donors as male candidates from the major parties. In their Report on misuse of state resources across seven counties, Transparency International Kenya (TI-Kenya) noted that common offenses related to misuse of state resources in campaigns included the use of state facilities (519 cases) followed by the unveiling of government projects during campaign events (378 cases) and the use of state funds, such as the National Government Constituencies Development Fund (290 cases).⁴⁰

Following the rejection of the 2022 rules by the National Assembly, several civil society organisations instituted a suit against IEBC, the National Assembly and its Speaker in the case of **Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties) [2022] eKLR**. The Petitioners sought a declaration that the IEBC's power to make regulations under section 29(1) is unconstitutional to the extent that it requires mandatory approval of the National Assembly. The court held that Section 29(1) of the ECF Act is unconstitutional as it is contrary to Article 10(2)(c) and 88(4)(i) of the Constitution. It also held that such a law creates unnecessary conflict and confusion in the manner statutory instruments ought to be dealt with under the law. The impugned provision also creates an unjustified special category of statutory instruments. The court further found that election campaign spending limits in Sections 12, 18, and 19 of the ECF Act must undertake public engagement, but such resultant limits are not subject to parliamentary approval. While this decision is crucial, there is a lack of clarity on how regulations in the Election Campaign and Financing Act are to be implemented.

4.4 Perception of SIGS on Support from Legal Framework

Respondents to this study shared the common sentiment that the Constitution is supportive of the inclusion of special interest groups in politics, particularly, with the expansion of elective and nomination positions for women. While some were of the opinion that the laws have also been supportive, others highlighted the failure to legislate the two-thirds gender rule as well as Article 100 on Special Interest Groups, and the need to strengthen provisions on the inclusion of persons with disabilities through indication of the specific number of seats available to this category.

Most stakeholders highlighted the gap of implementation, with one interviewee highlighting the challenges that inhere in political interests, patriarchy, illiteracy, the inadequacy of resources to participate in elections and the hostile nature of the political infrastructure towards persons with disability.

The most recurring problem for special interest groups is the challenge of resource mobilization. In its 2020 report on the state of political inclusion of persons with disabilities in Kenyan politics, the Westminster Foundation for Democracy (WFD) noted that the inability to mobilize resources and the hidden costs of entering politics are among the major bottlenecks for PWDs.⁴¹ Political party nominations are a reward system for party loyalists and those who offer financial support. The youth, women, and PWDs who do not have the financial wherewithal and those who do not have political patrons have very slim chances of participating substantively in the affairs of a political party.

⁴⁰ Transparency International-Kenya's portal can be found at: <http://campaignwatch.tkenya.org>

⁴¹ WFD, The State of Political Inclusion of Persons with Disability (PWDs) within Political Parties in Kenya (2020). Available at <https://www.wfd.org/sites/default/files/2022-01/WFD-KIPP-Baseline-Report-The-State-of-Political-Inclusion-of-Persons-with-Disability-PWDs-within-Political-parties-in-Kenya.pdf>

Indeed, a study by Westminster Foundation for Democracy (WFD) and Netherlands Institute for Multiparty Democracy (NIMD) found that the more a candidate parliament spends, the higher their chance of winning.⁴² The report also found that the cost of contesting a Senate seat costs about KShs. 35.5 million (US\$ 350,000); a Women Representative seat cost, KShs. 22.8 million (US\$ 228,000); members of parliament's average spend was KShs. 18.2 million (US\$ 182,000), while the Member of County Assembly seat was the least expensive at KShs. 3.1 million (US\$ 31,000). These costs tend to be raised from a candidate's personal savings as well as with support from family and friends.

4.5 Levels of Awareness

It is apparent that members of Special interest Groups are aware of their political rights as well as of the laws in place on elections and nomination. Respondents to this study who were members of special interest groups showed that they were not only familiar with the content of the law, but also with the nuances of its applications in their respective political parties. However, there remain gaps in knowledge with respect to political party nomination processes. Most respondents opined that the party nomination rules are not widely known amongst the party membership and aspirants thus disadvantaging the marginalized groups from adhering to them. There is also a need for public sensitization on SIGs.

4.6 Role and Performance of Key Institutions

i. Office of the Registrar of Political Parties (ORPP)

It was appreciated that the Office of the Registrar of Political Parties has to a great extent supported the participation of special interest groups in political parties through strict implementation of the Political Parties Act, ensuring political parties' governance structures are inclusive and that the equitable fund for political parties is shared by proportional representation. Certain Respondents however felt that the ORPP should ensure that political parties do not charge high fees that discourage special interest groups from vying, that it should champion the transparency of the nomination process by coming up with stringent rules and regulations for political parties and ensure that political parties follow the law to the letter.

There was also a feeling that the Office of the Registrar of Political parties need to be given more powers in law to regulate the process of nominations by political parties so that they can ensure that parties fully implement the requirements for inclusivity in politics during their party nomination processes. This would however overlap with the role of the IEBC, which is to ensure that each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to nomination or party list seats.

The office of the Registrar has also been supportive by developing guidelines on the content of party nomination rules. These guidelines, developed in 2013 provide support to political parties on the contents they need to have when developing their party nomination rules. One of the areas covered by these guidelines is promotion of the participation of and support to women, youth and persons with disability who are aspiring candidates for various elective posts. In addition, the Office of the Registrar of Political parties was hailed for its support in organising capacity building targeting women, youth and persons with disabilities which aimed at creating awareness amongst them on party nominations.

⁴² Karuti Kanyinga & Tom Mboya 'The cost of politics in Kenya: Implications for political participation and development' (NIMD & WFD, 2021). Available at: https://nimd.org/wp-content/uploads/2021/07/WFD_NIMD_2021_The-cost-of-politics-in-Kenya-1.pdf

ii. Independent Electoral and Boundaries Commission

In the 2022 election cycle, the IEBC upheld the Constitutional standards of inclusion when it rejected 79 party lists which did not meet the two-thirds gender principle in their nomination lists. The Commission gave these political parties the opportunity to revise these lists and only accepted their submission when they complied with the law. IEBC's insistence on adherence to the inclusivity requirements and past court judgements on the same was, however, overturned by the Courts that argued in favour of political parties citing difficulties in complying with the provisions at the last minute.

Respondents were of the view that the IEBC is transparent and credible, and it has supported the youth and PWDs seeking elective positions through civic education, reducing nomination fees and ensuring that political parties include special interest groups. It was also appreciated that IEBC waived the nomination fees for special interest groups vying for any political seat by half, thus, making it easier for many of them to come out and vie even as independent candidates. Some however opined that IEBC officials are compromised by politicians thus, leading to voter bribery and rigging as evidenced by the number of cases taken to courts.

iii. Party Governing Bodies

Party governing bodies are contemplated under the second schedule of the Political Parties Act, and may include the national assembly, the senate and county assembly caucuses; the executive board which entails the chairperson, the vice chair, the secretary general, the treasurer, and other board members. There may also be a disciplinary board that deals with internal dispute resolution. The parties may have committees that deal with different functions like fundraising, recruitment of members, and investment of party resources among others.

Party Governing Bodies play a key role in policy formation that can improve the inclusion of special interest groups. Respondents indicate that this was done through parties subsidizing the fees for persons seeking to be elected as representatives of special interest groups. In some instances, the fee was fully exempted.

The following rates were applied by parties as nomination fees in the run-up to the August 2022 elections.

Table 5: United Democratic Alliance (UDA) nomination fees


 UDA	PRESIDENT	GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	1,000,000	500,000	250,000	250,000	-	50,000
F	1,000,000	250,000	125,000	125,000	250,000	25,000
Y	500,000	125,000	125,000	125,000	125,000	25,000
PWD	NIL	NIL	NIL	NIL	NIL	NIL

Table 6: Jubilee Party nomination fees

Application fees for nomination to party lists – 5,000/-


	PRESIDENT	GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	-	500,000	250,000	200,000	-	50,000
F	-	250,000	125,000	100,000	200,000	25,000
Y	-	125,000	50,000	50,000	100,000	15,000
PWD	NIL	NIL	NIL	NIL	NIL	NIL

Table 7: Orange Democratic Movement (ODM) nomination fees


	PRESIDENT	GOVERNOR	DEPUTY GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	-	500,000	250,000	250,000	250,000	-	50,000
F	-	250,000	125,000	125,000	125,000	125,000	25,000
Y	-	250,000	125,000	125,000	125,000	125,000	25,000
PWD	-	250,000	125,000	125,000	125,000	125,000	25,000

Table 8: Wiper Democratic Movement nomination fees


	PRESIDENT	GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	1,000,000	500,000	200,000	200,000	-	25,000
F	-	250,000	150,000	150,000	200,000	25,000
Y	-	-	-	-	100,000	25,000
PWD	-	-	-	-	-	-

Table 9: KANU nomination fees


	PRESIDENT	GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	-	502,000	252,000	102,000	-	22,000
F	-	252,000	127,000	52,000	52,000	12,000
Y	-	252,000	127,000	52,000	52,000	12,000
PWD	-	252,000	127,000	52,000	52,000	12,000

Table 10: FORD Kenya nomination fees



	PRESIDENT	GOVERNOR	DEPUTY GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	1,000,000	300,000	200,000	100,000	100,000	-	20,000
F	500,000	150,000	100,000	50,000	50,000	100,000	10,000
Y	500,000	150,000	100,000	50,000	50,000	50,000	10,000
PWD	500,000	150,000	100,000	50,000	50,000	50,000	10,000

Table 11: Amani National Congress nomination fees

	PRESIDENT	GOVERNOR	SENATOR	MEMBER OF NATIONAL ASSEMBLY	WOMEN'S REP	MEMBER OF COUNTY ASSEMBLY
M	-	300,000	200,000	150,000	-	25,000
F	-	150,000	100,000	75,000	150,000	10,000
Y	-	150,000	100,000	75,000	150,000	10,000
PWD	-	25,000/-	25,000/-	25,000/-	25,000/-	10,000/-

Some respondents however felt that political parties only support inclusion in theory, with special interest groups facing several challenges including financial constraints, non-practicality of the laws and the prevalent patriarchy in the Kenyan political scene, especially with negotiated democracy which works to disadvantage women, youth and PWDs in the political process. Therefore, the introduction of indirect nomination by parties in the 2022 election cycle negatively impacted the political participation of special interest groups in Kenya. Other challenges included classist biases in the nomination process, corruption, bribery and violence during party primaries and rallies, which causes persons with disabilities to avoid their attendance.

Respondents appreciated the impact of the various leagues, established by political parties including for women, youth and PWDs, who face unique challenges. They urged that leagues act as support systems and they also mobilize more women, youth and PWDs to participate in electoral processes. Given the avenue that these leagues provide for SIGs, there is a need to train the leaders of the leagues on how to lobby and make the best of their strengths. Furthermore, there should be proper mentorship structures within political parties to mentor the younger generation and SIGs in their political journey. Respondents also opined that SIGs who have either been elected or nominated into office ought to have strategic agenda and goals specific to their needs that they should push in order to increase the number of representation of SIGs in subsequent election cycles.

4.7 Implications of Independent Candidate Provisions

Several aspirants who were denied nomination because of board room deals opted to run as independent candidates, which arguably weakened the chances of success of their party. As earlier noted, there was a 64% increase of independent candidates in the 2022 elections, pointing to dissatisfaction with the utility of political parties in seeking electoral appointment.

5.0 Political Parties Dispute Resolution Processes & Their Impact on Inclusion

5.1 Rationale

Political party primaries for selecting candidates are rife with violence, intimidation, bribery, harassment especially against disenfranchised minorities like women, the youth and persons with disabilities. Being alive to this fact, the electoral system in Kenya has a well set out mechanism of dispute resolution starting within the political party and moving out to the, IEBC, PPDT and the Court.

5.2 Internal Dispute Resolution (IDR) Processes

Section 38B (1)(a) of the Political Parties Act requires every political party to establish mechanisms for the resolution of disputes arising out of the nominations. AS noted above, all political parties in this study have established internal dispute resolution processes. Under section 38I of the Political Parties Act, the party must resolve any dispute arising out of nomination within 30 days of the date of nomination. For those not satisfied with IDR, there is an avenue for appeal before the IEBC and/or IECB. However, not all disputants follow the appellate process. Some defect from their parties and decide to go it alone as independent candidates or join other parties. Others, for fear of being maligned by their parties or for strategic reasons of maintaining good relations so as to land government appointments, abandon the cases altogether.

While some Respondents appreciated that the IDR processes were fairly conducted, others opined that the dispute mechanisms are not favourable because the same people that handle and influence nominations are the same ones who handle the disputes; or are the same people who choose officials that handle disputes.

Despite the code of conduct signed by each political party, this study did not find a record of any disciplinary process carried out by a political party for violence or breach of the code of conduct during elections or pre-elections. The lack of an electoral code of conduct in the 2022 elections may also have contributed to there being no disciplinary processes since there was no reference guide. Party Disciplinary, however seems to be utilised to further political goals rather than to ensure inclusion of all persons. The law has consequently incentivised political parties to fulfil requirements of having constitutions, procedures and systems cognisant of the rights of special interest groups, but this is yet to result in a culture change and in build buy-in among heads of political parties.

5.3 Independent and Electoral Boundaries Commission (IEBC)

IEBC is established under Article 88 of the Constitution with the mandate to settle all electoral disputes except election petitions and disputes subsequent to the declaration of election results. Under section 74 of the Elections Act, IEBC is required to settle such pre-election disputes within 10 days of lodging of the dispute.

Some respondents felt that IEBC did not promote inclusivity because its disregarded complaints which were even highlighted in the media, and it accepted party lists that did not include marginalized groups. It was all the same appreciated that IEBC conducted civic education that encouraged the participation of the marginalized groups and that its fees were also fairly low as compared to those of political parties.

5.4 Political Parties Disputes Tribunal

The Political Parties Disputes Tribunal (PPDT) is established under section 39 of the Political Parties Act and its jurisdiction is to deal with disputes arising from party nominations. The party taking the dispute before the PPDT has the evidentiary burden to prove that they have attempted to subject the dispute to the party IDR mechanisms. The PPDT is required to adjudicate on and conclude matters presented before it within a period of 3 months from the date of filing.

In the 2013 and 2017 election cycles, the PPDT was only based in Nairobi. In 2013, the PPDT adjudicated over 33 cases which in 2017 shot up to over 500 cases. In the lead up to the 2022 election cycle, the Chief Justice decentralized the PPDT and established regional offices in Nairobi, Meru, Mombasa, Kisumu, Kakamega, Nyeri and Eldoret. This was not only in anticipation of a high case load but also to improve access to justice for all litigants. In 2022, the PPDT heard and determined 314 pre-election disputes within the stipulated timelines.

The Tribunal's judgments, orders and rulings are enforceable in the same manner as those of the subordinate courts; and dissatisfied disputants have a right of appeal before the High Court. The Tribunal's decisions from the 2017 cycle have been published and can be accessed by the public on the Kenya Law platform.⁴³ At the time this report was drafted, decisions from the 2022 election cycle were yet to be published.

Most Respondents in this study were of the view that PPDT is very effective in addressing the disputes from women or any other special interest group through its speedy process that ensures the issues relating to nominations and inclusion are sufficiently addressed. Some were of the view that the Tribunal was controlled by politicians.

5.5 Courts

The jurisdiction of courts in relation to pre-election disputes is mainly appellate. One Respondent indicated that courts take time, are expensive and are therefore not effective in resolving political party nomination disputes. Some also felt that the courts take too much time with the cases thus giving politicians an opportunity to interfere with the outcome.

The courts have reiterated the central role played by political parties in the preparation of party lists. In its decision in **Linet Kemunto Nyakeriga and Another v Ben Njoroge and 2 Others, Court of Appeal (2014) eKLR**, the Court of Appeal castigated the actions of the IEBC following the 2013 polls, to ensure that the two reserved seats for senators with disabilities would be allotted to candidates with different types of disabilities. The court was of the view that it is the responsibility of parties to choose their preferred candidate and rank them in order of priority of preference. The seats won by each party are therefore to be filled by candidates in the order they appear on the parties' respective list.

In another case **Harold Kimuge Kipchumba v Independent Electoral & Boundaries Commission & another [2017] eKLR** the High Court lauded the acts of the IEBC, where it used its discretion to choose the first candidate on the Jubilee Party list who was male and the second listed candidate on the ODM Party list who was female to avoid a situation where the Senate's slate of legislators with disabilities would be exclusively male.

The drop in the number of cases both at PPDT and at Courts can be attributed to better mechanisms employed by the parties in the primaries and by IEBC in the general elections. However, some respondents opined that they are reluctant to resort PPDT or court battles due to vilification by the party once they do so. Others opined that the cost implication associated with legal fees was a restraining factor as well. In that regard, they suggested that a structure be set up for pro-bono legal services to be provided for SIGs who wish to challenge decisions following nominations.

⁴³ 2017 Political Parties Disputes Tribunal. Available at: <http://kenyalaw.org/kl/index.php?id=7522>

6.0 Conclusion & Recommendations



6.1 Conclusions

The Study sought to interrogate the extent to which the legal framework recognises and provides for inclusion of special interest groups in elective politics. It specifically focussed on assessing the current provisions on party nominations in the run up to the 2022 elections and their impact on the participation and success of women, youth and PWDs candidates. The conclusion of this study is that the Constitution and legal framework have provisions that recognise and provide for inclusivity in politics. However, there exists gaps and contradictions in their content and failure in full adherence and implementation which denies special interest groups from enjoying their political rights on an equal footing with other members of the Kenyan society.

On party nominations, it is evident that despite strides made in regulating party nominations in law, including providing for the oversight authority of the IEBC and the ORPP, prescriptions on how political parties should conduct their nominations, the end result has not been a satisfactory to special interest groups. The numbers, while increased, are still not commensurate with the percentage of these groups in society or in accord with the constitutional promise.

Amendments made to the Political Parties Act (2011) drew a distinction between parties and coalitions and restrictions on changing parties. Further the amendments demanded that political parties publish and file their nomination processes with the ORPP. The amendments also encouraged the formation of coalition and also touched on party primaries including a clause on indirect party nominations.

The study found out that political parties did not have a structured way of conducting indirect nominations, raising questions on meaningful participation. The lower political positions showed slower momentum, whereas the national nomination process for Presidential candidates showed increased activity. This is because the majority of political parties adopted an indirect method for nominating candidates. Only three political parties Orange Democratic Movement (ODM), United Democratic Alliance (UDA) and Amani National Congress (ANC) invested in a nationwide nomination process, with the majority of other political parties concentrating on their perceived "strongholds." In 2022, political parties considered their strongest candidates under their respective Alliances rather than individually during the nominations process. Coalitions and alliances also played a significant role.

This study noted that while majority of the political parties adopted a hybrid system of nomination, where indirect nomination was conducted, there was a bias towards aspirants with financial muscle. Besides this, aspirants spent campaign time and resources only to be told to step down for those sowing seeds of discord, leading to apathy in the general elections and also running against the spirit of democratic ideals as espoused in the country's constitution.

Political and electoral rights of special interest groups are solidly supported by the electoral legal framework, which is based on Kenya's 2010 Constitution and related election legislation. However, the gender quota and campaign finance regulations, which have the potential to increase electoral inclusion and transparency, have not yet been operationalized. Successive parliaments rejected subsidiary legislation the IEBC had proposed to enforce the Election Campaign Financing Act of 2013, the law has never been implemented. Most recently, in October 2021, the IEBC's regulations were de-gazetted after the National Assembly rejected them. After that, the High Court decided that the IEBC can make regulations without the National Assembly's approval, but the decision came too close to the elections to allow them to be made in time for their application in the 2022 electoral cycle.

While the Constitution of Kenya has provided for inclusion of women, youth and persons with disability in the political sphere, parliament failed to legislate the two thirds gender rule and an act to include special interest groups. As a result, the Constitutional thresholds for the gender quota in the National Assembly, and five percent representation of persons with disabilities in elective and appointive bodies is yet to be achieved. During the elections and for the first time, the IEBC required disability status certification from the National Council for Persons with Disabilities prior to nomination for these elections, further the study noted that political parties have not been able to ensure that PWDs are identified, recruited, and supported in order to effectively participate in internal party processes.

6.2 Recommendations

First is the full implementation of Articles 81 and 100 of the Constitution with the former providing guiding principles to the electoral process and the latter, mandating Parliament to enact legislation to promote the representation in Parliament of marginalised groups is necessary and urgent. Parliament should prioritise the debate and passage of the Representation of Special Interest Groups Laws (Amendment) Bill and the Political Primaries Bill. The Persons with Disabilities (Amendment) Bill should also be prioritised for passage as it platforms the political rights of PWDs.

The question of the implementation of the two-thirds gender principle that has remained a vexing one requires final resolution. It is important that mechanism be put in place to actualise the constitutional principle that not more than two-thirds of representative to every elective body should not be more than one gender. The fact that previous legislative and judicial interventions have not led to the actualisation of this principle is demonstration that other efforts are necessary. This study recommends that the country explores a specific constitutional amendment to ensure that the principle is realised by the 2027 elections. President William Ruto has submitted a Memorandum to the Speakers of the National Assembly and to the Senate with proposals on this issue.

Similarly, in the run up to the 2022 elections, the building Bridges Initiative contained proposals to also actualise the same. The upshot of both these initiatives is to demonstrate unanimity amongst the main political party groups in the country on the need for amending to the Constitution to realise gender equity in elective politics. It is recommended that a bipartisan modality be explored to ensure that these proposals are passed into law.

With respect to the operationalization of the Election Campaign Financing Act, there is a need to amend Section 29(1) of the Act, which was declared unconstitutional. There is also a need to implement the Election Campaign Financing (Amendment) Bill 2021 which has provided structure in the process for political parties and candidates to report their campaign financing and to promote transparency and accountability in campaign financing.

On the process of party nominations, it is recommended that Section 38G of the Political Parties Act on the conduct of indirect nominations be amended to prescribe the principles of inclusion and equity shall guide such process, and that parties shall prioritise the interests of SIGs in indirect nomination.

On the finding that Party constitutions and rules have provisions on inclusion which are not implemented, this study recommends that there is thus a need to strengthen checks and balances for inclusivity. The office of the Registrar of Political Parties should also be strengthened so that it can effectively monitor the activities of political parties regarding inclusivity. Secondly the ORPP requires extra resources geared towards monitoring compliance with inclusivity in party nominations and to conduct capacity building and awareness programs to enhance the participation and election of special interest groups.

To arrest any biases that may be held by party leaders who engage in the resolution of disputes, there is a need for an independent body to conduct nominations for political parties so that there can be some level of transparency. Previously, the law provided that IEBC could conduct such nominations at the request of a political party. However, the danger with such a proposal is the impact of such a decision on the impartiality and preparations for the conduct of the General elections on the IEBC. It is important though that the process of party nominations be critically regulated, including strengthening the oversight role by an independent institution. This requires an amendment to Section 38F of the Political Parties Act vesting institutional responsibility for the conduct of party nominations. This approach would enhance the transparency and objectivity of the party nominations and encourage more special interest groups to participate in and be elected to political positions.

On the part of political parties, political parties also need to strengthen their leagues for the respective special interest groups. This should be done through holding in-house trainings to empower more women, youth and PWDs to seek elective positions. These trainings could be held within the five years leading to elections so that by the time elections come, they are sufficiently prepared. Training in nomination processes was also suggested for special interest group members. It was also highlighted that parties ought to conduct continuous and inclusive membership drives.

The possession and utilization of excessive campaign financing by some candidates enables bribery and other corrupt practices leading to tensions and/or violence. This not only undermines democracy but also creates insurmountable impediments for special interest groups. Consequently, the Attorney General should liaise with Office of the Registrar of Political Parties (ORPP) and IEBC to put the suspended legislation of electoral campaign financing into force. To this end, they should develop effective means of monitoring candidates' financing levels. Political parties further need to deal with the issues of corruption, bribery and negotiated democracy to provide an equal platform for everyone to seek elective positions. They also bear the responsibility to ensure that nomination processes are transparent.

Political parties, whose membership is part of parliament should support legislative review and amendments on inclusion and thereafter, implement the laws on inclusivity. The amendments of the Elections Act at section 34 requires to be amended to provide more elaborate guidelines and stipulations on the process and of development of political party lists to ensure more equitable representation of special interest groups including PWDs and Youth. This would also reduce the number of contestations and reduce the discretion that IEBC enjoys in determining the allocations to political parties after an election.

6.2.1 Programmatic Interventions.

It is imperative to support relevant bodies including Civil Society, National Gender and Equality Commission, Ethics and Anti-corruption Commission and relevant Parliamentary Committees monitor extent of implementation of enacted electoral legislation including but not limited to the Campaign Financing Act, 2013, the Elections Act, 2011. This will provide up to date information on the progress and challenges with the implementation process to enable corrective action to spur greater implementation and provide a basis for legislative amendments where gaps or contradictions are identified.

Continuous capacity strengthening of technical staff of political and electoral management bodies on an array of issues including but not limited to electoral public expenditure management, conflict mitigation and inclusion. The role of the ORPP, IEBC and state institutions responsible for ensuring compliance with the legal framework that support inclusion is critical, Interventions geared towards capacity building and strengthening enforcement capacity including prosecution is necessary to improve the levels of compliance with the existing legal provisions and requirements.

Similarly, programmes that support political parties to enhance their engagement with women, youth and PWDs within their party process, strengthening of the special interest group caucuses, reviewing party nomination rules and consulting and engaging the electorate on inclusivity in politics would also support improved participation and election of special interest groups.

Identified legal amendments, including constitutional reform requires the design of a multi-stakeholder forum to push. This should include the Attorney General's Office, the ORPP, the IEBC, Parliament, Political Parties and Civil society with a series of activities including technical research and drafting; stakeholder forums, lobbying and advocacy and consensus building initiatives to help develop contextual and acceptable legislative proposals on improved inclusive politics and nominations.

Extensive civic education by electoral stakeholders on electoral processes whilst mainstreaming the promotion of Special Interest Groups participation in elective politics. The design of such a civic and voter education programme should adopt the use of new and social media in addition to the traditional means. A sustained media campaign over a period of time would be ideal.

It is paramount that the elected members of special interest groups and their caucuses be targeted in a specific programmatic intervention that focusses on building their capacity, providing them with a platform to influence their political parties, mentor and aspire other aspiring politicians and create awareness and influence the public on the importance of elective more special interest groups into politics in addition to developing and pushing for legislative and policy reforms to ensure increased election of more special inters group politicians.

6.3 Summary Matrix of Key Required Actions

THEME	FINDING	RECOMMENDATION	INSTITUTION RESPONSIBLE
LEGAL & REGULATORY FRAMEWORK	Lack of laws to operationalize the two-thirds gender rule	In accordance with constitutional provisions, swiftly pass legislation to implement the two-thirds gender rule in both chambers.	PARLIAMENT
		Lobby and advocate for legislation on implementation of two thirds gender rule	CSOs
	Election Campaign Financing Act of 2013 remained un-operationalized and during the 2022 elections.	Implement the Campaign Finance Act of 2013 by imposing limits on contributions and expenditures by donors and imposing disclosure and reporting requirements on candidates and parties.	IEBC
INTERNAL DEMOCRACY	Lack of clarity in political party rules on how exactly negotiated democracy undertaken, consequently disenfranchising and Women, youth and PWDs.	In order to promote good governance and transparent and accountable internal party processes, including the election of party officials and the nomination of candidates for elective positions, political parties should review their internal constitutions and rules, particularly the elections and nomination rules. This includes using the register of genuine members for crucial decision-making activities like party nominations.	Political Parties ORPP
ENFORCEMENT & COMPLIANCE	Poor compliance by political parties with the provisions of the law on elections and party nominations disenfranchising special interest groups and weak enforcement by electoral management body, state agencies and the Judiciary	Strengthen capacity of relevant state agencies, KIEBC and Judiciary to enforce political party compliance with legal provisions on inclusivity in party nominations and elective politics	IEBC ORPP ODPP Ethics and Anti-corruption Commission Judiciary
DISPUTE RESOLUTION	Decentralization of PPDT + Digitized case management + remote hearings–improved efficiency and effectiveness.	Increase the regions in which PPDT sit as well as timing for hearing cases	Judiciary

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Annex 2: Key Informants

NAME OF INTERVIEWEE	DESIGNATION	POLITICAL PARTY
Sara Kosgei	Maendeleo ya Wanawake Chairperson Nandi County	UDA
Collins Kipkoech	Representative of Persons with Disabilities Nandi County	UDA
Sikuku Jerusa Aleu	Elected MCA Milima ward, Bungoma	Ford-Kenya
Daniel Kiptoo	Deputy Party Director	UDA
Nicodemus Bore	Executive Director	UDA
Sifuma Sheila	Nominated MCA Bungoma County	UDA
Linda Kharakha Wekesa	Deputy Secretary Constitutional and Legal Affairs, and Nominated MCA Bungoma County	Ford-Kenya
Amran Hany Wardere	MP candidate, Lafey Constituency, Mandera County	UDA
Afandi Bagada	Woman Representative Candidate, Vihiga County	UDP
Dr. Priscila Iteyo	Chairperson Disciplinary Committee and women league	DAP - Kenya
Ronald Jumbe	Chairperson National Elections Board	DAP - Kenya
	Member of Secretariat	DAP - Kenya
Mr. Isaac Manyonge	Performance Contracting Coordinator	National Council of Persons with Disabilities (NCPWD)
Khadija Mustafa	National director of elections	FORD - Kenya
Hon. Mwaura Chege	Member of County Assembly, Ngara, Nairobi	UDA

