

# Ending the Oppression Olympics: Promoting the concomitant political participation of marginalised groups in Kenya

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## Abstract

*The 2010 Constitution of Kenya is laudable for its commitment to redressing the exclusion from political and public life experienced by marginalised groups. Articles 21 and 27 require that the state and public officials take legal and administrative measures to ensure marginalised groups' participation in governance and other spheres of life. Moreover, Article 100 mandates the passing of a single legislation to provide for the representation in Parliament of women, youths, persons with disabilities, ethnic minorities and marginalised communities. These provisions evince an intention that their inclusion be redressed simultaneously.*

*However, the equality debate appears to have become synonymous with gender equality or the implementation of the 'two-thirds gender rule' as it is popularly known. This rule requires that not more than two-thirds of any elective or appointive position be occupied by one gender. Women's underrepresentation has dominated litigation on inclusion, academic writing and proposals for electoral reforms.*

*This unitary approach to inclusion, which privileges one category of difference, makes other marginalised groups doubly invisible. Moreover, statistics demonstrate that despite privileging gender over other factors of exclusion, women's participation remains marginal. Further, it causes the groups at the bottom to compete rather than cooperate, while still falling short of addressing the informal patterns of prejudice and discrimination that keep the majority of the marginalised on the fringes of public life.*

*This research proposes the intersectionality approach to policy design to simultaneously promote political participation of the various groups. Intersectionality recognises the role of the various categories of difference as equally important yet conceptually different, examines the relationship between the various categories, and emphasises the interaction between individual and institutional factors in achieving equality. Intersectionality, therefore, provides the most effective approach to diagnosing the factors fuelling exclusion and ultimately providing an effective prescription.*

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## Keywords

*Minorities, Oppression, Oppression, Sport, Equality, Marginalised Communities*

...inequality is the cause and consequence of the failure of the political system, and it contributes to the instability of our economic system, which in turn contributes to increased inequality—a vicious downward spiral...from which we can emerge only through concerted policies...<sup>1</sup>

## 1 Introduction

Kenya has always been hailed as the bastion of peace and stability relative to other countries in Eastern Africa.<sup>2</sup> It has not, unlike other countries in the region, undergone *coups d'état* or uprisings. Nevertheless, during the initial review, the African Peer Review Mechanism (APRM) Country Review Mission noted with concern that the country had markers that had resulted in civil strife in other countries. It listed 'ethnic divisions, polarised political issues, political manipulation, rampant violence, socio-economic disparities, deepening levels of poverty and endemic corruption' as colonial vestiges to be concerned about.<sup>3</sup> Unfortunately, ethnic politics and inequalities between ethnic groups have continued to characterise political participation. Lower levels of access to education and other social services have left groups at the mercy of the elite who utilise the poverty of the marginalised as a bargaining chip to secure support for themselves and the political parties they represent.<sup>4</sup>

Historical marginalisation is further compounded by globalisation. Joseph Stiglitz asserts that the interconnectedness that has come with globalisation can be used either to 'effectively promote prosperity' or to 'spread greed and misery'.<sup>5</sup> He decries the fact that capitalism has ensnared people to the extent that the sense

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<sup>1</sup> Joseph Stiglitz, *The price of inequality*, Penguin, London, 2012, xi.

<sup>2</sup> African Peer Review Mechanism (APRM), *Country Review Report of the Republic of Kenya*, 2014, 14, available at <[http://us-cdn.creamermedia.co.za/assets/articles/attachments/03703\\_aprmkenya\\_report.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/03703_aprmkenya_report.pdf)> on 21 December 2020. The APRM is a self-monitoring mechanism open to all Member States of the African Union. It seeks to enhance the quality of governance in Africa by ensuring that the policies and practices of Member States adhere to the agreed political, economic and corporate values of the region, thereby promoting political stability, economic growth, sustainable development and regional integration.

<sup>3</sup> APRM, *Country Review Report of the Republic of Kenya*, 14.

<sup>4</sup> APRM, *Country Review Report of the Republic of Kenya*, 14.

<sup>5</sup> Joseph Stiglitz, *The price of inequality*, xiii.

of ‘fair play’ that existed in the past, which inhibited unfair lending practices or exploitation of the poor and least educated, has disappeared, and the world is now witnessing moral deprivation—a lack of a basic sense of values.<sup>6</sup> Rather than delivering on the promise of equality of opportunity, capitalism has birthed ‘inequality, pollution, unemployment and most important of all, the degradation of values to the point where everything is acceptable and no one is accountable.’<sup>7</sup> This is an apt description of the Kenyan society today.

While ethnic inequality has been carried on by successive post-colonial governments, the greed that fuelled the global economic crisis is exemplified in Kenya by massive corruption by the elite, and youth unemployment and high levels of disaffection with government, often expressed through protests and riots. Riots are the citizens’ response to a system that only allows them ‘shallow participation,’ that is, it allows them to vote but not to influence economic policy.<sup>8</sup> Democracies that do not facilitate meaningful citizen participation not only push citizens towards ‘street democracy,’ that is, protests,<sup>9</sup> but they also aggravate ethnic cleavages and tensions, breed social and political division and have the potential to flame social and political instability and preclude national cohesion.<sup>10</sup> Since 2016, Kenya has been rocked by a series of protests against corruption,<sup>11</sup> the electoral management body—the Independent Electoral and Boundaries Commission (IEBC)—<sup>12</sup> the management of the educational sector,<sup>13</sup> as well as nationwide strikes by doctors, nurses, university staff. This was amidst the hue and cry for implementation of constitutional provisions on representation in Parliament of marginalised groups, which ended in defeat.<sup>14</sup>

<sup>6</sup> Joseph Stiglitz, *The price of inequality*, xiii.

<sup>7</sup> Joseph Stiglitz, *The price of inequality*, xviii.

<sup>8</sup> Alina Menocal, Verena Fritz & Lise Rakner, ‘Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries’ 15(1) *South African Journal of International Affairs*, 2008, 29 and 34.

<sup>9</sup> Andrew Ellis, ‘Tuning in to democracy: Challenges of young people’s participation’ Keynote speech at International Symposium on Engaging Youth in Modern Democracy, University of Sydney, 12 October 2006, 8.

<sup>10</sup> Emmanuel Gyimah-Boadi, ‘Ghana’s Fourth Republic: Championing the African democratic renaissance?’ 8(4) *Briefing Paper, Center for Democratic Development-Ghana*, 2008, 5.

<sup>11</sup> See Jill Craig, Lenny Runaga & Amos Wangwa, ‘Nairobi anti-corruption protest turns violent’ *Voice of America*, 3 November 2016, <<https://www.voanews.com/africa/nairobi-anti-corruption-protest-turns-violent>> on 21 December 2020.

<sup>12</sup> Standard reporter, ‘Mammoth crowd heading to IEBC offices in protest led by CORD’ *The Standard*, 16 May 2016, <<https://www.standardmedia.co.ke/article/2000202054/photos-mammoth-crowd-heading-to-iebc-offices-in-protest-led-by-cord>> on 21 December 2020.

<sup>13</sup> Elizabeth Cooper, ‘Students, arson, and protest politics in Kenya: School fires as political action’ 113(453) *African Affairs*, 2014, 583.

<sup>14</sup> The various attempts to pass this legislation are discussed below.

What is apparent from the foregoing is that there is a simultaneous failure of the economic and political systems. Not only have the levels of corruption skyrocketed, but the administration of the law has precluded accountability of those involved and failed to protect ordinary Kenyans against the elite. The brunt of the economic decline is borne by marginalised groups. Political participation is, therefore, not only crucial to securing their interests, but enables them to shape their societies politically and become recognised and valued members of their communities.<sup>15</sup>

Since citizenship demands ‘an equal distribution of entitlements, equal recognition of standing and protection of rights and interests of all citizens,’<sup>16</sup> minimal participation turns marginalised groups into absent citizens and precludes them from articulating interests peculiar to that group, such as eradication of poverty.<sup>17</sup> Their exclusion also precludes their contribution to development, and has been cited as one of the reasons African countries fail to meet their development goals.<sup>18</sup> It is asserted that the skills and productivity of a country’s workforce are the most important determinants of its competitiveness, with gender equality being directly correlated to competitiveness.<sup>19</sup>

This paper analyses the history of marginalisation in Kenya to contextualise the need for entrenching remedial measures in the 2010 Constitution. It then appraises the extent to which the 2010 Constitution redresses this trajectory of exclusion. It proceeds to situate the current challenges to inclusion of marginalised groups by drawing parallels from the Oppression Olympics hypothesis as postulated by Ange-Marie Hancock to understand the limited progress being realised despite the progressive provisions of the 2010 Constitution. It also reviews the wider context within which the country is operating to understand why lack of political will, disjointed inclusion efforts and the high profile of the

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<sup>15</sup> Judith Shklar, ‘American citizenship: The quest for inclusion’ The Tanner Lectures on Human Values, University of Utah, 1 May to 2 May, 1989, 387-388.

<sup>16</sup> Lucianna Thuo, ‘Realising the inclusion of youth with disabilities in political and public life in Kenya’ in Charles Ngweni, Ilze Grobbelaar -du Plessis, Helene Combrinck and Serges Kamga (eds) *Africa Disability Rights Yearbook*, volume 4, 2016, 26.

<sup>17</sup> The memorandum of objects of the 2000 Affirmative Action Bill tabled by Beth Mugo urged that increasing women’s participation in Parliament would contribute to ‘redefining political priorities, placing new items on the political agenda that reflect and address women’s gender specific concerns.’ See Walter Ochieng, ‘Chimera of constitutionally-entrenched gender quotas: The contested judicial enforcement of quotas in Kenya’ 2 *Journal of Law and Ethics*, 2016, 61.

<sup>18</sup> See Elizabeth Merab, ‘Africa losing billions due to gender inequality, UN agency says’ Nation, 7 September 2016, <<https://nation.africa/kenya/news/africa-losing-billions-due-to-gender-inequality-un-agency-says-1236282>> on 21 December 2020.

<sup>19</sup> World Economic Forum, *Global Gender Gap Report*, 2013, 31.

gender movement have coalesced to keep marginalised groups in the periphery of political and public life. It concludes by proposing ways in which intersectionality can be used to promote the concomitant participation of all marginalised groups.

## 2 A history of marginalisation

The African Peer Review Mechanism Country Review Mission (APRM CRM) observed as follows in relation to marginalisation in Kenya:<sup>20</sup>

There exists in Kenya an asymmetric exclusion of different social groups, i.e. various groups have been excluded for different reasons and face different structural problems. It is not appropriate to paint with very broad brush strokes when designing appropriate intervention or advocacy measures for affected populations. The major problem for disadvantaged groups seems to be the inadequacy of government resources required to bolster service delivery efforts. The inequitable allocation of resources to certain areas and sectors of society has also spawned systemic marginalisation and discrimination, which affects vulnerable groups disproportionately. Affirmative action is more appropriate for those groups that require the removal of structural barriers and the strengthening of policy tools and development inputs for those whose problems stem from inaccessibility of resources and infrastructure.

Marginalisation in Kenya can be attributed to a combination of colonial policies, post-colonial government exclusionary policies<sup>21</sup> and the privileging of ethnicity in political and economic power struggles.

Following independence, the state adopted an 'ethnically-blind' approach to politics; it gave the impression of ethnic neutrality, under the guise of promoting national unity, all the while privileging some ethnic communities over others.<sup>22</sup> The post-independence policy of prioritising high-potential areas, at the expense of low-potential ones, further served to prioritise some regions over others, with the resultant effect of institutionalising economic marginalisation of some regions.<sup>23</sup> There was an interlocking of economic and ethnic marginalisation since the exclusion of some regions locked out the ethnic communities found in those regions.

The return to multiparty democracy in 1992 brought with it, as predicted

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<sup>20</sup> APRM, *Country Review Report of the Republic of Kenya*, 14.

<sup>21</sup> See Republic of Kenya, *African socialism and its application to planning in Kenya*, Sessional Paper No. 10 of 1965.

<sup>22</sup> Jill Cottrel-Ghai, Yash Ghai, Korir Sing'oei, & Waikwa Wanyoike, 'Taking diversity seriously: Minorities and political participation in Kenya' Briefing, Minority Rights Group International, January 2013, 2.

<sup>23</sup> Sessional Paper No. 10 of 1965.

by the then President Daniel Moi, organised violence targeted at groups that were not considered 'indigenous' to the Coastal, Eastern, Nyanza, Rift Valley and Western provinces.<sup>24</sup> A commission of inquiry established in 1998 attributed the causes of the violence to 'extreme levels of marginalisation of communities in political, economic and social structures and processes.'<sup>25</sup> It also found that the government had taken part in fuelling the violence but failed to take adequate steps to prevent it from spiralling out of control.<sup>26</sup> The APRM CRM decried the lack of political will by the state in addressing marginalisation, which further polarises communities and increases the feeling of marginalisation.<sup>27</sup> It was not until 2008, in the wake of post-election violence, that the state had to come to terms with ethnic bias, and its disastrous effects on the country.

As will be discussed below, whereas several groups have been excluded from political and public life, women's inclusion efforts have taken centre stage in the equality debate and dominated academic writing on equality.<sup>28</sup> The impact that this has had on the inclusion of other marginalised groups will also be examined later in this paper.

## Marginalised groups' inclusion efforts

Previously, the legal framework did not facilitate political participation by marginalised groups. While there were attempts to address the marginalisation of persons with disabilities in the education and health sectors, their political participation needs were ignored.<sup>29</sup> While youths form the largest segment of the population, they play a minimal role in the development of policies, legislation and public decision-making. In many cases, they are treated as pawns by political parties during elections.<sup>30</sup>

Out of all marginalised groups, Kenya has witnessed a longer history of

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<sup>24</sup> APRM, *Country Review Report of the Republic of Kenya*, 13.

<sup>25</sup> The Akiwumi Commission of Inquiry was established to look into ethnic violence in 1998 and its report was released in 2002.

<sup>26</sup> Human Rights Watch, 'Kenya report: Politicians fuelled ethnic violence' Human Rights Watch, 31 October 2002, <<https://www.hrw.org/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence>> on 21 December 2020.

<sup>27</sup> APRM, *Country Review Report of the Republic of Kenya*, 65.

<sup>28</sup> Karen Bird, 'Political representation of women and ethnic minorities in established democracies: A framework for comparative research' Working Paper presented for the Academy of Migration Studies in Denmark, Aalborg University, 11 November 2003, 7.

<sup>29</sup> APRM, *Country Review Report of the Republic of Kenya*, 111.

<sup>30</sup> National Democratic Institute for International Affairs (NDI), *Engaging young people in politics in conflict and post-conflict settings: A toolkit*, 2007, 4.

women's inclusion struggle. In the 1990s, a constitutional amendment was passed which repealed section 2A of the (now repealed) Constitution, thereby allowing for multi-partyism. However, these reforms did not alter the undemocratic legal framework and the political culture remained unchanged.<sup>31</sup> It did, nevertheless, expand the space for civil society and by extension for previously marginalised groups such as women to pursue political mobilisation and articulate their demands. The consequence of this was the emergence of a vibrant feminist movement which took it upon itself to engage in gender activism, gender sensitisation and mobilisation, capacity building of women for political leadership, empowerment programmes for women living in poverty as well as lobbying for constitutional reform.<sup>32</sup>

Despite significant improvements in civic, gender and human rights awareness and increased policy and advocacy interventions, women's participation in decision-making and in political-making platforms, particularly Parliament and the civil service, has remained minimal.<sup>33</sup> Winnie Mitullah asserts that while women were generally excluded in the military, religion and politics, it is in politics that women had the least representation.<sup>34</sup> Their participation in electoral politics is largely hindered by limited resources, electoral violence and unfavourable media coverage.<sup>35</sup> Numerous attempts to pass legislation to increase women's representation in Parliament before 2010 were unsuccessful.<sup>36</sup>

<sup>31</sup> Makau Mutua, *Kenya's quest for democracy: Taming leviathan*, Lynne Rienner Publishers, Colorado, 2008, 26.

<sup>32</sup> Walter Ochieng 'Chimera of constitutionally-entrenched gender quotas', 68.

<sup>33</sup> Walter Ochieng 'Chimera of constitutionally-entrenched gender quotas', 69.

<sup>34</sup> Winnie Mitullah 'Gender inclusion in transitional politics: A review and critique of women's engagement' in Walter Oyugi, Peter Wanyande & Crispin Odhiambo-Mbai (eds) *The politics of transition in Kenya: From KANU to NARC*, Heinrich Böll Foundation, Nairobi, 2003, 212-213.

<sup>35</sup> Julie Ballington (ed), *The implementation of quotas: African experiences*, Quota Report Series, International Institute for Democracy and Electoral Assistance, 2004, 350.

<sup>36</sup> In 1996, a bill to implement the Beijing Platform for Action failed. In 1997, the Affirmative Action Bill sought to have at least a third of all nominated candidates be women, to amend the constitution to provide two parliamentary constituencies exclusively for women candidates and to introduce legislation linking party funding to compliance with quotas for nominated women. The Bill was also unsuccessful. In 2000, the Beth Mugo Bill sought to reserve 33% of all seats in Parliament and local assemblies for women as an entry-point for decision-making in all sectors. In 2007, there were two proposed legislations on affirmative action: Constitution of Kenya (Amendment) Bill which proposed the creation of 40 seats for women in the Tenth Parliament, and an additional 40 constituencies. The Bill was unsuccessful for failure to seek broad consensus within the ruling party and failure to include other marginalised groups. Secondly, the Equal Opportunities Bill of 2007 attempted to give effect to a Presidential directive in 2006 that 30 per cent of all public service appointments should be made up of women. However, the bill was not passed, and the directive, therefore, had no enforcement mechanism.



The limited success of gender inclusion efforts was attributed in part to the underrepresentation of women in key policy-making institutions of the state.<sup>37</sup> Government and non-governmental organisations tended to place emphasis on programmes which addressed the gender question on a day-by-day basis, without undertaking long-term policies which would serve to mainstream women's participation.<sup>38</sup>

The provisions of the 2010 Constitution mandating the inclusion of marginalised groups are a culmination of a long struggle spanning a period of over twenty years.<sup>39</sup> At the heart of this long and torturous journey was women's struggle for gender equality, fuelled by a desire to free themselves from a life of patriarchal oppression and discrimination.<sup>40</sup> Increasing women's participation in political and public life not only aligns with recognition of their numerical superiority and allows them to pursue their interests, but it also has been proven to ameliorate the quality of governance due to the different perspectives that they bring to decision-making.<sup>41</sup>

### 3 The 2010 Constitution and political inclusion of minorities and marginalised groups

It is argued that the 2010 Constitution now contains a robust exposition of the right to equality and non-discrimination by any standard.<sup>42</sup> Although it is acknowledged that political participation does not by itself result in the inclusion of marginalised groups, it is considered a crucial first step in increasing the political voice of marginalised communities and improving their capabilities.<sup>43</sup>

<sup>37</sup> Winnie Mitullah, 'Gender inclusion in transitional politics', 213.

<sup>38</sup> Winnie Mitullah, 'Gender inclusion in transitional politics', 225.

<sup>39</sup> See generally Willy Mutunga, *Constitution making from the middle: Civil society and transition politics in Kenya, 1992-1997*, Mwengo, Nairobi, 1999. See also Committee of Experts on Constitutional Review, *Final report*, 2010.

<sup>40</sup> Maria Nzomo, 'Kenya: The women's movement and democratic change' in Leonardo Villalon & Phillip Huxtable (eds) *The African state at a critical juncture: Between disintegration and reconfiguration*, Lynne Rienner Publishers, Colorado, 1998, 167 (Cited in Walter Ochieng, 'Chimera of constitutionally-entrenched gender quotas', 66).

<sup>41</sup> Wanjiku Kabira & Elishiba Kimani, 'The historical journey of women's leadership in Kenya' 3(6) *Journal of Emerging Trends in Educational Research and Policy Studies*, 2012, 842 (Cited in Winifred Kamau, 'Women's representation in elective and appointive offices in Kenya: Towards realisation of the two-thirds gender principle' in Morris Mbondenyei, Evelyne Asaala, Tom Kabau & Atiya Warris (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal*, Pretoria University Law Press, Pretoria, 2015, 181.

<sup>42</sup> William Ochieng, 'Chimera of constitutionally-entrenched gender quotas', 67.

<sup>43</sup> Jill Cottrel-Ghai *et al*, *Taking diversity seriously*, 1.



The High Court, in a case reviewing delimitation of electoral boundaries by the IECB in 2012 also asserted, 'We must emphasise once again that delimitation of electoral boundaries is not the only means by which the problems of minorities and the marginalised will be solved.'<sup>44</sup>

The 2010 Constitution is the first to grant juridical recognition to marginalised groups and communities. It seeks to redress the marginalisation experienced in political and public life by vulnerable groups, notably, women, youth, the elderly, persons with disabilities, ethnic minorities and marginalised communities. Articles 21 and 27 require that the government and state and public officials address their needs and take legal and administrative measures to ensure their participation in governance and other spheres of life. The specific provision for political inclusion of all these groups in the Bill of Rights evinces an intention that their inclusion be redressed concomitantly. It defines 'marginalised group' as: A group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).<sup>45</sup>

The grounds listed in Article 27 (4) include 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'<sup>46</sup> In addition to the protection of the marginalised being declared a national value,<sup>46</sup> the Bill of Rights obliges the state and state officials to ensure that their needs are met,<sup>47</sup> and to put into place affirmative action measures to facilitate their participation and representation in governance and other spheres of life.<sup>48</sup> One of the affirmative action measures proposed in relation to political participation is for Parliament to pass legislation to provide for the representation in Parliament of marginalised groups.<sup>49</sup>

The Bill of Rights, in addition to the general provision on political rights,<sup>50</sup> specifically addresses the rights of vulnerable groups to political participation. In relation to women's inclusion, the main affirmative action provision is contained in Article 27(8); it requires the state to take legislative and other measures to ensure that not more than two-thirds of any gender hold any elective or

<sup>44</sup> *Republic v Independent Electoral and Boundaries Commission ex-parte Kibusa and others, Judicial Review*, [2012] eKLR, para 243.

<sup>45</sup> Article 260, *Constitution of Kenya* (2010).

<sup>46</sup> Article 10 (1) (b), *Constitution of Kenya* (2010).

<sup>47</sup> Article 21, *Constitution of Kenya* (2010).

<sup>48</sup> Article 56, *Constitution of Kenya* (2010).

<sup>49</sup> Article 100, *Constitution of Kenya* (2010).

<sup>50</sup> Article 38, *Constitution of Kenya* (2010).

appointive position. While in theory this provision is gender neutral, in the current political context it is intended to address women's underrepresentation.<sup>51</sup> The general principles of the electoral system are also required to give effect to this 'two-thirds gender rule,' as it is known in public debates.<sup>52</sup> To strengthen women's presence, 47 seats in the National Assembly and 16 seats in the Senate are reserved for women.

Article 54 (2), much like the two-thirds gender rule, requires the state to take measures to ensure that at least five percent of the members of elective and appointive bodies are persons with disabilities. Moreover, the youth are entitled to 'opportunities to associate, be represented and participate in political, social, economic and other spheres of life.'<sup>53</sup> Further, the state is obligated to put in place affirmative action programmes directed at ensuring that minorities and marginalised groups 'participate and are represented in governance and other spheres of life.'<sup>54</sup>

In relation to political representation, Chapter VII of the 2010 Constitution requires parties to recognise the right of all persons to participate freely in political activities and to nominate persons to represent special interests in the National Assembly. Chapter VIII provides for the representation in Parliament and the county assemblies of special interests.<sup>55</sup> Unlike the repealed Constitution where the President nominated 12 persons to represent special interests in the National Assembly, parties have the prerogative of nominating persons to represent special interests, but in compliance with two criteria: the preparation of party lists that alternate between men and women and which reflect the regional and ethnic diversity of the people of Kenya.

These special interests are not defined by the 2010 Constitution; rather, the list is open-ended. In *Rangal Lemeiguran v Attorney General and others*<sup>56</sup> the High Court found that the Ilchamus minority group represented a special interest under the repealed Constitution. Therefore, in the absence of an explicit definition, it is arguable that minorities are included in the definition of special interest under the 2010 Constitution. In *Commissioner for the Implementation of the Constitution v*

<sup>51</sup> National Women's Steering Committee & Institute of Economic Affairs, *Implementing the constitutional two-thirds gender principle: The cost of representation*, 2015, iv.

<sup>52</sup> Article 81 (b), *Constitution of Kenya* (2010).

<sup>53</sup> Article 55 (b), *Constitution of Kenya* (2010).

<sup>54</sup> Article 56 (a), *Constitution of Kenya* (2010).

<sup>55</sup> See Articles 97 (1) (c), 98 (1) (b)-(d) and 177 (1) (b) & (c), *Constitution of Kenya* (2010).

<sup>56</sup> [2006] eKLR.

*Attorney General & 2 others*,<sup>57</sup> the Court of Appeal overruled the finding of the High Court that it was left up to political parties to give flesh to the term. In the words of the appellate court:<sup>58</sup>

We agree that special interests is not defined in the Constitution but from what we have said regarding the corresponding provisions for the other legislative assemblies, they must bear the same meaning as marginalised groups...From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalisation and disadvantage keeping them away from the centre of the political process.

Therefore, the Court of Appeal affirmed that ‘special interests’ was synonymous with ‘marginalised groups.’ Additionally, Section 34(9) of the Elections Act, insofar as it proposed to include presidential and deputy presidential candidates as intended representatives of the special interests defined under Article 97(1)(c) of the 2010 Constitution, was not in consonance with the 2010 Constitution.

The various provisions on political participation and non-discrimination of marginalised groups have been criticised for being vague.<sup>59</sup> Save for Article 100, which mandates specific legislation on participation, these provisions fall short of creating a specific obligation on the part of the state or non-state actors to take definite action to secure the inclusion of marginalised groups. Therefore, there is a concern, which experience has shown is not unfounded, that the demands for the inclusion of marginalised groups will be ignored where the state lacks political will to pursue their inclusion.<sup>60</sup>

The next section analyses some of the barriers to inclusion and details how among other factors, the Oppression Olympics, the high profile of the gender movement, lack of political will and disjointed inclusion efforts have precluded progress in the inclusion of marginalised groups in political and public life in Kenya.

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<sup>57</sup> [2013] eKLR.

<sup>58</sup> At pages 12 & 14.

<sup>59</sup> Ben Nyabira & Zemelak Ayele, ‘The state of political inclusion of ethnic communities under Kenya’s devolved system’ 20 *Law, Democracy and Development*, 2016, 131 and 135.

<sup>60</sup> Jill Cottrel-Ghai *et al*, ‘Taking diversity seriously’, 4.

## 4 Challenges to inclusion of marginalised groups in Kenya

### The Oppression Olympics and identity politics

Elizabeth Martínez, who in 1993 decried competition among the various excluded groups for what she termed ‘the “Most Oppressed” gold,’<sup>61</sup> is credited with coining the term ‘Oppression Olympics.’ Ange-Marie Hancock defines Oppression Olympics as competition between groups for the mantle of the most oppressed in order to gain access to, *inter alia*, political support from the dominant groups, economic resources and policy remedies.<sup>62</sup> It results from the compartmentalisation of categories of exclusion as mutually exclusive for political purposes. This kind of competition is considered a threat to democracy because rather than promoting solidarity between the excluded groups, it leaves the overall system of stratification unchanged, thereby precluding progress for any of the excluded groups.<sup>63</sup> Valerie Purdie-Vaughns and Richard Eibach refer to the same internecine competition as ‘a score-keeping contest between battle-weary warriors’ who ‘*display ever deeper and more gruesome battle scars in a game of one-upmanship, with each trying to prove that he or she has suffered more than the other...*’ (emphasis added)<sup>64</sup>

The Oppression Olympics provide a framework that goes beyond looking at historical and legal bases for exclusion—from which most interventions proceed—to offer a paradigm for understanding why a unitary approach to inclusion, which privileges one category of difference as being most relevant, makes other marginalised groups doubly invisible. It also deprives marginalised groups of the opportunity for coalition-building, which leaves the informal practices of discrimination and prejudice and the overall structure of exclusion unchanged. There are various aspects, or as Hancock prefers to call them, ‘events’ of the Oppression Olympics as discussed below.

### Leapfrog Paranoia

The first of the Oppression Olympics events was highlighted by Elizabeth Martínez.<sup>65</sup> Leapfrog Paranoia is a zero-sum game of trying to establish who has it

<sup>61</sup> Cited in Ange-Marie Hancock, *Solidarity politics for millennials: A guide to ending the Oppression Olympics*, Palgrave Macmillan, United States, 2011, 3.

<sup>62</sup> Ange-Marie Hancock, ‘When multiplication doesn’t equal quick addition: Examining intersectionality as a research paradigm’ 5(1) *Perspectives on Politics*, 2007, 68.

<sup>63</sup> Ange-Marie Hancock, ‘When multiplication doesn’t equal quick addition’, 68.

<sup>64</sup> Valerie Purdie-Vaughns & Richard Eibach, ‘Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities’ 58 *Sex Roles*, 2008, 377.

<sup>65</sup> Elizabeth Martínez, ‘Beyond black/white: The racisms of our time’ 20 *Social Justice*, 1993.

toughest and therefore whose needs should be addressed first. In essence, which former victim goes first in obtaining access to political resources?<sup>66</sup> It bolsters the idea that in politics, one group's gain is another's loss. In Kenya, strategic litigation on the participation of marginalised groups has focused predominantly on securing the political inclusion of women, despite the 2010 Constitution containing inclusion provisions aimed at securing the participation of all marginalised groups.<sup>67</sup> This means that marginalised groups pursue inclusion in an isolated manner rather than cohesively. Unfortunately, these parallel inclusion efforts allow dominant groups to divide and conquer marginalised communities as they seek to compete among themselves to determine whose needs should be addressed first.

## Movement Backlash

Elizabeth Martínez outlines how Movement Backlash manifests in the struggle for inclusion. Movement Backlash manifests as opposition to the gains made by a marginalised group; with the assertion being that these gains have the collateral damage of creating a 'new class of formerly privileged victims who are now unfairly disadvantaged.'<sup>68</sup> In essence, previously dominant groups push back against the gains of marginalised groups and seek to define themselves as 'most oppressed' by expanding the definition of victimhood to include those affected by inclusion efforts such as affirmative action.<sup>69</sup> Some of the affirmative action measures aimed at improving the participation of marginalised groups in the Kenyan electoral process include the reduction of nomination fees in half for all elective seats.<sup>70</sup>

Like in other jurisdictions where the backlash has been against the gender movement,<sup>71</sup> the gender movement in Kenya has experienced various facets of the Movement Backlash. Gerface Ochieng', for example, argues that the provisions on gender equity in the 2010 Constitution have entrenched reverse

<sup>66</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 8.

<sup>67</sup> See for example Article 100 which anticipates legislation for all marginalised groups. Some of the cases are discussed in footnote 151. See also Catherine Kaimenyi, Emedla Kinya & Chege Macharia, 'An analysis of affirmative action: The two-thirds gender rule in Kenya' 3(6) *International Journal of Business, Humanities and Technology*, 2013, 92.

<sup>68</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 13.

<sup>69</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 13.

<sup>70</sup> IEBC, 'Qualifications and requirements for nomination of candidates for the different elective positions', available at <https://www.iebc.or.ke/uploads/resources/D2CtRkduPk.pdf> on 21 December 2020.

<sup>71</sup> See for example Susan Faludi, *Backlash: The undeclared war against American women*, Three Rivers Press, New York, 2006.

discrimination against men.<sup>72</sup> In party politics, strong female leaders have been subjected to greater scrutiny than their male counterparts when seeking leadership roles.<sup>73</sup> The Judiciary, expected to be the vanguard of equality and non-discrimination,<sup>74</sup> has also in the past denounced the validity of affirmative action measures contending that they marginalised males from marginalised communities further.<sup>75</sup> In *FIDA Kenya & others v Attorney General*,<sup>76</sup> a suit filed to challenge the gender composition of the list of nominees to the Supreme Court, the predominantly male bench of the High Court, while declining to allow the constitutional challenge, opined:

The fact that our Constitution was ratified by a majority of Kenyans does not mean or prove that its provisions are just and fair despite its many virtues. It might be argued that these defects can be traced to a flaw in the consent or ratification processes. One may ask why should a lady judge from Central, Western, Nyanza and Rift Valley Provinces get an edge over a male judge from Upper Eastern or Northern Kenya who may actually have faced tougher and more difficult conditions in terms of economic, social, political and environmental struggle...<sup>77</sup>

While it is true that if affirmative actions, if not monitored, may privilege only a few, it has been asserted that it is never possible to define the categories so exactly that the most marginalised benefit.<sup>78</sup>

During electoral processes, Movement Backlash has also manifested as electoral violence and smear campaigns directed at female candidates as a

<sup>72</sup> Gerface Ochieng', 'Philosophical analysis of gender-based affirmative action policy in Kenya with respect to theory of justice' Master of Arts in Philosophy Thesis, Kenyatta University, 2010, 146-152 (Cited in Benard Manani, 'Women, representation in elective office and the electoral process in Kenya under the 2010 Constitution: Which way for the two-thirds gender rule?' 12 *Law Society of Kenya Journal*, 2016, 119 & 138).

<sup>73</sup> Winnie Mitullah highlights the plight of the first female presidential candidate, Charity Ngilu, who took a stab at the presidency in 1997. She had to quit her own political party and form another when pressured to drop out of leadership for possessing inadequate academic qualifications. Winnie decries the fact that this is despite the fact that male politicians had held key positions with comparatively lower academic qualifications, and asserts that the move to unseat her was simply a backlash against her political prowess. See Winnie Mitullah 'Gender inclusion in transitional politics', 226.

<sup>74</sup> Patricia Kameri-Mbote, 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' Inaugural Lecture, University of Nairobi, 24 January 2013, 29.

<sup>75</sup> A similar argument was rejected by the High Court in *John Kabui Mvui & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR, where the court ruled that an affirmative action policy will not amount to unfair discrimination unless it is demonstrated that the differential treatment of persons in relatively similar situations is without any objective and reasonable justification.

<sup>76</sup> Petition Number 102 of 2011 eKLR.

<sup>77</sup> At page 53 of the judgment.

<sup>78</sup> Walter Ochieng, 'Chimera of constitutionally-entrenched gender quotas', 89.

ploy to turn public opinion against them.<sup>79</sup> Ange-Marie asserts that fighting Movement Backlash is harder without also addressing Leapfrog Paranoia and Wilful Blindness. She argues further that sometimes due to Movement Backlash, the best a marginalised group can hope for is invisibility.<sup>80</sup>

## Wilful Blindness

According to Ange-Marie, wilful blindness emerges from a persistent vision of one's group as solely victims; this then causes the privileged elements of the group to be invisible and the group is blinded to its own agency.<sup>81</sup> Since wilful blindness does not allow for a proper appreciation of the political realities of other groups, it creates no room for the building of egalitarian coalitions or the developing of political trust among marginalised groups.<sup>82</sup> Elizabeth also decries the impact of the perception of one's group as the perennial victims, pointing out that it discourages the perception of common interests and serves to isolate marginalised groups from potential allies.<sup>83</sup> Patricia Hill Collins expressed it thus:<sup>84</sup>

Each group speaks from its own standpoint and shares its own partial situated knowledge. But because each group perceives its own truth as partial, its knowledge is unfinished... Partiality and not universality is the condition of being heard; individuals and groups forwarding knowledge claims without owning their position are deemed less credible than those who do...

The APRM made a similar observation concerning the relationship between marginalised groups in 2014. The CRM observed, in its report on vulnerable groups, that:<sup>85</sup>

The groups [that] met seemed to have a very isolationist view and approach to their problem i.e. identifying themselves singularly as Nubians, PWDs, women, and pastoralists in the same forum. Many did not seem to have a consciousness of the problems faced by other groups or how to collectively address the overarching issues that cut across the structural difficulties faced by individual groups. From comments made, it was garnered that some individuals and representatives held and reflected patterns of prejudice similar to that of the larger community.

<sup>79</sup> Winnie Mitullah, 'Gender inclusion in transitional politics', 226.

<sup>80</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 10.

<sup>81</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 11.

<sup>82</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 11.

<sup>83</sup> Elizabeth Martínez, 'Beyond black/white'.

<sup>84</sup> Patricia Hill Collins, *Black feminist thought: Knowledge, consciousness and the politics of empowerment*, Routledge, London, 2000, 236 (Cited in Nira Yuval-Davis, 'Dialogical epistemology—An intersectional resistance to the "Oppression Olympics"' 26(1) *Gender and Society*, 2012, 46.

<sup>85</sup> APRM, *Country Review Report of the Republic of Kenya*, 112.



This category ignores the fact that there is a constant redefining of victimhood, with persons moving in and out of the excluded status constantly. As Ange-Marie points out, membership to a privileged or marginalised group does not remain static over time.<sup>86</sup>

Acknowledging the gains made by women allows for a more critical evaluation of the way forward. While it is true, as asserted by many authors, that Kenya has low levels of women's political participation, both in elective and appointive capacities, especially considering that women are numerically superior,<sup>87</sup> women are more privileged than other marginalised groups. Not only have they received greater allocations of government resources and donor funds,<sup>88</sup> they have become the face of the inclusion debate in Kenya, as evidenced by the fact that the proposed Article 100 legislation is referred to as the two-thirds gender rule bill (gender bill), despite addressing the inclusion of various special interest groups.<sup>89</sup>

## Defiant Ignorance

Defiant ignorance is a defence mechanism. Privileged groups deny the existence of victimhood and stratification of power and responsibility for and the advantage gained from inegalitarian traditions.<sup>90</sup>

Defiant ignorance can manifest in two ways: it can take the form of ignorance about the excluded group, or deliberate appropriation of the cultural products of an excluded group for the benefit of a privileged one.<sup>91</sup> The debate on the two-thirds gender rule demonstrated that while there is a lot of awareness on the participation rights of women, the needs of other marginalised groups are obscure. While the gender bill seeks to protect special interest groups, these special interests did not feature in public debates. Writing on the failure to pass Article 100 legislation has also focused on women.

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<sup>86</sup> Ange-Marie Hancock, *Solidarity politics for millennials*.

<sup>87</sup> See analysis by Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <<https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860>> on 21 December 2020.

<sup>88</sup> In 2016, for example, KES 3 billion was designated for women's programmes while 1.3 billion was designated for youth empowerment.

<sup>89</sup> See, for example, the Two-Third Gender Rule Laws (Amendment) Bill, 2015, available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/Two-ThirdGenderRuleLaws\\_Amendment\\_Bill2015.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/Two-ThirdGenderRuleLaws_Amendment_Bill2015.pdf) on 21 December 2020.

<sup>90</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 14-15.

<sup>91</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 14-15.

## Compassion Deficit Disorder

Ange-Marie defined compassion deficit disorder as a resolution by dominant groups to deny victim status to any and all groups; a rationalisation of Wilful Blindness and Defiant Ignorance. This denial is extended to blaming the excluded group. Ange-Marie asserts that where a dominant group has no compassion for excluded groups, such groups are dehumanised and considered politically and practically expendable.<sup>92</sup> Compassion deficit disorder may also manifest as misplaced compassion; for example, the dominant group may express greater concern over preventing corruption in relation to taxpayers' funds than utilising the funds to address the needs of the victims.<sup>93</sup>

In Kenya, this has manifested in much public debate about the cost of including all marginalised groups. Politicians have often contended that it would be too costly to implement the two-thirds gender principle.<sup>94</sup> However, studies show that these allegations are unfounded and the costs are not unduly prohibitive.<sup>95</sup>

Where a group is perceived as undeserving of compassion, the dominant group then exercises defiant ignorance and wilful blindness of their suffering without contrition. When insufficient attention is paid to the interests of the marginalised, there is a perversion of democratic attention.<sup>96</sup> This means that even where marginalised people are given a voice, their opinions are not valued or respected and may even be distorted.<sup>97</sup> The High Court, for example, while dismissing a petition challenging non-compliance with the two-thirds gender

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<sup>92</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 16.

<sup>93</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 17.

<sup>94</sup> Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <<https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860>> on 21 December 2020. See also Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <<http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill>> on 21 December 2020.

<sup>95</sup> National Women's Steering Committee & Institute of Economic Affairs, *Implementing the constitutional two-thirds gender principle: The cost of representation*, v. See also Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <<https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860>> on 21 December 2020

<sup>96</sup> Ange-Marie Hancock, 'Trayvon Martin, intersectionality and the politics of disgust' 15(3) *Theory & Event* 2012 <[http://muse.jhu.edu/journals/theory\\_and\\_event/v015/15.3.hancock.html](http://muse.jhu.edu/journals/theory_and_event/v015/15.3.hancock.html)> on 21 December 2020.

<sup>97</sup> Ange-Marie Hancock, 'Trayvon Martin, intersectionality and the politics of disgust'.

rule, chastised the gender movement for its proactivity in the following terms:<sup>98</sup>

Keep your feminine missiles to their launch pads until the state acts on policies and programmes as they are envisaged under Article 27(6) and (8) and the Legislature has legislated accordingly to set out the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.

When members of parliament (MPs) were interviewed concerning the failure to pass the legislation, many expressed apathetic views concerning women's inclusion, all of which are indicative of Compassion Deficit Disorder. In addition to openly celebrating the failure to pass the law to comply with the constitutional requirement, some MPs were jubilant that the gender bill would not be used as a gateway for party leaders to 'nominate their "girlfriends" to the House.'<sup>99</sup>

Others cited the high numbers of representatives to both houses (National Assembly and Senate) as a justification for refusal to support the gender bill. Ostensibly acting in the interests of the country in lowering the wage bill, they justified their vote on the basis that there are already many representatives, thus not every member gets a chance to participate in House proceedings. As such, allowing more women in would serve no purpose, and in any case, women ought not to be allowed free seats but they should contest for parliamentary seats on an equal footing with men.<sup>100</sup> No reference was made to the other special interests that the gender bill sought to represent.

In each of these instances, there is an inherent binary logic that supports a zero-sum approach to issues of democracy and inclusion. This zero-sum approach causes each group to approach inclusion in such a way that the gain of another means their concomitant loss.<sup>101</sup> The next section reviews how the Oppression Olympics has manifested in Kenya, making solidarity in pursuing inclusion elusive, with the result that marginalised groups remain in the fringes of political and public life in Kenya.

<sup>98</sup> *FIDA Kenya & others v Attorney General and another* [2011] eKLR, at page 53.

<sup>99</sup> Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' *The Standard*, 6 May 2016 <<http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill>> on 21 December 2020.

<sup>100</sup> Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' *The Standard*, 6 May 2016 <<http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill>> on 21 December 2020.

<sup>101</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 8.

## Manifestations of the Oppression Olympics: Why solidarity remains elusive in Kenya

### The high profile of the gender movement

Inclusion efforts are unlikely to be successful where marginalised groups do not win the respect of all stakeholders and where they do not appear to be driven by selfless motives. Given that ceding one's position does not come easily, where the group seeking inclusion appears to be ego-driven, it raises the chances of resistance and backlash. Julian Smith and Jenny Hedström laud inclusion campaigns where the group seeking inclusion allows others to take the spotlight and benefit from their negotiation success from time to time.<sup>102</sup>

As stated above, the equality debate in Kenya appears to have become synonymous with gender equality or the implementation of the two-thirds gender rule. Women's underrepresentation has dominated litigation on inclusion, academic writing and proposals for electoral reforms. This is evidenced by the reference to the proposed Article 100 legislation in public debates as 'the two-thirds gender rule bill,' even though it addresses the inclusion of multiple groups.<sup>103</sup>

However, statistics demonstrate that despite the progress made by the gender movement, women's participation in Kenya remains marginal. Kenya has the lowest number of female lawmakers in the East African Community though it has the biggest economy. It is asserted that the refusal by MPs to change political party and election rules has meant that the inclusion of women in electoral politics is not realisable due to a lack of favourable rules, past injustices and the existence of cultural and structural constraints.<sup>104</sup> Karen Bird refers to these as macro-level factors and cites the electoral system, the organisation of political parties, and widely-held cultural beliefs about women as factors limiting women's participation.<sup>105</sup> These obstacles also impede the participation of youth, persons with disabilities, ethnic minorities and other marginalised communities.<sup>106</sup>

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<sup>102</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion: Strategies for marginalised groups to successfully engage in political decision-making*, International Institute for Democracy and Electoral Assistance (International IDEA), 2013, 64.

<sup>103</sup> See *Two-Third Gender Rule Laws (Amendment) Bill*, 2015.

<sup>104</sup> Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 19.

<sup>105</sup> Karen Bird, 'Political representation of women and ethnic minorities', 8.

<sup>106</sup> Karen asserts that the exclusion of ethnic minorities is caused by both macro and micro-level factors such as the degree of ethnic concentration in constituencies, collective political mobilisation within communities, whether there are ethnic rivalries, and individual characteristics of candidates; Karen Bird, 'Political representation of women and ethnic minorities', 8.

The high profile of the gender movement in lobbying for the proposed Article 100 legislation may have had an impact on the fate of the gender bill in both Houses of Parliament.<sup>107</sup> It may have been more beneficial at some stages of the lobbying process, given the openly expressed views of the male parliamentarians against the proposed law, for the gender movement to adopt a lower profile and allow other marginalised groups to take the limelight. This would have kept the focus of the gender bill, that is, ensuring the representation in parliament of all marginalised groups, in the public domain. The Kenya Women Parliamentary Association (KEWOPA), following two failed attempts to pass the gender bill, admitted that, the fact that the gender was presented ‘as if it was a women-only bill’ contributed to its failure to pass.<sup>108</sup>

This debate has spilled over into the Building Bridges Initiative (BBI) and the consequential Constitution of Kenya (Amendment) Bill 2020. The Bill seeks to amend Articles 89 and 97 of the 2010 Constitution to expand the number of seats in Parliament from 290 to 360.<sup>109</sup> It proposes further to do away with the 47 seats allocated to women representatives in the National Assembly and introduce a top-up system that will create as many special seats as are necessary to ensure that not more than two-thirds of the members of the National Assembly are of the same gender.<sup>110</sup> The number of slots available to political parties for nomination of members of special interests groups including persons with disabilities, youth and workers have whittled down from 12 to six. In the Senate, the proposal is to do away with the 20 slots available for women, persons with disabilities and youth and reconstitute the Senate to comprise 94 members, with one man and one woman being elected from every county.<sup>111</sup> While the proposed amendments have been lauded for facilitating the realisation of two-thirds gender rule, other marginalised groups do not appear to have featured prominently in the inclusion discourse, which creates a danger of double invisibility for the members of these constituent groups.

<sup>107</sup> Wilfred Ayaga and Jacob Ng’etich, ‘Why Kenyan MPs shot down gender bill’ *The Standard*, 6 May 2016 <<http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill>> on 21 December 2020.

<sup>108</sup> Wilfred Ayaga and Jacob Ng’etich, ‘Why Kenyan MPs shot down gender bill’ *The Standard*, 6 May 2016 <<http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill>> on 21 December 2020.

<sup>109</sup> Clauses 10 and 13(a)(i), *Constitution of Kenya (Amendment) Bill*, 2020.

<sup>110</sup> Clause 13 (a) (iii), *Constitution of Kenya (Amendment) Bill*, 2020.

<sup>111</sup> Clause 14 (a) (i), *Constitution of Kenya (Amendment) Bill*, 2020

## Lack of political will

Prior to the promulgation of the 2010 Constitution, hope for democratic, more inclusive change was pinned on a new constitution.<sup>112</sup> The introduction of the devolved system of government, long recommended as an avenue for addressing inequality and historical injustices, brought hope of greater involvement in decision-making and active citizen participation in development. One of the objects of devolved government is to ‘protect and promote the interests and rights of minorities and marginalised communities.’<sup>113</sup> However, rather than be a beacon of hope, devolution has resulted in disillusionment; instead of attending to historical exclusions, corruption, inequality and tribalism have worsened.<sup>114</sup> Stiglitz cautions that ‘[i]nequality gives rise to instability and instability produces even more inequality. It is a vicious cycle.’<sup>115</sup>

During the first round of reviews under the APRM mechanism, the CRM condemned the fact that despite having laws, programmes and institutions that would predispose Kenya to good democratic governance, poor implementation and lack of enforcement capacity have precluded the entrenchment of democracy.<sup>116</sup> While it would appear easier to implement the two-thirds gender principle in relation to appointive rather than elective positions, the practice points to the contrary. The government has not been gender-responsive in making appointments to public bodies in many instances,<sup>117</sup> and this has been attributed to lack of good faith and political will to actualise the 2010 Constitution.<sup>118</sup>

Walter Khobe writes that Kenya’s electoral system ‘does not ensure and facilitate broad-based and inclusive political participation in the decision-making process.’<sup>119</sup> The case of *National Gender and Equality Commission & others v IEBC*

<sup>112</sup> Makau Mutua, *Kenya’s quest for democracy: Taming leviathan*, 2.

<sup>113</sup> Article 174 (e), *Constitution of Kenya* (2010).

<sup>114</sup> Claire Elder, Susan Stigant & Jonas Claes, *Elections and violent conflict in Kenya: Making prevention stick*, United States Institute for Peace, 2014, 17.

<sup>115</sup> Joseph Stiglitz, *The price of inequality*, 91-92.

<sup>116</sup> APRM, Country Review Report of the Republic of Kenya, 29.

<sup>117</sup> Dorothy Otieno, ‘Share of women leaders in government falls short of two-thirds gender rule’ Nation, 25 August 2016, <<https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860>> on 21 December 2020. Manani also points to the replacement of a female Deputy Inspector-General of the Kenya National Police Service with a male one as an indication of the government’s reluctance to implement the principle. See Benard Manani ‘Women, representation in elective office’, 120.

<sup>118</sup> Benard Manani, ‘Women, representation in elective office’, 120.

<sup>119</sup> Walter Khobe, ‘The quest for a more perfect democracy: Is mixed member proportional representation the answer?’ in Morris Mbondenyi *et al* (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal*, 2015, 121 and 128.

& others,<sup>120</sup> where youths, women and persons with disabilities were left out of party lists, demonstrated that the constitutional dictates of non-discrimination and inclusion have not permeated the identity and party politics that characterise elections in Kenya.<sup>121</sup>

In addition, the 11th Parliament neglected its constitutional duty to pass legislation to provide for the representation in Parliament of the various special interest groups.<sup>122</sup> Parliament has failed to gather enough support for the approval of the gender bill about four times. In 2017, the High Court, taking cognisance of this lapse by Parliament, issued a final ultimatum and a failure to comply with the ultimatum entitled lobby groups to petition the President for the dissolution of Parliament, as provided for in the 2010 Constitution.<sup>123</sup> An appeal against the decision of the High Court in this matter was dismissed.<sup>124</sup> Following several petitions to the Chief Justice to advise the President to dissolve Parliament under Article 261(7) of the 2010 Constitution for failure to pass the required legislation under Article 100, the Chief Justice issued an advisory to the President on 22 September 2020.<sup>125</sup> While this advisory has been challenged in court and is pending determination, the President has hinted that he ‘would not like’ to dissolve Parliament.<sup>126</sup> There is a clear lack of political will by dominant groups to cede power and the court orders obtained by lobby groups appear impotent against an unyielding political class.

From the foregoing, it is clear that focusing on political power as the avenue for pursuing inclusion has yielded minimal results. Partly attributable to Movement Backlash and to Defiant Ignorance, proposed legislative changes have been unsuccessful, despite the President’s exhortation to the current Parliament to pass legislation to secure the inclusion of marginalised groups in Parliament.<sup>127</sup>

<sup>120</sup> Nairobi High Court Petition 147 of 2013 eKLR.

<sup>121</sup> It is noteworthy that via legislative amendment, the distribution of the Political Parties Fund to political parties is now predicated on, among other factors, the level of inclusion of special interest groups both in the membership of the party and as candidates for elective office. See *Political Parties (Amendment)* (Act 21 of 2016).

<sup>122</sup> Winifred Kamau, ‘Women’s representation in elective and appointive offices in Kenya’, 184.

<sup>123</sup> *CREAW & Others v Speaker of the National Assembly & others (Constitutional Petition 371 of 2016)* sought to implement Article 260 of the Constitution of Kenya, 2010.

<sup>124</sup> *Speaker of the National Assembly v CREAW & others* (Civil Appeal 148 of 2017).

<sup>125</sup> <<http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>> on 21 December 2020.

<sup>126</sup> Hillary Orinde, ‘Uhuru ‘would not like’ to dissolve Parliament’ *The Standard*, 2 October 2020 <https://www.standardmedia.co.ke/politics/article/2001388502/uhuru-would-not-like-to-dissolve-parliament> on 21 December 2020.

<sup>127</sup> <<http://www.president.go.ke/2017/04/14/pass-the-two-thirds-gender-rule-president-kenyatta-urges-parliament/>> on 21 December 2020.



Julian Smith and Jenny Hedström opine that where inclusion strategies depend solely on political leadership, reforms are amenable to compromise and are often short-term in nature; it is therefore more prudent to anchor them in the local culture and values for long-term effects and to overcome traditional resistance.<sup>128</sup>

### Disjointed inclusion efforts

The outcome of the Oppression Olympics has been the fragmentation among marginalised groups, with each seeking its own resources for inclusion. However, these parallel quests for inclusion have so far served to do little more than move some marginalised groups into the margin of inclusion — or what Ange-Marie calls ‘advanced marginalisation’ — without the structural reforms necessary for lasting change.<sup>129</sup> For example, the 2007 Constitution of Kenya (Amendment) Bill, ‘which sought a constitutional amendment to create 50 special seats for women in Parliament prior to the general elections of 2007’ was not passed for several reasons, including failure to consider persons with disabilities, ethnic and other minorities and the youth.<sup>130</sup>

As Julius Lambi and Oussematou Dameni concluded in their research on inclusion of marginalised groups in Cameroon, there cannot be any meaningful participation where marginalised groups are ‘fragmented, disorganised, informal and therefore, politically weak.’<sup>131</sup>

Having noted the disjointed inclusion efforts of the various marginalised groups, the 2014 APRM CRM recommended that organisations and persons representing marginalised and vulnerable groups consider ways of harmonising coordination efforts.<sup>132</sup> This was reiterated in the 2019 report where the CRM recommended that these groups tap into available corporate social responsibility avenues to complement existing government efforts at inclusion.<sup>133</sup> Patricia

<sup>128</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 46.

<sup>129</sup> Ange-Marie citing Cathy Cohen, asserts that advanced marginalisation is a stage where de jure injustice is forbidden but the system of stratification is kept in place by informal patterns of prejudice and discrimination. See Cathy Cohen, *The boundaries of blackness Chicago: AIDS and the breakdown of black politics*, University of Chicago Press, Chicago, 1999 (Cited in Ange-Marie Hancock, ‘When multiplication doesn’t equal quick addition’, 70).

<sup>130</sup> Winifred Kamau, ‘Women’s representation in elective and appointive offices in Kenya’, 185.

<sup>131</sup> Julius Lambi & Oussematou Dameni ‘Making decentralization meaningful for marginalized communities: Lessons from the Integrated Development Foundation in Cameroon’ in International IDEA, *Journeys from exclusion to inclusion: Marginalized women’s successes in overcoming political exclusion*, International IDEA, Stockholm, 2013, 354.

<sup>132</sup> APRM, *Country Review Report of the Republic of Kenya*, 116.

<sup>133</sup> APRM, *The 2nd Kenya Self-Assessment Report*, 2015, 83. <<http://nepadkenya.org/documents/2nd%20>

Kameri-Mbote asserts that an exchange of ideas by persons suffering inequality facilitates the identification and resolution of potential intersectional inequalities, creates empathy within groups and contributes to not privileging some inequalities over others.<sup>134</sup>

## 5 Avenues for promoting inclusion of marginalised groups

### Exploring intersectionality and coalition-building

The first step in promoting the participation rights of marginalised groups is in the acknowledgment that compartmentalising categories as mutually exclusive for political purposes contributes to the Oppression Olympics. As Ange-Marie asserts: ‘to combine gender with race, language, sexual orientation, concrete interpersonal relations, and a host of other dimensions of identity is no easy or uncomplicated thing. But it is from the recognition of this complexity and these contradictions that we must start.’<sup>135</sup> On the other hand, categorical multiplicity recognises that bases for exclusion pose an equal but not identical threat to equality and inclusion.<sup>136</sup>

Valerie Purdie-Vaughns and Richard Eibach propound a similar hypothesis. In rejecting both the social dominance theory and the double jeopardy approaches — both of which lead to score-keeping on who has it worse — they point out that there are many complex ways in which people with intersecting identities are interdependent with those who are disadvantaged on one or more grounds and that it is impossible to assess using the same measure the extent to which the various types of oppression are experienced.<sup>137</sup>

Where marginalised groups continue to compete with each other for inclusion, and it becomes apparent that political and economic inequalities persist, disillusionment follows. This disillusionment can either manifest as disengagement from political processes or an attraction to populist and extremist systems which share their disdain for the establishment, which does not proffer any realistic promises of change.<sup>138</sup> Where such high levels of apathy exist, it may be a useful strategy to take advantage of non-political spaces and informal set-ups

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Kenya%20CSA%20Report%20-%20Abridged%20Version%20Final.pdf> on 21 December 2020.

<sup>134</sup> Patricia Kameri-Mbote, ‘Fallacies of equality and inequality’, 30.

<sup>135</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 3.

<sup>136</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

<sup>137</sup> Valerie Purdie-Vaughns and Richard Eibach, ‘Intersectional invisibility’, 380.

<sup>138</sup> Joseph Stiglitz, *The price of inequality*, 127-128.

to bring together marginalised communities, without an overt political agenda. This has been shown to be successful in West India where prayer meetings, healing workshops and festivals have been used to build trust among people of different religious and ethnic backgrounds.<sup>139</sup> In Kenya, local community meetings called by the provincial administration, locally known as *barazas*, have in the past served this purpose.

Moreover, with the aim of ending Oppression Olympics, it is necessary to promote a common goal based on a shared identity, which would serve to overcome deeply-entrenched differences. Promoting the common characteristics and shared experiences can serve to bind marginalised groups and downplay any differences arising from other characteristics.<sup>140</sup> This is not a call to do away with the categories of identity. It is to change the approach to inclusion from an additive logic, which results in Oppression Olympics, to an intersectional one, which recognises each of the categories of exclusion pose equal but not identical threats to freedom and equality. The assumption that multiple categories operate identically or that it is possible to compare the various types of oppression experienced by different groups is untenable.<sup>141</sup>

Patricia Hall Collins highlights that since each marginalised group approaches inclusion from its own standpoint and has only partial knowledge based on its own social positioning, such knowledge is ‘unfinished’.<sup>142</sup> Patricia points out the futility of fighting for the mantle of ‘most oppressed’ among marginalised groups by rejecting the idea that there is one category of people that is more oppressed than everyone else.<sup>143</sup> Ange-Marie, advancing this train of thought in her work on solidarity politics, asserts that once disadvantaged groups recognise that they are all simultaneously privileged and marginalised, ‘[t]he competition for the title “most oppressed” stagnates,’<sup>144</sup> and they find ways to stand in solidarity with one another in the pursuit of deep political solidarity. Therefore, as Patricia opined, the only way to ‘approximate truth’ is by encouraging dialogue among people from different positionings.<sup>145</sup> This provides

<sup>139</sup> Vasu Mohan & Suraiya Tabassum, ‘The inclusion of Muslim women in Indian democratic governance structures and processes’ in International IDEA, *Journeys from exclusion to inclusion*, 264.

<sup>140</sup> Julian Smith, ‘Conclusion: Learning from the stories of marginalised women’ in International IDEA, *Journeys from exclusion to inclusion*, 369.

<sup>141</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

<sup>142</sup> Patricia Hill Collins, *Black feminist thought*, 236 (Cited in Nira Yuval-Davis, ‘Dialogical epistemology’, 46).

<sup>143</sup> Patricia Hill Collins, *Black feminist thought*, 236.

<sup>144</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 19.

<sup>145</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 19.

an opportunity for new types of counter-intuitive coalitions.<sup>146</sup> Julian Smith and Jenny Hedström, similarly opine that where marginalised groups promote shared experiences from unifying characteristics, it downplays differences arising from other characteristics.<sup>147</sup>

These coalitions can be used to address the factors that serve to keep all marginalised groups on the fringes of political and public life. These include exclusive party policies, lack of resources, exposure to electoral violence and intimidation and a general lack of political will to implement constitutional dictates on inclusion.<sup>148</sup> Other advantages of pooling inclusion efforts include increasing the impact of information dissemination, added human resources and enthusiasm and political weight for reforms.<sup>149</sup> Research on youth participation in politics by International Foundation of Electoral Systems and National Democratic Institute for International Affairs demonstrates that youths are more willing to take political risks, they have more time to devote to political causes and have fewer allegiances to traditional voting patterns and political party loyalties than older generations.<sup>150</sup> Since the youth form the majority of the population, coalescing with the youth would prove highly productive to inclusion efforts.

In addition, lack of resources has also hampered inclusion efforts by certain special interest groups. Not only has the equality debate become almost synonymous with gender equality, but the gender movement has enjoyed wider support and donor funding than other marginalised groups. Since advocacy and strategic litigation require funding for preparation and training as well as attendant costs such as those tied to strategic litigation, it comes as no surprise that the gender movement has a longer history of strategic litigation.<sup>151</sup> Coalescing

<sup>146</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 12.

<sup>147</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 70.

<sup>148</sup> Lucianna Thuo, 'Is the two-thirds gender rule discourse engendering double invisibility in public life for other vulnerable groups in Kenya?' Oxford Human Rights Hub, 19 August 2016 <<http://ohrh.law.ox.ac.uk/is-the-two-thirds-gender-rule-discourse-engendering-double-invisibility-in-public-life-for-other-vulnerable-groups-in-kenya/>> on 21 December 2020.

<sup>149</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 35.

<sup>150</sup> International Foundation of Electoral Systems (IFES) & National Democratic Institute for International Affairs (NDI), *Equal access: How to include persons with disabilities in elections and political processes*, 2014, 19.

<sup>151</sup> See for example *In the Matter of Gender Representation in the National Assembly and the Senate* (Supreme Court Advisory Opinion 2 of 2012) on whether article 27(8) was immediately realisable or subject to progressive realisation. *FIDA Kenya & others v Attorney General and another* [2011] eKLR which challenged the gender composition of the Supreme Court. *Milka Adhiambo Otieno & another v Attorney General & 2 others*, Kisumu High Court Petition No 44 of 2012 eKLR which challenged elections to the Kenya Sugar Board for non-compliance with the two-thirds gender principle. *CREAW v Attorney General*, Petition Nos 207 & 208 of 2012 eKLR which sought to nullify the appointment of county

with the gender movement would provide a much needed resource boost for other marginalised groups and allow for a consolidation of gains. In essence, focusing on a common outcome, that is, greater inclusion and empowerment to participate actively in decision-making, while drawing on the strengths of each identity group, provides a higher likelihood of success than previous inclusion efforts.

## Fiscal incentives for inclusion in political parties

Despite the constitutional requirement that political parties respect the right of all persons to participate freely in political activities, there are few incentives for parties to prioritise the inclusion of minorities. However, Section 26 of the Political Parties Act<sup>152</sup> provides a platform for ensuring greater inclusivity in political parties. The Political Parties Fund, administered by the Registrar of Political Parties is required to be used for, among other purposes, promoting the representation in Parliament and county assemblies of vulnerable groups including women, persons with disabilities, youth, ethnic and other minorities and marginalised groups.<sup>153</sup> Following a 2016 amendment to the Act, 15% of the Political Parties Fund has been set aside for allocation to parties based on the number of persons from special interest groups elected in the general election.<sup>154</sup>

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commissioners for non-compliance with the two-thirds gender principle. *National Gender and Equality Commission v IEBC*, High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under Article 90 of the Constitution for, inter alia, the exclusion of youths, persons with disabilities and women. *Centre for Rights Education and Awareness (CREAW) v Attorney General & another* [2015] eKLR which challenged the non-publication of a bill to give effect to Article 100 of the Constitution on representation of marginalised groups in Parliament. *CREAW & others v Speaker of the National Assembly & others*, Constitutional Petition 371 of 2016 which sought to implement Article 261 of the Constitution to compel Parliament to pass legislation seeking to implement Article 100, otherwise it would stand dissolved. An appeal against the decision of the High Court in this matter was dismissed, see *Speaker of the National Assembly v CREAW & others*, *Civil Appeal 148 of 2017*. Following several petitions to the Chief Justice to advise the President to dissolve Parliament under Article 261 (7) of the Constitution for failure to pass the required legislation under Article 100, the Chief Justice issued an advisory to the President on 22 September 2020 <<http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>> on 21 December 2020. In *Katiba Institute v IEBC* [2017] eKLR, the court also asserted the obligation of the IEBC to ensure implementation of the two-thirds gender rule by political parties in the nomination process, with the attendant power to reject non-compliant lists, but the implementation was deferred to the 2022 elections.

<sup>152</sup> (Act No. 11 of 2011).

<sup>153</sup> Section 26 requires that at least 30 per cent of each party's allocation be used for promoting the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities.

<sup>154</sup> Section 28, *Election Laws (Amendment)* (Act No. 36 of 2016) which amended section 25(1) of the

A report by the Centre for Multiparty Democracy (CMD) indicates that the implementation of this provision has been impeded by various obstacles. Firstly, due to the strict eligibility criteria for the Political Parties Fund, only a few political parties qualify to receive the fund, with only two out of 68 registered political parties currently receiving the fund.<sup>155</sup> It has therefore been recommended that the law be amended to expand the number of parties that can be funded. Second, it was difficult to assess the extent to which funds allocated were directed at the interests of special interest groups seeing as no guidance was given to political parties as to how to develop programmes to guide the pursuit of the interests of marginalised groups. There is no requirement under the Act for political parties to account for the money set aside for inclusion of marginalised groups and therefore, no basis for evaluating whether and how well the money was directed towards this endeavour.<sup>156</sup> CMD, therefore, recommends capacity-building for political parties by the Office of the Auditor General, the Office of the Registrar of Political Parties and other civil society actors to facilitate effective planning and reporting on these resources.

Where allocation of additional funds is made contingent on the extent to which a party secures the inclusion of vulnerable groups both in the party lists and in the leadership of political parties, a greater incentive for parties to prioritise inclusion efforts is provided. However, care has to be taken to ensure that the inclusion of special interest groups takes into account the fact that marginalised groups are not homogenous and in many cases, due to intersecting discrimination, these groups are made of multiple subgroups with varying inclusion needs. In the past, inclusion of persons with disabilities, for example, has been taken to mean inclusion of persons with physical disabilities, thus creating double invisibility for persons with other categories of disability.<sup>157</sup>

While the 2010 Constitution allows for independent candidature, the political party culture is deeply-entrenched<sup>158</sup> and independent candidature is quite costly. It is, therefore, highly unlikely that vulnerable groups will mobilise sufficient resources to go it alone in elections. For this reason, it is recommended

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Political Parties Act in this regard.

<sup>155</sup> Centre for Multiparty Democracy (CMD), *Political parties' utilization of the Political Parties' Fund (PPF) to promote political participation of marginalized and minority groups in Kenya*, 2020, 13, <https://cmd-kenya.org/wp-content/uploads/2020/10/Political-Parties-Utilization-of-the-Political-Parties-Fund-PPF-CMD-Kenya-2.pdf> on 21 December 2020.

<sup>156</sup> CMD, *Political parties' utilization of the Political Parties' Fund*, 9.

<sup>157</sup> Lucianna Thuo, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya' 2 *Strathmore Law Journal*, 2016, 97 and 125.

<sup>158</sup> Jill Cottrel-Ghai *et al*, 'Taking diversity seriously', 6.

that they find ways of engaging political parties and begin by highlighting issues pertinent to both the dominant groups and the vulnerable groups, before pursuing the inclusion agenda.<sup>159</sup>

Borrowing from the experience of the 2013 and 2017 general elections, political parties may need to be prompted to ensure inclusion of marginalised groups in party lists. Marginalised groups can incentivise parties to ensure their inclusion by showing them what they stand to gain financially from such inclusion efforts.<sup>160</sup> To avoid undermining the quota systems created by Articles 97 and 100 of the 2010 Constitution, it is also important that party officials be encouraged to maintain the legitimacy of the system by refraining from selecting members of marginalised groups loyal to them. This practice was cited as an excuse for not passing Article 100 legislation as required by the 2010 Constitution.<sup>161</sup> It also casts doubt as to the quality of representation by members of marginalised groups selected through the quota system, thus compromising future entry of marginalised groups into Parliament.<sup>162</sup>

## Choice of political party

One of the factors that hinders access to political inclusion is the choice of political parties. Winnie Mitullah, while acknowledging the need for a critical mass of women in politics in order to effect change in policy and decision-making, also bemoaned the disadvantage that women were put in when they sought political office using weak political parties which did not command a wide following.<sup>163</sup> The choice of a political party is crucial as the number of seats available in Parliament is dependent on the performance of the political party in the elections.<sup>164</sup> Moreover, to have higher chances of securing parliamentary or county assembly seats, marginalised groups have to ensure that they not only get onto party lists but also that they rank highly on those lists, as nomination is dependent on the order in which names appear on the list.

<sup>159</sup> Jill Cottrel-Ghai *et al*, 'Taking diversity seriously', 8.

<sup>160</sup> Section 28 of the Election Laws Amendment Act 36 of 2016 amended section 25(1) of the Political Parties Act to provide a greater portion of the Political Parties Fund to be shared among parties based on their inclusion of special interest groups.

<sup>161</sup> Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' *The Standard*, 6 May 2016 <<http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill>> on 21 December 2020.

<sup>162</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 84.

<sup>163</sup> Winnie Mitullah, 'Gender inclusion in transitional politics', 229.

<sup>164</sup> Article 97 (1) (c) of the Constitution as read with Section 36 of the Elections Act, 2011.



Julian Smith and Jenny Hedström assert that due to the strong link that exists between poverty and marginalisation, multidimensional interventions are required to overcome political exclusion.<sup>165</sup> These would include seeking legal reforms at all levels of government combined with empowerment strategies such as training on income generation, community education and literacy and improving physical infrastructure.<sup>166</sup> Studies have demonstrated that constitutional and legislative reforms on their own may serve to improve the participation levels of marginalised groups but still have little impact on service delivery or quality of life.<sup>167</sup> Ange-Marie concurs, asserting that ‘mere recognition of multiple categories is necessary but not sufficient for substantial societal transformation.’<sup>168</sup>

Prejudicial attitudes towards marginalised groups, lack of capacity-training for political leaders and low levels of education may stagnate constitutional and legislative gains towards inclusion.<sup>169</sup> The highlighted instances of Movement Backlash at the Judiciary demonstrate that prejudices towards marginalised groups are deep-seated and targeted efforts are necessary to address systemic and institutional obstacles to inclusion.<sup>170</sup> Julian and Jenny propose that marginalised groups take advantage of the capacity-training offered by organisations that promote the rights of the marginalised such as Minority Rights International.<sup>171</sup>

Since the inclusion of marginalised groups ultimately increases the influence that they had and threatens the dominant position of those in power, it is important that those seeking the inclusion of marginalised groups consider in advance how conflicts with dominant groups will be resolved.

## Mainstreaming

As is clear from the foregoing, lack of political will and prejudicial attitudes towards marginalised groups continue to preclude participation efforts. While inclusive constitutional and legislative positions are a great starting point, they are

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<sup>165</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 27.

<sup>166</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 28.

<sup>167</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 29.

<sup>168</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

<sup>169</sup> Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

<sup>170</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 30.

<sup>171</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*. Minority Rights Group International works with disadvantaged minorities and indigenous people to enhance their voice and full participation in public life through training and education, litigation, publication and the media. It has its headquarters in London with offices in Budapest and Kampala.

insufficient in themselves to facilitate effective and meaningful participation.<sup>172</sup> Without goodwill and cooperation from all arms of government, as well as collaboration with political parties, civil society and grassroots organisations, there can be no meaningful progress. Inclusion efforts must be holistic to be successful. Where entire communities are oriented and involved in designing inclusion solutions, the normative underpinnings of exclusion are addressed, and dominant groups and children are recruited as future agents of change.<sup>173</sup> Such an approach to inclusion has to be intersectional, addressing the hierarchies of exclusion.

In addition to promoting the participation and leadership of marginalised groups in their programmes with organisations that they collaborate with, donors can increase the capacity of marginalised groups and their organisations by making their grant application processes easier to negotiate.<sup>174</sup> If the processes are too complex, or they exclude certain groups, they further marginalise the very groups that donors seek to empower. Enabling them to access funding allows marginalised groups to take charge of their own needs assessment and implementation programmes, thus resulting in their empowerment.

### Role of international institutions and special mechanisms

Despite having a robust exposition of rights in the 2010 Constitution, some provisions, particularly those relating to inclusion of marginalised groups and leadership and integrity have not yielded the desired fruit. Without implementation, they have no innate capacity to benefit the right-holders. As highlighted above, marginalised groups have encountered resistance from those already enjoying the rights. Patricia Kameri-Mbote asserts that to ensure that these rights do not turn into a ‘mirage or eternal fallacy’,<sup>175</sup> it is the Judiciary’s role to demand that all branches of government remain faithful to the 2010 Constitution.<sup>176</sup> It is the role of the Judiciary to ensure that the failure to pass enabling legislation does not lead to a loss of entitlements.

The Kenyan Judiciary has been proactive in ensuring that human rights are respected. Even in the absence of implementing legislation for human rights treaties ratified in Kenya, the Judiciary has directly applied international

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<sup>172</sup> Winifred Kamau, ‘Women’s representation in elective and appointive offices in Kenya’, 210.

<sup>173</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 91.

<sup>174</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 94.

<sup>175</sup> Patricia Kameri-Mbote, ‘Fallacies of equality and inequality’, 50.

<sup>176</sup> Patricia Kameri-Mbote, ‘Fallacies of equality and inequality’, 50.

human rights standards and held the state accountable for failure to honour its international obligations.<sup>177</sup> Article 22(3) of the 2010 Constitution gives the High Court wide remedial powers where a right in the Bill of Rights is violated, or threatened with violation. To ensure implementation of court decisions in human rights cases, the courts have also been willing to adopt creative remedies such as a compelling mandamus, where the parties are requested to report back to the court on the progress made in implementing the court decision periodically.<sup>178</sup> Nevertheless, decisions relating to equality have not had such innovative decisions by the court.

Regional and international mechanisms concerned with human rights promotion and protection are, therefore, vital to the success of inclusion efforts in Kenya. Where there has been a demonstrated lack of political will to give effect to the rights of minorities, as was the case in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*,<sup>179</sup> international pressure from the APRM,<sup>180</sup> advocacy groups as well as United Nations (UN) mechanisms such as the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Populations, the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the UN Permanent Forum on Indigenous People contributed to the establishment of a taskforce to consider the decision and to advise the government on the effects of its implementation.<sup>181</sup> This demonstrates the strategic value of the involvement of UN special procedures in highlighting government inaction as a means of facilitating reform.

<sup>177</sup> See for example *CK & others v Commissioner of Police Meru*, Petition 8 of 2012, where the state applied the due diligence principle as it relates to protecting women from sexual violence. *Mitu-bell Welfare Association v Attorney General* [2013] eKLR where the state was held liable for carrying out evictions without following internationally-established resettlement guidelines.

<sup>178</sup> In *Satrose Ayuma & others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & others*, High Court Petition 65 of 2010, the Court ordered the state to file an affidavit indicating the measures taken to realise the right to adequate housing in Kenya. The state was also directed to dialogue with the petitioners to develop a programme of action for the evictions and that the process of eviction be supervised by independent observers.

<sup>179</sup> (2009) AHRLR 75 (ACHPR 2009). The case is also known as the Endorois case. The African Commission on Human and Peoples' Rights found that the government's eviction of the community from their ancestral lands to facilitate construction of a game reserve, without compensating them or giving them access to their religious sites, was a violation of their rights to religious practice, property, development and disposition of natural resources as provided for in the African Charter on Human and Peoples' Rights.

<sup>180</sup> APRM, *Country Review Report of the Republic of Kenya*, 2014.

<sup>181</sup> The taskforce was established in September 2014 vide Kenya Gazette Notice 6708.

## Investment in research on marginalised groups

Ange-Marie condemns the fact that policy-making regarding marginalised groups is often based on perceived rather than real needs.<sup>182</sup> Research on the extent of marginalisation and the impact of marginalisation on development as a whole is not only useful as an advocacy tool, but it also allows for more targeted interventions by policy-makers. Where one approach is used to address the marginalisation of all excluded groups, it amounts to treating ‘multiple diagnosis problems with a single magic policy prescription,’ thus creating a permanent set of marginal groups.<sup>183</sup> Where the experiences of marginalised group are used as a basis for intervention, it allows for policies to be tailored to the expressed rather than perceived needs of the group. Wanjiku Kabira<sup>184</sup> asserts that the inclusive nature of the 2010 Constitution is attributable to the participation of marginalised groups through narrating their experiences.

## Inculcation of inclusion in curricula

It has to be appreciated that change is long-term. Therefore, it is vital that change advocates placing a premium on education and development of curricula that can be used in mainstream education and civic education to raise awareness on human rights principles and the importance of tolerance.<sup>185</sup> The training also ought to be targeted at marginalised groups to empower them for leadership, build their confidence and enlighten them on strategies for poverty alleviation.<sup>186</sup> Leadership training is crucial in arming marginalised groups with the confidence and other tools needed to engage effectively in political debate and negotiation with dominant groups.<sup>187</sup> Those trained can later serve as trainers as well as role models for younger generations, thus creating sustainable political change.<sup>188</sup> In Kenya, among the organisations that offer or support such programmes include Konrad Adenauer Stiftung (KAS), the National Democratic Institute (NDI), Women’s Empowerment Link (WEL), Community Advocacy and Awareness Trust (CRAWN), the Centre for Rights Education and Awareness (CREAW), the Federation of Women Lawyers Kenya (FIDA), the Youth Agenda, Siasa

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<sup>182</sup> Ange-Marie Hancock, ‘When multiplication doesn’t equal quick addition’, 70-71.

<sup>183</sup> Ange-Marie Hancock, ‘When multiplication doesn’t equal quick addition’, 71.

<sup>184</sup> Wanjiku Kabira, *Time for harvest: Women and constitution-making in Kenya*, University of Nairobi Press, 2012 (Cited in Patricia Kameri-Mbote, ‘Fallacies of equality and inequality’, 19).

<sup>185</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 16.

<sup>186</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 16.

<sup>187</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 85.

<sup>188</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 85.

Place, National Youth Bunge Association, the United Nations Development Programme (UNDP) and the Centre for Multiparty Democracy (CMD). CMD proposes further capacity-building for political parties to enable them spend resources allocated by the state for facilitating inclusion of special interest groups better.<sup>189</sup>

For training programmes offered by NGOs and development assistance to be effective, it must include literacy training. Since marginalisation in most cases has hampered access to education, basic literacy training must form the foundation for any other education training programmes carried out for the benefit of marginalised groups. This would open up leadership education and civic training to more marginalised communities. Coordination among NGOs involved would also ensure that all groups and geographical regions are covered by the training,<sup>190</sup> and that the training programmes include follow-up rather than one-off or short-term programmes which are limited in efficacy.<sup>191</sup>

### Flexibility in choice and emphases on inclusion strategies

Champions of inclusion should be chosen carefully. There may be need to alternate between representatives of the various marginalised groups in the lobbying/advocacy campaigns to reduce the impact of Movement Backlash and Defiant Ignorance. As pointed out by Julian Smith, promoting the inclusion of marginalised groups almost always results in their gaining influence at the expense of previously dominant groups.<sup>192</sup> This creates a danger of previously dominant groups sabotaging participation processes or setting up parallel decision-making platforms that allow them to retain power over previously marginalised groups.<sup>193</sup> Research from Wajir in North Eastern Kenya demonstrates that where women adopted a low profile and allowed others to take the spotlight and benefit from their successes, inclusion efforts were effective as they gave the impression that they were not ego-driven.<sup>194</sup>

Valerie Purdie-Vaughns and Richard Eibach provide further insight as to why alternating inclusion strategies may be more effective. Due to the intersectional invisibility created by androcentrism, ethnocentrism and heterocentrism, persons

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<sup>189</sup> CMD, *Political parties' utilization of the Political Parties' Fund*, 9.

<sup>190</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 86.

<sup>191</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 96.

<sup>192</sup> Julian Smith, 'Conclusion: Learning from the stories of marginalised women', 368.

<sup>193</sup> Julian Smith, 'Conclusion: Learning from the stories of marginalised women', 368.

<sup>194</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 64.

with intersecting identities are not often viewed as members of their constituent groups.<sup>195</sup> This social invisibility allows them to evade many actively discriminatory practices, including the brunt of Defiant Ignorance.

Since the hegemonic centre is the locus of decision-making that affects all, it is necessary to find ways of disarming those in positions of power, to avoid the creation of alternative centres of power that continue to keep subordinate groups in the margins.<sup>196</sup> The recruitment of socially invisible persons to the frontline of the inclusion struggle may offer one such tool. Julian Smith and Jenny Hedström also propose the use of role models such as sports personalities who are either members of marginalised groups or even from the dominant groups to sway public and political opinion in their favour as a strategy for overcoming exclusion.<sup>197</sup>

## 6 Conclusion

The limited success of gender inclusion efforts in Kenya demonstrates that no group can succeed entirely on its own. If each of the vulnerable groups chooses to focus on its own victimhood and pursue inclusion alone, none will make significant progress towards inclusion. It is, therefore, unnecessary to focus on which of the categories of identity is the basis of exclusion, but rather on acknowledgement that each of these categories are relevant. Moreover, as Patricia Kameri-Mbote asserts, exploring intersectionality allows for an exchange of ideas among marginalised groups, such a move will facilitate exchange of ideas, create empathy within groups and allow for identification and resolution of potential intersecting inequalities.<sup>198</sup> The collective performance of a state also improves where the state taps into the entire pool of resources and talent.<sup>199</sup>

Whenever a group is engaged in Oppression Olympics, they are constantly on the defensive rather than establishing a visionary offence.<sup>200</sup> Forming

<sup>195</sup> Valerie Purdie-Vaughns and Richard Eibach 'Intersectional invisibility', 381.

<sup>196</sup> Valerie Purdie-Vaughns and Richard Eibach 'Intersectional invisibility', 381.

<sup>197</sup> Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 62. UN Women for example has been supporting such an inclusion in a sports campaign for women in Zanzibar. See <https://africa.unwomen.org/en/news-and-events/stories/2020/05/i-am-generation-equality-fatma-ahmed-zanzibar> on 21 December 2020.

<sup>198</sup> Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 30.

<sup>199</sup> Sheryl Sandberg, *Lean in: Women, work and the will to lead*, WH Allen London, 2015, 7.

<sup>200</sup> Ange-Marie Hancock, 'Empirical intersectionality: A tale of two approaches' 3(2) *UC Irvine Law Review*, 259 and 296.

coalitions would assist marginalised groups in building a strong offence. Moreover, intersectionality as an approach to policy design will preclude these vulnerable groups from being ‘divided and conquered’ by dominant groups and ensure that they are not at the mercy of lawmakers in seeking implementation of their participation rights.

As pointed out by Jill Cottrel-Ghai *et al.*<sup>201</sup> minorities, in seeking elective and appointive positions must have in mind the goal of representing the needs of both the dominant and non-dominant groups: ‘To win, minorities cannot pursue the concerns of their communities alone, but must project their visions of social transformation that have impact on dominant groups as well...’ In other words, marginalised groups should be pursuing issues of global concern before seeking attention for their agenda. Dominant groups may be more willing to support inclusion where mutual gains from including marginalised groups are highlighted.

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<sup>201</sup> Jill Cottrel-Ghai *et al.*, ‘*Taking diversity seriously*’, 8.