

Double Invisibility: Realising the Right to Vote for Persons with Intellectual Disabilities in Kenya

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Abstract

The right to vote is plausibly one of the most fundamental rights held by a citizen. It upholds the notion of equal citizenship and is intertwined with personal dignity. Historically, PWIDs have been denied their voting rights on the grounds that their disability impairs their ability to make rational decisions. The concept of making independent political judgments is fundamental to democracy; thus, if one is dependent on others to vote, they may become susceptible to undue influence or electoral fraud ultimately undermining the legitimacy of elections. Although reasonable, this perspective overlooks the unique demands of PWIDs who deserve an equal right to vote. The Constitution of Kenya recognises every citizen's voting rights without unreasonable limitations. Despite this, PWIDs still encounter restrictions which stem from a lack of understanding of their unique demands. The imposition of blanket restrictions, such as those related to 'unsound mind', lack clear assessment criteria for voting purposes. This leads to uncertainty and misconceptions that PWIDs cannot make informed voting decisions. Through the relational personhood concept, this paper aims to demonstrate that PWIDs are not of unsound mind, but in the absence of good communication and require support to vote. It suggests the provision of reasonable accommodation to resolve the limitations encountered by PWIDs in Kenya.

Keywords: *Persons with Intellectual Disabilities, reasonable restrictions, reasonable accommodation, support, unique demands*

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I. Introduction

The term intellectual disability is a socially constructed concept that has changed meaning over a period of time. The definition of the term depends on the classification system of society and the medical profession, as it was predominantly known as ‘mentally retarded’.¹ Intellectual disability in this context refers to the substantial limitations in intellectual functioning and adaptive behaviour that appear before the age of eighteen. Intellectual functioning is best captured by the general factor of intelligence, and it relates to the capacity to reason, think critically, address problems and understand intricate ideas. On the other hand, adaptive behaviour encompasses a set of social, practical, and conceptual abilities that individuals can perform and learn during their everyday lives.² Down syndrome, cerebral palsy and autism are among the conditions that are associated with intellectual disability.³

Persons with intellectual disabilities (PWIDs) have varying capacities, which helps in determining the type of support they require. Individuals with mild intellectual disability can live independently with minimal support, while those with moderate intellectual disability may need moderate levels of support such as group homes. Individuals with severe intellectual disability have major delays in development and require extensive support. This is also evident for those with profound intellectual disabilities, who cannot live independently due to their extremely limited ability, and hence require pervasive support.⁴ These support needs define their unique demands and differentiate them from the general population.⁵ Additionally, their needs are heterogeneous as they vary depending on the severity of their disabilities.⁶

Legal capacity is a fundamental right inherent in all individuals, including those with disabilities. It is vital for engaging in civil and political life since it entails legal standing, which is the capacity to hold rights and duties, as well as

¹ Dimopoulos A, *Issues in human rights protection of intellectually disabled*, Ashgate Publishing, Farnham, 2010, 9.

² Shree A and Shukla P, ‘Intellectual disability: Definition, classification, causes and characteristics’ 7 *An International Journal of Educational and Social Development* 1, 2016, 10-11.

³ Kenya National Commission on Human Rights, *A briefing paper on implementing Article 12 of the Convention on the Rights of persons with disabilities regarding legal capacity in Kenya: A study carried out in Mandera and Taita Taveta Counties*, 2018,7.

⁴ Boat F and Wu J, *Mental disorders, and disabilities among low-income children*, The National Academic Press, Wahington, 2015, 171.

⁵ Wehmeyer M, ‘Strengths-based approaches to disability, the supports paradigm, and the importance of the support’s intensity scales’ 33 *Revista Educação Especial*, 2020, 8.

⁶ Parmenter T, ‘The present, past and future of the study of intellectual disability: challenges in developing countries’ 50 *Salud Pública México* 2, 2008, 124.

the agency to exercise and uphold them. Historically, PWIDs have been denied their legal capacity, which has consequently deprived them of their right to vote.⁷ During the 18th and 19th centuries, voting requirements encompassed economic conditions such as owning property and paying taxes. These conditions were gradually abandoned and shifted towards restricting anyone deemed mentally incompetent.⁸ Such individuals were considered unduly dependent and therefore could not exercise their political rights.⁹ PWIDs were often regarded as ‘idiots’ or ‘insane’, and this exacerbated their exclusion not only in the political sphere but also in society.¹⁰ This exclusion was considered self-evident and terms such as ‘retarded’ began being incorporated into constitutions and electoral laws.¹¹

Nevertheless, PWID rights have been progressively realised throughout the 20th and 21st centuries.¹² This progress is exemplified by non-binding declarations embraced by the United Nations on the rights of ‘mentally retarded’ in 1971 and of disabled persons in 1975.¹³ However, the terms used to refer to PWIDs in legislation such as ‘retarded’ or ‘unsound mind’, are now considered derogatory as they disqualify them from the electoral process. Advocacy of rights-friendly language such as persons with intellectual and psychosocial disabilities has been recommended.¹⁴ This language change is reflected in the United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2008, which has been widely recognised as representing a ‘paradigm shift’ through its interpretation and approaches to human rights and disability.¹⁵

The 2019 National Population and Housing Census in Kenya revealed that persons with disabilities constitute 2.2% of the population, an estimate

⁷ CRPD, *General Comment No. 1, Equal recognition before the law*, 11 April 2014, 2-3.

⁸ Belt R, ‘Mental disability and the right to vote’ Unpublished PhD, University of Michigan, Michigan, 2015, 28.

⁹ Beckman L, ‘Political equality and the disenfranchisement of people with intellectual impairments’ 6 (1) *Social Policy and Society*, 2007, 15.

¹⁰ Schriener K, Ochs L and Shields T, ‘Democratic dilemmas: Notes on the ADA and voting rights of people with cognitive and emotional impairments’ 21 (1) *Berkeley Journal of Employment and Labour Law*, 2000, 441.

¹¹ Beckman L, ‘The accuracy of electoral regulations: The case of the right to vote by people with cognitive impairments’ 13 (2) *Social Policy and Society*, 2014, 221.

¹² Owen F, Griffiths D, Tarulli D and Murphy J, ‘Historical and theoretical foundations of the rights of persons with intellectual disabilities: Setting the Stage’ in Owen F and Griffiths D (eds), *Challenges to the human rights of persons with intellectual disabilities*, Jessica Kingsley Publishers, London, 2009, 28.

¹³ Series L, ‘Disability and human rights’ in Watson N and Vehmas S (ed) *Routledge handbook of disabilities studies*, 2ed, Routledge, New York, 2019, 75.

¹⁴ Ambani J and Sipalla H, *Mental health and the criminal justice system*, Kabarak University Press, Nakuru, 2023, 3, 61.

¹⁵ Series L, ‘Disability and human rights’, 76.

of around 0.9 million individuals,¹⁶ with 23.2% having cognitive or intellectual impairments.¹⁷ This accounts for around 212,798 individuals, with a significant number residing in rural areas as compared to urban areas.¹⁸ However, it is crucial to note that stigma surrounding intellectual disability may cause some households to conceal such information, leading to potential underreporting. Thus, the prevalence of intellectual disability in Kenya might be higher than what was reported during the census.¹⁹

In Kenya, PWIDs are not expressly excluded from the right to vote, but in practice, their participation is precluded by broad restrictions such as those related to unsound mind, which lack specific assessment criteria. As a result, this has led to arbitrary interpretations which restrict them from the right to vote. Some attempts to register them have been challenged by assertions that they are of unsound mind.²⁰ Officers from polling stations in the past national and local elections have also restricted PWIDs from participating in polls without any clear justification or capacity tests.²¹ Although Disabled People's Organisations have assisted some PWIDs in voter registration, many continue to encounter limitations due to negative social attitudes.²² Furthermore, statistical reports on voting for individuals with disabilities exhibit a major oversight, particularly in their neglect of the underrepresentation of those with invisible disabilities such as PWIDs. This oversight has led to limitations in voting for these individuals due to a lack of data collection, and consequently, reduced mobilisation efforts.²³

Additionally, their support needs are not adequately understood or accommodated in the voting process.²⁴ Their unique demands are often met

¹⁶ State Department for Social Protection, Senior Citizens Affairs and Special Programmes, *Status report on disability inclusion in Kenya, 2021: Implementation of the global disability summit commitments of 2018*, November 2021, 4.

¹⁷ United Nations Population Fund, 'Disability inclusion' UNFPA Kenya, <https://kenya.unfpa.org/en/topics/disability-inclusion> accessed 20 May 2024.

¹⁸ Kenya National Bureau of Statistics *Kenya Population and Housing Census, Volume IV: Distribution of population by social-economic characteristics*, 2019, 405.

¹⁹ Development Initiatives, *Status of disability in Kenya: Statistics from the 2019 census*, May 2020, 11. See also Njoroge E and Murenga H, 'Effect of economic costs of caring for children with intellectual disability on family well-being in Nakuru municipality, Nakuru county, Kenya' 3 (1) *Journal of the Kenya National Commission for UNESCO*, 2023, 2.

²⁰ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya' 2 (1) *Strathmore Law Journal*, 2016, 121.

²¹ Mute L, 'Shattering the glass ceiling: Ensuring the right to vote for persons with intellectual disabilities in Kenya' 2 (2) *A Journal of the Philosophical Association of Kenya*, 2010, 13.

²² Mental Disability Advocacy Center, *The right to legal capacity in Kenya*, 2014, 37.

²³ Handicap International, *Participation of persons with disabilities in the electoral and political processes in Kenya*, 2017, 11.

²⁴ Caldwell J, Hauss S and Stark B, 'Participation of individuals with developmental disabilities and families on advisory boards and committees' 20 (2) *Journal of Disability Policy Studies*, 2009, 103.

with mixed signals from electoral bodies, for instance, the Interim Independent Electoral Commissioner during the Constitutional Referendum issued a statement suggesting that PWIDs would not be able to vote.²⁵ Despite the withdrawal and rectification of this statement, only a minimal number voted due to the numerous attitudinal barriers they faced at voting stations.²⁶ In the 2013 general elections, the Independent Electoral and Boundaries Commission (IEBC) also raised reservations regarding support for PWIDs when voting.²⁷ Consequently, this treatment limits their right to vote.

The laws in Kenya, particularly the Constitution, envision sovereign power residing with the people, who can exercise it either directly or through their elected representatives.²⁸ Additionally, Article 38(3)(b) of the Constitution affirms every citizen's voting right without any unreasonable restrictions.²⁹ Voting assistance is also recognised as a right for individuals with disabilities.³⁰ While it is apparent that the laws in Kenya promote the right to vote for PWIDs, there is a lack of clarification regarding what constitutes an unreasonable restriction in relation to Article 38(3)(b) of the Constitution. Moreover, the duration of the restriction has not been specified as permanent or temporary.³¹

Article 83(1) of the Constitution proceeds to exclude individuals described as having 'unsound mind' from voting.³² In Kenya, 'unsound mind' is the legal language used to describe individuals with mental health conditions.³³ These are persons who are diagnosed by qualified mental health practitioners to be suffering from mental illness, including conditions such as substance abuse as well as those displaying suicidal ideation and behaviour.³⁴ The framework for receiving and treating such persons is established to be in mental health facilities. PWIDs live in communities as opposed to mental health facilities on electoral days and are

²⁵ Mute L, 'Shattering the glass ceiling', 3-4. See also Mental Disability Advocacy Center, *The right to legal capacity in Kenya*, 2014, 37, para 4.

²⁶ Mental Disability Advocacy Center, *The right to legal capacity in Kenya*, 2014, 37, para 4.

²⁷ Kenya National Commission on Human Rights, *How to implement Article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper*, 2018, 60.

²⁸ Article 1(2), *Constitution of Kenya* (2010).

²⁹ Article 38(3) (b), *Constitution of Kenya* (2010).

³⁰ Section 29, *Persons with Disabilities Act Kenya* (Act No. 14 of 2003).

³¹ Oyugi P, 'The implementation of Article 12 of the convention on the rights of persons with disabilities in Kenya' *Journal of Law and Ethics*, 2018, 30.

³² Article 83(1), *Constitution of Kenya* (2010).

³³ Kenya National Commission on Human Rights, *A briefing paper on implementing article 12 of the Convention on the rights of persons with disabilities regarding legal capacity in Kenya: A study carried out in Mandera and Taita Taveta Counties*, 2018, 7.

³⁴ Section 2, *Mental Health Act* (Act No 27 of 2022).

thus able to exercise their political rights.³⁵ Hence, intellectual disability is not a mental illness and for the purposes of this paper, the concept of ‘unsound mind’ will mean persons declared as such by a judicial process after consideration of all relevant information.³⁶ On that account, the majority of PWIDs are not of unsound mind; instead, they are in the absence of good communication and require support to be able to vote.³⁷

Kenya has ratified the CRPD which acknowledges that PWIDs should be viewed as active subjects capable of having rights rather than objects of social protection.³⁸ Furthermore, it also recognises the positive duty of States to guarantee that PWIDs participate in the electoral process, through the provision of reasonable accommodation.³⁹ The ongoing academic discourse on reasonable accommodation as a measure to address the voting restrictions faced by PWIDs in Kenya is limited. Although some scholars such as Thuo have noted the significance of reasonable accommodation for PWIDs, no extensive discussion has been offered.⁴⁰ This study will further explore this concept to address the existing gap in the literature. Moreover, the critical premise for effectively fulfilling this measure is dependent on understanding the unique demands of PWIDs, which differ from the needs of other individuals with disabilities.⁴¹ Thus, this paper examines how the constitutional provisions on the right to vote in Kenya can take into account the unique demands of PWIDs. It argues that, despite the Constitution’s guarantee of equal voting rights, PWIDs still encounter limitations that stem from insufficient understanding and recognition of their unique demands.

The outline of this paper is as follows. Section one offers an introduction. Section two will discuss the concept of relational personhood, providing a lens for understanding the unique demands of PWIDs. Thereafter, Section three will assess the importance of the right to vote for PWIDs. This section will discuss how a reinterpretation of PWIDs’ mental capacity from an interdependent

³⁵ Kamundia E, *African Disability Rights Yearbook*, 2014, 204.

³⁶ Mute L, ‘Shattering the glass ceiling’, 6.

³⁷ Redley M, Maina E, Keeling A, and Pattni P, ‘The voting rights of adults with intellectual disabilities: Reflections on the arguments and the situation in Kenya and England, and Wales’ *Journal for Intellectual Disability Research*, 2012, 1031.

³⁸ *Wilson Morara Siringi v the Republic* (2014) eKLR, para 15.

³⁹ Oluchina W, ‘The right to political participation for people with disabilities in Africa’ 3 (1) *African Disabilities Rights Yearbook*, 2015, 326.

⁴⁰ Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya’, 106.

⁴¹ Thuo L, ‘Ending the oppression olympics: Promoting the concomitant political participation of marginalised groups in Kenya’ 5 (1) *Strathmore Law Journal*, 2021, 76.

perspective is warranted to enable their participation in voting. Subsequently, Section four will assess the restrictions PWIDs face in Kenya, by conducting a reasonable analysis to determine if such restrictions are reasonable. Section five proposes reasonable accommodation to address the limitations PWIDs face in voting. Lastly, Section six will offer recommendations and a conclusion.

II. Conceptual Framework: Relational Personhood

This study will be based on the concept of relational personhood which states that the moral value of a person is not found in their characteristics but in their relationships.⁴² It is the moral values that they establish through their relationships that make them worthy of their moral status.⁴³ This concept stems from feminist theories which suggest that autonomy comes from supportive relationships rather than an inherent trait. This perspective is significant for PWIDs since it shows that they can often make their own decisions but may require support to do so.⁴⁴

This concept departs from the personhood approach adopted by liberal political theorists, which focuses on the individual exercising their personhood independently. These individualistic liberal theories prioritise individual independence, occasionally to the point of viewing an individual's circumstances separately from the social context in which they reside.⁴⁵ This perspective considers interdependence as a threat to the legal system, and an individual is deprived of legal capacity if they cannot make a decision independently.⁴⁶ However, based on the relational concept, legal personhood is always relational because of the interdependence that exists among persons.⁴⁷ This concept, therefore, serves as a critique of the influential liberal political theory that has disproportionately affected PWIDs rights and overlooked their need for interdependent relationships in decision-making.⁴⁸ To understand relational personhood, it is crucial to understand the vulnerable and caring self-aspects.⁴⁹

⁴² Herring J, 'Relational personhood' *Keele Law Review*, 2020, 24.

⁴³ Herring J, 'Relational personhood', 37.

⁴⁴ Davy L, 'Philosophical inclusive design: Intellectual disability and the limits of individual autonomy in moral and political theory' 30 (1) *Hypatia: A Journal of Feminist Philosophy*, 2015, 140.

⁴⁵ Skarstad K, 'Human rights through lens of disability' 36 (1) *Netherlands Quarterly of Human Rights*, 2018, 12.

⁴⁶ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood: A conception of legal personhood with insights from disability rights and environmental law' 30 (4) *Griffith Law Review*, 2021, 531.

⁴⁷ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 533.

⁴⁸ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 531.

⁴⁹ Herring J, 'Relational personhood', 35.

Fineman portrays vulnerability as an inherent, unavoidable, and persistent trait of being human which stems not only from the body's nature, which is open to harm or hurt, but also from limitations by our bodies defining what we can or cannot do. This makes all people dependent on other people and this view envisions universal vulnerability.⁵⁰ PWIDs may also face pathogenic vulnerability, and this is argued by Mackenzie, Rogers, and Dodds who state that in response to ameliorating vulnerability for an individual, it does the contrary and generates new ones. This brings out a paradoxical effect, especially in response to PWIDs who have limited cognitive functioning.⁵¹ For instance, recognising PWIDs as vulnerable to manipulation in the electoral process and depriving them of the right to vote on this basis may heighten their vulnerability by labelling them as inferior moral and legal agents.⁵²

The underlying factor, however, is that PWIDs face some form of vulnerability regardless of whether it is universal or pathogenic. This vulnerable self makes the caring self-aspect evident, as dependency is no longer viewed as a threat, especially for PWIDs who require care due to their lifelong need for support. The care and support provided act as a positive measure for PWIDs to enhance themselves.⁵³ Additionally, the concept emphasises that everyone needs support when making decisions. It suggests that it is infeasible to make well-informed decisions without support from others, as one person cannot solely compile sufficient information on every issue.⁵⁴

In this context, support means strategies and resources that are employed to enable a person to participate in society.⁵⁵ These support needs would vary depending on the individual, for instance, a person with higher personal competency would need less intensive support.⁵⁶ Nonetheless, the support utilised would be suitable for aiding PWIDs to achieve certain environmental

⁵⁰ Fineman M, 'The vulnerable subject: Anchoring equality in the human condition', 20 (1) *Yale Journal of Law and Feminism*, 2008, 8-9.

⁵¹ Mackenzie C, Rogers W, Dodds S, *Vulnerability: New essays in ethics and feminist philosophy*, Oxford University Press, Oxford, 2014, 9.

⁵² Snipstad M, 'Concerns regarding the use of the vulnerability concept in research on people with intellectual disability', 50 (2) *British Journal of Learning Disabilities*, 2022, 112.

⁵³ Herring J, 'Relational personhood', 36.

⁵⁴ Skarstad K, 'Human rights through lens of disability', 17.

⁵⁵ Thompson J, Shogren K and Wehmeyer M, 'Support and support needs in strength-based models of intellectual disability' in Wehmeyer M and Shogren K (eds) *Handbook of research-based practices for educating students with intellectual disability*, Routledge, 2016, 32.

⁵⁶ Wehmeyer M, 'Strengths-based approaches to disability, the supports paradigm, and the importance of the support's intensity scales' *Revista Educação Especial*, 2020, 7-<file:///C:/Users/ggros/Downloads/Strengths-based_approaches_to_disability_the_supp%20(1).pdf>.

demands, such as voting.⁵⁷ This study will use the relational personhood concept to critique the notion of individualised personhood, which takes away the right to vote for PWIDs due to their dependency and need for support.⁵⁸

III. Importance of the Right to Vote

i. Approaches Used to Assess Decision-Making Capacity for PWIDs

It is crucial to understand the limitations of PWIDs in intellectual functioning and adaptive behaviour in order to analyse the approaches used to determine their decision-making capacity. Intellectual functioning involves the capacity to reason, think abstractly and understand complex ideas, while adaptive behaviour comprises practical, social, and conceptual skills essential for functioning in society. Limitations in these two aspects make PWIDs have differences in thought processes, comprehension, memory, reasoning, and how to cope in society.⁵⁹ Scholars such as Greenspan have highlighted that limitations in adaptive behaviour among PWIDs can make them extremely gullible, and sometimes this may overlap with the intellectual limitations when making a decision. Society demands hypothetical thinking associated with verbal fluency, abstract reasoning, and comprehension of information, all of which can be strenuous for PWIDs.⁶⁰ Hence it becomes evident that PWIDs can encounter difficulties when making decisions.⁶¹

From this premise, various approaches have been developed to assess the decision-making capacity of PWIDs. In this context, approaches refer to capacity tests or methods employed to attribute incapacity to PWIDs.⁶² These diverse approaches have been used in most jurisdictions to determine the legal capacity of PWIDs to make decisions.⁶³ If an individual is found to have

⁵⁷ Thompson J, Shogren K, Wehmeyer M, 'Support and support needs in strength-based models of intellectual disability', 32.

⁵⁸ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 540-541.

⁵⁹ Tassé M, Luckasson R and Shalock R, 'The relation between intellectual functioning and adaptive behaviour in the diagnosis of intellectual disability', 54 (6) *Intellectual and Developmental Disabilities*, 2016, 3.

⁶⁰ Khemka I, 'Understanding decision making and intellectual and developmental disabilities' in Khemka I, Hickson L (eds) *Decision making by individuals with intellectual and developmental disabilities*, Springer Nature, Berlin, 2021, 265.

⁶¹ Khemka I, 'Understanding decision making and intellectual and developmental disabilities', 255.

⁶² Dhanda A, 'Legal capacity in the disability rights convention: Stranglehold of the past or the lodestar for the future' 34 (2) *Syracuse Journal of International Law and Commerce*, 2007, 431.

⁶³ Marishet M, 'Legal capacity of a person with disabilities in Ethiopia: The need to reform existing legal frameworks' *International Journal of Law and Psychiatry*, 2017, 9.

impaired decision-making skills from one of the approaches, they are restricted from making a decision or exercising their legal capacity.⁶⁴

a. The Status Approach

The status approach relies on a medical diagnosis and denies an individual of legal capacity to make decisions once it is established that they have a disability.⁶⁵ Therefore if an individual has an intellectual disability he or she is deprived of their legal capacity. In this approach, having the status of being labelled as disabled is deemed sufficient to deprive a person of the ability to make legal decisions. It categorises individuals as either having full legal capacity or lacking it completely. Once it is established that a person lacks capacity, a third party, often a guardian, is assigned to make decisions on behalf of the individual.⁶⁶ This approach is similar to the medical model of disability because they both declare that it is only a medical diagnosis that can determine whether a person is competent enough to make a choice.⁶⁷ Countries that have adopted this approach use different measures and criteria to restrict PWIDs, all of which question their voting capacity. Strict standards excluding individuals due to their intellectual impairment are utilised in countries such as Lithuania, Bulgaria, and Poland.⁶⁸ For instance, in Lithuania, some individuals are deprived of their full legal capacity because of their disabilities and are placed under substitute decision-making mechanisms.⁶⁹ These mechanisms include adult guardianship and curatorship, which aim to protect the rights of the vulnerable such as PWIDs, but often result in the violation of their rights.⁷⁰ As a result, individuals regarded as lacking legal

⁶⁴ Flynn E and Arstein-Kerslake A, 'Legislating personhood: Realizing the right to support in exercising legal capacity' 10 (1) *International Journal of Law in Context*, 2014, 86.

⁶⁵ Dhanda A, 'Legal capacity in the disability rights convention', 431.

⁶⁶ Mahony C, 'Legal capacity and detention: Implications of the UN disability convention for the inspection standards of human rights monitoring bodies' 16 (6) *International Journal of Human Rights*, 2012, 886.

⁶⁷ Dhanda A, 'Legal capacity in the disability rights convention', 432.

⁶⁸ Okura S, 'The last suffrage movement in Japan: Voting rights for persons under guardianship' 30 (2) *Contemporary Japan*, 2018, 192. See also Kaiser J, 'How EU citizens with disabilities are deprived of their voting rights' *The Parliament*, 14 May 2024 <https://www.theparliamentmagazine.eu/news/article/ballot-barrier-how-eu-citizens-with-disabilities-are-deprived-of-their-voting-rights> on 20 May 2024.

⁶⁹ Gudelytė U, Ruškus J and McCrea K, 'Help me to decide: A study of human rights-based supported decision making with persons with intellectual disabilities' 94 (3) *American Journal of Orthopsychiatry*, 2024, 6.

⁷⁰ Juodkaite D, 'Supported decision making model as a tool and form for socialization of people with psychosocial disabilities: Legal and social education challenges in Lithuania' 116 (4) *Pedagogika*, 2014, 202. For instance, a person under full guardianship may be deprived of their civil or political rights on an equal basis with others.

capacity in Lithuania may be arbitrarily denied certain rights, such as voting.⁷¹ Moreover, the utilisation of these mechanisms not only undermines political equality⁷² but also disproportionately affects PWIDs.⁷³

b. The Functional Approach

The functional approach acts as a threshold test. It determines a person's legal capacity to make a decision based on their capability to understand the nature and consequences of that decision. The basic features of the test are whether the person can retain, weigh, and use the information available to make a decision. Thereafter, the individual is assessed whether they can communicate the decision, and if not, they are deemed incapable of exercising their legal capacity. This approach has however been highly endorsed due to its focus on the individual's decision-making skills rather than their status.⁷⁴ A mere presence of disability is regarded as insufficient to attribute incapacity to an individual, as the approach emphasises on the individual's ability to perform certain tasks.⁷⁵ For instance, it recognises that a person might not be able to make a financial decision but has the capacity to make a voting decision.⁷⁶ Countries that have reformed their statutory laws to conform with this approach include Ireland and Canada.⁷⁷ Ireland, for instance, has transformed from a status-based to a functional-based approach through the Assisted Decision-Making (Capacity) Act 2015.⁷⁸ Similarly, England and Wales have endorsed this approach with the Mental Capacity Act 2005, which employs a functional assessment in attributing capacity.⁷⁹ Even so, the functional approach has encountered criticism for perpetuating discrimination by solely assessing legal capacity, rather than focusing on evaluating accommodations and support.⁸⁰

⁷¹ Gudelyte U, Ruskus J and McCrea K, 'Help me to decide', 6.

⁷² Gudelyte U, Ruskus J and McCrea K, 'Help me to decide', 11.

⁷³ *CRPD General Comment No. 1, 2-3, para 9*. The CRPD committee calls for the prevention of these regimes to ensure restoration of full legal capacity, while simultaneously stating that a person's disability status should not be used as a ground for denying legal capacity.

⁷⁴ Flynn E and Arstein-Kerslake A, 'Legislating personhood', 86-87.

⁷⁵ Dhanda A, 'Legal capacity in the disability rights convention', 431.

⁷⁶ Mahony C, 'Legal capacity and detention', 886.

⁷⁷ Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity' Law Commission of Ontario, 2010, 19.

⁷⁸ Committee on the Rights of Persons with Disabilities, *Initial report under the convention on rights of persons with disabilities*, 2020, 28.

⁷⁹ Flynn E and Arstein-Kerslake A, 'Legislating personhood', 86.

⁸⁰ Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity', 19-20.

c. The Outcome Approach

This approach presumes that if an individual with a disability makes poor decisions or has flawed decision-making skills, they have no capacity to make any decision.⁸¹ As a result, if a PWID makes a poor decision they are perceived as incapable of carrying out acts that require complex thinking, such as political judgments.⁸² Furthermore, the competence of a person is contested when they arrive at a decision not socially accepted. This has led to arguments which contend that this approach is practically like the status approach since, once disability is established, the capacity of the person to make a decision will always be doubted.⁸³ Additionally, this approach is deemed unjust as it sets a higher decision-making standard for PWIDs, overlooking the fact that all individuals, regardless of ability, can make poor decisions.⁸⁴ An instance of the outcome approach was witnessed in Hungary where some PWIDs were denied their right to vote after being placed in the guardianship system. As a result, these individuals were unable to participate in the Hungarian parliamentary and municipal elections held in 2010. Their case was presented before the CRPD Committee, which declared that depriving them of the right to vote on the basis of not forming a valid political opinion contravened the CRPD.⁸⁵ Furthermore, this approach has been expressly rejected in the Mental Capacity Act of England and Wales, which specifies that an individual should not be deemed unable to make a decision purely because they make an unwise decision.⁸⁶

In general, these approaches used by states to determine decision-making capacity have been subject to criticism since they presume that all PWIDs lack legal capacity, with the burden of proving the contrary placed on them.⁸⁷

ii. *Interpretation of Mental Capacity in Justifications Excluding PWIDs from Voting*

⁸¹ Mahony C, 'Legal capacity and detention', 886.

⁸² Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 112.

⁸³ Dhanda A, 'Legal capacity in the disability rights convention', 433.

⁸⁴ Mahony C, 'Legal capacity and detention', 886.

⁸⁵ Marishet M, 'Legal capacity of persons with disabilities in Ethiopia: The need to reform existing legal frameworks', 9-10. Persons under guardianship were deprived of the right to vote because they were considered incapable of forming a rationale and valid political opinion.

⁸⁶ Mahony C, 'Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in England and Wales and in Northern Ireland' in Domanski M and Lackoronski B (eds) *Models of implementation of Article 12 of the convention on the rights of persons with disabilities*, Taylor and Francis, Oxfordshire, 2024, 565.

⁸⁷ Dhanda A, 'Legal capacity in the disability rights convention', 433.

The concept of being rationally capable of making independent decisions is perceived as the basis of a democratic society.⁸⁸ This notion stems from the democratic theory which states that an individual needs to make independent judgments to actively participate in society. If they are unable to do so, any power they exercise is regarded as democratically illegitimate.⁸⁹ From this basis, the state is required to protect the legitimacy of elections from any person who cannot independently cast a vote or lacks the mental capacity to make a decision.⁹⁰ In this case, the democratic society has a reasonable utilitarian interest in an intelligent electorate, and dependency is seen as a threat to the legitimacy of elections.⁹¹ Consequently, justifications have been developed to exclude PWIDs from the right to vote to protect the legitimacy of elections.

A cause of concern is the interpretation of mental capacity in justifications used to limit the right to vote for PWIDs. Mental capacity refers to a person's decision-making skills or abilities, which can vary based on individual differences as well as social and environmental factors.⁹² Justifications used in various democratic nations to limit the right to vote for PWIDs emphasise the notion of mental capacity being exercised independently, inadvertently excluding most PWIDs from voting. Additionally, all the justifications limiting the right to vote for PWIDs aim towards protecting the legitimacy of the democratic process.⁹³

The most common justification for limiting the right to vote for PWIDs is the alleged lack of voting capacity.⁹⁴ This rationale stems from the guardianship systems most PWIDs are subjected to because of their life-long need for support. The guardian, who is often a family member, is assigned a substitute role in making decisions on behalf of the PWIDs, who is regarded as incapable of making any decision, including voting. Therefore, the right to vote for a PWID is taken away because of their need for dependency.⁹⁵ Proponents of this rationale contend that PWIDs do not have the mental competence to cast an informed

⁸⁸ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness', 56 (11) *Journal of Intellectual Disability Research*, 2012, 230.

⁸⁹ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness', 225.

⁹⁰ Beckman L, 'Political equality and the disenfranchisement of people with intellectual impairments', 17-18, para 5.

⁹¹ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness', 227.

⁹² *CRPD General Comment No. 1*, 3.

⁹³ Beckman L, 'Political equality and the disenfranchisement of people with intellectual impairments', 21.

⁹⁴ Savery J, 'Voting rights and intellectual disability in Australia: An illegal and unjustified denial of rights' 37 (2) *Sydney Law Review*, 2015, 297.

⁹⁵ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union: Toward equal voting participation for Europeans with disabilities' 55 (1) *Harvard International Law Journal*, 2014, 88.

vote.⁹⁶ Indeed, some individuals with profound intellectual disabilities may not be able to vote even with the most extensive forms of accommodation.⁹⁷ However, any decision to deny them of such a right must be related to a legitimate and compelling state interest, rather than a pure presumption of incompetence.⁹⁸ It is essential to acknowledge the heterogeneous nature of PWIDs, recognising that while some may not be able to vote despite the accommodations provided, others possess the capacity to participate in the political process.⁹⁹

Several states such as Canada, Ireland, Sweden, and Italy have no restrictions on the voting rights of PWIDs.¹⁰⁰ In Sweden, for example, there is a basic presumption that all individuals with disabilities possess equal legal capacity. This ensures that all individuals, including PWIDs, are granted their full voting rights.¹⁰¹ Comparably, in Ireland, capacity is presumed for every individual to uphold their autonomy rights. The Assisted Decision-Making (Capacity) Act of 2015 acknowledges the fluctuating nature of a person's capacity, permitting decisions to be assessed based on a specific issue and timeline.¹⁰²

Another justification put forth is the prevention of fraudulent voting and undue influence. This argument presumes that PWIDs are more susceptible to fraudulent voting due to their vulnerability, which may be taken advantage of by their caregivers providing support.¹⁰³ Certainly, instances of fraud involving PWIDs have been observed not only in political participation but also in other contexts such as financial abuse.¹⁰⁴ Additionally, their vulnerability experience may vary depending on the type of condition. For instance, individuals with Williams Syndrome and Down Syndrome may be more vulnerable due to their physical attributes, which make them more perceptible compared to those

⁹⁶ Agran M and Hughes C, 'You can't vote- you're mentally incompetent: Denying democracy to people with severe disabilities' 38 (1) *Research and Practice for Persons with Severe Disabilities*, 2013, 59.

⁹⁷ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 89.

⁹⁸ Agran M and Hughes C, 'You can't vote- you're mentally incompetent', 59.

⁹⁹ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 88.

¹⁰⁰ Redley M, Maina E, Keeling A and Pattni P, 'The voting rights of adults with intellectual disabilities', 1027.

¹⁰¹ Bratan T, Fischer P, Maia M and Aschmann V, 'Implementation of the UN Convention on the rights of persons with disabilities: A comparison of four European countries with regards to assistive technologies' 10 (4) *Societies*, 2020, 8-9.

¹⁰² Committee on the Rights of Persons with Disabilities, *Initial report under the convention on rights of persons with disabilities*, 2020, 28.

¹⁰³ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 86-87.

¹⁰⁴ Buhagiar S and Azzopardi-Lane C, 'Freedom from financial abuse: Persons with intellectual disability discuss protective strategies aimed at empowerment and supported decision-making' 37 (3) *Disability and Society*, 2022, 362.

with an autism spectrum disorder.¹⁰⁵ Efforts to resolve such abuses have been limited by low statistical data, as some PWIDs may abstain from reporting it due to communication challenges, shame or fear.¹⁰⁶ This aspect can however be mitigated by inspection bodies, as advocated by CRPD, which would monitor and respond to abuse cases in a manner that recognises the unique demands of PWIDs.¹⁰⁷

While fraud is a legitimate factor, arguments against this rationale assert that such concerns are rooted in state prejudice and stigma.¹⁰⁸ Thus, countries that support voting for PWIDs have created opportunities for them to vote while simultaneously adopting measures to reduce the risk of electoral fraud. For instance, in Canada, measures taken include restricting non-family members offering support to assist only one disabled individual and mandating the supporters to take an oath.¹⁰⁹ In Ireland, inspection bodies such as the Decision Support Service have been established to address fraud complaints and evaluate the appropriateness of decision-making supporters.¹¹⁰

Closely tied to the concern of fraudulent voting is the rationale of electoral manipulation, which posits that PWIDs can easily be manipulated or unduly influenced.¹¹¹ Research investigating why few adults with intellectual impairments vote depicted that a notable number of individuals believed PWIDs would struggle to understand complex notions required in the voting process. Some reported that it would be impossible for a PWID to vote without undue influence by the person offering support.¹¹² The CRPD has acknowledged that persons requiring support to make decisions, such as PWIDs, may be vulnerable to undue influence. However, to ensure the exercise of equal legal capacity, it states that safeguards against undue influence should be provided in any process a person needing support participates in.¹¹³

¹⁰⁵ Fisher M, Moskowitz A and Hodapp R, 'Differences in social vulnerability among individuals with autism spectrum disorder, williams syndrome and down syndrome' 7 (8) *Research in Autism Spectrum Disorders*, 2013, 7.

¹⁰⁶ Buhagiar S and Lane C, 'Freedom from financial abuse', 364.

¹⁰⁷ Buhagiar S and Lane C, 'Freedom from financial abuse', 366.

¹⁰⁸ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 86, para 1.

¹⁰⁹ Prince M, 'Electoral participation of electors with disabilities: Canadian practices in a comparative context' Elections Canada, 2012, 32.

¹¹⁰ Committee on the Rights of Persons with Disabilities, *Initial report under the convention on rights of persons with disabilities*, 2020, 28-29.

¹¹¹ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 86.

¹¹² Agran M, MacLean W and Andren K, 'I never thought about it: Teaching people with intellectual disability to vote' 50 (4) *Education and Training in Autism and Developmental Disabilities*, 2015, 390-391. The research referred to was conducted in the United States.

¹¹³ CRPD *General Comment 1*, 5, para 22.

Nonetheless, some arguments opposing this rationale sustain the view that undue influence is ever-present and inevitable in the democratic voting process. This is because all voters, including non-disabled, are exposed to all kinds of information which can influence their voting decisions. Some individuals base their choices on the advice of their family members and friends while others may choose artistic qualities, personal characteristics, or the promised policies of the candidate.¹¹⁴ Additionally, this justification has been drawn parallel to the property restrictions imposed on women in the 19th century, which were rooted in the presumed risk of undue influence by their spouses.¹¹⁵ Countries that promote voting for PWIDs, such as Canada, incorporate various supported decision-making principles which assert that support provided should be freely consented to and must be free from undue influence or abuse.¹¹⁶ This principle echoes the CRPD's recognition of the need to establish safeguards against abuse such as undue influence.¹¹⁷

The premises used to warrant these justifications may be reasonable, but the conclusions are arguably faulty. The independent view of interpreting mental capacity views the support needs of PWIDs as a threat to the legitimacy of elections. Their dependency should neither be considered a democratic problem nor a ground for exclusion. Instead, States should uphold their duty to reasonably accommodate them as opposed to the use of exclusionary measures.¹¹⁸ Embracing liberal political values that give prominence to individualism often disregards the relational aspect of our society.¹¹⁹ Furthermore, voting is not only about electing leaders but also a politically expressive act that connects a voter to the community and is essential for the public ritual of democracy.¹²⁰

¹¹⁴ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 87.

¹¹⁵ Ryan T, Henderson A and Bonython W, 'Voting with an 'unsound mind'? A comparative study of the voting rights of persons with mental disabilities' 39 (3) *University of New South Wales Law Journal*, 2016, 1064.

¹¹⁶ Browning M, 'Developing an understanding of supported decision-making practice in Canada: The experiences of people with intellectual disabilities and their supporters' Published PhD Thesis, La Trobe University, Melbourne, 2018, 184.

¹¹⁷ *CRPD General Comment 1*, 5.

¹¹⁸ Beckman I, 'Political equality and the disenfranchisement of people with intellectual impairments', 18.

¹¹⁹ O'Donnel E and Arstein-Kerslake A, 'Recognising personhood: The evolving relationship between the legal person and the state' 30 (3) *Griffith Law Review*, 2021, 339.

¹²⁰ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness', 229.

iii. *Alternative Way of Understanding Mental Capacity in PWIDs Right to Vote*

PWIDs might face challenges in having full autonomy, where a person retains autonomy for some actions and not others. Moreover, this autonomy may fluctuate impairing their capacity to perform certain actions. Instead of excluding them from the right to vote based on their inability to act independently, the State has the responsibility to uphold and support the missing autonomy.¹²¹ This aspect can be linked to the relational personhood concept adopted in this paper, which posits that legal personhood is inherently relational, and interdependence exists among persons.¹²² In a democratic society, a crucial concern is to ensure that all individuals, including PWIDs, have an equal right to vote.¹²³ The prevailing view of mental capacity as an objective, scientific, and naturally occurring phenomenon overlooks its influence by social, and political contexts, as well as the disciplines and professions that primarily evaluate it. Moreover, the decision-making skills of an individual vary, and perceived or actual deficits in mental capacity should not be used as a justification for denying legal capacity.¹²⁴

The CRPD has called for a reinterpretation of the way mental capacity is perceived in the legal framework, advocating for an approach that goes beyond assessing the individual's cognitive skills. The proposed interpretation asserts that mental capacity should focus on the decision-making skills of PWIDs from an interdependent perspective. This paper adopts this view as an alternative way of interpreting the mental capacity of PWIDs, in order to realise their right to vote.¹²⁵ Moreover, this perspective has facilitated international recognition of relational personhood within the realm of human rights.¹²⁶ Embracing the relational reality of autonomy is crucial when providing support to an individual.¹²⁷

For one to be deemed incapable of making a decision all practical steps, which do not solely rely on cognitive skills, would have to be taken without

¹²¹ Dimopoulos A, 'Issues in human rights protection of intellectually disabled persons', Ashgate Publishing Company, Farnham, 2010, 29-30.

¹²² Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 533.

¹²³ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness', 229.

¹²⁴ *CRPD General Comment 1*, 4.

¹²⁵ Browning M, Bigby C and Douglas J, 'Supported decision making: Understanding how its conceptual link to legal capacity is influencing the development of practice' 1 (1) *Research and Practice in Intellectual and Developmental Disabilities*, 2014, 41.

¹²⁶ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 533.

¹²⁷ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 532, para 3.

success.¹²⁸ Thus, if decision-making is interdependent, any assessment undertaken must encompass support provided throughout the process.¹²⁹ Support in decision-making has been identified as complex and can be a burdensome task for supporters. However, some of the elements employed are primarily related to environmental and contextual factors such as disability characteristics, accessibility of information, the complexity of the decision, relations with service providers, and family attitudes. Other proponents endorsing this perspective claim that the decision-making abilities of PWIDs can be enhanced by accommodations and support. Regardless of the elements considered the core of this perspective aims to ensure that PWIDs are not precluded from mechanisms that offer support in decision-making.¹³⁰

Such reconceptualisation of mental capacity in the legal context would help PWIDs enhance their legal capacity while addressing their support needs.¹³¹ Additionally, by embracing this interdependent perspective, justifications to exclude PWIDs from the right to vote would no longer hold, as dependency would not be regarded as a threat to the legitimacy of elections.

IV. Restrictions PWIDs face when voting in Kenya

i. 'Deciphering' a Reasonable Restriction in Light of Article 38(3)(b) of the Constitution of Kenya

Political participation provisions in the Constitution of Kenya are expansive.¹³² The right to vote is envisioned in Article 38(3)(b) of the Constitution which acknowledges that every citizen has the right to vote by secret ballot in any election or referendum without unreasonable restrictions.¹³³ The Constitution, however, does not define what is considered an 'unreasonable restriction' and the duration is also not specified as either permanent or temporary.¹³⁴

¹²⁸ Series L, 'Relationships, autonomy, and legal capacity: Mental capacity and support paradigms' *International Journal of Law and Psychiatry*, 2015, 9 -<https://www.researchgate.net/publication/276850263_Relationships_autonomy_and_legal_capacity_Mental_capacity_and_support_paradigms>.

¹²⁹ Browning M, Bigby C and Douglas J, 'Supported decision making', 41-42, para 3.

¹³⁰ Browning M, Bigby C and Douglas J, 'A process of decision-making support: Exploring supported decision-making practice in Canada' 46 (2) *Journal of Intellectual and Developmental Disability*, 2021, 139.

¹³¹ Browning M, Bigby C and Douglas J, 'Supported decision making', 42.

¹³² Thuo L 'Realizing the inclusion of young persons with disabilities in political and public life in Kenya' *African Disability Rights Yearbook* 4, 2016, 3 -<file:///C:/Users/ggros/Downloads/Realising_the_Inclusion_of_Youth_with_Di.pdf>.

¹³³ Article 38 (3), *Constitution of Kenya* (2010).

¹³⁴ Oyugi P, 'The implementation of Article 12 of the convention on the rights of people with disabilities in Kenya', 30.

The right to vote is not absolute, as the phrase ‘unreasonable restrictions’ in Article 38(3)(b) suggests, some reasonable restrictions are permissible.¹³⁵ One of the restrictions is expressed in Article 83 which prohibits an individual from voting if they are regarded as having an unsound mind.¹³⁶ While this provision does not expressly restrict PWIDs from voting, the lack of an assessment criteria to determine who is of unsound mind for voting purposes has led to prejudicial interpretations against PWIDs. This interpretation can, in part, be attributed to the history of conflation between intellectual disability and mental illness. Additionally, the Elections Act, which guides the conduct of elections, lacks an adjudication process for disputing exclusion from registration on this ground. In Kenya, mental capacity is equated with legal capacity and this conflation makes it amenable to exclude PWIDs.¹³⁷ This assumption arises from the belief that individuals with limited decision-making skills, such as PWIDs, do not possess the capacity to make voting decisions. The notion of reasonable restrictions is a nuanced concept that if unchecked can be misused and expanded beyond its intended scope.¹³⁸

a. Reasonable Restriction According to Courts Determination

To assess whether a restriction is reasonable, such as the unsound mind restriction, Article 24 of the Constitution outlines a standard of reasonableness when limiting a right. It specifies that a right can solely be limited by law, and the limitation must be reasonable and just in an open and democratic society founded on principles such as equality and human dignity.¹³⁹ Ascertaining what is regarded as reasonable in an open society has been recognised by courts as challenging. Nonetheless, the emphasis has been placed on respecting the rights and dignity of the individuals.¹⁴⁰

Article 24 of the Constitution further outlines certain conditions that must be satisfied when restricting a right. These conditions include considering the nature of the right being restricted, the purpose of the limitation as well as its

¹³⁵ Bokao G, ‘Political integrity as irrational and hypocritical values: Do the high standards of chapter six of the Constitution of Kenya breed a dangerous hypocrisy in the political class?’ *Kabarak Law Review*, 2022, 63 -<<https://journals.kabarak.ac.ke/index.php/klr/article/view/240/213>>.

¹³⁶ Article 83, *Constitution of Kenya* (2010).

¹³⁷ Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya’, 120-121.

¹³⁸ Kenya National Commission on Human Rights and the Open Society of Eastern Africa, *How to Implement Article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A Briefing Paper*, 2013, 70.

¹³⁹ Article 24, *Constitution of Kenya* (2010).

¹⁴⁰ *Peter Solomon Gichira v Independent Electoral and Boundaries Commission and another* (2017) eKLR, para 81.

significance, the extent of the limitation, the necessity of protecting a person's right without violating the rights of others and assessing the connection between the restriction and its purpose. An assessment of whether there exist less restrictive measures to achieve the purpose is also considered.¹⁴¹ The exercise of taking into account all these conditions is a balancing process that has been recognised by Kenyan courts as a test of proportionality.¹⁴² Hence, to measure what is a reasonable restriction, courts employ a proportionality test, which varies based on specific circumstances. Proportionality is determined through a four-part test, which involves assessing whether: i) the government action establishing the restriction of rights aims for a sufficiently important and legitimate objective, ii) the means employed to reach the objective are rationally connected and suitable iii) there are alternative means to attain the intended objective and iv) the beneficial effects of restricting the right outweigh the detrimental effects of the restriction (is there an equitable compromise between the public interest and the private right?)

Therefore, a reasonable restriction on a right would be justified if all the aforementioned questions receive affirmative responses.¹⁴³ According to Article 38(3)(b) of the Constitution, the legitimate aim of the electoral principles in Kenya is to safeguard the integrity of elections.¹⁴⁴ Despite voting being an essential aspect of democracy, it can be vulnerable to errors and fraud.¹⁴⁵ As discussed earlier, these risks have been cited as justifications for excluding PWIDs from voting. Although a legitimate aim, the means employed should have a clear connection to the objective and this implies a narrowly tailored approach that minimally infringes on the rights of those affected.¹⁴⁶ The purpose of this narrow and careful construction is to minimise issues of 'over-inclusion', since a law that is not narrowly tailored has the potential of certain cases being decided unreasonably or irrationally.¹⁴⁷

¹⁴¹ Article 24, *Constitution of Kenya* (2010).

¹⁴² *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR, para 69.

¹⁴³ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR, para 71 and 72.

¹⁴⁴ Ochieng W, 'Protecting integrity of the electoral process: The promise of the Maina Kiai judgment' 3 (1) *Kabarak Journal of Law and Ethics*, 2018, 2.

¹⁴⁵ Ochieng W, 'Protecting integrity of the electoral process', 9.

¹⁴⁶ Kiilu N, 'Indirect discrimination: Huduma namba (digital identification) and the plight of the Nubian community in Kenya' 7 (1) *Strathmore Law Review*, 2022, 37.

¹⁴⁷ Trikanad S, 'Judicial trends: How courts applied the proportionality test' SSRN Electronic Journal, 2020, 12-13 -<https://www.researchgate.net/publication/364649823_Judicial_Trends_How_Courts_Applied_the_Proportionality_Test>.

In Kenya, only a blanket restriction is provided, leading to evident issues of over-inclusion particularly for PWIDs. For instance, before the 2013 general elections, attempts to register PWIDs were challenged with arguments asserting that they were not of sound mind.¹⁴⁸ It is under Article 83(3)(b) of the Constitution that some PWIDs have been restricted from voting under the pretext that they are of unsound mind.¹⁴⁹ The concept of unsound mind has not been defined in the Constitution, thus no clarity exists as to what class of individuals it covers.¹⁵⁰ Furthermore, the concept has not yet been given a decisive interpretation in relation to political participation. This delay and vagueness have occasioned the term to be arbitrarily interpreted as analogous to intellectual disabilities.¹⁵¹

The electoral agency is legally empowered to restrict individuals declared to be of unsound mind from voting, however, there is no legal requirement to provide the agency with a register of such individuals.¹⁵² An assessment criterion, which specifies the parameters upon which an individual may be declared of unsound mind and determines whether such a decision is subject to appeal or review, is not provided for in the context of voting.¹⁵³ This absence of criteria has led presiding officers at polling stations in past national and local elections to arbitrarily restrict PWIDs from voting.¹⁵⁴ This practice has therefore had a significant impact on the voting rights of PWIDs.

In Kenya, mental capacity is a condition for voter registration, which, although permissible, must be specifically circumscribed in scope and narrowly tailored.¹⁵⁵ Approaches that are over-inclusive fail to meet the least restrictive measure hence considered unreasonable.¹⁵⁶ If the state is concerned with the competence of an electorate, for those with or without disability, it should fulfil

¹⁴⁸ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 121.

¹⁴⁹ Kenya National Commission on Human Rights, *Making bill of rights operational: Policy, legal and administrative priorities and considerations*, October 2011, 89.

¹⁵⁰ Oyugi P, 'The implementation of Article 12 of the convention on the rights of people with disabilities in Kenya', 30.

¹⁵¹ Kenya National Commission on Human Rights, *Compendium on Submissions to Convention on the Rights of Persons with Disabilities*, 2016, 62.

¹⁵² Mute L, 'Shattering the glass ceiling?', 13.

¹⁵³ Oyugi P, 'The implementation of Article 12 of the convention on the rights of people with disabilities in Kenya', 30-31.

¹⁵⁴ Mute L, 'Shattering the glass ceiling?', 13.

¹⁵⁵ Anderson J, 'Intellectual disability and the human right to vote: Evolving conceptions of the universality of suffrage' in Anderson J and Philips J (eds), *Disability and Universal Human Rights: Legal, Ethical and Conceptual Implications of the Convention on the Rights of Persons with Disabilities*, Netherlands Institute of Human Rights, Utrecht, 2012, 111-112.

¹⁵⁶ Kiiu N, 'Indirect Discrimination', 37.

its duty to offer reasonable accommodation. This approach would achieve the same legitimate aim through less restrictive means.¹⁵⁷ Based on this premise, it is evident that in Kenya the detrimental effects of restricting individuals of unsound mind from voting disproportionately affect PWIDs equal right to vote.¹⁵⁸

b. The Interplay between Reasonable Accommodation and Reasonable Restriction

Reasonable Accommodation refers to appropriate and necessary adjustments or modifications that enable individuals with disabilities to exercise their rights equally with others.¹⁵⁹ These adjustments and modifications have been considered as less restrictive measures to accommodate PWIDs while still achieving the legitimacy of elections.¹⁶⁰ However, as the term suggests, there are limits to the accommodation up to what is considered reasonable.¹⁶¹ A reasonable restriction that has been acknowledged in the CRPD is where the adjustment or modification in question is not disproportionate or imposes an undue burden on the providing party.¹⁶² Only in comparison can an adjustment or measure be deemed proportionate or disproportionate. In terms of reasonable accommodation, what is considered proportional are not the measures themselves but the cost, finances, or effort of such measures.¹⁶³

The CRPD does not specify the exact point at which the created burden is regarded as disproportionate. Some authors argue that the absence of economic or material standards in the Convention is due to the gradual realisation accorded to State parties, which allows them to utilise accommodations based on their economic capacity.¹⁶⁴ Therefore, Kenya could act on its capacity to realise reasonable accommodations for PWIDs. The burden of proving such disproportionality is however directed to the party providing such accommodation. In the voting sector, the only reasonable and main provider is the State which is required to demonstrate its inability to afford accommodations through an

¹⁵⁷ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 96, para 1.

¹⁵⁸ Thuo L, 'Realising the inclusion of young persons with disabilities in political and public life in Kenya', 26.

¹⁵⁹ Article 2, *Convention on the Rights of Persons with Disabilities*, 12 December 2006, A/RES/61/106.

¹⁶⁰ Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 96, para 1.

¹⁶¹ Henrard K, 'Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forwards and missed opportunities' 5 (1) *International Journal of Constitutional Law*, 2016, 963.

¹⁶² *CRPD General Comment No. 1*, 8, para 34.

¹⁶³ Edling A, 'Reasonable Accommodation: At what cost?' Unpublished LLM Thesis, Lund University, Lund, 2023, 24.

¹⁶⁴ Edling A, 'Reasonable Accommodation', 48.

objective assessment. Thus, this creates a form of reasonability test, as discussed earlier, with the focus shifting to material and financial conditions.¹⁶⁵

Similar to the reasonable restriction on the right to vote, a reasonable accommodation would be deemed proportional if it aligns with the constitutional objective of maintaining election integrity. For instance, if preventing fraud is one of the objectives, the accommodation should be transparent to achieve this. The benefits of the accommodation such as ensuring equal right to vote, must not be excessively detrimental to the State. The evaluation of the type of accommodation and the financial resources must be weighed against the needs of PWIDs right to vote.¹⁶⁶ The State must show that all reasonable accommodations are exhausted and employing others would be impractical.¹⁶⁷ Given this duty, the burden of proving that an accommodation is disproportionate should be substantial, considering the extensive array of resources at the State's disposal.¹⁶⁸ Thus, a reasonable restriction on accommodation would be one in which all potential accommodations are exhausted, and their implementation would either be disproportionate to the costs or impractical to preserve the legitimacy of elections.¹⁶⁹

ii. The Extent to which Kenya's Electoral System Accommodates PWIDs

PWIDs need life-long support and this makes them more dependent and vulnerable for most of their lives.¹⁷⁰ In Kenya, a person with a disability has the right to request and obtain assistance from persons of their choice when voting.¹⁷¹ The broad interpretation of this would imply that PWIDs can use an intermediary for assistance in voting.¹⁷² Regulation 72 of the Elections (General) Regulations also acknowledges assistance in casting ballots for individuals with

¹⁶⁵ Edling A, 'Reasonable Accommodation', 43. See also *CRPD General Comment No. 6, Equality, and non-discrimination*, 9 March 2018, 8.

¹⁶⁶ Asis R, 'Reasonableness in the concept of reasonable accommodation' *The age of the human rights Journal*, 2016, 52, -<file:///C:/Users/ggros/Downloads/Reasonableness_in_the_Concept_of_Reasonable_Accomm.pdf>.

¹⁶⁷ Megret F and Msipa D, 'Global reasonable accommodation: How the convention on the rights of persons with disabilities changes the way we think about equality' 30 (2) *South African Journal on Human Rights*, 2013, 268.

¹⁶⁸ Megret F and Msipa D, 'Global reasonable accommodation', 270.

¹⁶⁹ Asis R, 'Reasonableness in the concept of reasonable accommodation', 52.

¹⁷⁰ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 110.

¹⁷¹ Section 29, *Persons with Disabilities* (Act No. 14 of 2003).

¹⁷² Mute, 'Shattering the glass ceiling', 12.

disabilities.¹⁷³ In general, Kenya's electoral system envisions support for people with disabilities when voting.

The only reported instance of effective support for PWIDs in the voting process was in the 2007 presidential elections. In this case, The Kenya Society of Mentally Handicapped (KSMH) successfully advocated for funding from the United Nations Electoral Support Programme, which facilitated voting for individuals with physical and sensory impairments to be extended to PWIDs. The KSMH emphasised in their arguments before the Electoral Commission of Kenya that PWIDs were not of unsound mind, but in the absence of good communication and support that prevented them from voting. With a ruling secured in their favour, trainers known as 'human readers' were recruited to assist PWIDs in voting. They utilised simplified language, pictures, and role-play to assist them when casting a ballot. Despite the novelty of this program, it lacked safeguards against fraudulent voting as the recruited human readers often made decisions on behalf of PWIDs instead of offering support. Additionally, due to the timing of the 2007 electoral violence, there were no complaints and the number of PWIDs who voted was small.¹⁷⁴

In Kenya, the provision of reasonable accommodation for voting requires individuals with disabilities to have a special card, which is granted based on a biomedical assessment. While medical factors are important, this assessment neglects other social-ecological factors such as support that are crucial for PWIDs. As a result, they can be deprived of the card that grants them reasonable accommodation when voting.¹⁷⁵ These issues highlight the lack of understanding and inadequate attention to PWIDs accommodations. Consequently, electoral bodies tasked with supporting PWIDs often have mixed signals in addressing their unique demands. For instance, in the 2013 General elections, the IEBC expressed reservations about providing support for PWIDs when voting. It cited concerns about the practice of voter bribery and uncertainty regarding who was actually making the decision when support was provided.¹⁷⁶ To some extent, this demonstrates a neglect of the relational reality of PWIDs who can often make decisions for themselves, though not necessarily on their own.¹⁷⁷

¹⁷³ Regulation 72, *Elections (General) Regulations* (Legal Notice 128 of 2012).

¹⁷⁴ Redley M, Maina E, Keeling A and Pattni P, 'The voting rights of adults with intellectual disabilities', 1031.

¹⁷⁵ United Nations Development Programme, *Political participation of people with intellectual disabilities and psychosocial disabilities*, 2021, 40.

¹⁷⁶ Kenya National Commission on Human Rights and the Open Society of Eastern Africa, *How to implement Article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A Briefing Paper*, 2013, 60.

¹⁷⁷ Davy L, 'Philosophical inclusive design', 140.

Currently, there are limited supported decision-making mechanisms for PWIDs when voting. Regulation 72 of Elections (General) Regulations, which envisions assistance, does not consider the unique demands of PWIDs. The reason for this is that it homogenises all individuals with disabilities, presuming that they all require the same kind of support. Moreover, PWIDs have diverse support needs that vary according to the severity of their condition.¹⁷⁸ In Kenya, electoral officials pay considerable attention to accommodating individuals with visible disabilities.¹⁷⁹ This generates a form of double invisibility, where inclusion efforts for persons with disabilities overlook other groups with invisible disabilities such as PWIDs.¹⁸⁰

Additionally, some PWIDs are accused of dishonesty and denied priority to vote in polling stations because their disability is not obvious enough, forcing them to wait for hours to vote. The majority of PWIDs have also been reported to have no identity cards because their dependent caregivers often neglect to support them in the application process. The absence of an identity card poses further limitations since it is required for voter registration.¹⁸¹

V. Reasonable Accommodation

i. Adoption of a Functional Assessment of Decision-Making Capacity

At this point, it is apparent that PWIDs often face the risk of having decisions being made on their behalf. This is due to their adaptive behaviour and intellectual functioning limitations which are frequently viewed as an inability to make decisions. However, this is not universally true; as with reasonable accommodations, they can effectively make a decision.¹⁸² In this context, reasonable accommodation refers to suitable and necessary adjustments or modifications that specifically enable PWIDs to exercise their right to vote.¹⁸³ Therefore, this paper proposes a functional assessment of decision-making

¹⁷⁸ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 126.

¹⁷⁹ *United Nations Development Programme, Political participation of people with intellectual disabilities or psychosocial disabilities*, 2021, 40.

¹⁸⁰ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 125.

¹⁸¹ Virendrakumar B, Joelly E, Badu E and Schmidt E, 'Disability inclusive elections in Africa: A systematic review of published and unpublished literature' 33 (4) *Disability and Society*, 2018, 528-529.

¹⁸² Fiala-Butora J, Stein M and Lord J, 'The democratic life of the union', 88, para 1 and 2.

¹⁸³ Article 2, *Convention on the Rights of Persons with Disabilities*.

capacity to aid in the evaluation and provision of accommodations when a person's capacity to vote is reasonably questioned.

A functional assessment for persons with disabilities has been utilised in other contexts, such as the United States, by the Social Security Administration, to determine an individual's suitability for the Social Security Disability Insurance (SSDI) benefits.¹⁸⁴ This assessment has been considered most effective when third-party sources such as friends or family members are involved. These individuals, being familiar with the person, can provide supportive information during the assessment.¹⁸⁵ This aspect not only offers valuable insights in the context of voting but also aligns with the concept of relational autonomy, where such third parties are regarded as indispensable to an individual.¹⁸⁶

It is worth noting that the functional assessment of decision-making capacity utilised in this section presumes that every PWID has legal capacity. Its sole purpose would be to evaluate the necessary adjustments or modifications suitable for an individual. The assessment would initially question whether the person understands the nature of voting and recognises its potential consequences. If a person does not, reasonable accommodation would be offered to support them in making an informed decision.¹⁸⁷ Although this assessment leads to distinct circumstances, such as voting independently or with support, there is a potential for movement between these two points.¹⁸⁸ Consequently, it can be inferred that a limitation may arise in dire cases where an individual cannot make the voting decision either independently or with support. This limitation would however be temporary, lasting only until the next election period, and subject to periodic review.¹⁸⁹ Hence, this aspect acknowledges the potential fluctuation in a person's decision-making ability over time.¹⁹⁰

The practicality of such an assessment would happen before elections, as demonstrated in the 2007 presidential election where 'human readers' were recruited. However, in this case, a mock election would be conducted to evaluate

¹⁸⁴ National Academics of Sciences, Engineering and Medicine, *Functional assessment for adults with disabilities*, The National Academies Press, Washington DC, 2019, 13.

¹⁸⁵ National Academics of Sciences, Engineering and Medicine, *Functional assessment for adults with disabilities*, 379.

¹⁸⁶ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood', 540.

¹⁸⁷ Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity', 98-99.

¹⁸⁸ Fylnn E and Arstein-Kerslake A, 'Legislating personhood', 95.

¹⁸⁹ Glen K, 'Changing paradigms: Mental Capacity, legal capacity, guardianship and beyond' 44 (93) *Columbia Human Rights Law Review*, 2012, 134.

¹⁹⁰ Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity', 47.

the accommodations through which a person can vote. Afterwards, during the election period, individuals would be granted the ability to vote independently or with support, depending on the type of accommodation determined in the assessment. Moreover, trained neutral presiding officers, well versed in PWIDs accommodations, would be recruited and be available in polling stations on election days to address any concerns that reasonably question an individual's voting capacity. Through this assessment, the current arbitrary interpretations of the law that restrict PWIDs from voting would be eliminated. The diverse capacities of PWIDs can make it difficult to determine who can or cannot vote,¹⁹¹ and applying this uniform assessment would help resolve this uncertainty. It is essential to highlight that this assessment is different from the functional approach to determining legal capacity discussed in section three, as the proposed assessment focuses on evaluating accommodations and presumes legal capacity for all PWIDs.¹⁹²

ii. Proposed Types of Reasonable Accommodation

The types of reasonable accommodation in the functional assessment would vary depending on the individual's voting status, which could either be voting independently or with support. Nonetheless, irrespective of the chosen status, reasonable accommodation would be provided throughout the process.¹⁹³ For PWIDs who can vote independently, the envisioned accommodations would include providing information on the ballot paper in plain language, ensuring visibility and ease of comprehension. This accommodation would be particularly beneficial for individuals with mild and moderate intellectual disabilities who require episodic or limited support. Additionally, procedures for marking the ballot papers would be designed to be easy to read, understand, and access. Another type of accommodation for PWIDs who can vote independently is ample time. Given their limited intellectual functioning, PWIDs might need more time to think, reason, and understand information. In comparison to other individuals, they might not be able to grasp information quickly, and by including time adjustments, they can better understand information and make informed voting decisions.

If an individual cannot vote independently, support would be provided. Support can be offered informally, where an individual preferring informal

¹⁹¹ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 110; Blais A, Massicotte L and Yoshinaka A, 'Deciding who has the right to vote: A comparative analysis of election laws' 20 (1) *Electoral studies*, 2001, 51.

¹⁹² Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity', 99.

¹⁹³ Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity', 96.

support may consult those close to them such as their caregivers. The role of the caregivers would be to offer advice and assistance on how to arrive at a voting decision. A PWID would have the freedom to accept or reject the advice. Support could also be formalised to mitigate issues of manipulation, undue influence, and fraud in elections. This would involve a form of agreement that includes sanctions if the supporter fails to honour the individual's choice and intentions.¹⁹⁴ This study advocates for formalised support, as informal support has proven to hinder PWIDs from voting.¹⁹⁵ Regardless of the type of support, the accommodation provided through this status would include an interpretive role. The supporter would offer verbal explanations, clarification, and breakdown information to enable the individual to make an informed decision. Through interpretation, the supporter would communicate and use easy language for the individual to comprehend.¹⁹⁶ This would help align the individual's abilities with societal demands during voting. Additional accommodations, such as plain-language information and time adjustments, would also be required in the voting process.

iii. Resource Implications of Reasonable Accommodation

The adjustments and modifications utilised in the concept of reasonable accommodation are not supposed to impose an undue burden on the State as discussed in section four. Accordingly, a concern that might arise regarding the proposed reasonable accommodation is its resource implications, as accommodation is contingent on resources.¹⁹⁷ Factors to be taken into consideration include the cost, availability of funding, and time frame involved. It is essential to note that reasonable accommodations can incur both financial and non-financial costs.¹⁹⁸ Financial costs in this context would encompass the earnings or salaries of recruited members, such as the neutral decision makers, training expenses for these members, and production costs for the materials. Non-financial costs include the time adjustments employed to provide PWIDs

¹⁹⁴ Fylnn E and Arstein-Kerslake A, 'Legislating personhood', 95.

¹⁹⁵ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya', 122.

¹⁹⁶ Manktelow N, Chadwick D, Brewster S, and Tilly L, 'The perspectives of people with intellectual disabilities on their experience of voting in UK general elections' 36 (3) *Journal of Applied Research in Intellectual Disabilities*, 2023, 636.

¹⁹⁷ Genga S and Plessis M, 'A critical analysis of the duty to provide reasonable accommodation for employees with psychosocial conditions as an employment anti-discrimination obligation: A case study of Kenya's legal framework' *African Disabilities Rights Yearbook*, 2022, 37 -<<https://www.saflii.org/za/journals/ADRY/2022/3.pdf>>.

¹⁹⁸ *CRPD General Comment* 6, 8.

with reasonable time to understand the ballot paper and the support offered by their caregivers.

Kenya's electoral system is heavily dependent on donor funding, as evidenced in some general elections in the country.¹⁹⁹ Funds from donor agencies such as the United Nations Electoral Support Programme, which advances voting for individuals with impairments, could also be expanded to support PWIDs. Moreover, such donor agencies could collaborate with state entities such as the National Council for Persons with Disabilities (NCPWD) in providing funding.²⁰⁰ The government could also allocate resources to organisations such as the Kenya Association of Intellectually Handicap (KAIH) to train their officials to serve as neutral decision-makers. Such initiatives could potentially be voluntary since the officials would already be familiar with the unique demands of PWIDs. Additionally, these costs would only be incurred periodically during election years, making their implementation less burdensome.²⁰¹

The proposed functional assessment of decision-making capacity could also be utilised to assist in budget allocation during elections for PWIDs. This would enable electoral agencies and the government to accurately allocate funds for PWIDs. Furthermore, it could be used in donor funding, where it would serve as a guide and provide information on resource needs to donors wishing to support PWIDs. Other non-financial resources such as support by caregivers or time adjustments, could be effectively accommodated by the electoral agencies without incurring additional costs.

VI. Recommendations and Conclusion

i. Recommendations

To attain the equal right to vote for PWIDs in Kenya, collaborative efforts are required from the legislature, future researchers, as well as advocacy by electoral agencies such as IEBC, the community, and organisations for people with disabilities.

The first recommendation concerns the concept of an 'unsound mind' for voting purposes. This study has highlighted it as over-inclusive and not narrowly tailored. The legislature needs to review this restriction as it has inadvertently led

¹⁹⁹ Thuo L, 'Realising the inclusion of young persons with disabilities in political and public life in Kenya', 48.

²⁰⁰ Section 8, *Persons with Disabilities Act Kenya* (Act No. 14 of 2003).

²⁰¹ Edling A, 'Reasonable Accommodation', 48.

to prejudicial interpretations against PWIDs. It should be crafted in a narrowly circumscribed manner to minimise problems of over-inclusion, thereby ensuring the equal right to vote for PWIDs. Additionally, there is a lack of assessment criteria to determine who is of unsound mind for voting purposes. To enhance clarity, an assessment criterion should be incorporated, specifying the parameters upon which a person is declared of unsound mind and subsequently unfit for voting. This could help clarify the concept's meaning and the scope of individuals it covers. The duration of such a restriction should also be included in the assessment, along with the provisions for appeal or review mechanism from such restrictions.

Secondly, the IEBC, organisations for people with intellectual impairments such as KAIH, and state entities such as the NCPWD should promote public support for PWIDs voting rights. For instance, the NCPWD, which is entrusted with promoting awareness and receives an annual allocation from the national government's budget,²⁰² could consider advancing or extending these funds to support further marginalised groups, such as PWIDs. This support and advocacy would aim to highlight the unique demands of PWIDs in the voting process. The purpose of this recommendation would be to raise awareness of the support needs of PWIDs, which are often misunderstood and overlooked. PWIDs face double invisibility in comparison to other individuals with disabilities, and through this targeted advocacy, their needs will become more apparent and consequently accommodated in the voting process.

Lastly, while significant research in Kenya focuses on the political participation rights of individuals with more pronounced impairments, there is a clear need for more research on PWIDs. To address this gap, future researchers should focus on the political participation rights of PWIDs, offering potential solutions to help them realise their rights. For instance, research on their ability to stand for office is needed. Through extensive scholarship awareness of PWIDs could be enhanced, contributing to the advancement of their voting rights and quest for greater inclusion in society.

ii. Conclusion

This paper set out to determine how the provisions on the right to vote in the Constitution can take into account the unique demands of PWIDs. It employed the relational personhood concept to highlight PWIDs support needs

²⁰² Section 7(1)(i) and 8, *Persons with Disabilities Act Kenya* (Act No. 14 of 2003).

and then examined the limitations they encountered regarding their right to vote in Kenya. The findings have demonstrated that the unique demands of PWIDs are not adequately understood. Their support needs have faced mixed signals from electoral bodies and often receive less attention in the voting process. Furthermore, blanket restrictions of ‘unsound mind’ which lack a clear assessment criterion, have been determined as over-inclusive and not narrowly tailored. As a result, this situation has created opportunities for potential abuse against PWIDs, who have been wrongfully misconstrued as having unsound mind. However, this paper has shown that PWIDs are of sound mind and require support to vote. To resolve these limitations, reasonable accommodation should be employed to ensure that PWIDs right to vote is realised.